

In the Matter of

JERRY BENNETT and STAN LYNCH

dba Body Worx

Case No. 143-01

Final Order of the Commissioner Jack Roberts

Issued March 18, 2002

SYNOPSIS

Respondent Stan Lynch employed two wage claimants and failed to pay them straight time and overtime wages during December 2000 and January 2001. Respondent Lynch was ordered to pay claimants a total of \$8,149 in due and unpaid wages. Respondent Lynch's failure to pay the wages was willful, and he was ordered to pay \$4800 in civil penalty wages. The forum determined that Respondent Bennett was not the claimants' employer and dismissed the charges against him. ORS 652.140(1), ORS 652.150, ORS 653.261, OAR 839-001-0470(1), OAR 839-020-0030.

The above-entitled case came on regularly for hearing before Alan McCullough, 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 November 20 and December 19, 2001, in the Eugene office of the Bureau of Labor and Industries, located at 1400 Executive Parkway, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Peter McSwain, an employee of the Agency. Wage claimant Luis Zapien was present on November 20 and December 19 and was not represented by counsel. Respondent Stan Lynch was present on November 20 and was not represented by counsel. Neither Respondent Lynch nor Bennett was present on December 19. Ms. Terry Rodgers, an Oregon court-certified interpreter, was present both days as the forum's Spanish-speaking interpreter.

The Agency called wage claimants Luis Zapien and Jorge Chagoya as witnesses, as well as former Wage and Hour Division (“WHD”) Compliance Specialist Gerhard Taeubel.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-7 (submitted or generated prior to hearing);
- b) Agency exhibits A-1 through A-15 (submitted prior to hearing) and A-16, A-17, and A-18 (submitted at hearing);
- c) The forum’s exhibit ALJ-1 (submitted at hearing at the forum’s request).

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 February 9, 2001, Claimant Jorge Chagoya filed a wage claim with the Agency alleging that Respondent Stan Lynch, dba Body Worx, had employed him and failed to pay wages earned and due to him.
- 2) At the time he filed his wage claim, Claimant Chagoya assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant Chagoya, all wages due from Respondents.
- 3) Claimant Chagoya brought his wage claim within the statute of limitations.
- 4) On February 16, 2001, Claimant Luis Zapien filed a wage claim with the Agency alleging that Respondent Stan Lynch, dba Body Worx, had employed him and failed to pay wages earned and due to him.

5) At the time he filed his wage claim, Claimant Zapien assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant Zapien, all wages due from Respondents.

6) Claimant Zapien brought his wage claim within the statute of limitations.

7) On March 28, 2001, the Agency issued Order of Determination No. 01-0730 based upon the wage claims filed by Claimants Zapien and Chagoya and the Agency's investigation. The Order of Determination alleged that Respondents "Jerry Bennett and Stan Lynch dba Body Worx, Employers," operating as a partnership, owed a total of \$9,349.50 in unpaid wagesⁱ and \$5,988 in civil penalty wages,ⁱⁱ 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.

8) On April 16, 2001, Respondent Stan Lynch filed an answer and request for hearing. The answer denied that any money was owed to the Claimants and alleged the affirmative defense that Claimants were independent contractors.

9) On October 1, 2001, the Agency filed a "BOLI Request for Hearing" with the forum.

10) On October 9, 2001, the Hearings Unit issued a Notice of Hearing to Respondents, the Agency, and the Claimants stating the time and place of the hearing as November 20, 2001, at 1400 Executive Parkway, Eugene, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, 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 839-050-000 to 839-050-0440. These documents were mailed to Respondents at 540 Fillmore Street, Eugene, Oregon 97402 and to Stan Lynch at 1245

Ken Ray Loop, Springfield, OR 97477. Neither of the documents addressed to 540 Fillmore Street was returned to the Hearings Unit by the U.S. Postal Service.

11) On November 2, 2001, the Agency submitted a case summary.

12) On November 13, 2001, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); and a statement of any agreed or stipulated facts; and any wage and penalty calculations (for the Agency only.) The forum ordered the participants to submit case summaries no later than November 16, 2001, ordered Respondents to additionally bring two copies of their case summary to the hearing in the event their case summary did not reach the Hearings Unit or Agency case presenter prior to the hearing; and notified the Agency and Respondent of the possible sanctions for failure to comply with the case summary order. The ALJ hand-delivered the case summary order to Respondent Stan Lynch at 540 Fillmore, Eugene, Oregon, on November 13, 2001.

