

In the Matter of

COX AND FREY ENTERPRISES, INC., dba BUILDERS/INTERWEST,

Case No. 07-01

January 18, 2001

SYNOPSIS

Respondent employed Claimant as a construction worker for five years, during which time Respondent unlawfully deducted and retained \$8,899.62 in "process fees" from Claimant's paychecks to offset Respondent's undocumented administrative expenses related to issuing hundreds of payroll draws to Claimant. In addition, Respondent's payroll records show that another \$4,018.24 in unsubstantiated deductions were taken from Claimant's paychecks during Claimant's last several years of work. Respondent was ordered to pay \$12,917.86 in due and unpaid wages. Respondent's failure to pay the wages was willful, and Respondent was ordered to pay \$2,400.00 in civil penalty wages. ORS 652.140(2), 652.150, 652.610.

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 October 24, 2000, in the conference room of the Bureau of Labor and Industries, 165 E. 7th, Suite 220, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David K. Gerstenfeld, an employee of the Agency. Claimant Kenneth R. Dick was present throughout the hearing and was not represented by counsel. Cox and Frey Enterprises, Inc. ("Respondent") was represented by Michael T. Barrett, attorney at law. Marvin "Pete" Cox was present throughout the hearing as the person designated by Respondent to assist in the presentation of its case.

The Agency called as witnesses, in addition to Claimant: Marvin "Pete" Cox, Respondent's general manager, and Margaret Trotman, Compliance Specialist, Wage and Hour Division.

Respondent called Marvin "Pete" Cox as a witness.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-12 (submitted or generated prior to hearing).
- b) Agency exhibits A-1 through A-8 (submitted prior to hearing) and A-10 (submitted at hearing).

Respondent offered no exhibits.

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 May 10, 1999, Claimant filed a wage claim with the Agency. He alleged 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 assigned to the Commissioner of Labor and Industries, in trust for Claimant, all wages due from Respondent.
- 3) Claimant brought his wage claim within the statute of limitations.
- 4) On May 1, 2000, the Agency served Order of Determination No. 99-1661 on Respondent based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of \$12,917.68 in unpaid wages and \$2,428.80 in civil penalty wages, 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.

5) On May 10, 2000, Respondent, through counsel Michael T. Barrett, filed an answer and request for hearing. Respondent's answer included counterclaims that Claimant used two trucks belonging to Respondent for personal business and owed Respondent \$5,000, calculated at the rate of \$.40 per mile, and that Claimant performed a roofing job on his own time using Respondent's tools and materials without permission or authorization, to Respondent's detriment in the amount of \$1,500.

6) On August 1, 2000, the Agency filed a "BOLI Request for Hearing" with the forum.

7) On August 2, 2000, the Hearings Unit issued a Notice of Hearing to Respondent, Respondent's counsel, the Agency, and the Claimant stating the time and place of the hearing as October 24, 2000, at 9:00 a.m., in 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.

8) On August 14, 2000, the Notice of Hearing packet sent to Michael T. Barrett, Respondent's counsel, was returned to the forum by the U.S. Postal Service. The envelope was stamped "RETURN TO SENDER[.] BARRETT'MICHAEL MOVED[.] LEFT NO ADDRESS[.] UNABLE TO FORWARD[.] RETURN TO SENDER."

9) On August 15, 2000, the forum issued an interim order directing Respondent to notify the forum whether it was still represented by Mr. Barrett and, if so, to provide his current address and telephone number.

10) On August 22, 2000, the Agency case presenter notified the forum that Mr. Barrett's new mailing address was 3000 Market St. Plaza, Suite 515, Salem, Oregon 97301.

11) On or about August 25, 2000, the forum mailed the Notice of Hearing packet to Mr. Barrett at his new mailing address.

12) On August 28, 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 by October 13, 2000, and notified them of the possible sanctions for failure to comply with the case summary order.

