

In the Matter of
HAROLD ZANE BLOCK and
Susan Rebecca Schaan, partners,
aka Sage & Sand Equine Center and
aka Sage & Sand Trucking,
Respondents.

Case Number 58-98
Final Order of the Commissioner
Jack Roberts
Issued October 14, 1998

SYNOPSIS

Respondent Block operated a potato waste hauling business, employing Claimant as a truck driver, and failed to pay Claimant all wages due upon termination, in violation of ORS 653.025(1) (minimum wages), OAR 839-020-0030 (overtime wages), and ORS 652.140(1). Respondent Block's failure to pay the wages was willful, and the Commissioner ordered Respondent Block to pay civil penalty wages. ORS 652.140(1), 652.150, 653.025(1), 653.045, 653.055(1) and (2), 653.261(1), and OAR 839-20-030(1).

The Commissioner dismissed the Order of Determination as to Respondent Schaan.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The

hearing was held on June 25, 1998, in the conference room of the Oregon Department of Transportation, Department of Motor Vehicles, at 1732 S.W. Court Street, Pendleton, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Rosetta Marie Gilbert (Claimant) was present throughout the hearing. Harold Zane Block (Respondent Block or Block) was present at the hearing and represented himself. Susan Rebecca Schaan (Respondent Schaan or Schaan), after being duly notified of the time and place of this hearing, failed to appear in person or through a representative.

The Agency called the following witnesses: Rosetta Marie Gilbert, Claimant; and Margaret Trotman, a compliance specialist with the Wage and Hour Division of the Agency.

Respondent Block called himself as his only witness.

Administrative exhibits X-1 to X-9, Agency exhibits A-1 to A-9, and Respondent exhibits R-1 to R-12 were offered and received into evidence. The record closed on June 25, 1998.

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT -- PROCEDURAL

- 1) On March 10, 1997, Claimant filed a wage claim with the Agency. She alleged that Respondents employed her and failed to pay wages earned and due to her.
- 2) At the same time that she filed the wage claim, Claimant assigned to the Commissioner of Labor, in trust for Claimant, all wages due from Respondents.

- 3) Claimant brought her wage claim within the statute of limitations.
- 4) On September 9, 1997, the Agency served on Respondent Schaan an Order of Determination based upon the wage claim filed by Claimant and the Agency's investigation. On November 20, 1997, the Agency served the same Order of Determination on Respondent Block. The Order of Determination alleged that Respondents owed a total of \$581.32 in wages and \$1320.00 in civil penalty wages, plus interest, and required that, within 20 days, Respondents either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.
- 5) On December 16, 1997, the Agency sent to Respondent Block a Notice of Intent to Issue Final Order by Default. In that Notice, the Agency informed Respondent Block that, if the Agency did not receive an Answer and Request for Hearing or Court Trial by December 26, 1997, the Agency would issue a Final Order by Default.
- 6) On December 23, 1997, Respondent Block filed an answer to the Order of Determination and requested a contested case hearing. Block's answer denied that Respondent owed Claimant any amount of unpaid wages.
- 7) On May 1, 1998, the Agency requested a hearing in the matter. On May 22, 1998, the Hearings Unit issued a Notice of Hearing to Respondent Block, Respondent Schaan, the Agency, and the Claimant indicating the time and place of the hearing. Together with the Notice of Hearing, the forum sent a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.
- 8) On June 4, 1998, this forum sent an Amended Notice of Hearing to Respondents, the Agency and Claimant indicating a change in hearing location.

9) At the time and place set forth in the Amended Notice of Hearing for this matter, Respondent Schaan did not appear or contact the Agency or the Hearings Unit.

10) At the start of the hearing, Respondent Block said he had reviewed the "Notice of Contested Case Rights and Procedures" and had no questions about it.

11) Pursuant to ORS 183.415(7), the Administrative Law Judge explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

12) On September 9, 1998, the ALJ issued a proposed order that included an Exceptions Notice that allowed ten days for filing exceptions to the proposed order. By the terms of the proposed order and in accordance with OAR 839-050-0380, exceptions were due by September 21, 1998 (the next business day after 10 days from date of issuance of the proposed order), unless a request for extension of time was submitted no later than September 21, 1998. OAR 839- 050-0050(2).

