

In the Matter of

DANNY VONG PHUOC TRUONG dba DANNY'S AUTO REPAIR,

Case No. 38-01

Issued March 16, 2001

SYNOPSIS

Respondent employed Claimant as a salaried auto shop helper and failed to pay him overtime wages for hours worked over 40 in a given workweek. The forum found that Claimant worked 435 hours of overtime for which he was not paid and Respondent was ordered to pay Claimant \$4,224.11 in due and unpaid wages. Respondent's failure to pay the wages was willful, and Respondent was ordered to pay \$2,100.00 in civil penalty wages. ORS 652.140(2), 652.150, OAR 839-020-0030.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 23rd and 24th, 2001, in Hearings Room #1004 of the State Office Building, 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Cynthia L. Domas, an employee of the Agency. Wage claimant Liem Ngoc Nguyen ("Claimant") was present throughout the hearing and was not represented by counsel. Respondent Danny Vong Phuoc Truong ("Respondent") was present throughout the hearing and was represented by David B. Wagner, attorney at law.

Helen Luong Burton, an interpreter in Vietnamese, was also present throughout the hearing as the forum's interpreter. Ms. Burton translated the proceedings in their entirety.

The Agency called as witnesses: Liem Ngoc Nguyen, the wage claimant; Irene Zentner and Kathleen Johnson, Wage & Hour Division Compliance Specialists;

Catherine Lieu Van, Respondent's wife; Quan Van Do and Ricky Lihn Dihn, Respondent's former employees; and Vu Thi Phuong Loan, Claimant's wife.

Respondent called as witnesses: Danny Vong Phuoc Truong, Respondent; Catherine Lieu Van; Vu Mai Hoang, a current employee of Respondent; and Thanh Hoai Phan, Respondent's former employee.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-19 (submitted or generated prior to hearing);
- b) Agency exhibits A-1 through A-11 (submitted prior to hearing), and A-12 through A-14 (submitted at hearing);
- c) Respondent exhibits R-1 through R-4 (submitted prior to hearing), R-5, R-6, and R-7 (submitted at hearing).

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 July 3, 2000, 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 September 11, 2000, the Agency served Order of Determination No. 00-2802 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

\$6,193.96 in unpaid overtime wages and \$1,749.60 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 September 19, 2000, Respondent, through counsel David B. Wagner, filed an answer and request for hearing. Respondent's answer admitted that Respondent had been Claimant's employer and that Respondent owed Claimant \$911.25 in unpaid overtime wages, and denied the other allegations in the Order of Determination.

6) On November 21, 2000, the Agency filed a "BOLI Request for Hearing" with the forum.

7) On December 7, 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 January 23, 2001, at 9:00 a.m., in the 10th floor Hearings Room, State Office Building, 800 NE Oregon Street, Portland, 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 December 8, 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 January 15, 2001, and notified them of the possible sanctions for failure to comply with the case summary order. On January 3, 2001, the forum issued an interim order changing the filing date for case summaries to January 16, 2001.

9) On December 11, 2001, the Agency filed an exhibit referred to in Respondent's answer, but not filed with Respondent's answer, that Respondent's counsel provided to the Agency on November 24, 2000.

10) On December 29, 2000, the Agency moved for a Discovery Order requesting a complete list of Respondent's employees during the Claimant's employment, any and all documentation showing dates and hours worked by and wages paid to the Claimant, and the original calendars from which Respondent had previously made and submitted copies to the Agency. The Agency characterized the latter request as a "new request for discovery." The Agency provided documentation showing that the other requested items had previously been requested on an informal basis. The Agency did not include a statement of relevancy for any of the requested documents.

11) On December 29, 2000, the Agency moved to amend the Order of Determination to increase the amount of wages sought to \$10,723.51 and penalty wages sought to \$2,100.00. The proposed amendment was premised on the Agency's recalculation of Claimant's wages based on the 40-hour workweek admitted in Respondent's answer.

