

In the Matter of
LESLIE ELMER DeHART, ROXANNE LEA DeHART, and
PACIFIC NORTHWEST RECOVERY, INC.

Case Number 13-99
Final Order of the Commissioner
Jack Roberts
Issued April 8, 1999.

SYNOPSIS

Where Respondents submitted an answer to the Order of Determination and requested a hearing, but failed to appear at the hearing, the Commissioner found Respondent in default of the charges set forth in the Order of Determination. Respondent Leslie DeHart, who operated a repossession business, employed Claimant as a "spotter" and failed to pay Claimant all wages due upon termination, in violation of ORS 652.140(2). Respondent's failure to pay the wages was willful, and Respondent was ordered to pay civil penalty wages, pursuant to ORS 652.150. ORS 652.140(2), 652.150.

The above-entitled contested 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 (BOLI) for the State of Oregon. The hearing was held on January 13, 1999, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by David Gerstenfeld, an employee of the Agency. Lester Dale Myer (Claimant) was present throughout the hearing. Respondent Leslie DeHart was not present after due notice and was in default. Respondent Pacific Northwest Recovery, Inc., was not

represented at the hearing and was in default.

The Agency called the following witnesses: Lester Dale Myer, Claimant; Margaret Trotman, Wage and Hour Division Compliance Specialist; and Andy Joe Myer, Claimant's son.

Administrative exhibits X-1 to X-11 and Agency exhibits A-1 through A-7 were offered and received into evidence. The record closed on January 13, 1999.

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

FINDINGS OF FACT -- PROCEDURAL

1) On February 12, 1998, Claimant Lester Dale Myer filed a wage claim with the Agency. He alleged that he had been employed by Respondents Leslie and Roxanne DeHart, doing business as Pacific Northwest Recovery, and that Respondents had failed to pay wages earned and due to him.

2) At the same time that he filed the wage claim, Claimant assigned to the Commissioner of Labor, in trust for Claimant, all wages due from Respondents.

3) On August 31, 1998, the Agency issued an Order of Determination based upon the wage claims filed by Claimant and the Agency's investigation. The Order named Leslie Elmer DeHart and Roxanne Lea DeHart, partners, and Pacific Northwest Recovery, Inc. as Respondents. On September 3, 1998, the Agency served Leslie and Roxanne DeHart with an Order of Determination based upon the wage claim filed by Claimant and the Agency's investigation. Leslie DeHart was served as a partner and registered agent for Respondent Pacific Northwest Recovery, Inc. The Order of Determination alleged that Respondents owed a total of \$1,806.15 in wages and \$1,471.20 in civil penalty wages based on work Claimant had performed for Respondents from November 2, 1997, through January 9, 1998. The Order of Determination required that, within 20 days, Respondents either pay

these sums in trust to the Agency, or request an administrative hearing and submit an answer to the charges.

4) On September 24, 1998, Respondents, through counsel, filed an answer to the Order of Determination and requested a hearing. In the answer, Respondents raised two affirmative defenses. First, that Claimant was an independent contractor. Second, that Respondents and Claimant agreed to the payment by Claimant of \$100 on account of damage to a tow truck by Claimant's son, and that it was agreed by Claimant and Respondents that the damages would be repaid to Respondents at the rate of \$50 from two separate fee payments.

5) On November 10, 1998, the Agency sent the Hearings Unit a request for a hearing date. The Hearings Unit issued a Notice of Hearing to the Respondents, the Agency, and the Claimant indicating the time and place of the hearing. Together with the Notice of Hearing, the forum sent a document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

6) On December 7, 1998, the Agency filed a motion for a discovery order seeking documents related to Claimant's employment with Respondents. Respondents did not file a response to the Agency's motion.

7) On December 15, 1998, the ALJ issued a discovery order in response to the Agency's motion for a discovery order that required Respondents to provide the Agency with all documents requested by the Agency.

8) On December 15, 1998, the ALJ issued a discovery order directing each participant to submit a summary of the case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-050-0210(1). The summaries were due by January 4,

1999. The order advised the participants of the sanctions, pursuant to OAR 839-050-0200(8), for failure to submit the summary.

9) On January 4, 1999, the Agency submitted its Case Summary. Included in the Case Summary was a motion to reduce the wages and penalty wages sought by the Agency from \$1,806.15 to \$1,518.50 and \$1,471.20 to \$1,334.40, respectively.