13) On September 28, 1998, the Forum received a letter bearing a signature "H. Zane Block" and postmarked September 24, 1998. Block stated that he wanted to file exceptions to the proposed order and requested additional time for filing them. The ALJ denied the request as untimely and ordered that any untimely exceptions that might later be filed would be disregarded.

FINDINGS OF FACT -- THE MERITS

1) During all times material herein, Respondent Block, a person, did business as Sage & Sand Equine Center and/or Sage & Sand Trucking, a sole proprietorship located in Hermiston, Oregon. Respondent Block employed one or more persons in the State of Oregon as truck drivers.

2) From January 29, 1997, to February 20, 1997, Respondent Block employed Claimant as a truck driver. Claimant's employment duties including driving

truckloads of liquid potato waste from potato plants to farms and ranches that used the waste as animal feed. Respondents' trucks, which Claimant was responsible for driving, were "18-wheelers," had a maximum rated weight of 80,000 lbs, and were the type of truck commonly referred to as "semis." The potato waste was carried in farm bed trailers that could be raised at one end so the waste would drain out the other.

3) Claimant delivered loads of potato waste from the potato plants in Boardman to other locations within the State of Oregon. Claimant never made deliveries within Boardman itself; nor did she deliver potato waste to locations outside of Oregon.

4) During the week preceding January 29, 1997, Respondent Block and Claimant entered into an oral agreement that Claimant would work for a couple of days at minimum wage, while she was training. After that, Claimant would receive 20% of the amount Respondent Block received in payment for each truckload of potato waste that Claimant delivered to Respondent's customers.

5) Respondent Block expected Claimant to work from 6:00 a.m. to 6:00 p.m. each working day. Sometimes, however, Claimant worked later than 6:00 p.m. because a load of waste became available for delivery late in the day.

6) On an average day, Claimant delivered three or four loads of potato waste. When she was not occupied driving, Respondent Block required Claimant to be near the trucks and ready to haul the next available load. Respondent Block did not tell Claimant that she could go home or do what she pleased when no load was available to be delivered. Claimant had no scheduled lunch breaks and never was told that she could take a break and go to lunch.

7) Respondent Block told Claimant that another employee, John Krebs, would tell Claimant what to do, and instructed her to do as Krebs said. During times

when no load was ready for delivery, Krebs sometimes told Claimant to help with general truck maintenance, and Claimant did that. Krebs never told Claimant that she could go home or do what she pleased when no load was ready for delivery.

8) Although Claimant was not always busy during the times between loads, she did not believe she could leave the site where the trucks were located.

9) On or about February 8, 1997, while backing up a truckload of potato waste for delivery, Claimant tipped over the trailer of waste and almost rolled the truck itself. Respondent Block decided to dump the load of potato waste because he did not believe he could safely salvage the trailer otherwise. Block was angry at Claimant because of her mistake in backing up the truck and trailer.

10) Respondent Block discharged Claimant on February 20, 1997.

11) Respondent Block kept no record of the hours Claimant worked.

12) Claimant's records and testimony reveal the following information, which the forum has accepted as fact: she worked 210 total hours; of the total hours, 51 were hours worked in excess of forty hours per week. Claimant and Respondent Block had no agreement about overtime hours.

13) At times material, the minimum wage in Oregon was \$5.50 per hour, pursuant to ORS 653.025(1).

14) Pursuant to ORS Chapter 653 (Minimum Wages), OAR 839- 020-0030 (Payment of Overtime Wages) and Agency policy, the Agency calculated Claimant's total earnings to be \$1295.25. The total reflects the sum of the following:

159 hours at \$5.50 per hour (minimum wage [MW])	\$874.50
51 hours at \$8.25 per hour (overtime rate: 1.5 times MW)	<u>\$ 420.75</u>
TOTAL EARNED	\$1295.25

15) Respondent Block calculated Claimant's total earnings at \$828.58 by multiplying 0.20 by the amount he asserted he had been paid for loads delivered by Claimant. Respondent Block paid Claimant only \$713.93, however, because he withheld \$114.65 as the value of the load of potato waste that he dumped as a result of Claimant's mistake in backing up a truck. The \$713.93 paid to Claimant was comprised of checks for \$200.00, \$35.00 (paid to an apartment management company on Claimant's behalf), and \$268.72, plus legal deductions totaling \$210.21. Respondent Block knowingly and intentionally paid Claimant only \$713.93 in wages.