12) On January 9, 2001, Respondent filed untimely objections to the Agency's motions for a discovery order and to amend the Order of Determination.

13) On January 10, 2001, the forum issued an interim order granting the Agency's motion to amend the Order of Determination.

14) On January 10, 2001, the forum issued an interim order granting the Agency's motion for a discovery order in part. The forum denied the Agency's request for a complete list of Respondent's employees during Claimant's employment on the basis that the relevancy of the request was not apparent and denied the Agency's request for original calendars because the Agency had not first sought the calendars through informal discovery.

15) On January 15, 2001, Respondent filed its case summary, with attached exhibits. On January 16, 2001, the Agency filed its case summary, with attached exhibits.

16) On January 16, 2001, the Agency renewed its motion for a discovery order, providing a statement indicating the relevancy of a list of Respondent's employees during the Claimant's employment and the requested calendars, as well as stating the Agency had made informal attempts to obtain the requested calendars.

17) On January 16, 2001, the forum issued an interim order requiring Respondent: (1) to provide any existing documents to the Agency showing the names and dates of employment of Claimant's co-workers or a list showing the same; and (2) to produce the requested original calendars for the inspection of the Agency's case presenter.

18) On January 20, 2001, the Agency submitted an addendum to its case summary containing damage computations and attaching Exhibit A-7a.

19) 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.

20) Prior to opening statements, the Agency and Respondent stipulated that Respondent was Claimant's employer, that Claimant was employed by Respondent

from November 17, 1998, through June 7, 2000, and that Respondent paid Claimant \$24,785 in total.

21) On January 23, after the Agency completed presentation of its case in chief, Respondent's counsel stated his intent to call Vu Mai Hoang, a current employee of Respondent; and Thanh Hoai Phan, a former employee of Respondent, as witnesses. These witnesses were not listed in Respondent's case summary. Mr. Wagner stated that he had only learned of the existence of these witnesses that morning, and had disclosed their names to Ms. Domas just prior to the start of the hearing. Mr. Wagner also stated that these witnesses were Claimant's former co-workers and would be testifying about the hours worked by Claimant. The Agency objected on the grounds that the witnesses had not been disclosed in Respondent's case summary and that the Agency would be prejudiced by its inability to adequately question the witnesses due to lack of opportunity for preparation. The ALJ ruled that the witnesses would be allowed to testify, but that the hearing would be continued to give the Agency an adequate opportunity to prepare for their testimony. Mr. Wagner agreed to make the witnesses available for questioning in private by Ms. Domas, before they testified, after the hearing recessed for the day. Ms. Domas agreed that would cure the prejudice to the Agency. The hearing was then recessed, and Ms. Domas conducted a private interview with both witnesses to determine if the services of an interpreter were required. Ms. Domas determined she did not need an interpreter, and the forum excused Ms. Burton for the day. Ms. Domas then conducted private interviews with both witnesses. The hearing was reconvened at 1:30 p.m. the next day.

22) The evidentiary record of the hearing closed on January 24, 2001.

23) On February 16, 2001, the ALJ issued a proposed order that notified the participants that were entitled to file exceptions to the proposed order. The forum received no exceptions.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Danny Vong Phuoc Truong, an individual person, owned and operated an auto repair shop under the assumed business name of Danny's Auto Repair.

2) Claimant was employed by Respondent between November 17, 1998, and June 7, 2000, as a shop helper. Claimant quit Respondent's employment on June 7, 2000.

3) Respondent hired Claimant on November 16, 1998. Claimant's first day of work was November 17, 1998. Claimant was hired as a shop helper at the agreed upon rate of a \$1200 month salary. This salary was intended to compensate him for 40 hours of work per week. This equates to an hourly rate of \$6.92 per hour, and an overtime rate of \$10.38 per hour.ⁱ

4) Claimant had no prior experience working in an auto repair shop prior to going to work for Respondent.