10) On January 5, 1999, Respondents' counsel John O'Hara resigned as counsel for Respondents.

11) At the start of the hearing, Respondents did not appear and had not announced that they would not appear. Pursuant to OAR 839-050-0330(2), the ALJ waited 30 minutes before commencing the hearing. When Respondents did not appear or contact the hearings unit by telephone, the ALJ declared Respondents in default at 9:32 a.m. and commenced the hearing.

12) At the start of the hearing, the Agency moved to dismiss Roxanne Lea DeHart as a Respondent. The ALJ granted the motion.

13) At the start of the hearing, the ALJ granted the Agency's motion to reduce the wages and penalty wages sought by the Agency from \$1,806.15 to \$1,518.50 and \$1,471.20 to \$1,334.40, respectively.

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

15) The proposed order, which contained an exceptions notice, was issued February 22, 1999. Exceptions were due March 4, 1999. No exceptions were received.

FINDINGS OF FACT -- THE MERITS

1) During all times material herein, Leslie Elmer DeHart (hereafter "Respondent"), an individual person, did business under the assumed business

name of Pacific Northwest Recovery at 4721 SE 82nd Avenue, Portland, Oregon, and engaged the personal services of one or more persons in the State of Oregon.

2) Claimant and Respondent entered into an agreement on or about November 2, 1997 that Claimant would perform work as a "spotter" for Respondent. There was no agreement as to how long Claimant would perform this work.

3) Respondent and Claimant initially agreed that Claimant would be paid \$6.00 per hour. Shortly thereafter, Respondent and Claimant agreed that Claimant would be paid \$150 per week, no matter how many or how few hours he worked.

4) Claimant performed work for Respondent from November 2, 1997, through January 9, 1998.

5) Claimant's primary job duty for Respondent was working as a "spotter". As a "spotter," Claimant's job was to locate property that Respondent was trying to repossess. The primary types of property were cars, boats, and trailers. Between November 2, 1997, and January 9, 1998, Claimant also drove a tow truck for Respondent, washed cars and a trailer home belonging to Respondent's father, and acted as a security guard when work was slow.

6) Claimant had never worked as a "spotter" before November 2, 1997. Respondent told Claimant when to show up for work, when to go home from work, and what jobs to perform.

7) Claimant had no opportunity to make a profit or loss while working for Respondent.

8) Claimant did not invest any money in Respondent's business.

9) To perform his job as "spotter," Claimant used paperwork from Respondent describing the item and address of the property to be repossessed, Respondent's cell phone, Respondent's "Thomas Guide,"¹ Respondent's tow truck, and Respondent's business cards. Respondent paid for the gas used by the tow truck.

10) Respondent paid Claimant by check on Saturdays in November, then on Fridays in December and January. The checks had the names of Leslie and Roxanne DeHart and Pacific Northwest Recovery on them.

11) Claimant's son, Andy, scratched Respondent's tow truck during Claimant's employment. Respondent deducted \$50 from each of two paychecks to Claimant to pay for the scratch. Claimant did not agree to this deduction and did not sign an authorization for the deduction.

12) Respondent paid Claimant a total of \$1,275 in gross wages. Respondent paid this amount knowingly and intentionally. Respondent was a free agent.

13) Claimant worked 440 hours between November 2, 1997, and December 31, 1997, earning \$2,420 in wages.² The number of hours he worked per week ranged from a minimum of 40 to a maximum of 56.

14) Claimant worked 62.25 hours for Respondent between January 1, 1998, and January 9, 1998, earning \$373.50 in wages.³

15) Claimant's last day of work for Respondent was January 9, 1998. Claimant quit work on January 14, 1998, without giving prior notice.

16) January 16, 1998, was Claimant's next regularly scheduled payday. Claimants' wages were due and owing on January 16, 1998.

17) At the time Claimant quit, Respondent owed Claimant \$1,518.50 in unpaid wages.

18) The Forum computed civil penalty wages, in accordance with ORS 652.150, as follows for Claimant: (a) \$2,793.50 (total wages earned) divided by 502.25 (total hours worked) equals an average hourly rate of \$5.56/hr.; (b) \$5.56/hr. multiplied by 8 hours per day equals \$44.48; and (c) \$44.48 multiplied by 30 (the maximum number of days for which civil penalty wages continued to accrue) equals \$1,334.⁴

19) Respondent did not allege in his answer an affirmative defense of financial

inability to pay the wages due at the time they accrued; nor did he provide any such evidence for the record.

