

In the Matter of

**FRANCISCO CISNEROS dba Sergio's Dos
Mexican & Seafood Restaurant,**

Case No. 93-00

February 7, 2001

SYNOPSIS

Respondent employed the three wage Claimants as kitchen help. Respondent agreed to pay them a fixed salary based on working 80 hours every two weeks, but failed to pay them for overtime hours worked. Respondent failed to pay two of the wage Claimants all of the straight time wages they earned. The commissioner ordered Respondent to pay the Claimants \$15,602.40, \$7,581.49, and \$3,962.04, respectively, representing unpaid, due and owing straight time wages, as well unpaid, due and owing overtime wages that were earned within two years of the issuance of the Agency's Order of Determination. The commissioner also found that Respondent's failure to pay the Claimants these wages was willful and ordered Respondent to pay the Claimants \$3,492, \$2,126, and \$1,819, respectively, in civil penalty wages. ORS 12.110(3), ORS 652.140, ORS 652.150, ORS 653.261, OAR 839-020-0030, OAR 839-020-0470.

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 July 25 and 26, 2000. From 9 a.m. on July 25 to 11:40 a.m. on July 26, the hearing was conducted at the Oregon State Employment Department, 801 Oak Avenue, Klamath Falls, Oregon. To accommodate the participants' schedules, the location of the hearing was moved at lunchtime on July 26 and reconvened at 1:30 p.m. at the Elks Lodge, 601 Main, Klamath Falls, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Linda Lohr, an employee of the Agency. Francisco Guerra Guerra, Jose Segura Guerra, and Valentin Segura Guerra, the three wage Claimants, were present throughout the hearing, except when one of them was testifying. None of the Claimants

were represented by counsel. Respondent Francisco Cisneros was present during the majority of the hearing and was represented by Michael L. Spencer, attorney at law. Also present throughout the hearing was Steve Tillson, an interpreter in Spanish, who translated the proceedings in their entirety.

The Agency called as witnesses, in addition to Claimants: Antonio Cisneros, Respondent's general manager; Moises Galvan, Jocabel Segura, Luis Mora, former co-workers of Claimants; and Gerhard Taeubel, Agency compliance specialist.

Respondent called as witnesses: Antonio Cisneros and Francisco Cisneros.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-7 (submitted or generated prior to hearing), and X-8 and X-13 (submitted or generated after the hearing);
- b) Agency exhibits A-1 through A-16 and A-19 through A-21 (submitted prior to hearing), A-25 (submitted at hearing), and A-30 through A-32 (submitted after the hearing);
- c) Respondent exhibits R-1 through R-8 (submitted prior to hearing), and R-12 through R-15 (submitted at hearing).

Having fully considered the entire record in this matter, I, Jack Roberts, 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 April 13, 1999, Claimant Jose Segura Guerra ("J. Segura") filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him.
- 2) At the time he filed his wage claim, Claimant J. Segura assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant J. Segura, all wages due from Respondent.

3) On August 25, 1999, Claimant Valentin Segura ("V. Segura") filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him.

4) At the time he filed his wage claim, Claimant V. Segura assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant V. Segura, all wages due from Respondent.

5) On August 25, 1999, Claimant Francisco Guerra Guerra ("F. Guerra") filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him.

6) At the time he filed his wage claim, Claimant F. Guerra assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant F. Guerra, all wages due from Respondent.

7) On February 3, 2000, the Agency issued Order of Determination No. 99-1396 based upon the wage claims filed by Claimants and the Agency's investigation. The Order of Determination alleged that Respondent Francisco Cisneros owed a total of \$16,192 in unpaid wages and \$4,966.00 in civil penalty wages to Claimants V. Segura, J. Segura, and F. Guerra, plus interest, and required that, within 20 days, Respondent 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. The Agency computed the amount of wages allegedly owed on the basis that Respondent:

"was required to compensate the wage Claimants at the rates not less than \$6.00 per hour and \$6.50 per hour for each hour worked by the provision of ORS 653.025. In addition, the employer was required by the provisions of OAR 839-020-0030 to compensate the wage Claimants at one and one half times the regular rates of pay for each hour worked over 40 hours in a given work week."

The Agency sought the following wages for each Claimant:

V. Segura: \$ \$3,003.25 in unpaid wages for the time period January 11, 1998 to August 13, 1999; \$1,644.00 in civil penalty wages.

J. Segura: \$7,585.67 in unpaid wages for the time period January 11, 1998 to April 9, 1999; \$1,673.00 in civil penalty wages.

F. Guerra: \$5,604.00 in unpaid wages for the time period June 20, 1998 to July 24, 1999; \$1,649.00 in civil penalty wages.

8) On February 18, 2000, Respondent, through counsel, filed an answer and request for hearing. Respondent's answer admitted he employed Claimants, but denied that the Claimants had worked the claimed hours or were entitled to any unpaid wages. The answer also denied that any potential underpayment, if found to exist, was willful.

9) On April 20, 2000, the Agency filed a "BOLI Request for Hearing" with the forum. The Request included a statement that a Spanish interpreter would be needed at the hearing.

10) On May 2, 2000, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and the Claimant stating the time and place of the hearing as July 25, 2000, at 9:00 a.m., at the Oregon State Employment Department, 801 Oak Avenue, Klamath Falls, 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.

11) On June 14, 2000, 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); a brief statement of any defenses to the claim (for Respondent only); 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 July 14, 2000, and notified them of the possible sanctions for failure to comply with the case summary order.

12) On July 11, 2000, Respondent's attorney filed a letter stating his belief that a Spanish speaking interpreter would be needed at the hearing because it appeared many of the witnesses in the case would not be able to communicate in English.

13) The Agency filed its case summary, with attached exhibits, on July 14, 2000. The Agency filed an addendum to its case summary on July 17, 2000.

14) Respondent filed its case summary, with attached exhibits, on July 13, 2000

15) At the outset of the hearing, the ALJ explained the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing.

16) After opening statements were made, the Agency moved to exclude witnesses, including Antonio Cisneros ("A. Cisneros"), who was listed as a witness in the Agency's case summary. Respondent moved to allow A. Cisneros, Respondent's brother, to remain in the hearings room throughout the hearing as Respondent's authorized representative. Respondent stated that Francisco Cisneros ("F. Cisneros") had very little to do with the day-to-day operations of Respondent's business, that A. Cisneros was the manager, and that Respondent could not effectively present its case and would be prejudiced without the presence of A. Cisneros to assist Respondent's counsel. The ALJ ruled that A. Cisneros could not be present as Respondent's authorized representative and excluded him from the hearing unless he was testifying. The ALJ noted that if Respondent chose to have A. Cisneros remain in the hearings room after testifying, A. Cisneros would not be able to testify again. Subsequently, A. Cisneros testified as the Agency's first witness, then remained outside the hearings room while the remaining witnesses testified. The ALJ excluded all other witnesses.

17) During the hearing, Respondent provided the original timecards that comprised the third page of exhibit R-2 and the second page of exhibits R-3 through R-8 for the inspection of the ALJ and Agency case presenter due to the illegibility of copies offered as evidence. The ALJ subsequently copied the originals, copying the front and back of each timecard onto one page, and substituted these copies for exhibits R-2 through R-8 that were provided with Respondent's case summary. The ALJ mailed the original and a copy of the substituted exhibits back to Respondent's counsel and the Agency.