5) Throughout Claimant's employment with Respondent, Danny's Auto Repair was open for customers from 8:30 a.m. until 6 p.m., Monday through Friday, and 9 a.m. until 3 p.m. on Saturday. However, Respondent's employees often worked as late as 5 p.m. on Saturday, and as late as 6 p.m. on at least one occasion.

6) Throughout Claimant's employment, Respondent came home each day and told his wife, Catherine Van, the hours that his employees had worked that day. Each day, Van wrote down on a calendar the time span that Respondent told her his employees had worked.ⁱⁱ On occasion, she wrote the total number of hours worked by

an employee in parentheses after the employee's name. On each occasion, the number of hours in parentheses was less than the total hours in the notated time span.ⁱⁱⁱ

7) Claimant did not keep a contemporaneous record of the hours he worked during his employment with Respondent. After Claimant left Respondent's employment, and just before he filed his wage claim, he created a calendar showing the hours he worked for Respondent. The hours he wrote down are only an approximation and Claimant's best guess of the hours he worked. On the calendar, Claimant claimed to have worked 10 hours per day, six days a week, from November 17, 1998, to May 2, 1999; nine hours per day, six days a week, from May 3, 1999, to October 31, 1999; four hours per day from November 1, 1999, to November 27, 1999; and 8½ hours per day from November 29, 1999, to June 7, 2000.

8) Claimant stated on his wage claim form that he worked "60-70 hrs/wk." while employed by R.

9) On July 3, 2000, Claimant told Zentner that he worked from 9 a.m. until 8 p.m. or 9 p.m., six days per week.

10) On August 21, 2000, the Agency received a letter from Catherine Van that read, in pertinent part:

"Enclosed please find copies of the calendar which show the hours that Mr. Nguyen worked, the days that he was not at work, and the days that the shop was closed per your request."

The letter enclosed a copy of Respondent's calendar upon which Van had written the hours worked by employees. Beginning with the entry on December 3, 1998, and ending with the entry on March 1, 1999, the calendar copy contains numerous changes from and additions to the original calendar that are handwritten in pencil. All the changes are related to specific hours and total hours worked by Claimant each day.^{iv}

11) Respondent's workweek was Monday through Saturday.

12) Throughout Claimant's employment, Respondent paid its employees every two weeks for work performed from Monday until Saturday the following week.

13) Claimant took no breaks and had irregular lunch hours during his employment with Respondent. Usually, he took 15-20 minutes to eat lunch whenever he had time. Sometimes he took an hour break for lunch.

14) Between November 17, 1998, and April 17, 1999, Claimant worked 844 straight time hours and 82.58 overtime hours, for a total of 926.58 hours. Based on an hourly rate of \$6.92 per hour and an overtime rate of \$10.38 per hour, Claimant earned \$5,840.48 in straight time pay and \$857.18 in overtime pay, for a total of \$6,697.66.

15) On April 18, 1999, Claimant was given a raise to \$1300 per month, based on a 40-hour workweek. This equates to an hourly wage of \$7.50 per hour, and an overtime rate of \$11.25 per hour.^v

16) Between April 18, 1999, and November 27, 1999, Claimant worked 1199 straight time hours and 173.08 overtime hours, for a total of 1,372.08 hours. Based on an hourly rate of \$7.50 per hour and an overtime rate of \$11.25 per hour, Claimant earned \$8,992.50 in straight time pay and \$1,947.15 in overtime pay, for a total of \$10,939.65.

17) On November 28, 1999, Claimant was given a raise to \$650 every two weeks, based on a 40-hour workweek. This equates to an hourly wage of \$8.13 per hour, and an overtime rate of \$12.19 per hour.^{vi}

18) Between November 28, 1999, and April 1, 2000, Claimant worked 713.83 straight time hours and 121.92 overtime hours, for a total of 835.75 hours. Based on an hourly rate of \$8.13 per hour and an overtime rate of \$12.19 per hour, Claimant earned \$5,803.44 in straight time pay and \$1,486.20 in overtime pay, for a total of \$7,289.64.