13) At 4:30 p.m. on November 19, 2001, Respondent Lynch's wife telephoned the ALJ and stated that she was calling on behalf of Lynch, who had developed an abscessed tooth, and sought a postponement because of this medical condition. The ALJ informed her that Lynch had three options – bring a medical release signed by a doctor or dentist to the hearing; come to the hearing and let the ALJ evaluate Lynch's ability to participate; or simply come to the hearing and participate. The ALJ disclosed this *ex parte* communication on the record when the hearing began on November 20.

14) On November 20, 2001, at 9 a.m., Respondents did not appear for the hearing. The ALJ went on the record and announced that he would wait until 9:30 a.m.,

pursuant to OAR 839-050-0330, to commence the hearing and that Respondents would be in default if they did not make an appearance by that time.

15) About 9:15 a.m., Respondent Lynch appeared at the hearing and informed the ALJ he had tried to call to say he would be late, but was unable to make a connection. Lynch brought a dentist's statement with him verifying that he had an abscessed tooth and had been given a prescription for antibiotics and pain medication. Lynch stated that he was in severe pain at that time and would like a postponement.

16) The Agency did not object to Lynch's request for a postponement and the hearing was rescheduled for 9:30 a.m. on December 19, 2001, at the same location.

17) On November 20, 2001, the ALJ issued an interim order confirming that the hearing was reset to begin at 9:30 a.m. on December 19, 2001, at the same location. The interim order also ordered that Respondent Lynch's case summary must be filed by 5 p.m. on December 10, 2001.

18) Respondents did not submit a case summary.

19) On December 19, 2001, Respondents did not appear at the hearing. The ALJ waited 30 minutes, until 10 a.m. When Respondents did not appear and did not notify the forum that they would not be appearing, the ALJ declared Respondents to be in default and commenced the hearing.

20) At the start of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

21) On February 13, 2002, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Stan Lynch (“Lynch”), an individual person, owned and operated an auto body repair and paint shop under the assumed business name of Body Worx in Eugene, Oregon. Lynch himself worked on cars at Body Worx.

2) Respondent Jerry Bennett, Lynch’s brother-in-law, was not an owner of Body Worx and did not employ either wage claimant.

3) Lynch hired Claimant Chagoya (“Chagoya”) at the beginning of April 2000 to repair and paint cars and agreed to pay him \$12.00 per hour for his work. While employed by Lynch, Chagoya used his own tools.

4) Lynch paid Chagoya in full for all hours worked by Chagoya prior to December 1, 2001.

5) Chagoya worked a total of 403.5 hours for Lynch between December 1, 2000, and January 31, 2001, not including a 30-minute lunch break that he received every day. 52 of these hours were hours worked over 40 in a given work week.ⁱⁱⁱ Chagoya’s overtime wage rate was \$18.00 per hour.

6) Between December 1, 2000, and January 31, 2001, Chagoya earned a total of \$4,218 in straight time wages, calculated at \$12.00 per hour, and \$936 in overtime wages, calculated at \$18.00 per hour, for a total of \$5,154. Lynch paid Chagoya nothing for this work.

7) Lynch fired Chagoya on January 31, 2001.

8) Lynch owes Chagoya \$5,154 in unpaid wages.

9) Civil penalty wages are computed as follows for Chagoya, in accordance with ORS 652.150 and OAR 839-001-0470(1): \$12.00 per hour x 8 hours x 30 days = \$2,880.

10) Claimant Zapien (“Zapien”) applied for work with Body Worx in response to a newspaper advertisement. He was interviewed and hired by Lynch around the end of September 2000 to prepare cars for painting. Lynch agreed to pay him \$8.00 per hour for his work.

11) Zapien worked a total of 385.75 hours for Lynch between December 11, 2000, and January 31, 2001, not including a 30-minute lunch break that he received every day. 77.25 of these hours were hours worked over 40 in a given work week.^{iv} Zapien’s overtime wage rate was \$12.00 per hour.

12) Between December 11, 2000, and January 31, 2001, Zapien earned a total of \$2,468 in straight time wages, calculated at \$8.00 per hour, and \$927 in overtime wages, calculated at \$12.00 per hour, for a total of \$3,395. Lynch paid Zapien only \$400 for his work during this period of time.

13) Lynch fired Zapien on January 31, 2001.

14) Lynch owes Zapien \$2,995 in unpaid wages.

15) Civil penalty wages are computed as follows for Zapien, in accordance with ORS 652.150 and OAR 839-001-0470(1): \$8.00 per hour x 8 hours x 30 days = \$1,920.

16) During the entire period of time Zapien and Chagoya worked for Lynch, Lynch rented the space in which he conducted the business of Body Worx. Persons who had Body Worx perform repairs on their vehicles paid Lynch directly for the work.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Stan Lynch was an individual doing business under the assumed business name of Body Worx and engaged the personal services of one or more employees.