18) During the hearing, the Agency moved to amend the Order of Determination to increase the amount of wages and penalty wages owed to all three Claimants. The Agency's motion was based on evidence produced without objection during the hearing that showed the Claimants were paid on a salary basis. Respondent objected to the Agency's motion, and the ALJ deferred ruling until the proposed order.

19) On August 1, 2000, the ALJ issued an interim order scheduling oral argument on August 16, 2000, on the Agency's motion to amend the Order of Determination. The order required the Agency to prepare an exhibit with specific wage calculations in support of its proposed amendment and serve it on Respondent's attorney no later than August 10, 2000.

20) On August 10, 2000, the Agency filed exhibits X-9, A-31, A-32, and A-33 with the Hearings Unit in response to the ALJ's August 1 interim order.

21) On August 16, 2000, the ALJ conducted a teleconference in which the Ms. Lohr and Mr. Spencer presented closing arguments concerning the Agency's motion to amend the Order of Determination.

22) Through its motion to amend and exhibits X-9, A-31, A-32, and A-33, the Agency sought to amend the Order of Determination to seek the following wages:

V. Segura: \$13,410.80 in unpaid wages; \$3,151 in civil penalty wages.

J. Segura: \$9,710.40 in unpaid wages; \$1,906 in civil penalty wages.

F. Guerra: \$4,788.80 in unpaid wages; \$4,890 in civil penalty wages.

The Agency's motion to amend the Order of Determination is **GRANTED**. A discussion of the reasons for granting the Agency's motion is contained in the Opinion section of this Order.

23) The ALJ issued a proposed order on November 15, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance.

24) On November 21, 2000, Respondent filed a motion requesting a one week extension of time to file exceptions.

25) On November 26, 2000, the ALJ granted Respondent's motion and extended the deadline for filing exceptions for both the Agency and Respondent to December 6, 2000.

26) Respondent timely filed exceptions on December 6, 2000. Those exceptions are addressed in the Opinion section of this Order.

FINDINGS OF FACT – THE MERITS

1) During all times material, Respondent Francisco Cisneros owned and operated a restaurant called Sergio's and Sergio's Dos Mexican & Seafood Restaurant ("Sergio's Dos") in Klamath Falls, Oregon. He was the sole owner of both restaurants.

2) Sergio's opened for business in 1994. Sergio's Dos opened for business in 1995. Both have operated continually since they opened.

3) In 1998-99, Antonio Cisneros ("A. Cisneros"), managed both Sergio's and Sergio's Dos, though not at the same time.

4) In 1998 and 1999, Respondent paid his employees every two weeks ("bi-weekly").

5) In 1998 and 1999, Respondent employed one chef and three cook's helpers at Sergio's Dos, and one chef and two cook's helpers at Sergio's. On all shifts at both restaurants, Respondent always had either a chef and a cook's helper or two cook's helpers working together in the kitchen.

6) In 1998 and 1999, Respondent paid chefs and cook's helpers on a salary basis. This salary was based on 80 or less hours of work every bi-weekly pay period. This salary was not intended to cover time worked in excess of 80 hours in any bi-weekly pay period.

7) A. Cisneros and F. Cisneros jointly decided the salary that each chef and cook's helper would be paid.

8) During the Claimants' employment, Respondent did not use a written work schedule for chefs and cook's helpers. Respondent kept no records of the hours worked by chefs and cook's helpers, including overtime hours.

9) During the Claimants' employment, Respondent was open for customers from 11 a.m. until 10 p.m., seven days a week.

10) V. Segura was hired by Respondent at Sergio's in 1994 as a dishwasher. Shortly afterward, he was promoted to cook's helper. In 1997, he was promoted to chef. Between January 11, 1998, and August 13, 1999, he was the chef at Sergio's Dos.

11) Between January 11, 1998, and August 13, 1999, V. Segura worked 51 hours per week. He worked 12 hours on Monday, 7 hours on Tuesday through Thursday, 9 hours on Friday and Saturday, and had Sundays off.

12) Between January 11, 1998, and August 13, 1999, Respondent paid V. Segura a bi-weekly salary of \$1,050, which equates to \$525 per week. This salary was intended to compensate him for 80 hours of work.

13) Between January 11, 1998, and August 13, 1999, Respondent paid V. Segura his bi-weekly salary of \$1,050 in full. Prior to May 21, 1999, Respondent paid part of V. Segura's salary by check and part in cash. Respondent did not keep a record of the amount of cash paid to V. Segura. Starting on May 21, 1999, Respondent began paying V. Segura's entire salary by check.

14) V. Segura took a week off for vacation sometime in 1998. He also was off work on vacation from May 21, 1999, through June 20, 1999.

15) V. Segura quit Respondent's employment on August 13, 1999. There is no evidence in the record of the number of hours he worked on August 13, 1999.

16) Between January 11, 1998, and August 13, 1999, V. Segura's regular hourly rate of pay was \$13.13 per hour (\$1050 divided by 80 hours). V. Segura's overtime rate of pay was \$19.70 per hour ($\13.13×1.5).

17) Respondent paid V. Segura a total of \$39,375.00 in wages between January 11, 1998, and August 9, 1999.ⁱ This figure was arrived at by multiplying 75 weeks x \$525. Respondent paid V. Segura a total of \$37,800.00 in wages between February 3, 1998, and August 9, 1999. This figure was computed by subtracting \$1,575 (three weeks pay earned between January 11, 1998, and February 2, 1998) from \$39,375.00.

18) V. Segura earned \$16,252.50 in overtime wages between January 11, 1998, and August 9, 1999.ⁱⁱ Five weeks were excluded from this time period based on evidence that V. Segura took five weeks of vacation in this time period. This figure was computed as follows: 75 weeks x 11 hours per week x \$19.70 per hour. V. Segura earned \$15,602.40 in overtime wages between February 3, 1998, and August 9, 1999. This figure was computed by subtracting \$650.10 (three weeks overtime pay earned

between January 11, 1998, and February 2, 1998) from \$16,252.50. Respondent has not paid V. Segura any of these overtime wages.

19) Pursuant to ORS 652.150 and OAR 839-001-0470, V. Segura is entitled to \$3,492.00 in civil penalty wages. This figure was computed by determining V. Segura's total wage entitlement for the wage claim period of February 3, 1998, to August 9, 1999 (\$37,800 actually paid plus \$15,602.40 in unpaid overtime wages = \$53,402.40), dividing that sum by total hours worked in the same period (72 weeks x 51 hours = 3,672), multiplying the resultant average hourly wage (\$14.55 per hour) by 8 hours, and multiplying that figure (\$116.40) by 30 days.

20) J. Segura was hired by Respondent in September 1997 as a cook's helper at Sergio's Dos. He worked as a cook's helper throughout his employment with Respondent. About Thanksgiving 1998, he transferred to Sergio's and worked there until he was fired on April 10, 1999.

21) While employed by Respondent, J. Segura worked an alternating weekly schedule, working 48 hours one week and 54 hours the next, for a total of 102 hours each bi-weekly pay period, an average of 51 hours per week.

22) From the time he was hired until August 22, 1998, Respondent paid J. Segura a bi-weekly salary of \$600, which equates to a weekly salary of \$300. This salary was intended to compensate him for 80 hours of work every two weeks.