20) The only evidence presented to establish that Pacific Northwest Recovery, Inc., was Claimant's employer at times material was a Corporation Division general inquiry. It showed that Pacific Northwest Recovery, an assumed business name for Leslie DeHart, voluntarily canceled on November 14, 1997, and that Pacific Northwest Recovery, Inc. was incorporated effective November 14, 1997, with Leslie Dehart as the registered agent at the same address that Claimant worked.

PROPOSED ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent Leslie Elmer DeHart was a person who engaged the personal services of one or more employees in the State of Oregon.

2) Respondent DeHart employed Claimant in Oregon from November 2, 1997, until January 9, 1998.

3) Claimant was not employed by Pacific Northwest Recovery, Inc. during times material herein.

4) Claimant earned \$2,793.50 in wages during his employment with Respondent.

5) Claimant was paid \$1,275 in wages during his employment with Respondent .

6) Respondent deducted \$100 from Claimant's wages to pay for a scratch that Claimant's son put on Respondent's tow truck. Claimant did not agree to this deduction and did not sign an authorization for the deduction.

7) Claimant quit Respondent's employment without notice on January 14, 1998.

8) When Claimant quit, Respondent owed Claimant \$1,518.50 in unpaid wages.

9) Respondent willfully failed to pay Claimant \$1,518.50 in earned, due, and payable wages at the next regularly scheduled payday 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 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 herein, Respondent employed Claimant.

2) During all times material herein, Pacific Northwest Recovery, Inc. was not Claimant's employer.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 652.310 to 652.405.

4) ORS 652.140(2) provides:
"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."

Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid on Friday, January 16, 1998, Claimant's next regularly scheduled payday after Claimant quit employment without notice.

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."

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

- 5) ORS 652.610(3) provides:
"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; or
 - "(d) The deduction is authorized by a collective bargaining agreement to which the employer is a party."

Respondent's purported reason for deducting \$100 from Claimant's wages, that Claimant's son had scratched his tow truck, was not a legal defense under the facts presented.

- 6) OAR 839-050-0330(1) and (2) provide, in pertinent part:
"(1) Default can occur in four ways:
" * * *
"(d) Where a party fails to appear at the scheduled hearing.
"(2) When a party notifies the agency that it will not appear at the specified time and place for the contested case hearing or, without such notification, fails to appear at the specified time and place for the contested case hearing, the hearings referee shall take evidence to establish a prima facie case in support of the charging document and shall then issue a proposed order to the commissioner and all participants pursuant to OAR 839-050-0370. Unless notified by the party, the hearings referee shall wait no longer than thirty (30) minutes from the time set for the hearing in the notice of hearing to commence the hearing."

Respondents did not appear at the hearing at all and were properly found to be in default when 30 minutes had elapsed after the specified time for the contested case hearing.

7) 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 Order of Determination, as amended, that Claimant was employed by Respondents Leslie and Roxanne DeHart and Pacific Northwest Recovery, Inc., from November 2, 1997, through January 9, 1998, that Claimant was not paid in full for all wages earned, that \$1,518.50 in back wages are due and owing to Claimant, and that \$1,334 in penalty wages should be assessed against Respondents.

Respondents

The Agency named Leslie and Roxanne DeHart, partners, and Pacific Northwest Recovery, Inc., as Respondents. At the commencement of the hearing, the Agency moved to dismiss the charges against Roxanne DeHart, and the motion was granted. The Agency provided the evidence cited in Finding of Fact - The Merits #20 in support of the theory that Pacific Northwest Recovery, Inc. was Claimant's employer from November 14, 1997, through January 9, 1998. These Corporation Division documents, weighed against testimony by Claimant that all of his paychecks had the name of Respondent DeHart and his assumed business name, Pacific Northwest Recovery, printed on them, do not establish by a preponderance of the evidence that Pacific Northwest Recovery, Inc. was Claimant's employer during the last seven weeks of his employment. *In the Matter of Sunnyside Inn*, 11 BOLI 151, 165 (1993). The forum concludes that the proper Respondent in this case is Leslie Elmer DeHart (hereinafter "Respondent"). Accordingly, the charges against Pacific

Northwest Recovery, Inc. are dismissed.