19) On April 2, 2000, Claimant was given a raise to \$700 every two weeks, based on a 40-hour workweek. This equates to an hourly wage of \$8.75 per hour, and an overtime rate of \$13.13.

20) Between April 2, 2000, and June 7, 2000, Claimant worked 381 straight time hours and 57 overtime hours, for a total of 438 hours. Based on an hourly rate of \$8.75 per hour and an overtime rate of \$13.13 per hour, Claimant earned \$3,333.75 in straight time pay and \$748.41 in overtime pay, for a total of \$4,082.16.

21) Claimant earned a total of \$29,009.11 in gross wages while employed by Respondent and has only been paid a total of \$24,785 in gross wages.

22) Respondent owes Claimant a total of \$4,224.11 in unpaid wages.

23) Civil penalty wages are computed as follows for the Claimant, in accordance with ORS 652.150 and OAR 839-001-0470(2): \$8.75 per hour x 8 hours x 30 days = \$2,100.00.

24) Catherine Van had a financial and familial bias because she is Respondent's wife. Her credibility was lessened by her alteration of Claimant's hours on the calendar that she mailed to the Agency.^{vii} She testified she paid Claimant \$600 in cash, and \$600 by check for fulltime work in November 1999; however, the documents she testified were Claimant's complete payroll records only showed two \$300 payments to Claimant in November 1999. The forum has relied on the original calendar contemporaneously created by Van showing hours worked by the Claimant and other employees, but has not relied on any of her testimony that is not supported by other credible evidence.

25) Quan Do was a credible witness. He responded to questions in direct and cross-examination in a straightforward manner, without hesitation or apparent attempt to deceive. He had no apparent bias, and his testimony concerning his work hours and

Claimant's work hours was generally consistent with Respondent's hours of business. His only major inconsistency was his statement that he worked nine months for Respondent, whereas Respondent's calendar shows he only worked seven months, May through December 1999. However, the forum has not relied upon his testimony that Claimant worked until after 6 p.m. Monday through Friday because of inconsistencies with Claimant's statements.^{viii}

26) Ricky Dinh worked for Respondent from August 1, 1999, until June 7, 2000. He quit Respondent's employment at the same time as Claimant because of a dispute over his wages. Like Quan Do, his testimony was straightforward, with no apparent attempt to deceive. Like Do, he testified that Claimant worked longer hours than Van wrote on Respondent's calendar; however, the forum has not relied upon this testimony because of inconsistencies with Claimant's statements^{ix} and because Dinh did not provide specific dates that Claimant worked after 6 p.m.

27) Vu Thi Phuong Loan is Claimant's wife. Her testimony, which described her attempts to telephone Claimant at home and Claimant's work schedule in November 1999, was not material to the forum's determination and has not been relied upon by the forum.

28) Irene Zentner and Kathleen Johnson, both Agency compliance specialists, were both credible witnesses regarding the substance of their investigation. The forum has not relied on Johnson's calculation of wages due to the Claimant because it was based on Claimant's version of hours worked, which the forum has determined is not reliable.

29) Vu Mai Hoang has been continuously employed by Respondent since February 1997 on a part-time basis as an auto mechanic. His testimony, which primarily concerned Claimant's work schedule in November 1999, was contradicted by

Respondent's payroll records and calendar, and the forum has not relied upon his testimony in determining the hours worked by the Claimant.