23) Between January 11, 1998, and August 22, 1998, Respondent paid J. Segura a total of \$9,600 (\$300 x 32 weeks) in cash to compensate him for 80 hours worked during each bi-weekly period during that time period. Between February 3, 1998, and August 22, 1998, Respondent paid J. Segura a total of \$8900 (\$300 x 29 weeks).

24) Between January 11, 1998, and August 22, 1998, J. Segura's regular hourly rate of pay was \$7.50 per hour (\$600 divided by 80 hours). His overtime rate of pay during this time was \$11.25 per hour ($\7.50×1.5).

25) Between January 11, 1998, and August 22, 1998, J. Segura earned \$3,960.00 in overtime wages. This figure was computed as follows: 32 weeks x 11 hours per week x \$11.25 per hour. Between February 3, 1998, and August 22, 1998, J. Segura earned \$3,588.75 in overtime wages. Respondent has not paid J. Segura any of these wages.

26) On September 7, 1998, Respondent began paying J. Segura his salary by check and cash. Between August 23, 1998,ⁱⁱⁱ and January 11, 1999, Respondent paid him bi-weekly with a check in the gross amount of \$600.00, less standard deductions, and also gave him approximately \$60 cash with each check to bring his gross salary to \$660 and his net salary to \$600.^{iv} This equates to a weekly salary of \$330. This salary was intended to compensate him for 80 hours of work during each bi-weekly period between August 23, 1998, and January 11, 1999.

27) Between August 23, 1998, and January 11, 1999, Respondent paid J. Segura a total of \$6,270 ($\330×19 weeks) in checks and cash.

28) Between August 23, 1998, and January 11, 1999, J. Segura's regular hourly rate of pay was \$8.25 per hour ($\660 divided by 80 hours). His overtime rate of pay during this time was \$12.38 per hour ($\8.25×1.5).

29) Between August 23, 1998, and January 11, 1999, J. Segura earned \$2,587.42 in overtime wages. This figure was computed as follows: 19 weeks x 11 hours per week x \$12.38 per hour. Respondent has not paid J. Segura any of these wages.

30) Between January 11, 1999, and April 5, 1999,^v J. Segura was paid a bi-weekly salary consisting of a check for \$500.00, less standard deductions, and \$92 in cash that was given to him with each check. This equates to a weekly salary of \$296. This salary was intended to compensate him for 80 hours of work.

31) Between January 12, 1999, and April 5, 1999, Respondent paid J. Segura a total of \$3,256 ($\296×11 weeks) in checks and cash.

32) Between January 12, 1999, and April 5, 1999, J. Segura's regular hourly rate of pay was \$7.40 per hour ($\592 divided by 80 hours). His overtime rate of pay during this time was \$11.10 per hour ($\7.40×1.5).

33) Between January 12, 1999, and April 5, 1999, J. Segura earned \$1,343.10 in overtime wages. This figure was computed as follows: 11 weeks x 11 hours per week x \$11.10 per hour. Respondent has not paid J. Segura any of these wages.

34) Respondent did not keep a record of the amount of cash paid to J. Segura.

35) Respondent fired J. Segura on April 10, 1999. There is no evidence in the record of the number of hours J. Segura worked on April 10, 1999.

36) On April 21, 1999, J. Segura was issued a final paycheck in the gross amount of \$115.38. He received no cash with this check. Respondent intended to compensate him for 24 hours of work between April 6 and April 10. There is no evidence in the record that the wage agreement described in Finding of Fact – The Merits 30 was changed between April 6 and April 10.

37) Respondent paid J. Segura in full for all straight time hours^{vi} worked between January 11, 1998, and April 5, 1999, paying him a total of \$19,126.00 in wages over this period of time.

38) Respondent paid J. Segura in full for all straight time hours worked between February 3, 1998, and April 5, 1999, paying him a total of \$18,226.00 in wages over this period of time. This figure was computed by subtracting \$900, or three weeks pay earned between January 11, 1998, and February 2, 1998, from \$19,126.00.

39) J. Segura earned \$7,890.52 in overtime wages between January 11, 1998, and April 5, 1999. He earned \$7,519.27^{vii} in overtime wages between February 3, 1998, and April 5, 1999. Respondent has not paid him any of these wages.

40) J. Segura earned \$177.60 in straight time wages between April 6 and April 10, 1999, and was only paid \$115.38. Based on a wage rate of \$7.40 per hour, he should have been paid gross wages of \$177.60.^{viii} Respondent has not paid him the difference of \$62.22.

41) Pursuant to ORS 652.150 and OAR 839-001-0470, J. Segura is entitled to \$2,126.00 in civil penalty wages. This figure was calculated by determining J. Segura's total wage entitlement for the wage claim period of February 3, 1998, to April 5, 1999 (\$19,126.00 actually paid plus \$7,519.27 in unpaid overtime wages = \$26,645.27), dividing that sum by total hours worked in the same period (59 weeks x 51 hours = 3,009 total hours), multiplying the resultant average hourly wage (\$8.86) by 8 hours, multiplying that figure (\$70.88) by 30 days, then rounding to the nearest dollar.

42) F. Guerra was hired by Respondent at Sergio's Dos on or about June 20, 1998. He worked as a dishwasher until December 27, 1998.^{ix}

43) F. Guerra was paid \$6.00 per hour while he worked as a dishwasher. He worked 6 hours on Tuesday through Saturday and 11 hours on Sunday, for a total of 41 hours per week. His overtime rate of pay was \$9.00 per hour.

44) F. Guerra earned a total of \$6,723.00 in wages while working as a dishwasher for Respondent. This figure was computed as follows: 27 weeks x 40

hours x \$6.00 per hour = \$6,480.00; 27 hours of overtime x \$9.00 per hour = \$243.00;
\$6,480.00 + \$243.00 = \$6,723.00.

45) F. Guerra was paid a total of \$5,496.00 while working as a dishwasher for Respondent. This figure was derived from the "YTD" salary printed on the pay stub accompanying Respondent's check No. 2768, the paycheck F. Guerra received for Respondent's "12/14/98-12/27/98" payroll period.

46) Respondent owes F. Guerra \$1,227.00 in unpaid wages for his work as a dishwasher between June 20, 1998, and December 27, 1998. Respondent has not paid F. Guerra any of these wages.

47) Respondent had a time clock at Sergio's Dos in 1998. All hourly employees, including F. Guerra, were expected to punch in on the time clock when they arrived at and left work. The time cards used in the time clock covered Respondent's bi-weekly payroll period.