16) The forum computed civil penalty wages, in accordance with ORS 652.150 and Agency policy, as follows: \$5.50 (minimum wage) multiplied by 8 (hours per day) equals \$44.00. This figure of \$44.00 is multiplied by 30 (the maximum number of days for which civil penalty wages continue to accrue) for a total of \$1320.00. The Agency set forth this figure in the Order of Determination.

17) Respondent Block did not allege in his answer an affirmative defense of financial inability to pay the wages due at the time they accrued; nor did he provide any such evidence for the record.

18) The forum carefully observed Claimant's demeanor and found her testimony to be credible. She had most pertinent facts readily at her command. In addition, Claimant did not attempt to deny that she had agreed to be paid at the rate of 20% of the amount Respondent Block received for each load of potato waste that Claimant delivered. Nor did Claimant deny that it was her mistake in driving that ultimately resulted in Respondent Block's decision to dump one load of potato waste.

19) Respondent Block's testimony was not reliable or credible where it conflicted with other credible evidence. Evidence Block submitted was internally inconsistent in some respects. For example, Block's May 4, 1997, response to the

Agency's wage claim investigation stated that Claimant's last day of work had been February 18, 1997. Block later submitted documentation stating that Claimant had worked on February 19. In addition, Respondent Block's testimony conflicted with the documentary evidence; he claimed that he had enclosed the documents comprising Exhibit R-12 with his May 4, 1997, letter to the Agency, but Agency records indicate this is not the case. Moreover, the main disputed factual issue in this case -- the hours and days Claimant worked for Respondent Block -- involves matters about which the law requires Block to keep records. See ORS 653.045; OAR 839-020-0080(1). Despite the Agency's requests, Respondent Block did not produce any records of the hours or days Claimant worked for him, other than a *post-hoc* attempt to calculate the number of hours Claimant would have been occupied in driving loads of waste. Accordingly, the forum gave little weight to Respondent's testimony, except that which other credible evidence corroborated or which was against his pecuniary interest.

20) Respondent Schaan and Respondent Block had a personal relationship. Schaan had signing authority for the Sage & Sand bank account and Block permitted her to withdraw funds from that account for her personal use. Block had Schaan's name printed on the Sage & Sand bank checks so Schaan would not have difficulty using them. The account, however, was his alone.

21) Respondent Schaan wrote Claimant a check for wages drawn from Schaan's personal checking account. Respondent Block believes that Schaan would have reimbursed herself for that amount from the Sage & Sand bank account.

22) Respondent Block did not intend to form a business partnership with Respondent Schaan. Schaan did not have an ownership interest in any assets of Sage & Sand, and would not share in any losses the business suffered. Respondent Schaan did not have authority to hire or fire Sage & Sand employees. The forum has accepted

Respondent Block's testimony regarding the nature of his personal and professional relationship with Schaan because the testimony is against his pecuniary interest in this matter.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent Block was a person doing business as Sage & Sand Equine Center and/or Sage & Sand Trucking in the state of Oregon, and who engaged the personal services of one or more employees in the operation of that business.

2) Respondent Block employed Claimant as a truck driver from January 29 to February 20, 1997. During that time, Respondent Block suffered or permitted Claimant to render personal services to him.

3) The state minimum wage during 1997 was \$5.50 per hour.

4) Claimant's last day of work was February 20, 1997, the same day Respondent Block terminated Claimant's employment.

5) Claimant worked 210 hours for Respondent Block, 51 of which were hours worked in excess of 40 per week. At the minimum wage of \$5.50 per hour, and the overtime rate of \$8.25 per hour, Claimant earned \$1295.25 in wages. Respondent Block has paid Claimant only \$713.93 and owes her \$581.32 in earned and unpaid compensation.

6) Respondent Block willfully failed to pay Claimant \$581.32 in earned, due, and payable wages. Respondent Block has not paid Claimant the wages owed and more than 30 days have elapsed from the due date of those wages.

7) Civil penalty wages, computed in accordance with ORS 652.150 and Agency policy, equal \$1320.00.