13) On September 29, 2000, the Agency filed a motion for partial summary judgment on the following issues:

a) That Respondent owes Claimant \$3,899.62 in unpaid wages, plus interest, for the time period covering the weeks ending November 2, 1996, through April 17, 1999, for "process fees" Respondent withheld from Claimant's paychecks;

b) That Respondent owes Claimant \$2,400 in penalty wages, plus interest thereon at the legal rate.

14) On October 5, 2000, Respondent filed objections to the Agency's motion.

15) On October 11, 2000, the forum issued an interim order granting the Agency's motion for partial summary judgment. That interim order, which contains the following language, is affirmed:

"Introduction

"This is a single claimant wage claim case involving a wage claim filed by Kenneth R. Dick ('Claimant') against Respondent. In its Order of Determination, the Agency alleged that Respondent owed Claimant owed

\$12,917.86 in unpaid wages. On September 29, 2000, the Agency filed a motion for partial summary judgment, contending that undisputed facts entitle the Agency to judgment as a matter of law on two issues: (1) Respondent owes Claimant \$3,899.62 in unpaid wages that were deducted from pay advances issued to Claimant as 'process fees'; and (2) Respondent is liable for civil penalty wages in the amount of \$2400 based on those deductions. Respondent filed a responsive pleading on October 6 in which it opposed the Agency's motion.

“Summary Judgment Standard

“A motion for summary judgment may be granted where no genuine issue as to any material fact exists and a participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings. OAR 839-050-0150(4)(B). The standard for determining if a genuine issue of material fact exists follows:

‘ * * * No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at [hearing].’ ORCP 47C.

“Respondent’s Deduction Of \$3,899.62 For “Process Fees.”

“The undisputed facts show the following. Claimant was employed by Respondent between approximately August 9, 1994 through April 17, 1999. Between the weeks ending November 2, 1996 through April 17, 1999, Claimant requested and received literally hundreds of checks that constituted advance draws on his pay. For all but a handful of these payroll draws, Respondent charged a process fee amounting to \$5.00 or 10% of the advance, whichever was greater. Before each draw, Claimant signed a “draw form” with form language that read as follows:ⁱ

‘AMOUNT OF DRAW
PROCESS FEE

TOTAL AMOUNT TO BE WITHHELD FROM PAYROLL

WEEK ENDING:_____

CK #:_____

I AM HERewith REQUESTING THAT THE COMPANY ADVANCE THESE FUNDS TO ME AND REDUCE MY PAYROLL BY AN AMOUNT EQUAL TO THE DRAW AMOUNT PLUS ANY FUNDS OWED TO THE COMPANY. I AM AWARE THAT A PROCESS FEE WILL BE CHARGED ON THE DRAW AND I AM AUTHORIZING BOTH THE DRAW AND THE PROCESS FEE.

This document also serves as a "Promissory Note" payable to Builders Interwest. For value received, the undersigned promises to pay the full amount of this draw together with interest at the rate of 24% per annum.

The undersigned waives demand, presentment and notice of dishonor.

EMPLOYEE SIGNATURE: _____ DATE: _____

APPROVAL SIGNATURE _____ DATE _____

The total amount of process fees charged to Claimant on account of his payroll draws and deducted from his wages during this time period was \$3,899.62.

"The Agency contends that these deductions were unlawful as a matter of law. Respondent contends that the deductions were authorized by ORS 652.610(3)(b).

"ORS 642.610(3) governs deductions that may be taken from an employee's wages. It provides that an employer may not deduct any part of an employee's wages unless one of five specific exceptions applies. The Agency and Respondent are in agreement that four of those exceptions do not apply, and the forum agrees with that conclusion. ORS 652.610(3)(b) contains the remaining exception, which Respondent contends applies to this case. It reads as follows:

'(3) No employer may withhold, deduct or divert any portion of an employee's wages unless:

'* * * * *

'(b) The deductions are authorized in writing by the employee, are for the employee's benefit, and are recorded in the employer's books[.]'