Default

Respondent failed to appear at the hearing and thus defaulted to the charges set forth in the Order of Determination. OAR 839-050-0330(1) and (2). In a default situation, pursuant to ORS 183.415(5) and (6), the task of this forum is to determine if a prima facie case supporting the Agency's Order of Determination has been made on the record. *In the Matter of Tina Davidson*, 16 BOLI 141, 148 (1997); see also OAR 839-050-0330(2).

Where a Respondent submits an answer to a charging document, the forum may admit the answer into evidence during a hearing and may consider the answer's contents when making findings of fact. Where a Respondent fails to appear at hearing, the forum may review the answer to determine whether the Respondent has set forth any evidence or defense to the charges. *Id.* In a default situation where a Respondent's total contribution to the record is a request for a hearing and an answer that contains nothing other than unsworn and unsubstantiated assertions, those assertions are overcome wherever they are controverted by other credible evidence on the record. *Id.*

The Agency has established a prima facie case. A preponderance of credible evidence on the whole record showed that Respondent employed Claimant during the period of the wage claim⁵ and willfully failed to pay him all wages, earned and payable, when due. The evidence that established the hours Claimant worked and the amount Respondent owed Claimant was credible, persuasive, and the best evidence available, given the failure of Respondent to appear at the hearing. Having considered all the evidence on the record, the forum finds that the Agency's prima facie case has not been controverted by the unsworn and unsubstantiated assertions in Respondent's answer and request for hearing.

Independent Contractor

Respondent's answer contends that Claimant was not owed any wages because he was an independent contractor. This is an affirmative defense. Respondent bears the burden of proof on this issue, and did not provide any evidence to support this defense other than the assertion in the answer. Consequently, the forum looks to the credible evidence on the record to see if it overcomes Respondent's defense. *Id.*

This forum has adopted an "economic reality" test to determine whether a claimant is an employee or independent contractor under Oregon's minimum wage and wage collection laws. *In the Matter of Frances Bristow*, 16 BOLI 28, 37 (1997); *In the Matter of Geoffroy Enterprises, Inc.*, 15 BOLI 148 (1996) (relying on *Circle C Investments, Inc.*, 998 F2d 324 (5th Cir 1993)). The focal point of the test is "whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which she renders her services." *Geoffroy Enterprises, Inc.*, 15 BOLI at 164. The forum considers five factors to gauge the degree of the worker's economic dependency, with no single factor being determinative. These factors are:

- (1) The degree of control exercised by the alleged employer;
- (2) The extent of the relative investments of the worker and alleged employer;
- (3) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer;
- (4) The skill and initiative required in performing the job;
- (5) The permanency of the relationship. *Id.*

In this case, the preponderance of credible evidence on the whole record establishes the following:

(1) The degree of control exercised by the alleged employer

Respondent exercised extensive control over Claimant's work. He instructed Claimant when to report to work, when to go home, what jobs to perform, and when

to perform those jobs. He exercised control over Claimant in a wide-ranging way that indicates an employer-employee relationship.

(2) The extent of the relative investments of the worker and alleged employer

Respondent supplied the vehicle, phone, maps, and instructions that Claimant needed to perform his job. Claimant had no financial interest in the business; his only investment was his time. Claimant's lack of financial interest indicates an employee-employer relationship.

(3) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer

Respondent established the terms of the compensation agreement with Claimant; however, this agreement was illegal because it brought Claimant's rate of pay below the minimum wage. There was no opportunity for Claimant to suffer a profit or loss. This evidence shows an economic dependence by Claimant on Respondent's business and indicates an employee-employer relationship.

(4) The skill and initiative required in performing the job

Claimant had never performed the job of "spotter" before starting work for Respondent and began performing the duties of that job on his first day of work. Claimant was given specific instructions as to which specific property he was to repossess and the address that property could be located at. Claimant had very little opportunity to exercise initiative; his job was purely responsive. The job did not require any specialized skills that suggest the job was one performed by independent contractors. The lack of skill and initiative required of Claimant in performing his job indicate an employee-employer relationship.