30) Thanh Phan worked for Respondent from December 10, 1998, through March 13, 1999, as an auto mechanic. His testimony primarily concerned Claimant's work schedule and is generally consistent with the hours shown on Respondent's original calendar. However, his testimony that he "sometimes" worked "a few hours" on Saturday is belied by Respondent's original calendar, which shows Phan working every Saturday during his employment except for December 26, when Respondent was closed. On several Saturdays, he worked from 9 a.m. to 5 p.m. His testimony that he worked 40 hours a week and "sometimes" more is also in contrast to Respondent's original calendar, which shows him working more than 40 hours per week his last nine consecutive weeks of employment.^x Because of these inconsistencies in his testimony concerning his own hours, the forum has not relied on Phan's testimony in determining the number of hours worked by the Claimant.

31) Danny Truong was an emotional witness who believed he had done Claimant a favor by hiring him when Claimant had no job skills and that he had an employment contract with Claimant that excused him from having to pay overtime wages. Nonetheless, the forum found his testimony credible that he informed Van each night of the hours that employees had worked that day and that Van wrote those hours down at that time on a calendar and has credited Truong's testimony about the calendar in its entirety.

32) Claimant's prior inconsistent statements concerning his work schedule, coupled with his lack of any contemporaneous or accurate record of his work hours, made his testimony concerning his work hours unreliable. In consequence, the forum has not relied on Claimant's version of his work hours except where they are

corroborated by Van's notations on Respondent's original calendar. However, the forum has credited Claimant's testimony that he generally did not get a lunch hour on those days where Respondent's calendar does not contain a number in parentheses after Claimant's work schedule for that day.

33) The forum has relied exclusively on Respondent's original calendar in calculating the total hours worked by Claimant each week. Even though credible testimony from the Agency's witnesses indicates that Claimant may have worked longer hours on some days than those shown on the calendar, the forum finds that Respondent's calendar is the most reliable record of the hours worked by Claimant for two reasons. First, there is credible evidence that it was contemporaneously created. Second, there is no other credible or reliable record of Claimant's hours. Where that calendar notes hours worked by Claimant with a number in parentheses after those hours, the forum has credited Claimant with having worked the number of hours shown in parentheses.^{xi} Where the calendar notes hours worked by Claimant with no number in parentheses after those hours, the forum has credited Claimant with having worked the entire time span encompassed by the entry^{xii} and has not subtracted any time for a lunch break.^{xiii}

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Danny Vong Phuoc Truong was an individual doing business under the assumed business name of Danny's Auto Repair and engaged the personal services of one or more employees.

2) Claimant was employed by Respondent from November 17, 1998, through June 7, 2000, when he quit Respondent's employment.

3) From November 17, 1998, to June 7, 2000, Claimant earned \$29,009.11 and has only been paid \$24,785.00. Claimant was paid the agreed upon salary of \$700

every two weeks during his last month of employment with Respondent, which equates to an hourly rate of \$8.75.

- 4) Respondent owes Claimant \$4,224.11 in due and unpaid wages.
- 5) Respondent willfully failed to pay Claimant \$4,224.11 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 Danny Vong Phuoc Truong 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 scheduled 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 September 1, 2000, which is less than two years after December 15, 1998, the date Claimant’s first earned overtime wages became due.^{xiv} Respondent violated ORS 652.140(2) by failing to pay Claimant all earned overtime wages no later than June 13, 2000, five business days after Claimant quit. In total, Respondent owes Claimant \$4,224.11 in unpaid wages that are due and owing.

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(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 \$2,100.00 in civil penalties under ORS 652.150, computed by multiplying Claimant’s hourly rate (\$8.75 per hour) x 8 hours per day x 30 days = \$2,100.00, for willfully failing to pay all wages or compensation to Claimant 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 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

The Agency alleged in its original Order of Determination that Claimant had worked substantial amounts of overtime for which he had not been compensated, and that Respondent owed him \$6,193.96 in unpaid wages and \$1,749.60 in penalty wages.

The Agency subsequently recalculated the amount due Claimant by computing Claimant's hourly rate based on a 40-hour workweek and amended its Order of Determination to seek \$10,723.51 in unpaid overtime wages and \$2,100.00 in penalty wages. Both totals were based on the number of hours Claimant alleged that he worked.