48) Respondent provided time cards purported to be those of F. Guerra for the time periods purported to cover June 15-28, 1998, July 27-September 6, 1998; and November 15-December 27, 1998. However, the forum gives no weight to the dates and hours worked printed on those time cards because undisputed testimony, as well as the timecards themselves, established that the time clock did not accurately reflect dates and hours worked. For example, Exhibit R-6 has the dates "11/16-11/29" handwritten on the top of the time card, but the date entered by the time clock is "AGO," meaning August. Typical of the entries printed by the time clock are two days showing F. Guerra working from 3:02 a.m. until 10:13 a.m., and from 10:00 p.m. until 3:55 a.m.^x

49) On exhibits R-2, R-3, R-4, R-5, R-6, R-7, and R-8, either F. Cisneros or A. Cisneros wrote the number of hours worked for each day beside the time clock printouts for each day, totaled all hours worked at the end of the payroll period, wrote the total on

each time card, and instructed Respondent's bookkeeper to write a paycheck based on their handwritten total of hours. Exhibit R-2 reflects a total of 75 hours, 1 minute actually worked; the handwritten total is 74 hours. Exhibit R-3 reflects a total of 81 hours, 25 minutes actually worked; the handwritten total is 80 hours. Exhibit R-4 shows a total of 82 hours, 12 minutes actually worked; the handwritten total is 75 hours. Exhibit R-5 shows a total of 77 hours, 37 minutes actually worked; the handwritten total is 71 hours. Based on Respondent's own time records, Respondent appears to have underpaid F. Guerra by at least 16 hours and 15 minutes of time that F. Guerra worked over four payroll periods.

50) On or about December 28, 1998, F. Guerra was promoted to cook's helper. He worked as cook's helper at Sergio's Dos until July 24, 1999, when he quit Respondent's employment.

51) F. Guerra worked two different shifts as cook's helper, "day" and "night" shift. He worked about 50% of the time on each shift. On day shift, he worked 8 a.m. to 3 p.m., Tuesday through Thursday, 8 a.m. to 2 p.m. and 6 p.m. to 8 p.m. on Friday and Saturday, and 8 a.m. to 10 p.m. on Sunday, with a two hour break, for a total of 49 hours per week. On night shift, he worked 3 p.m. to 10 p.m., Tuesday through Saturday, and 8 a.m. to 10 p.m. on Sunday, with a two hour break, for a total of 47 hours per week. He averaged 48 hours per week.

52) Between December 28, 1998, and July 19, 1999, Respondent paid F. Guerra by check and cash. In that period of time, Respondent paid him bi-weekly with checks in the gross amount of either \$550 or \$600, less standard deductions, and also gave him enough cash with each check to bring his net salary to \$600. This salary was intended to compensate him for 80 hours of work. Respondent did not keep a record of the cash paid to F. Guerra.

53) Between December 28, 1998, and July 19, 1999,^{xi} F. Guerra earned and received \$9,111.58 in straight time wages.^{xii} His regular hourly rate of pay was \$8.14 per hour (\$9,111.58 total wages received divided by 1120 hours worked during 14 bi-weekly periods). His overtime rate of pay during this time was \$12.21 per hour.

54) Between December 28, 1998, and July 19, 1999, F. Guerra earned \$2,735.04 in overtime wages. This figure was computed as follows: 28 weeks x 8 hours per week x \$12.21 per hour = \$2,735.04. Respondent has not paid him any of these overtime wages.

55) Pursuant to ORS 652.150 and OAR 839-001-0470, F. Guerra is entitled to \$1,819.00 in civil penalty wages. This figure was calculated by determining F. Guerra's total wage entitlement for the wage claim period (\$14,607.58 actually paid + \$1,227.00 unpaid straight time and overtime wages earned from June 20, 1998, to December 27, 1998 + \$2,735.04 unpaid overtime wages earned from December 28, 1998, to July 19, 1999 = \$18,569.62), dividing that sum by total hours worked in the same period (2,451),^{xiii} multiplying the resultant average hourly wage (\$7.58 per hour) by 8 hours, multiplying that figure (\$60.64) by 30 days, and rounding to the nearest dollar.

56) Luis Mora worked as a cook's helper for Respondent in 1998 and 1999. Moises Galvan worked as a cook's helper and chef for Respondent from 1995 until March 1998. Both worked at least 100 hours bi-weekly as cook's helpers. Respondent routinely paid Mora and Galvan by check and cash.

CREDIBILITY FINDINGS

57) Moises Galvan was the only witness not related to one of the Claimants or to Respondent, and the only witness who had nothing to gain or lose from the outcome of the hearing. His testimony was straightforward, thoughtful, and internally consistent. The forum has credited his testimony in its entirety.

58) Luis Mora is the nephew of V. Segura and J. Segura and lived in the same house with them while he worked for Respondent. Despite this inherent familial bias, his testimony was candid and did not appear to be slanted in favor of the Claimants. The forum found him to be a credible witness.

59) Jocabel Segura is the sister-in-law of V. Segura and J. Segura. Her testimony was directly responsive to questions and internally consistent. Despite her inherent familial bias, the forum found her testimony to be credible and has credited it in its entirety. However, the forum has not relied on her testimony in determining the number of hours worked by the Claimants, their rate of pay, or whether they were paid by check or cash.

60) Gerhard Taeubel was a credible witness. However, the forum has not relied on his testimony to determine the number of hours worked by V. Segura or F. Guerra, the three Claimants' rate of pay, or whether they were paid by check or cash. The forum has relied on his interview notes to determine the number of hours worked by J. Segura.

61) Antonio Cisneros is Respondent's brother and long-time managerial employee, giving him a financial and familial bias. This bias was reflected in his testimony, which was internally inconsistent, inconsistent with the testimony of more credible witnesses and, in some cases, simply not believable.

Internally inconsistent statements included testimony that he lowered J. Segura's pay in January 1999 due to a drop in business at Sergio's at that time, compared with testimony that business dropped from September-December 1999, at which time he lowered the pay of Sergio's kitchen staff. He testified that Respondent's chef currently earns \$9.50 per hour, more than chefs earned during the Claimants' employment, but

also testified that V. Segura earned \$1050 bi-weekly, based on an 80-hour workweek, at the time of his termination, which equals \$13.13 per hour.

He testified about several issues in a manner that was inconsistent with testimony elicited from more credible witnesses. His testimony that both Sergio's and Sergio's Dos each always employed one chef and three cook's helpers contrasted with Moises Galvan's testimony that Sergio's employed only one chef and two cook's helpers. His testimony that chefs and cook's helpers rarely worked more than 80 hours in a bi-weekly period was in marked contrast to the testimony of Galvan, Mora, V. Segura, J. Segura, and F. Guerra, and was not supported by the records that Respondent was required to maintain pursuant to ORS 653.045.^{xiv} A. Cisneros testified as to two implausible, mutually exclusive reasons why Respondent paid chefs and cook's helpers cash. First, that chefs and cook's helpers were paid cash as a bonus to compensate them for overtime hours, and second, that a cash bonus was paid when business was good. Galvan, Mora, and the three Claimants all testified credibly that they were regularly paid substantial amounts of cash as part of their salary. Further, there is no evidence to dispute J. Segura's testimony that he was paid *entirely* in cash between September 1997 and August 22, 1998.

Cisneros's testimony on two issues was simply unbelievable. The first issue concerns his testimony that he gave V. Segura a \$400 bi-weekly raise in order to keep him from quitting, and that he agreed to this raise *after* V. Segura's May 21-June 20, 1999 vacation. This would have meant that V. Segura had been earning only \$650 bi-weekly, or \$150 less than Galvan had earned a year earlier at Sergio's, where there was less business. Even if this pay discrepancy could be explained, Respondent's own documents show that V. Segura was paid \$1050 in a check dated May 21, 1999 that was intended to cover the pay period from May 6, 1999 to May 20, 1999. The second

issue involves Cisneros's testimony about how he computed J. Segura's final check. Cisneros testified to using two different formulas to arrive at the figure of \$115.38, the gross amount of J. Segura's final check. The first was multiplying 24 hours by the minimum wage (\$6.50), which yields a result of \$156.00. The second was dividing J. Segura's \$500 bi-weekly salary by 13, the number of the days in the payroll period, and multiplying that figure by the four days J. Segura worked. That formula yields the sum of \$153.85.