8) Respondent Block did not allege in his answer an affirmative defense of financial inability to pay the wages due at the time they accrued. Respondent Block did not provide any such evidence for the record at the hearing.

9) Respondent Schaan did not share in the losses of Respondent Block's business or own any assets of that business.

CONCLUSIONS OF LAW

1) ORS 653.010 provides, in pertinent part:

"(3) 'Employ' includes to suffer or permit to work; * * *."

"(4) 'Employer' means any person who employs another person * * *."

ORS 652.310 provides, in pertinent part:

"(1) 'Employer' means any person who in this state, directly or through an agent, engages personal services of one or more employees * * *."

"(2) 'Employee' means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled."

During all times material herein, Respondent Block was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.414, and 653.010 to 653.261.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414.

3) Before the start of the contested case hearing, the forum informed Respondent Block of his rights as required by ORS 183.413(2). The Administrative Law Judge complied with ORS 183.415(7) by explaining the information described therein to the participants at the start of the hearing.

4) The actions or inactions of John Krebs, an agent or employee of Respondent Block, are properly imputed to Respondent.

5) ORS 653.025 requires that:

" * * * for each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages computed at a rate lower than:

"(1) For calendar year 1997, \$5.50."

Oregon law required Respondent Block to pay Claimant at a fixed rate of at least \$5.50 per hour. Respondent Block failed to pay Claimant the minimum wage rate of \$5.50 for each hour of work time.

6) ORS 653.261(1) provides:

"The Commissioner of the Bureau of Labor and Industries may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to, minimum meal periods and rest periods, and maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of such employees when computed without benefit of commissions, overrides, spiffs and similar benefits."

OAR 839-020-0030(1) provides, in pertinent part:

"[A]ll work performed in excess of forty (40) hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed without benefit of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1)."

Oregon law obligated Respondent Block to pay Claimant one and one-half times her regular hourly rate, in this case the minimum wage of \$5.50, for all hours worked in excess of 40 hours in a week. Respondent failed to pay Claimant at the overtime rate, in violation of OAR 839-20-030(1).

7) ORS 652.140(1) provides:

"Whenever an employer discharges an employee or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge or termination shall become due and

payable not later than the end of the first business day after the discharge or termination."

Respondent Block violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid not later than the end of the first business day after discharging her from employment on February 20, 1997.

- 8) ORS 652.150 provides:
"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent Block is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140.

9) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent Block to pay Claimant her earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

10) The Agency did not prove by a preponderance of the evidence that Respondent Schaan was the business partner of Respondent Block. Respondent Schaan was not Claimant's employer for the purposes of ORS 652.110 to 652.200, 652.310 to 652.414, and 653.010 to 653.261. Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to dismiss the Order of Determination as to Respondent Schaan upon finding no violation that was charged. ORS 652.332.

OPINION

Minimum Wage and Overtime

Respondent Block contends that he owes no wages to Claimant because she agreed to compensation of 20% of the amount Block received in payment for each load of potato waste that Claimant delivered, and Block paid Claimant that amount. ORS 653.055(2) states, however, that "[a]ny agreement between an employee and an employer to work at less than the wage rate required by [the minimum wage law] is no defense to an action under subsection (1) of this section." Similarly, ORS 652.360 states that "[n]o employer may by special contract or any other means exempt the employer from any provision of or liability or penalty imposed by ORS 652.310 to 652.414 or by any statute relating to the payment of wages * * *." In other words, an employer may not make an agreement with an employee whereby the employer is not required to comply with the minimum wage law or the wage collection law. The agreement between Respondent and Claimant is no defense to a failure to pay the minimum wage or a failure to pay final wages when due. Respondent Block did not assert, and the Administrative Law Judge did not find, any other exemption or exclusion from the coverage of the Minimum Wage Law, ORS 653.010 to 653.261, or the Wage and Hour Laws, ORS Chapter 652, for Respondent Block or Claimant.

ORS 653.025(1) prohibited employers, during 1997, from paying their employees at a rate less than \$5.50 for each hour of work time. OAR 839-020-0030 provides that all work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half the regular rate of pay. Respondent Block was obliged by law to pay Claimant at least \$5.50 per hour worked plus one and one-half times that wage for all hours worked in excess of 40 hours in a week.