2) Jerry Bennett was not an owner of Body Worx and did not employ either claimant.

3) Jorge Chagoya was employed by Lynch at Body Worx from April 2000 until January 31, 2001, on which date Lynch fired him.

4) From December 1, 2000, to January 31, 2001, Chagoya earned \$5,154 and has not been paid any of those wages.

5) Lynch owes Chagoya \$5,154 in due and unpaid wages.

6) Lynch willfully failed to pay Chagoya \$5,154 in earned, due, and payable wages not later than the end of the first business day after Chagoya was fired, and more than 30 days have elapsed from the date Chagoya's wages were due.

7) Civil penalty wages for Chagoya, computed in accordance with ORS 652.150 and OAR 839-001-0470(1), equal \$2,880.

8) Luis Zapien was employed by Lynch at Body Worx from September 2000 until January 31, 2001, on which date Lynch fired him.

9) From December 11, 2000, to January 31, 2001, Zapien earned \$3,395 and has only been paid \$400.

10) Lynch owes Zapien \$2,995 in due and unpaid wages.

11) Lynch willfully failed to pay Zapien \$2,995 in earned, due, and payable wages not later than the end of the first business day after Zapien was fired, and more than 30 days have elapsed from the date Zapien's wages were due.

12) Civil penalty wages for Zapien, computed in accordance with ORS 652.150 and OAR 839-001-0470(1), equal \$1,920.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent Stan Lynch was an employer doing business as Body Worx in Eugene, Oregon. Jorge Chagoya and Luis Zapien were employees subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405. During all times material herein, Lynch employed Claimants.

2) During all times material herein, Respondent Jerry Bennett did not employ claimants Chagoya and Zapien and the charges against Bennett are dismissed.

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

4) At times material, ORS 652.140(1) provided:

“(1) 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.”

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 * * * 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 provides, in pertinent part:

“(1) Except as provided in OAR 839-020-0100 to 839-020-0135 all 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 * * * .

“* * * * *

“(3) Methods for determining amount of overtime payment under different compensation agreements:

“(a) Compensation based exclusively on hourly rate of pay:

“(A) Where the employee is employed solely on the basis of a single hourly rate, the hourly rate is the “regular rate”. For hours worked in excess of forty (40) hours in a work week the employee must be paid, in addition to the straight time hourly earnings, a sum determined by multiplying one-half the hourly rate by the number of hours worked in excess of forty (40)[.]”

Respondent Lynch violated ORS 652.140(1) by failing to pay Claimants Chagoya and Zapien all unpaid wages earned from December 1, 2000, and December 11, 2000,

respectively, through January 31, 2001, not later than the end of the first business day after they were discharged. Those wages total \$8,149.

5) 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.”

OAR 839-001-0470(1) provides:

“(1) When an employer willfully fails to pay all or part of the wages due and payable to the employee upon termination of employment within the time specified in OAR 839-001-0420, 839-001-0430 and 839-001-0440, the employer shall be subject to the following penalty:

“(a) The wages of the employee shall continue from the date the wages were due and payable until the date the wages are paid or until a legal action is commenced, whichever occurs first;

“(b) The rate at which the employee’s wages shall continue shall be the employee’s hourly rate of pay times eight (8) hours for each day the wages are unpaid;

“(c) Even if the wages are unpaid for more than 30 days, the maximum penalty shall be no greater than the employee’s hourly rate of pay times 8 hours per day times 30 days.”

Respondent Lynch is liable for a total of \$4,800 in civil penalties under ORS 652.150, computed by multiplying Chagoya’s hourly rate (\$12.00 per hour) x 8 hours per day x 30 days = \$2,880, and Zapien’s hourly rate (\$8.00 per hour) x 8 hours per day x 30 days = \$1,920, for willfully failing to pay all wages or compensation to Chagoya and Zapien when due as provided in ORS 652.140(1).

6) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent Lynch to pay Claimants Chagoya and Zapien their

earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

PRIMA FACIE CASE

In a default situation, the Agency need only establish a prima facie case on the record to support the allegations in its charging document. *In the Matter of Usra A. Vargas*, 22 BOLI 212, 220 (2001). To establish a prima facie case in wage claim cases, the Agency must prove: (1) that Respondent employed the wage claimants; (2) any pay rate upon which Respondent and the claimants agreed, if it exceeded the minimum wage; (3) that claimants performed work for Respondent for which they were not properly compensated; and (4) the amount and extent of work claimants performed for Respondent. *Id.*