Finally, A. Cisneros's testimony was further discredited by the mathematical chicanery he and F. Cisneros performed on F. Guerra's purported timecards. By rounding off time in Respondent's favor, and in two cases, not even adding in hours worked on two days, Cisneros came up with hourly totals that resulted in underpayment to F. Guerra by \$97.50 in wages^{xv} over four bi-weekly pay periods in 1998.

Based on all of the above, the forum has only credited A. Cisneros's testimony where it was supported by other credible evidence and, in some cases, has not believed his testimony even where it was undisputed.

62) Claimants V. Segura and J. Segura are brothers; Claimant F. Guerra is their cousin.

63) V. Segura testified primarily about his own working conditions. His testimony was internally consistent and consistent with prior statements made to the Agency during the investigation of his wage claim. His testimony concerning the number of hours he worked during the wage claim period – 51 hours a week – was consistent with the credible testimony of Agency witnesses concerning the work schedule at Sergio's Dos and the number of hours per week worked by other chefs and cook's helpers employed by Respondent. Significantly, he testified that Respondent paid him more in 1998 than the sum of \$15,300.00 printed by Respondent on his 1998

W-2 form. Despite V. Segura's significant financial interest in the outcome of this case, the forum has found his testimony credible and has credited V. Segura's testimony in its entirety.

64) J. Segura, like V. Segura and F. Guerra, has a significant financial interest in the outcome of the case. That interest affected his testimony and written statements he made in his wage claim that exaggerated the number of hours he worked during the wage claim period. In his wage claim and accompanying calendar, he claimed he worked 112 hours every two weeks, alternating between 52 and 60 hours per week. Under oath, he verified this schedule. However, on June 1, 1999, J. Segura told Taubel, the Agency's investigator, that he worked an alternating weekly schedule of 54 and 48 weeks. This inconsistency puts J. Segura's entire testimony about his hours worked in doubt. However, based on several factors, the forum concludes that J. Segura worked an alternating weekly schedule of 54 and 48 hours per week. First, he told Taeubel that he worked that schedule. Second, he was a cook's helper and Luis Mora, Moises Galvan, and V. Segura all testified credibly that cook's helpers at Sergio's and Sergio's Dos consistently worked at least 100 hours every two weeks in 1998 and 1999. Third, Respondent did not come produce any records or credible testimony to dispute this conclusion.

J. Segura's testimony also contained an inconsistency regarding the amount of money Respondent paid him. He testified Respondent paid him only \$5400, the amount shown on his W-2, in 1998. He also testified that Respondent paid him \$600 in cash, bi-weekly, from January 11-August 22, 1998, then a check in the gross amount of \$600, less standard deductions, plus extra cash with each check to bring his net salary to \$600 during the rest of 1998. This latter amount far exceeds \$5400. The forum has relied on the latter amount because it amounts to an admission against interest, being

far greater than that shown in Respondent's records, and because of Respondent's admission that he paid J. Segura \$17,718.08 from January 11, 1998, to April 9, 1999.^{xvi}

Finally, J. Segura inexplicably testified that Taeubel wrote and sent Exhibit A-6 to him. Since the letter is clearly addressed to Taeubel,^{xvii} signed by "Juan Jose Segura Guerra," and its contents present no motive for J. Segura to lie, this testimony makes no sense whatsoever.

Based on all of the above, the forum has credited J. Segura's testimony where it was corroborated by other credible evidence or undisputed.

65) F. Guerra, like V. and J. Segura, has a significant financial interest in the outcome of this case. His testimony, like J. Segura's, was problematical in some respects. On one occasion, when he answered questions about the amount of salary he received by check and cash, the forum was unable to determine whether he was attempting to be deceitful or simply didn't understand the questions. His testimony as to the dates and hours that he worked was not entirely consistent with the hours shown on his wage claim. For example, he stated that he worked "3-4 months" as a dishwasher, whereas his pay stubs show he worked from June 20, 1998, through December 27, 1998, as a dishwasher, a period of six months. In contrast, his testimony that he worked a weekly schedule that varied in hours as it alternated between "day" and "night" schedule was consistent with the schedules worked by other cook's helpers. However, the forum disbelieved his testimony that he worked from 2 p.m. to 11 p.m. on Fridays and Saturdays. Based on Mora's testimony that day shift cook's helpers worked from 8 a.m. to 3 p.m., that cook's helpers on night shift worked from 3 p.m. until 10 p.m., and undisputed testimony that Respondent closed at 10 p.m., the forum has only credited F. Guerra with working from 3 p.m. to 10 p.m. on Fridays.

The forum was most concerned with his testimony that he worked Sundays as a cook's helper to V. Segura. In contrast, V. Segura credibly testified that he only rarely worked on Sundays in 1999. Nonetheless, the forum concludes that F. Guerra worked the hours claimed on Sunday, but did not work with V. Segura on that day. This conclusion is inferred from several facts. First, credible testimony by Luis Mora and V. Segura that they worked all day on Monday so cook's helpers who worked all day Sunday could have the day off. Second, Sergio's Dos only employed three cook's helpers in 1999, and a chef and cook's helper or two cook's helpers were present at all times. Since Mora and Segura worked all day Mondays, F. Guerra must have worked all day Sundays with another cook's helper. Third, Mora, Galvan, and V. Segura all testified credibly that cook's helpers at Sergio's and Sergio's Dos consistently worked at least 100 hours every two weeks in 1998 and 1999. Fourth, Respondent did not produce any records or credible testimony to dispute this conclusion.

Based on the above, the forum has found that F. Guerra worked overtime, although less than he claimed, and has credited his testimony concerning his dates of employment, his rate of pay, and the amount of pay he received from Respondent. The forum has credited the remainder of his testimony where it is supported by credible evidence.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent was a sole proprietorship who engaged the personal services of one or more persons in the state of Oregon, including Claimants, who were Respondent's employees.

2) V. Segura earned \$16,252.50 in overtime wages between January 11, 1998, and August 9, 1999. Between February 3, 1998, and August 9, 1999, V. Segura earned \$15,602.40 in overtime wages. Respondent has not paid V. Segura any of these overtime wages.

3) Respondent willfully failed to pay V. Segura \$15,602.40 in earned, due, and payable overtime wages within five days, excluding Saturdays, Sundays, and holidays, after he quit, and more than 30 days have elapsed from the date V. Segura's wages were due.

4) Civil penalty wages for V. Segura, computed in accordance with ORS 652.150 and OAR 839-001-0470, equal \$3,492.00.

5) J. Segura earned \$7,890.52 in overtime wages between January 11, 1998, and April 5, 1999. Between February 3, 1998, and April 5, 1999, J. Segura earned \$7,519.27 in overtime wages. Respondent has not paid J. Segura any of these overtime wages. Between April 6, 1999, and April 10, 1999, J. Segura earned at least \$177.60 and was only paid \$115.38. Respondent has not paid him the \$62.22 difference in wages between the \$177.60 he earned and the \$115.38 he was paid.