PRIMA FACIE CASE

To establish a prima facie case for wage claims, the Agency must establish the following elements: (1) Respondent employed Claimant; (2) Claimant's agreed upon rate of pay, if it was other than minimum wage; (3) Claimant performed work for which he was not properly compensated; and (4) the amount and extent of work performed by Claimant. *In the Matter of Contractor's Plumbing Service, Inc., 20 BOLI 257, 270 (2000).*

The first, second, and third elements are undisputed. First, both participants stipulated that Respondent employed Claimant from November 17, 1998, to June 7, 2000. Second, Respondent's payroll records show that Claimant was paid the following salaries: \$1200 per month from November 17, 1998, through April 17, 1999; \$1300 per month from April 18, 1999, through November 27, 1999; \$650 every two weeks from November 28, 1999, through April 1, 2000; and \$700 every two weeks from April 2, 2000, through June 7, 2000. It is also undisputed that this salary was based on a 40-hour workweek. Third, Respondent admitted in his answer that he owed Claimant \$911.25 in due and unpaid overtime wages.

The fourth element, the amount and extent of work performed by Claimant, is the crux of the matter. Both sides presented witness testimony and documents supporting conclusions that differed by \$9,800. 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 Nova Garbush, 20 BOLI 65, 72 (2000)*. A claimant’s credible testimony may be sufficient evidence. *Id.*

In this case, Respondent maintained a contemporaneous record of the hours worked by the Claimant. Although the format may not have been ideal, it still shows what Respondent told his wife, at the end of each day, concerning the hours that Claimant worked that day. Based on testimony of the Agency’s witnesses, the forum is not convinced that Respondent’s record is entirely accurate. However, Claimant’s after-the-fact recording of his hours is even less reliable, and Claimant’s testimony as to the total number of hours he worked is not credible at all. Consequently, the forum relies on Respondent’s calendar, the most reliable record of hours worked by Claimant, to determine the amount and extent of work performed by the Claimant.^{xv} As noted in Finding of Fact – The Merits 34, the forum has interpreted the notations on that calendar literally, deducting time from Claimant’s overall work hours where Respondent has indicated a deduction for a particular day, and not making a deduction for a lunch hour where Respondent has not indicated a deduction. This also takes into account the credible testimony of Claimant and Quan Do that they usually did not take more than 15-20 minutes for a lunch break and took no other breaks during the day.

Claimant was entitled to be paid for all work performed in excess of 40 hours per week. ORS 653.261(1), OAR 839-020-0030(1). The forum has converted Claimant’s salary to an hourly and overtime rate of pay under the provisions of OAR 839-020-0030(3).^{xvi} Based on Claimant’s agreed upon rates of pay, Respondent’s record of Claimant’s hours worked in Respondent’s original calendar, and the forum’s interpretation of that record, the forum concludes that Respondent owes Claimant \$4,224.11 in due and unpaid wages.

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. *Garbush, 20 BOLI at 72*. Respondent, as an employer, had a duty to know the amount of wages due his employees. *Id.* Respondent knew the overtime hours worked by Claimant and wrote them down on a calendar, but believed he did not have to pay Claimant for those overtime hours because Claimant was a salaried employee. Respondent's ignorance or misunderstanding of the law do not exempt him from a determination that he willfully failed to pay overtime. *In the Matter of Burrito Boy, Inc.*, 16 BOLI 1, 19 (1997). There is no evidence that Respondent acted other than voluntarily or as a free agent. The forum concludes that Respondent acted willfully and assesses penalty wages in the amount of \$2,100.00, the amount sought in the amended Order of Determination. This figure is computed by multiplying \$8.75 per hour x 8 hours per day x 30 days, pursuant to ORS 652.150 and OAR 839-001-0470.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages and civil penalty wages owed as a result of his violations of ORS 652.140 and OAR 839-020-0030, the Commissioner of the Bureau of Labor and Industries hereby orders Danny Vong Phuoc Truong to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries in trust for Claimant Liem Ngoc Nguyen in the amount of SIX THOUSAND THREE HUNDRED TWENTY FOUR DOLLARS AND ELEVEN CENTS (\$6,324.11), less appropriate lawful deductions, representing \$4,224.11 in