A. Respondent Lynch Employed Both Claimants

In his unsworn answer, Lynch alleged that Chagoya and Zapien were not his employees, and that Chagoya was an independent contractor who had a “quasi partnership” with Zapien to repair cars at a facility leased by Lynch. This forum employs an “economic reality” test to determine if wage claimants are employees or independent contractors under Oregon’s wage collection laws. That test involves consideration of five factors: the degree of control respondent had over the claimants; the extent of relative investments of the claimants and respondents; the degree to which the claimants’ opportunity for profit and loss was determined by respondent; the skill and initiative required in performing the job; and the permanency of the relationship. *In the Matter of Ilya Simchuk*, 22 BOLI 186, 194-96 (2001). Where a respondent fails to appear at hearing and his total contribution to the record is a request for hearing and an answer that contains only unsworn and unsubstantiated assertions, those assertions

are overcome wherever they are contradicted by other credible evidence in the record. *In the Matter of Landco Enterprises, Inc.*, 22 BOLI 62, 67 (2001).

In contrast to Lynch's unsworn assertions, both Chagoya and Zapien credibly testified that Lynch hired them, that they worked for Lynch throughout the wage claim periods, that they worked 40+ hours per week for Lynch during the wage claim period, that Lynch paid them for their work prior to the wage claim periods, and that Lynch fired them. There was no credible evidence that Chagoya and Lynch performed any other gainful work during the wage claim periods, had any investment in Lynch's business, or that they had any control over their opportunity for profit or loss. Based on their testimony about the nature of the work they performed and the lack of evidence of complaints about their work, the forum infers that Chagoya had the skills of a competent auto body repairman/painter and Zapien was an average unskilled laborer. There was no credible evidence concerning the initiative exercised by Chagoya and Zapien in performing their work.

Respondents have the burden of proving the affirmative defense that wage claimants were independent contractors, not employees. *In the Matter of Leslie Elmer DeHart*, 18 BOLI 199, 207-08 (1999). Respondent Lynch has not met that burden, and the forum concludes that Chagoya and Zapien were Lynch's employees.

The Agency also alleges that Jerry Bennett, Lynch's brother-in-law, was Lynch's partner and a co-owner of Body Worx. A partnership is never presumed and the Agency bears the burden of proof to show that Bennett was Lynch's partner and a co-employer of Chagoya and Zapien. *In the Matter of Bubbajohn Howard Washington*, 21 BOLI 91, 100 (2000). Here, there is no evidence in the record to support the Agency's partnership theory, other than a printout showing the registration of Body Worx as an assumed business name with the state of Oregon. That printout, showing a registry

date of "08-30-2000," lists Jerry Bennett and Stan Lynch as registrants. The information contained on the printout, standing alone, is insufficient to overcome the credible testimony of Chagoya and Zapien that Lynch, not Bennett, was their employer, as well as statements taken by the Agency's investigator from other witnesses indicating that Lynch was the owner of the business.

B. Both Claimants Performed Work at an Agreed Rate That Exceeded the Minimum Wage

Chagoya and Zapien credibly testified that Lynch agreed to pay them \$12.00 and \$8.00 per hour, respectively, for their work. This evidence is sufficient to overcome the unsworn assertions in Lynch's answer that they were independent contractors who did not work for an hourly wage. *Landco*, 22 BOLI at 67.

C. Both Claimants Performed Work For Which They Were Not Properly Compensated.

Chagoya and Zapien credibly testified that they were not paid for work they performed in December 2000 and January 2001, and there is no evidence to the contrary, other than Lynch's unsworn and discredited assertion that they were not his employees in that period of time.

D. Amount and Extent of Work Claimants Performed for Respondent.

Oregon law requires employers to maintain accurate records of the hours their employees work. *In the Matter of Sharon Kaye Price*, 21 BOLI 78, 88 (2000). Where the forum concludes that employees performed work for which they were not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours worked. *Vargas*, 22 BOLI at 220-21. In this case, Lynch produced no records showing the hours worked by Chagoya and Zapien. When an employer produces no records of hours or dates worked by wage claimants, the commissioner may rely on evidence produced by the Agency, including credible

testimony by the claimants, to show the hours worked by the claimants. *Id.* In this case, the Agency produced both credible testimony and time records completed by Chagoya and Zapien. Zapien provided contemporaneous notes of his hours worked and testified credibly about the creation of those notes, and the forum has based its calculation of time and dates worked by Zapien on those notes. Those calculations are reflected in Finding of Fact 11 – The Merits. Chagoya created a calendar of hours worked at the time he filed his wage claim and testified credibly that the hours shown on it were accurate, and the forum has based its calculation of time and dates worked by Chagoya on that calendar. Those calculations are reflected in Finding of Fact 5 – The Merits.