Respondent argues this exception applies because: (1) Claimant authorized the deduction in writing when he signed the draw forms; (2) The deductions were recorded in Respondent's books; and (3) The deductions were for Claimant's benefit, in that it was not feasible for Respondent to provide draws to Claimant without charging a process fee, given the huge number of draws requested by Claimant and costs incurred by Respondent in providing those draws.

"Viewing the evidence in the light most favorable to Respondent, it appears that the deductions were recorded in Respondent's books. The draw form, however, conspicuously fails to mention the charge for process fees. Claimant cannot be said to have authorized a deduction in an unspecified amount. Respondent's claim that the deductions were for Claimant's benefit also fails. Respondent was the beneficiary of the deductions, not Claimant. The fact that Claimant was required to authorize a deduction of indeterminate amount as a condition to getting

one of his numerous pay draws does not lead to the corollary that the resultant deduction was a benefit to him.

“Respondent’s deductions of \$3,899.62 from Claimant’s wages for ‘process fees’ do not fall within the statutory exception created by ORS 652.610(3)(b). The Agency’s motion for partial summary judgment on this sum, with interest thereon, is **GRANTED**.

“Civil Penalty Wages

“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.’

The undisputed facts pertinent to this issue are that Claimant was paid \$10.00 per hour during his employment with Respondent and more than 30 days has expired since Respondent last made a deduction for ‘process fees’ from Claimant’s wages. Respondent has not plead financial inability to pay. The only issue is whether Respondent’s unlawful deductions were ‘willful,’ a term this forum has frequently interpreted in the past. 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*, 18 BOLI at 219. Respondent, as an employer, had a duty to know the amount of wages due its employees. *In the Matter of R.L. Chapman Ent. Ltd.*, 17 BOLI 277, 285 (1999). There is no dispute that Respondent knew the amount of wages due Claimant or the amount it deducted for ‘process fees.’ Respondent argues it ‘was not a free agent as defined by caselaw cited by [the] Agency, in that it had to have some way of recovering the costs it incurred to make this benefit to Claimant possible.’ However, Respondent has produced no evidence to show it was under duress or coercion in making its business decision to charge process fees. The need to recover costs does not mean Respondent was not a free agent in deciding to recover those costs by deducting them directly from Claimant’s paycheck. Accordingly, the forum concludes that Respondent acted willfully.

“The Agency’s motion for summary judgment on the issue of civil penalty wages is **GRANTED**. The forum assesses penalty wages in the amount of \$2,400.00, the amount sought in the Order of Determination.

This figure is computed by multiplying \$10.00 per hour x 8 hours per day x 30 days, pursuant to ORS 652.150 and OAR 839-001-0470.”

16) The Agency filed its case summary, with attached exhibits, on October 12, 2000. Respondent filed its case summary, without exhibits, on October 12, 2000.

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

18) Prior to opening statements, the Agency and Respondent stipulated that exhibits A-1 through A-9 would be admitted without objection. Respondent also withdrew the affirmative defenses and counterclaims raised in its Answer.

19) During the hearing, the Agency and Respondent stipulated that Respondent deducted \$5,000 from Claimant’s wages for “process fees” associated with pay advances given to Claimant between August 1994 and October 26, 1996.

20) The evidentiary record of the hearing closed on October 24, 2000.

21) The ALJ issued a proposed order on November 29, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The forum received no exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Cox and Frey Enterprises, Inc. was an Oregon corporation doing business under the assumed business name of Builders Interwest and engaged the personal services of one or more employees.

2) Claimant was employed by Respondent from August 1994 through April 12, 1999. Claimant ran Respondent’s gutter truck crew.

3) Between October 27, 1996, and May 30, 1998, Respondent paid Claimant the agreed upon wage of \$9.50 per hour. Respondent paid Claimant the agreed upon wage of \$10.00 per hour during Claimant’s last year of employment with Respondent.