6) Respondent willfully failed to pay J. Segura \$7,581.49 in earned, due, and payable overtime and straight time wages by the end of the first business day after Respondent discharged J. Segura.

7) Civil penalty wages for J. Segura, computed in accordance with ORS 652.150 and OAR 839-001-0470, equal \$2,126.00.

8) F. Guerra earned \$18,569.62 in straight time and overtime wages between June 20, 1998, and July 19, 1999, and was only paid \$14,607.58, leaving a balance of \$4,006.56 that Respondent has not paid F. Guerra.

9) Respondent willfully failed to pay F. Guerra \$4,006.56 in earned, due, and payable straight time and overtime wages within five days, excluding Saturdays, Sundays, and holidays, after he quit, and more than 30 days have elapsed from the date F. Guerra's wages were due.

10) Civil penalty wages for F. Guerra, computed in accordance with ORS 652.150 and OAR 839-001-0470, equal \$1,819.00.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent Francisco Cisneros was an employer doing business as Sergio's and Sergio's Dos Mexican & Seafood Restaurant in Klamath Falls, Oregon. V. Segura, J. Segura, and F. Guerra were employees subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405. During all times material herein, Respondent employed Claimants.

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) At times material, ORS 652.140(1) and (2) 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.

“(2) When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly schedule payday after the employee has quit, whichever event first occurs.”

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:

“(d) Compensation based upon a weekly salary agreement for a regular work week of 40 hours:

“(A) Where the employee is employed on a weekly salary, the regular hourly rate of pay is computed by dividing the salary by the number of hours which the salary is intended to compensate;

“(B) For example, where an employee is hired at a salary of \$280 and it is understood that this weekly salary is compensation for a regular work week of 40 hours, the employee’s regular rate of pay is \$7 per hour and such employee must be compensated at the rate of \$10.50 per hour for each hour worked in excess of 40 hours in such work week.

“* * * * *

“(g) Fixed salary for periods other than work week: Where a salary covers a period longer than a work week, such as a month, it must be reduced to its work week equivalent. * * *”

ORS 12.110(3) provides:

“An action for overtime * * * shall be commenced within two years.”

The Agency issued its Order of Determination on February 3, 2000, and is barred by ORS 12.110(3) from seeking unpaid overtime wages that accrued before February 3, 1998.

Respondent violated ORS 652.140(2) by failing to pay Claimant V. Segura all unpaid wages earned between February 3, 1998, and August 13, 1999, not later than August 20, 1999, five business days after he quit, excluding Saturday and Sunday. Those wages amount to \$15,602.40.

Respondent violated ORS 652.140(1) by failing to pay Claimant J. Segura all unpaid wages earned between February 3, 1998, and April 10, 1999, not later than April

11, 1999, the first business day after he was discharged. Those wages amount to \$7,581.49.

Respondent violated ORS 652.140(2) by failing to pay Claimant F. Guerra all unpaid wages earned not later than July 30, 1999, five business days after he quit, excluding Sunday. Those wages amount to \$4,006.56.

4) 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(2) provides:

“The wages of an employee that are computed at a rate other than an hourly rate shall be reduced to an hourly rate for penalty wage computation purposes by dividing the total wages earned while employed or the total wages earned in the last 30 days of employment, whichever is less, by the total number of hours worked during the corresponding time period.”

Respondent is liable for \$3,492.00 civil penalty wages under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant V. Segura when due as provided in ORS 652.140(2).

Respondent is liable for \$2,126.00 in civil penalty wages under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant J. Segura when due as provided in ORS 652.140(1).

Respondent is liable for \$1,819.00 in civil penalty wages under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant F. Guerra when due as provided in ORS 652.140(2).

5) 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 to pay the Claimants their earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

INTRODUCTION

In this case, the Agency alleges that Respondent, the owner of two restaurants in Klamath Falls, employed the three wage Claimants in 1998-99 and substantially underpaid them for their work. In defense, Respondent contends that the Claimants did not work the hours claimed and are not entitled to any unpaid wages.

THE AGENCY'S MOTION AT HEARING TO AMEND THE ORDER OF DETERMINATION

The Agency's Order of Determination sought unpaid wages and penalty wages calculated on the assumption that the Claimants were only entitled to the minimum wage. At hearing, Antonio Cisneros and all three Claimants testified, without objection, that the Claimants were paid a salary intended to compensate them for 80 hours of work every two weeks, except for the period of time that F. Guerra was a dishwasher. The three Claimants all testified, without objection, as to the amount of salary they received in the form of checks and cash. The Agency offered exhibits A-4, A-12, and A-16, consisting of check stubs created by Respondent showing that the Claimants were paid on a salary basis, and the amount of salary they were paid. These exhibits were received without objection. At hearing, the Agency moved to amend the Order of Determination to recalculate unpaid wages based on the undisputed salary basis by which Claimants were actually paid. The Agency's amended calculations resulted in a significantly higher amount of unpaid wages and penalty wages.^{xviii}

Respondent objected to the Agency's motion to amend at the time the motion was made. Respondent argued that all evidence regarding Respondent's payment of a salary to Claimants was admissible and not subject to objection, and Respondent had therefore never expressly or impliedly consented to the amendment. Respondent also argued that the Agency did not show good cause for failing to amend the Order of Determination prior to hearing. Finally, Respondent objected to the admission of Exhibits A-30, A-31, A-32, the Agency's written statement of unpaid wages due the three Claimants computed on a salary basis, which was submitted at the forum's order.^{xix}

OAR 839-050-0140 governs amendments to charging documents in this forum.

It provides:

“(1) Prior to the hearing, a participant may amend its pleading once as a matter of course at any time before a responsive pleading is served. Otherwise, a participant may amend its pleading only by permission of the administrative law judge or by written consent of the other participants. Permission shall freely be given when justice so requires.

“(2)(a) After commencement of the hearing, issues not raised in the pleadings may be raised and evidence presented on such issues, provided there is express or implied consent of the participants. Consent will be implied where there is no objection to the introduction of the issues and evidence or where the participants address the issues. Any participant raising new issues must move the administrative law judge to amend its pleading to conform to the evidence and to reflect issues presented. The administrative law judge may address and rule upon such issues in the Proposed Order.

“(b) If evidence is objected to at hearing on the grounds that it is not within the issues raised by the pleadings, the administrative law judge may allow the pleadings to be amended to conform to the evidence presented. The administrative law judge shall allow the amendment where the participant seeking to amend its pleading shows good cause for not having included the new matter in its pleading prior to hearing and the objecting participant fails to satisfy the administrative law judge that it would be substantially prejudiced by the admission of such evidence. The administrative law judge may grant a continuance to enable the objecting participant to meet such evidence.

“(c) Charging documents and answers may be amended as provided in paragraphs (a) and (b) of this rule. Permissible amendments to charging documents include, but are not limited to: additions to or deletions of charges; changes to theories of liability; and increases or decreases to the damages, penalties, or other remedies sought. Permissible amendments to answers include, but are not limited to, additions to or deletions of affirmative defenses.”