WAGES DUE TO CLAIMANTS CHAGOYA AND ZAPIEN

In its Order of Determination, the Agency sought \$6,862.50 in unpaid wages for Claimant Chagoya, calculated at the rate of \$15.00 per hour. Based on Chagoya's calendar showing hours worked and the rate of \$12.00 per hour, the forum has calculated that he is owed \$5,154 in unpaid wages.

In its Order of Determination, the Agency sought only \$2,487 in unpaid wages for Claimant Zapien, based on the allegation that Zapien had been paid \$910. At hearing, the Agency proved that Zapien had only been paid \$400 for work performed during the wage claim period. Where the Agency proves a wage claimant is owed wages exceeding those sought in the Order of Determination, the commissioner has the authority to award the higher amount of unpaid wages. *In the Matter of Francisco Cisneros*, 21 BOLI 190, 213 (2001), *appeal pending*. Accordingly, the forum has awarded Zapien approximately \$510 more in unpaid wages than the amount sought in the Order of Determination, for a total of \$2,995.

PENALTY WAGES

An award of penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

Respondent, as an employer, had a duty to know the amount of wages due to his employees. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238 (1983). Because Lynch himself worked at Body Worx, the forum concludes that he knew Chagoya's and Zapien's hours of work. There was no evidence that Lynch acted other than voluntarily or as a free agent in not paying Chagoya and Zapien for the work they performed during the wage claim periods. Therefore, both wage claimants are entitled to penalty wages.

Lynch fired both wage claimants on January 31, 2001, and their wages became due on February 1, 2001. More than 30 days have expired since that date. Penalty wages are therefore assessed and calculated pursuant to ORS 652.150 and OAR 839-001-0470(1). Claimant Chagoya is entitled to \$2,880 in penalty wages (\$12.00 per hour x 8 hours per day x 30 days = \$2,880), and Claimant Zapien is entitled to \$1,920 in penalty wages (\$8.00 per hour x 8 hours per day x 30 days = \$1,920).

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages and civil penalty wages owed as a result of his violations of ORS 652.140 and OAR 839-020-0030, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent Stan Lynch 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 Claimant Jorge Chagoya in the amount of EIGHT THOUSAND THIRTY FOUR DOLLARS (\$8,034.00), less appropriate lawful deductions, representing \$5,154.00 in gross, earned, unpaid, due, and payable wages and \$2,880.00 in penalty wages, plus interest at the legal rate on the sum of \$5,154.00 from March 1, 2001, until paid and interest at the legal rate on the sum of \$2,880.00 from April 1, 2001, until paid.

A certified check payable to the Bureau of Labor and Industries in trust for Claimant Luis Zapien in the amount of FOUR THOUSAND NINE HUNDRED AND FIFTEEN DOLLARS (\$4,915.00), less appropriate lawful deductions, representing \$2,995.00 in gross, earned, unpaid, due, and payable wages and \$1,920.00 in penalty wages, plus interest at the legal rate on the sum of \$2,995.00 from March 1, 2001, until paid and interest at the legal rate on the sum of \$1,920.00 from April 1, 2001, until paid.

ⁱ The Agency alleged that Chagoya was entitled to \$6,862.50 and Zapien was entitled to \$2,487 in unpaid wages.

ⁱⁱ The Agency alleged that Chagoya was entitled to \$3,886 and Zapien was entitled to \$2,102 in penalty wages.

ⁱⁱⁱ There was no evidence that Respondent had an established work week as defined in OAR 839-020-0030(2)(a) and no evidence of the exact date that Chagoya started work for Respondent Lynch. Consequently, for purposes of calculating overtime hours worked, the forum considers the work week to have begun on the day Chagoya commenced work in the pay period in question and to have ended seven consecutive days later. Because Chagoya's first work week in the wage claim period began on December 1, a Friday, the forum considers his work week to have been Friday through Thursday and has computed his overtime hours worked based on a work week beginning on Friday and ending on Thursday. See *In the Matter of Burrito Boy, Inc.*, 16 BOLI 1, 13 (1997).

^{iv} There was no evidence that Respondent had an established work week as defined in OAR 839-020-0030(2)(a) and no evidence of the exact date that Zapien started work for Respondent Lynch. Consequently, for purposes of calculating overtime hours worked, the forum considers the work week to have begun on the day Zapien commenced work in the pay period in question and to have ended seven consecutive days later. Because Zapien's first work week began on December 11, a Monday, a Sunday, the forum considers his work week to have been Monday through Sunday and has computed his overtime hours worked based on a work week beginning on Monday and ending on Sunday. See *id.*