4) During Claimant's employment, Respondent's work week was Sunday to Saturday. Respondent paid its employees on Friday immediately following the work week.

5) During Claimant's employment, Claimant requested and received hundreds of payroll draws on wages that were not yet due, and sometimes had not been earned.

6) Claimant signed an authorization slip for the majority of payroll draws that he received.ⁱⁱ

7) For all but a handful of these payroll draws, Respondent charged a process fee of \$5.00 or 10% of the draw, whichever was greater. Each process fee was subsequently deducted from Claimant's paychecks.

8) The process fee was Respondent's attempt to recoup administrative expenses associated with issuing payroll draws to Claimant. Respondent retained each process fee deducted from Claimant's paychecks.

9) Respondent intentionally deducted the process fees.

10) Respondent made no attempt to calculate its costs associated with issuing payroll draws to Claimant.

11) Between August 1994 and October 26, 1996, Respondent deducted \$5,000.00 from Claimant's pay for process fees related to payroll draws issued to Claimant. Respondent retained these deductions.

12) Margaret Trotman is the Agency Compliance Specialist who investigated Claimant's wage claim. During her investigation, Respondent provided her with "payroll check history reports" related to Claimant's wages paid by check between October 11, 1996, through April 23, 1999. These reports contain entries in the following categories for each paycheck issued by Respondent to Claimant in this time period:

- a) Check date;
- b) Check number;
- c) Regular hours worked;
- d) Overtime hours worked;
- e) Gross wages;
- f) Federal withholding;
- g) FICA withholding;
- h) Medicare withholding;
- i) State withholding;
- j) Other taxes;
- k) Other deductions;
- l) Check amount.

13) During Trotman's investigation, Respondent provided records of all payroll advances received by Claimant and the amount of process fee deducted for each advance between October 29, 1996, and April 17, 1999. Those records showed that Respondent paid out \$35,740.88 in payroll advances and deducted \$3,899.62 in process fees in that time period.

14) Trotman used Respondent's payroll check history reports and records of payroll advances and process fee deductions to prepare a spreadsheet that chronologically listed and summarized the figures contained in those reports and records for the period of time covering paychecks issued beginning November 8, 1996,ⁱⁱⁱ until April 23, 1999. Trotman's summary appears on page 20 of Exhibit A-5.

15) Marvin Cox, Respondent's general manager, testified that he had reviewed page 20 of Exhibit A-5 and that the figures listed on it were accurate.

16) Respondent's "payroll check history reports" show that Claimant earned \$54,019.83 gross wages between October 27, 1996, and April 12, 1999, his last date of employment with Respondent. Trotman recalculated the gross wages earned by Claimant in this time and determined that Claimant had actually earned only \$53,596.19

during that time period. The Agency based its pleadings on Trotman's calculations, and the forum adopts the lower figure of \$53,596.19 as the gross wages earned by Claimant for work performed between October 27, 1996, and April 12, 1999.

17) Claimant was actually paid \$45,678.33 in gross wages for work performed between October 27, 1996, and April 12, 1999. This figure was derived by adding together the amount of lawful deductions^{iv} taken from Claimant's checks (\$7,298.47), his total payroll draws (\$35,740.88), and the net amount of his payroll checks (\$2,638.98).

18) The difference between what Claimant earned in wages between October 27, 1996, and April 12, 1999, and what Respondent paid Claimant is \$7,917.86. \$3,889.62 of this sum represents process fees.^v The remaining \$4,018.24 represents unsubstantiated deductions Respondent took from Claimant's paychecks. Cox testified that an unspecified amount of garnishments and loan repayments were included in this \$4,018.24 total, but Respondent did not provide documentation or written authorization for these deductions.

19) Claimant quit Respondent's employment on April 12, 1999, and was issued his final paycheck on April 23, 1999.