(5) The permanency of the relationship

Claimant was hired for an indefinite period. No evidence suggests that Respondent hired Claimant for a temporary, limited period. Claimant worked for slightly more than two months before quitting. These facts indicate employee status.

Conclusion

Considering each factor of the economic reality test, the only conclusion possible is that Claimant was economically dependent upon Respondent's business. Accordingly, as a matter of law, he was an employee and not an independent contractor.

Payroll Deduction

Respondent contends in the answer that he was entitled to deduct \$100 from Claimant's earnings on account of an agreement between Claimant and Respondent that Claimant would repay \$100 based on damage caused to a tow truck by Claimant's son. ORS 652.610(3) prohibits employers from deducting any part of an employee's wage unless the employer is required to do so by law; the deductions are for the employee's benefit, in which case they must be authorized in writing by the employee and recorded in the employer's books; or the deductions are authorized by a collective bargaining agreement to which the employer is a party. There is no evidence on the record that any of these tests were met. Consequently, the \$100 deduction from Claimant's paychecks must be disallowed as a matter of law and repaid to Claimant. *See also In the Matter of Handy Andy Towing, Inc.*, 12 BOLI 284, 292-95 (1994).

Claimant's Wage Rate

Respondents and Claimant agreed that Claimant would be paid \$150 per week, regardless of the number of hours he actually worked. Respondents did not assert in the answer that Claimant fit into one of the exclusions set out in ORS 653.020, but did contend that Claimant was an independent contractor. The forum has already concluded that Claimant was an employee, not an independent contractor.

ORS 653.025 prohibits employers from paying their employees at a rate less than minimum wage for each hour of work time and sets the minimum wage at \$5.50

and \$6.00 per hour for the calendar years of 1997 and 1998, respectively. ORS 653.055(1) provides that "[a]ny employer who pays an employee less than the [minimum wage and overtime] is liable to the employee affected: (a) For the full amount of the wages, less any amount actually paid to the employee by the employer; * * * and (c) For civil penalties provided in ORS 652.150." ORS 653.055(2) states that "[a]ny agreement between an employee and an employer to work at less than the [minimum wage and overtime] is no defense to an action under subsection (1) of this section." Thus, the salary agreement between Respondent DeHart and Claimant is no defense to Respondent's failure to pay the minimum wage, and Respondent is liable for the statutory minimum wage for all hours worked by Claimant. *See also In the Matter of Diran Barber*, 16 BOLI 190, 198 (1997)

Penalty Wages

Awarding penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done, and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent, as an employer, had a duty to know the amount of wages due to his employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). Evidence established that Respondent intentionally failed to pay wages, and that he acted voluntarily and as a free agent. He must be deemed to have acted willfully under this test and thus is liable for penalty wages under ORS 652.150 as computed in Finding of Fact - The Merits # 18.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as a result of Respondent Leslie Elmer DeHart's violations of ORS 652.140(2), the Commissioner of the Bureau of Labor and Industries hereby orders LESLIE ELMER DeHART as

payment 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 Lester Dale Myer in the amount of TWO THOUSAND EIGHT HUNDRED FIFTY TWO DOLLARS AND FIFTY CENTS (2,852.50), less appropriate lawful deductions, representing \$1,518.50 in gross earned, unpaid, due, and payable wages; and \$1,334.00 in penalty wages; PLUS

a) Interest at the legal rate on the sum of \$1,518.50 from January 16, 1998, until paid; and interest at the legal rate on the sum of \$1,334.00 from February 16, 1998, until paid.

¹A guidebook that contained detailed maps of the Portland metropolitan area.

²The figure of \$2,420 was computed by multiplying 440 hours x \$5.50/hr., the minimum wage in Oregon for the calendar year 1997. *ORS 653.025*.

³The figure of \$373.50 was computed by multiplying 62.25 hours x \$6.00/hr., the minimum wage in Oregon for the calendar year 1998. *ORS 653.025*.

⁴Although the ALJ granted the Agency's motion to amend civil penalty wages sought to \$1,334.40, pursuant to agency policy, this figure must be rounded off to the nearest dollar, or \$1,334. *In the Matter of Staff, Inc.*, 16 BOLI 97, 119 (1997).

⁵In the answer, Respondent asserts the affirmative defense that Claimant was an independent contractor, and as such, not employed by Respondents. This issue is resolved in Claimant's favor in the next section of this Proposed Opinion.