Work Time

This forum has ruled repeatedly that, pursuant to ORS 653.045, it is the employer's duty to maintain an accurate record of an employee's time worked. See, e.g., *In the Matter of Diran Barber*, 16 BOLI 190, 196-97 (1997) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946)); *In the Matter of Tina Davidson*, 16 BOLI 141, 148 (1997). Where the forum concludes that an employee was employed and was improperly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise amounts involved. *In the Matter of Diran Barber*, 16 BOLI at 196. Where the employer produces no records, the Commissioner may rely on the evidence produced by the Agency "to show the amount and extent of [the employee's] work as a matter of just and reasonable inference,' and `may then award damages to the employee, even though the result be only approximate.'" *Id.* (quoting *Mt. Clemens Pottery Co.*, 328 US at 687-688).

Here, Respondent Block kept no records of the days or hours that Claimant worked. Rather, Block relied solely on scale tickets and billing invoices showing how many loads of waste each truck driver delivered. Those records do not reflect hours or days spent on tasks other than driving; nor do they reflect compensable waiting time. In addition, nothing about the documents Respondent Block submitted establishes that they are true copies of the invoices actually sent to customers for billing. The documents all are dated February 1, 1997, even though they purport to be complete records of activities that took place during February. Nor were the documents accompanied by records of payment corresponding to the amounts purportedly billed to the customers. Because Respondent Block has not produced legally required records of Claimant's hours worked, the forum relies on the evidence produced by the Agency on that subject.

Claimant relied on her recollection and a personal calendar in determining the days on which she had worked for Respondent Block. Claimant's reconstruction of her work schedule, as reflected on the calendar admitted as Exhibit A-4, does conflict with Respondent Block's billing records in a few details. For example, Claimant reported that she worked from January 29 through February 20, with February 6, 11, 14, 15, and 16 as her days off. Respondent Block's billing records indicate, to the contrary, that Claimant did work on February 6, 11, and 15. Nonetheless, the forum has accepted Claimant's calendar and testimony as establishing, by a preponderance of the evidence, the *number* of days that she worked.

Claimant calculated that she worked a total of 15 days or fractions of days in February 1997. Respondent Block asserted that Claimant had worked only 13 days in that month. As noted above, however, Block did not produce any records of the days Claimant had worked, as required by law, and the forum finds his testimony on this point not credible. Similarly, the forum gives no weight to Respondent Block's denial of Claimant's credible testimony that she also worked on January 29, 30, and 31, 1997. Evidence in the record shows that Sage & Sand gave Claimant a \$35.00 advance on her earnings on January 23, 1997, which was a Thursday. Claimant testified credibly that she started work the week after she received that advance; it follows that Claimant's first work day must have occurred during the last week in January. For these reasons, the forum has accepted as fact Claimant's testimony regarding the number of days she worked for Respondent Block.

The forum also has accepted as fact Claimant's testimony regarding the number of hours she worked each day, which the forum finds to be credible. Claimant testified that she was required to be on duty, either driving, waiting to drive, or performing other tasks, from 6 a.m. to at least 6 p.m. each work day. Work time includes time spent

waiting to perform work for the benefit and at the request of the employer. Unless an employee is specifically relieved from duty and the time period is sufficiently long for the employee to use for his or her own purposes, the employer must compensate the employee for time spent waiting. See OAR 839-020-0041; *In the Matter of Mary Stewart-Davis*, 13 BOLI 188, 197 (1994), *aff'd sub nom Stewart-Davis v. Bureau of Labor & Industries*, 136 Or App 212 (1995). Here, Claimant testified that neither Respondent Block nor Krebs relieved her from duty during the time she spent waiting for loads to come available for delivery. Respondent Block provided no credible evidence to the contrary. Any time Claimant spent waiting for work between driving loads of potato waste was, therefore, compensable work time.

ORS 653.055(1) provides, in part, that "[a]ny employer who pays an employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261 is liable to the employee affected: (a) For the full amount of the wages, less any amount actually paid to the employee by the employer * * *." Respondent Block paid Claimant only \$713.93. Therefore, Respondent Block owes Claimant unpaid wages in the amount of \$581.32 (\$1295.25 - \$713.93).