20) Respondent has not paid Claimant the \$5,000 in process fees that were deducted from his wages between August 1994 and October 26, 1996, or the \$7,917.86 in process fees and unsubstantiated deductions that Respondent deducted from Claimant's wages between October 27, 1996, and April 23, 1999. Total unpaid wages due and owing to Claimant amount to \$12,917.86.

22) Civil penalty wages, computed in accordance with ORS 652.150 and OAR 839-001-0470(1), equal \$2,400 (\$10.00 per hour x 8 hours x 30 days = \$2400).

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Cox and Frey Enterprises, Inc. was an Oregon corporation doing business under the assumed business name of Builders Interwest that engaged the personal services of one or more employees.

2) Claimant was employed by Respondent from August 1994 through April 12, 1999.

3) Between August 1994 and October 26, 1996, Respondent deducted \$5,000.00 from Claimant's wages for process fees related to payroll draws issued to Claimant.

4) Between October 27, 1996, and April 12, 1999, Claimant earned \$53,596.19 in gross wages and has only been paid \$45,678.33. Claimant was paid the agreed upon rate of \$10.00 per hour during his last year of employment with Respondent.

5) Between October 27, 1996, and April 23, 1999, Respondent deducted \$3,889.62 from Claimant's wages for process fees related to payroll draws issued to Claimant.

6) Claimant signed an authorization slip for the majority of his payroll draws.^{vi} Respondent deducted process fees from Claimant's paychecks in an attempt to recoup the cost of issuing payroll draws to Claimant. Respondent retained the deducted process fees and made no attempt to calculate its costs associated with issuing payroll draws to Claimant.

7) Between October 27, 1996, and April 23, 1999, Respondent made an additional \$4,018.24 in unsubstantiated deductions from Claimant's paychecks.

8) Respondent has not reimbursed Claimant for any of these deductions and owes Claimant \$12,917.86 in due and unpaid wages.

9) Respondent willfully failed to pay Claimant \$12,917.86 in earned, due, and payable wages within five days, excluding Saturdays, Sundays, and holidays, after Claimant quit, and more than 30 days have elapsed from the date Claimant's wages were due.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent Cox and Frey Enterprises, Inc. was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405. During all times material, Respondent employed Claimant.

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(2) provided:

“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.”

At times material, ORS 652.610 provided:

“(1) All persons, firms, partnerships, associations, cooperative associations, corporations, municipal corporations, the state and its political subdivisions, except the federal government and its agencies, employing, in this state, during any calendar month one or more persons, and withholding for any purpose, any sum of money from the wages, salary or commission earned by an employee, shall provide such employee on regular paydays with a statement sufficiently itemized to show the amount and purpose of such deductions made during the respective period of service which said payment covers.

“(2) The itemized statement shall be furnished to the employee at the time payment of wages, salary or commission is made, and may be attached to or be a part of the check, draft, voucher or other instrument by

which payment is made, or may be delivered separately from such instrument.

“(3) No employer may withhold, deduct or divert any portion of an employee's wages unless:

“(a) The employer is required to do so by law;

“(b) The deductions are authorized in writing by the employee, are for the employee's benefit, and are recorded in the employer's books;

“(c) The employee has voluntarily signed an authorization for a deduction for any other item, provided that the ultimate recipient of the money withheld is not the employer, and that such deduction is recorded in the employer's books;

“(d) The deduction is authorized by a collective bargaining agreement to which the employer is a party; or

“(e) The deduction is made from the payment of wages upon termination of employment and is authorized pursuant to a written agreement between the employee and employer for the repayment of a loan made to the employee by the employer, if all of the following conditions are met:

“(A) The employee has voluntarily signed the agreement;

“(B) The loan was paid to the employee in cash or other medium permitted by ORS 652.110;

“(C) The loan was made solely for the employee's benefit and was not used, either directly or indirectly, for any purpose required by the employer or connected with the employee's employment with the employer;

“(D) The amount of the deduction at termination of employment does not exceed the amount permitted to be garnished under ORS 23.185 (1)(a) or (d); and

“(E) The deduction is recorded in the employer's books.