gross, earned, unpaid, due, and payable wages and \$2,100.00 in penalty wages, plus interest at the legal rate on the sum of \$4,224.11 from July 1, 2000, until paid and interest at the legal rate on the sum of \$2,100.00 from August 1, 2000, until paid.

ⁱ These rates were determined pursuant to OAR 839-020-0030(3)(g) by the following calculations: (1) $\$1200 \times 12 = \$14,400 \div 52 = \$276.92 \div 40 = \6.92 ; (2) $\$6.92 \times 1.5 = \10.38 .

ⁱⁱ For example, the entry on February 1, 1999 reads: "Vu 4[,] Thanh 9-5[,] Liem 9-5"

ⁱⁱⁱ For example, the entry on January 23, 1999 reads: "Vu off[,] Thanh 9-3(5)[,] Liem 9-3(5)"

^{iv} For example, the entry on December 3, 1998 was changed from "Liem 9-5(7)" to "Liem 9-6(8)."

^v These rates were determined pursuant to OAR 839-020-0030(3)(g) by the following calculations: (1) $\$1300 \times 12 = \$15,600 \div 52 = \$300 \div 40 = \7.50 ; (2) $\$7.50 \times 1.5 = \11.25 .

^{vi} These rates were calculated by dividing \$650 by 80 hours, which equals \$8.13, then multiplying \$8.13 x 1.5, which equals \$12.19.

^{vii} See Finding of Fact – The Merits 10, *supra*.

^{viii} Claimant's calendar (Exhibit A-4) states Claimant only worked "9 hours per day" from "5/3/99 to 10/31/99," and "8 1/2 hours per day" from "11/29/99 to 6/7/00," the time period encompassing Do's employment. If Claimant started work at 9, took no lunch hour, and worked 9 hours, his work would have ended at 6 p.m. each day. If Claimant started work at 9, took no lunch hour, and worked 8 1/2 hours, his work would have ended at 5:30 p.m. each day.

^{ix} *Id.*

^x The forum arrived at this conclusion by calculating Phan's hours worked in the same manner that Claimant's were calculated. See Finding of Fact – The Merits 33, *infra*, and accompanying footnote.

^{xi} For example, the entry on November 20, 1998, reads "Liem 9-5:30 (7 1/2)." The forum has credited Claimant with having worked 7 1/2 hours that day.

^{xii} For example, the entry on February 17, 1999, reads "Liem 9-5." The forum has credited Claimant with having worked 8 hours that day.

^{xiii} Claimant testified that he never got a one-hour lunch break, and Respondent testified that Claimant and other employees routinely took one-hour lunch breaks. The forum resolves this issue by basing its conclusion on the most reliable record of Claimant's work schedule – Respondent's original calendar. Where Respondent's total of hours for Claimant reflects a deduction from the total time span worked, the forum has relied on that total. Where Respondent did not deduct any time from Claimant's workday, the forum has not deducted any time.

^{xiv} Respondent's calendar shows that December 7-12 was the first workweek in which Claimant worked more than 40 hours, and that Respondent issued a paycheck covering that workweek on December 15, 1998.

^{xv} *C.f. In the Matter of Ann L. Swanger*, 19 BOLI 42, 57 (2000), where the forum declined to "speculate or draw inferences about wages owed" based on the claimant's testimony, where that testimony was not credible, even though respondents had failed to create and maintain a record of hours worked by the claimant.

^{xvi} See Findings of Fact – The Merits 3, 15, 17, and 19, *supra*.