The Agency’s amendment increases damages and penalties, both permissible subjects of amendment under paragraph (2)(c). While being examined by the Agency case presenter, A. Cisneros testified, without objection from Respondent, that all three claimants were paid on a salary basis while employed as chefs or cook’s helpers. Respondent did not object to any evidence elicited by the Agency from its witnesses related to Respondent’s payment of Claimants on a salary basis, and both participants addressed that issue during witness examination. The Agency offered Exhibits A-4, A-12, and A-16, check stubs created by Respondent for the Claimants indicating that Claimants were paid on a salary basis; these exhibits were received without objection. Respondent’s argument that no objection was made because the evidence would have been admitted as relevant on other grounds is without merit. Consequently, the conditions attached to proposed amendments in paragraph (2)(b) are inapplicable. Based on implied consent of the participants, the Agency’s amendment is allowed. Respondent’s exception to the amendment is overruled.

THE AGENCY’S AMENDMENT AND THE FORUM’S CALCULATION OF UNPAID WAGES AND PENALTY WAGES

The forum’s calculation and award of unpaid wages and penalty wages differs considerably from the Agency’s calculations. It is based on the forum’s independent calculations, which in turn are based on the forum’s independent determination of the number of hours worked, total amounts earned, and total amounts paid to each claimant. The forum has awarded J. Segura and F. Guerra less, and V. Segura more, in unpaid wages and penalty wages than sought by the Agency in its amendment. This

forum has previously held that the commissioner has authority to award monetary damages exceeding those sought in the charging document where damages are awarded as compensation for statutory violations alleged in the charging document. *In the Matter of Contractor's Plumbing Service, Inc.*, 20 BOLI 257, 273-74 (2000). On that basis, the forum awards V. Segura damages as calculated by the forum instead of the lesser damages sought by the Agency in its amended Order of Determination.

PRIMA FACIE CASE

To establish a prima facie case supporting these wage claims, the Agency must prove: 1) that Respondent employed the Claimants; 2) any pay rate upon which Respondent and the Claimants agreed, if it exceeded the minimum wage; 3) that the Claimants performed work for Respondent for which they were not properly compensated; and 4) the amount and extent of work the Claimants performed for Respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230, 262 (2000). The first and second elements are undisputed.

The forum relies on the testimony of the Claimants, Moises Galvan, Luis Mora, Antonio Cisneros, and exhibits A-4 and A-16 to determine whether the Claimants performed work for which they were not properly compensated. Based on exhibit A-4 and A. Cisneros's testimony, the forum has concluded that J. Segura performed at least 24 hours of work during his last week of employment for which he was not properly compensated. Based on exhibit A-16, p.6 (F. Guerra's last pay check stub as a dishwasher) and F. Guerra's undisputed testimony that he worked at least 40 hours a week as a dishwasher at minimum wage, the forum has concluded that Respondent did not pay F. Guerra in full for the time he worked as a dishwasher. It is undisputed that Respondent paid all three Claimants in full for the straight time hours worked as chef and cook's helpers. However, testimony by the Claimants, Galvan, and Mora

establishes by a preponderance that the Claimants worked overtime every week and were not paid anything for those overtime hours. This satisfies the third element of the Agency's prima facie case.

The final element of the Agency's prima facie case requires proof of the amount and extent of work performed by the Claimants. The Agency's burden of proof can be met by producing sufficient evidence from which "a just and reasonable inference may be drawn." *In the Matter of Debbie Frampton*, 19 BOLI 27, 38-39 (2000). Where an employer produces no records of hours or dates worked by Claimants, the commissioner may rely on evidence produced by the agency, including credible testimony by the Claimants, "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." *In the Matter of Diran Barber*, 16 BOLI 190, 196-97 (1997), *citing Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946). The rationale for this policy is "not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work" when such inability is based on "an employer's failure to keep proper records, in conformity with his statutory duty * * *." *Frampton*, at 39, *citing Anderson*.

Respondents neither kept nor produced a record of hours or dates worked by Claimants V. and J. Segura, and produced only unreliable records purporting to represent F. Guerra's hours worked as a dishwasher. As there are no accurate records to rely on, the forum examines the Agency's evidence to determine if it shows "the amount and extent of the employee's work as a matter of just and reasonable inference." *Barber*, at 196-97.

V. Segura testified credibly that he worked 51 hours per week as a chef, and the forum has accepted his credible testimony as fact.

J. Segura's testimony as to the number of hours he worked per week was less credible than V. Segura's, but his testimony and statement to Tauebel that he worked an average of 102 hours every two weeks was accepted as credible because it was supported by the credible testimony of Galvan and Mora.

F. Guerra's testimony as to the number of hours he worked per day and per week was inconsistent with the credible testimony of Mora and V. Segura. Based on Guerra's undisputed testimony about the hours he worked as a dishwasher, credible testimony by Mora and Galvan as to the number of hours worked by cook's helpers, and the circumstances outlined in Finding of Fact – The Merits 65 that led the forum to conclude that F. Guerra must have worked Sundays, the forum concludes that the Agency has established, by a preponderance, that F. Guerra worked an average of 41 hours a week as a dishwasher and 48 hours per week as a cook's helper.

In contrast, Respondent presented only incomplete and inaccurate records to establish the time periods of the Claimants' employment and the amount the Claimants were paid. Respondent presented no credible records to show how many hours the Claimants worked. Respondent's case summary listed twelve persons, who might be called as witnesses at hearing. Presumably, these witnesses would have testified as to the dates and hours worked by the Claimants. Respondent called none of them except for Francisco Cisneros and Antonio Cisneros. Their only relevant testimony was A. Cisneros's statement that chefs and cook's helpers "very rarely" worked more than 80 hours per week, and F. Cisneros's testimony that he had no knowledge that any of his employees had worked more than 80 hours per week. The former has been discredited; the latter only shows that Respondent was apparently ignorant of his

employee's schedules. In short, Respondent's case consisted almost entirely of an attempt to discredit the Agency's witnesses. That attempt failed.

CIVIL 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. *In the Matter of Barbara Coleman*, 19 BOLI 230, 265 (2000). Respondent, as an employer, had a duty to know the amount of wages due his employees. *Id.*

Respondent was aware that Claimants were employed by him and performing work on his behalf. Respondent was aware of the salary agreement with Claimants and was legally obligated to pay Claimants all overtime wages earned computed in accordance with OAR 839-020-0030(3)(d). Respondent's purported ignorance, which was based in part on a deliberate failure to maintain statutorily-mandated records and a malfunctioning time clock, is not a defense. There is no evidence that Respondent was other than a free agent in failing to pay the Claimants the wages they earned.

The forum derives its penalty wage computations with ORS 652.150 and OAR 839-001-0470(2). OAR 839-001-0470(2) provides that, for penalty wage computation purposes, the hourly rate of an employee who is not paid by the hour is determined by:

“dividing the total wages earned while employed or the total wages earned in the last 30 days of employment, whichever is less, by the total number of hours worked during the corresponding time period.”

Because of Respondent's failure to maintain records, the forum is unable to determine either the total wages earned or total number of hours worked in each of the Claimants' last days of employment that fall outside a payroll period. Consequently, the forum has calculated penalty wages by dividing the total wages earned through each Claimant's

last payroll period by the total number of hours worked during that same time period. Those calculations are reflected in Findings of Fact – The Merits 19, 41, and 55.