“(4) Nothing in this section shall be construed as prohibiting the withholding of amounts authorized in writing by the employee to be contributed by the employee to charitable organizations, including contributions made pursuant to ORS 243.666 and 663.110; nor shall this section prohibit deductions by check-off dues to labor organizations or service fees, where such is not otherwise prohibited by law; nor shall this section diminish or enlarge the right of any person to assert and enforce a lawful setoff or counterclaim or to attach, take, reach or apply an employee's compensation on due legal process.

Respondent deducted \$8,899.62 in process fees from Claimant's wages between August 1994 and April 12, 1999. These deductions were not authorized by law.

Respondent additionally took \$4,018.24 in unsubstantiated deductions from Claimant's wages between October 27, 1996, and April 23, 1999. Respondent violated ORS 652.140(2) by failing to pay Claimant these wages no later than April 19, 1999, five business days after Claimant quit. In total, Respondent owes Claimant \$12,917.86 in unpaid wages that are due and owing.

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 is liable for \$2,400 in civil penalties under ORS 652.150, computed by multiplying Claimant's hourly rate (\$10.00 per hour) x 8 hours per day x 30 days = \$2,400, for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(2).

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

OPINION

INTRODUCTION

In its Order of Determination, the Agency alleged that Respondent owes Claimant \$12,917.86 in unpaid wages and \$2,400 in civil penalty wages. The Agency filed a motion for partial summary judgment on the issue of civil penalty wages and \$3,899.62 of the unpaid wages that were deducted from Claimant's paychecks as "process fees." That motion was granted, and the only issues at hearing were whether Claimant was owed an additional \$5,000 in wages that were deducted as "process fees" between August 1994 and October 26, 1996, along with \$4,018.24 in unsubstantiated deductions taken from Claimant's paychecks for work performed between October 27, 1996, and April 12, 1999.

AMOUNT OF UNPAID WAGES DUE AND OWING TO THE CLAIMANT

Claimant's alleged unpaid wages can be divided into three categories. First, the \$5,000.00 in "process fees" deducted by Respondent from Claimant's paychecks between August 1994 and October 26, 1996. Second, the \$3,899.62 in "process fees" deducted by Respondent from Claimant's paychecks between October 27, 1996, and April 23, 1999. Third, the \$4,018.24 in unsubstantiated deductions taken by Respondent from Claimant's paychecks between October 27, 1996, and April 23, 1999.

A. The \$3,899.62 in “Process Fees.”

This issue was resolved prior to hearing when the forum granted the Agency's motion for partial summary judgment. That ruling has been confirmed in this Order and requires no further discussion.

B. The \$5,000 in “Process Fees.”

These “process fees,” like the \$3,899.62, were deducted from Claimant's paychecks and retained by Respondent in a misguided attempt to recoup their administrative costs. The legal analysis used by the forum in granting the Agency's motion for partial summary judgment applies equally to this sum. As a result, the forum concludes that Respondent's deductions of \$5,000 in process fees from Claimant's wages between August 1994 and October 26, 1996, do not fall within the statutory exception created by ORS 652.610(3)(b). This sum is due and owing to Claimant as unpaid wages.

C. The \$4,018.24 in Unsubstantiated Deductions.

The Agency arrived at this sum by a two-step process based on undisputed figures provided by Respondent. First, the Agency subtracted the gross wages (\$45,678.33) paid to Claimant between October 27, 1996, and his termination from the gross wages (\$53,596.17) he earned in that period of time. This left a remainder of \$7,917.86. Second, the Agency subtracted the \$3,899.62 in “process fees” deducted from Claimant's wages during that period of time from \$7,917.86. This left a remainder of \$4,018.24. Cox, Respondent's general manager, attempted to explain these deductions as garnishments and loan repayments, but provided no documentation of individual deductions or written authorization from the Claimant for the deductions. Claimant did not testify that he authorized any of the deductions in writing or that they were to repay loans or satisfy garnishments required by law.