Deductions

ORS 652.610(3) establishes when an employer may withhold, deduct, or divert any portion of an employee's wages. Except as required by law or authorized by a collective bargaining agreement, nothing in that statute would allow for a deduction from wages where the employee has not authorized that deduction in writing, particularly where the ultimate recipient of the money withheld is the employer. See *In the Matter of Mary Stewart-Davis*, 13 BOLI at 195-96; see also *Garvin v. Timber Cutters, Inc.*, 61 Or App 497, 658 P2d 1164, 1166 (1983) (construing previous version of ORS 652.610(3)).

Respondent Block violated ORS 652.610(3) by deducting \$114.65 from Claimant's wages to cover the value of the load of dumped potato waste.

Penalty Wages

Awarding penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency. Rather, a respondent commits an act or omission "willfully" if the respondent acts (or fails to act) intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent Block, as an employer, had a duty to know the amount of wages due to his employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). Here, Respondent Block admitted that he paid Claimant only a percentage of the amount he received in payment for each truckload of potato waste that Claimant delivered to Block's customers. He also admitted that he deducted from Claimant's wages the value of the dumped load of potato waste. Evidence showed that Respondent Block committed these acts voluntarily, intentionally, and as a free agent. Thus, Respondent Block acted willfully and is liable for penalty wages of \$1320.00 under ORS 652.150.

Respondent Block did not plead or show that he was financially unable to pay Claimants' wages at the time they accrued. Therefore, he cannot escape penalty wage liability.

Default by Respondent Schaan; Dismissal of Order of Determination as to Respondent Schaan.

Respondent Schaan failed to respond to the Order of Determination and never filed an answer, a request for a contested case hearing, or a demand for a court trial. Thus, she defaulted to the charges set forth in the Order of Determination. In a default situation, pursuant to ORS 183.415(5) and (6), the task of this forum is to determine

whether the Agency has made on the record a prima facie case supporting the Order of Determination. See *In the Matter of Tina Davidson*, 16 BOLI at 148; see also OAR 839-050-0330(2).

The Agency has not established a prima facie case that Respondent Schaan was Claimant's employer. The Agency's theory was that Respondent Block and Respondent Schaan were business partners. The Agency did establish, through the testimony of Respondent Block, that Respondent Schaan was given access to the bank account of Respondent Block's business, Sage & Sand. The Agency did not, however, prove that Respondents intended to form a partnership. Nor did it prove that Respondent Schaan owned any assets of the business, shared in any of the business's losses, or controlled the business's operations. Although Schaan did write a wage check to Claimant out of her own bank account, Respondent Block testified that Schaan would have reimbursed herself for that amount out of the Sage & Sand account. Nor is the fact that Block gave Schaan signing authority for the Sage & Sand account, and had her name printed on the business's checks, sufficient to establish that Block and Schaan were partners. Block testified that he had Schaan's name printed on Sage & Sand's checks only so she would not have difficulty using them. In the absence of persuasive evidence that Respondents intended to form a partnership, the forum concludes that Schaan was not Block's partner. See *Widmer Brewing Co. v. Rolph*, 128 Or App 666, 671, 877 P2d 112, rev den 320 Or 110 (1994) ("The essential test in determining the existence of a partnership is whether the parties intended to establish such a relationship. * * *. Intent to form a relationship may be established by an express agreement or inferred from the conduct of the parties, including whether the parties shared profits, losses and control of the business."). The Order of Determination as to Respondent Schaan is dismissed.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as a result of Respondent Block's violation of ORS 652.140(1), ORS 653.025(1), and OAR 839-020-0030(1), the Commissioner of the Bureau of Labor and Industries hereby orders HAROLD ZANE BLOCK to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR ROSETTA MARIE GILBERT in the amount of \$1901.32, less appropriate lawful deductions, representing \$581.32 in gross earned, unpaid, due, and payable wages, and \$1320.00 in penalty wages; plus interest at the rate of nine percent per year on the sum of \$581.32 from February 21, 1997, until paid and nine percent interest per year on the sum of \$1320.00 from March 24, 1997, until paid.

The Commissioner further orders that the Order of Determination is dismissed as to Respondent Schaan.

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