RESPONDENT’S EXCEPTIONS

Respondent filed exceptions objecting to the ALJ’s conclusions regarding the hours worked and rate of pay for all three Claimants, the ALJ’s credibility findings, the ALJ’s granting of the Agency’s amendment to the pleadings, statements in Proposed Finding of Fact – The Merits 62 concerning the experience of Moises Galvan and salary received by Galvan, and the ALJ’s computation of unpaid wages due to the Claimants. Respondent also argued that the ALJ incorrectly shifted the burden of proof to Respondent, contending that the Agency presented no credible evidence supporting its prima facie case and that the ALJ penalized Respondent solely because Respondent failed to keep time records as required by ORS 653.045.

The forum has altered Finding of Fact – The Merits 61^{xx} to accurately reflect Galvan’s experience as depicted in the record.

Respondent’s objection to the Agency’s amendment has been addressed in the section of the Opinion entitled “The Agency’s Motion At Hearing To Amend The Order Of Determination.”

Respondent’s exception to the ALJ’s credibility findings is overruled. A review of the record shows that they are supported by substantial evidence in the record. The ALJ’s conclusions as to the hours worked and rate of pay for the three Claimants are primarily based on the same credibility findings and Respondent’s exceptions to those conclusions are likewise overruled.

Respondent’s exception that the ALJ incorrectly shifted the burden of proof from the Agency to Respondent and penalized Respondent solely because Respondent failed to keep time records as required by ORS 653.045 is misplaced. The ALJ did not

find Respondent liable for unpaid wages based solely on Respondent's failure to produce those time records. Respondent was held liable for those unpaid wages because the Agency proved its prima facie case by means of credible evidence. Respondent's failure to produce records required by statute or to otherwise provide any credible evidence of the number of hours worked by the Claimants was considered because it was an aid to the forum in evaluating the credibility of the Claimants.^{xxi} The burden of proof never shifted to Respondent. Respondent's exceptions on these points are overruled.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages and civil penalty wages he owes 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 **Francisco Cisneros** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Valentin Segura Guerra in the amount of NINETEEN THOUSAND NINETY FOUR DOLLARS AND FORTY CENTS (\$19,094.40), less appropriate lawful deductions, representing \$15,602.40 in gross earned, unpaid, due, and payable wages and \$3,492.00 in penalty wages, plus interest at the legal rate on the sum of \$15,602.40 from September 1, 1999, until paid, and interest at the legal rate on the sum of \$3,492.00 from October 1, 1999, until paid.

(2) A certified check payable to the Bureau of Labor and Industries in trust for Jose Segura Guerra in the amount of NINE THOUSAND SEVEN HUNDRED SEVEN DOLLARS AND FORTY NINE CENTS (\$9,707.49), less appropriate lawful deductions, representing \$7,581.49 in gross earned, unpaid, due, and payable wages and \$2,126.00 in penalty wages, plus interest at the legal rate on the sum of \$7,581.49 from May 1, 1999, until paid, and interest at the legal rate on the sum of \$2,126.00 from June 1, 1999, until paid.

(3) A certified check payable to the Bureau of Labor and Industries in trust for Francisco Guerra Guerra in the amount of FIVE THOUSAND EIGHT HUNDRED TWENTY FIVE DOLLARS AND FIFTY SIX CENTS (\$5,825.56), less appropriate lawful deductions, representing \$4,006.56 in gross earned, unpaid, due, and payable wages and \$1,819.00 in penalty wages, plus interest at the legal rate on the sum of \$4,006.56 from August 1, 1999, until paid, and interest at the legal rate on the sum of \$1,819.00 from September 1, 1999, until paid.

ⁱ The most recent check stub for V. Segura in the record is for the bi-weekly payroll period ending July 5, 1999 (Exhibit A-12, p.4). Based on this check stub, the forum has calculated that V. Segura's last full week of employment ended on August 9, 1999. Because the record does not show how many hours V. Segura worked on August 13, 1999, his last date of employment, the forum has only calculated V. Segura's earned wages through August 9, 1999.

ⁱⁱ *Id.*

ⁱⁱⁱ J. Segura was not issued his first check until September 7, 1998, but it covered the period extending back to August 23, 1998.

^{iv} For example, on January 11, 1999, he was given a net check for \$540.82 and approximately \$60 in cash, to bring his net pay to \$600.

^v Although J. Segura worked until April 10, 1999, the last check stub showing he was paid on a salary basis covers the payroll period ending April 5, 1999.

^{vi} In this context, "straight time" hours refers to 80 hours worked each bi-weekly period, the number of hours Respondent intended J. Segura's salary to cover.

^{vii} This figure was computed by multiplying 3 weeks (January 11, 1998, to February 2, 1998) x 11 hours x \$11.25 per hour = \$371.25 and subtracting \$371.25 from \$7,890.52.

^{viii} This assumes that J. Segura only worked 24 hours in this time period.

^{ix} This date is based on Exhibit A-16, p. 6, which shows the payroll period ending 12/27/98 as the last payroll period for which F. Guerra was paid an hourly wage.

^x In contrast, Respondent was only open for customers from 11 a.m. until 10 p.m.

^{xi} Because F. Guerra was terminated in the middle of a bi-weekly pay period, and there is nothing in the record to reflect the amount of his final check or the shift he worked his last week, the forum has no basis on which to calculate the number of hours he worked, the amount he earned, or the amount he was paid after July 18, 1999.

^{xii} "Straight time" refers to 80 hours worked each bi-weekly period, the number of hours Respondent intended F. Guerra's salary to cover. The figure of \$9,111.58 was derived by adding together: (1) the gross amounts from each of F. Guerra's checks as reflected in Exhibit A-16; (2) \$550 for the payroll periods December 28, 1998 – January 11, 1999, and January 12-24, 1999; (3) \$600 for the payroll period from July 6-20, 1999; (4) \$1,161.58 in cash received reflecting the difference between F. Guerra's net checks and \$600 each payroll period.

^{xiii} This total was computed by multiplying the 27 weeks F. Guerra worked as a dishwasher x 41 hours, multiplying the 28 weeks F. Guerra worked as a cook's helper x 48 hours, and adding the two sums together.

^{xiv} ORS 653.045 requires employers required to pay a minimum wage to any employees to "make and keep available to the Commissioner of the Bureau of Labor and Industries for not less than two years, a record or records containing: * * * (b) The actual hours worked each week and each pay period by each employee."

^{xv} This figure was arrived at by multiplying 16.25 hours x \$6.00 per hour, the minimum wage in 1998. See Finding of Fact – The Merits 49, *supra*.

^{xvi} The Agency alleged this figure in Exhibit A of its Order of Determination, and Respondent did not deny this in its Answer.

^{xvii} The inside address reads “Gerhard Taeubel, 800 NE Oregon St. #32, Portland, Or 97232” and the salutation reads “Estimado Sr. Gerhard.”

^{xviii} See Findings of Fact – Procedural 7 and 22, *supra*.

^{xix} See Finding of Fact – Procedural 19, *supra*.

^{xx} This was Proposed Finding of Fact – The Merits 62, but was renumbered because of an error in numbering the Findings of Fact – The Merits in the proposed order.

^{xxi} See, e.g., *In the Matter of Robert Gonzalez*, 12 BOLI 181, 200 (1994) (One factor in determining the credibility of testimony is whether it is corroborated or contradicted by other testimony or evidence). See also *In the Matter of Kenny Anderson*, 12 BOLI 275, 280 (1994) (“Respondent’s testimony was evaluated, not only by its own intrinsic weight, but also according to the evidence that was in his power to produce.”)