ORS 652.610 requires employers to provide employees with itemized statements showing the amount and purpose of all payroll deductions. The purpose of that requirement is to apprise employees of the statutory deductions that have been withheld from their paychecks, e.g. FICA, and to prevent employers from making unlawful deductions. If Respondent lawfully deducted the \$4,018.24 from Claimant's paychecks, it could have provided copies of Claimant's itemized deduction slips, as well as documentation supporting those deductions.^{vii} Respondent did not do so, and Cox's unsupported, generic testimony regarding those deductions is no substitute. Based on the undisputed figures provided by Respondent showing Claimant's gross wages earned and paid, and Respondent's inability to satisfactorily account for \$4,018.24 in deductions, the forum concludes that these deductions constitute unpaid wages that are due and owing to the Claimant.

CIVIL PENALTY WAGES

This issue was resolved prior to hearing when the forum granted the Agency's motion for partial summary judgment and awarded Claimant \$2,400 in civil penalty wages. That ruling has been confirmed in this Order. At hearing, the Agency sought to increase the amount of civil penalty wages to \$2,429 based on the "Interpretation" contained on page 201 of the Agency's Field Operations Manual regarding how civil penalty wages should be calculated. This interpretation states that "same hourly rate" as set forth in ORS 652.150 is "the average hourly rate for the period covered by the claim," and that figure is determined by an equation set forth by Agency policy consisting of "**Total earned during wage claim period *divided by* Total number of hours worked during wage claim period *multiplied by 8 hours. multiplied by 30 days.***" (emphasis in original) The problem with this approach is that the wage claim goes back to August 1994, and there is no evidence in the record showing how many

hours Claimant worked and how much he earned between August 1994 and October 26, 1996. Consequently, the forum relies on Claimant's hourly wage of \$10.00 per hour during his last year of employment to calculate civil penalty wages. Using \$10.00 per hour as a factor results in civil penalty wages of \$2,400, the figure awarded by the forum in its ruling granting the Agency's motion for partial summary judgment.

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 its violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders **Cox and Frey Enterprises, Inc.** 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 Kenneth Ray Dick in the amount of FIFTEEN THOUSAND THREE HUNDRED SEVENTEEN DOLLARS AND EIGHTY SIX CENTS (\$15,317.86), less appropriate lawful deductions, representing \$12,917.86 in gross, earned, unpaid, due, and payable wages and \$2,400.00 in penalty wages, plus interest at the legal rate on the sum of \$12,917.86 from May 1, 1999, until paid and interest at the legal rate on the sum of \$2,400.00 from June 1, 1999, until paid.

ⁱ Although Respondent only submitted a copy of one draw form signed by Claimant on 1/15/98 in support of its objections to the Agency's motions, for the purpose of this motion, the forum assumes that Claimant signed a draw form before obtaining each draw.

ⁱⁱ See Finding of Fact – Procedural 15, *supra*, for the exact wording of the authorization slips.

ⁱⁱⁱ Because Respondent issued paychecks to its employees six days after the conclusion of the work week in which the wages were earned, the November 8, 1996, paycheck reflects wages earned between October 27 and November 2, 1996. See Finding of Fact – The Merits 4, *supra*.

^{iv} The forum includes federal withholding, FICA withholding, Medicare withholding, and state withholding in the category of "lawful deductions."

^v See Finding of Fact – The Merits 13, *supra*.

^{vi} However, this authorization slip did not meet the requirements of ORS 652.610. See Finding of Fact – Procedural 15, *supra*.

^{vii} For example, a writ of garnishment.