

In the Matter of

ELISHA, INC.

Case No. 24-02

Final Order of Commissioner Dan Gardner

Issued December 23, 2003

SYNOPSIS

Four wage claimants were employed at Respondent's motel and lived at the motel during their employment. Respondent claimed all four were excluded from the coverage of Oregon's minimum wage laws under ORS 653.020(9) because they were engaged in the management or maintenance of Respondent's motel. Respondent claimed it was also entitled to a setoff for the fair market value of the claimants' lodging. The Commissioner found that none of the claimants was engaged in the management or maintenance of Respondent's motel, but allowed a setoff for lodging for two of the claimants. The Commissioner awarded a total of \$53,826.03 in unpaid wages and \$6,355 in penalty wages to claimants. ORS 653.020(9), ORS 652.140(2), *former* ORS 652.150, ORS 652.610; ORS 653.035(1); OAR 839-020-0004(17), OAR 839-020-0025(1)(2)(3) & (7), OAR 839-020-0042.

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 December 3, 4, and 5, 2002, at the State of Oregon offices located at 94145 Fifth Place, Gold Beach, Oregon. The hearing reconvened on January 17, 2003, at the Bureau's Eugene office, with Respondent participating by telephone. On that date, Francine Geers testified and the participants made closing arguments.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Peter McSwain, a case presenter employed by the Agency. Claimants Angel and Brenda Dominguez (hereafter "Claimants Dominguez" when referred to jointly and "A. Dominguez" and "B. Dominguez" when referred to individually), and David and Vicki

Thomas (“Claimants Thomas” when referred to jointly, and “D. Thomas” and “V. Thomas” when referred to individually) were present during their own testimony and at other times during the hearing. Claimants were not represented by counsel. Respondent was represented by attorney at law David S. Tilton. Carlata Bennett, Respondent’s registered agent, was present throughout the hearing as the individual designated to assist Respondent in the presentation of its case.

The Agency called as witnesses: Angel and Brenda Dominguez and David and Vicki Thomas, wage claimants; and Susan Foster Cohenⁱ, vocational consultant, as an expert witness (telephonic). Respondent called as witnesses: Carlata Bennett, Clinton Bennett, and Clifford Bennett, shareholders; Elizabeth Bennett, Respondent’s bookkeeper; and Francine Geers, vocational consultant, as an expert witness.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-7 (submitted or generated prior to hearing);
- b) Agency exhibits A-1 through A-9 (submitted prior to hearing), and A-10 (submitted at hearing);
- c) Respondent exhibits R-1 through R-21ⁱⁱ (submitted prior to hearing), and R-22 through R-25 (submitted at hearing).

Having fully considered the entire record in this matter, I, Dan Gardner, 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 August 10, 2000, Claimants A. and B. Dominguez and D. and V. Thomas filed wage claims with the Agency alleging that Respondent had employed them and failed to pay wages earned and due to them.

2) At the time they filed their wage claims, Claimants assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimants, all wages due from Respondent.

3) Claimants brought their wage claims within the statute of limitations.

4) On April 27, 2001, the Agency issued Order of Determination No. 00-3444 based upon the wage claim filed by the claimants A. and B. Dominguez and the Agency's investigation. The Order of Determination alleged that Respondent Elisha, Inc. dba Econo Lodge at Gold Beach owed a total of \$57,185.14ⁱⁱⁱ in unpaid wages and \$3,120^{iv} in 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 April 27, 2001, the Agency issued Order of Determination No. 00-3446 based upon the wage claim filed by Claimant D. Thomas and the Agency's investigation. The Order of Determination alleged that Respondent Elisha, Inc. dba Econo Lodge at Gold Beach owed a total of \$3,905.85 in unpaid wages for work performed from April 16, 1999, through July 31, 2000, and \$1,680 in 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.

6) On April 27, 2001, the Agency issued Order of Determination No. 00-3447 based upon the wage claim filed by Claimant V. Thomas and the Agency's investigation. The Order of Determination alleged that Respondent Elisha, Inc. dba Econo Lodge at Gold Beach owed a total of \$2,924.82 in unpaid wages for work performed from September 26, 1999, through June 3, 2000, including 26.5 hours of overtime, and \$1,692 in 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.

7) On May 4, 2001, Respondent filed an answer and request for hearing through counsel. Respondent denied the substantive allegations of all four wage claims and asserted its entitlement to reasonable attorney fees. Respondent alleged the following three affirmative defenses:

a) Claimants were employees who were domiciled at multiunit accommodations designed to provide other people with temporary or permanent lodging, for the purpose of maintenance, management or assisting in the management of same, and are therefore excluded from the provisions of ORS 653.010 to 653.261 pursuant to ORS 653.020(9).

b) Claimants had a rental agreement with Respondents in which the claimants agreed to allow a set-off for rent and the value of goods and services they received.

c) Respondent was financially unable to pay the claimants' wages or compensation for hours in which they did not actually work during the time they were employed.

8) On August 29, 2002, the Agency filed a "BOLI Request for Hearing" with the forum.

9) On August 29, 2002, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and the Claimants stating the time and place of the hearing as December 3, 2002, at the State of Oregon offices, 94145 Fifth Place, Gold Beach, 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.

10) On October 3, 2002, 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 and any wage and penalty calculations (for the Agency

only); a brief statement of any defenses to the claim (for Respondent only); and a statement of any agreed or stipulated facts. The forum ordered the participants to submit case summaries no later than November 22, 2002, and notified them of the possible sanctions for failure to comply with the case summary order.

11) Respondent filed its case summary, with attached exhibits, on November 21, 2002. The Agency filed its case summary, with attached exhibits, on November 22, 2002.

12) On November 25, 2002, the Agency filed a supplemental case summary stating that "Susan Foster, Certified Vocational Counselor, will be a witness for the wage claimants."

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

14) During the hearing, Respondent objected when the Agency called Susan Foster as an expert witness. Respondent's objection was two-fold. First, because the Agency had not named Foster as a witness in its initial case summary, and second, because the Agency's supplemental case summary failed to state that Foster was being called as an expert witness or state Foster's qualifications and the substance of the facts and opinions to which she was expected to testify. The ALJ ruled that Foster could testify, but that Respondent was entitled to a continuance for the purpose of providing the testimony of its own expert witness.

15) The hearing adjourned at approximately 2:30 p.m. on December 5, 2002, after the ALJ scheduled a conference call with Mr. Tilton and Mr. McSwain for December 9 to determine if Respondent wished to call an expert witness.

16) On December 9, 2002, the ALJ held a telephonic conference with Mr. McSwain and Mr. Tilton, and Tilton stated that Respondent would call an expert witness. Subject to confirmation of the availability of Respondent's expert witness, the hearing was tentatively scheduled to reconvene at 10:30 a.m. on January 17, 2003.

17) Respondent's expert witness testified and closing arguments were made on January 17, 2003. The evidentiary record of the hearing closed on January 17, 2003.

18) The ALJ issued a proposed order on February 25, 2003, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Respondent filed exceptions on March 4, 2003. Respondent's exceptions are discussed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

RESPONDENT AND THE BENNETT FAMILY

1) At all times material herein, Respondent Elisha, Inc. was an Oregon corporation doing business as Econo Lodge at Gold Beach in Gold Beach, Oregon, and an employer who suffered or permitted its employees, including Claimants, to work and engaged the personal services of one or more employees, including Claimants.

2) At all times material herein, Respondent was a motel and a multi-unit accommodation within the meaning of ORS 653.020(9) with 38 rooms available to rent to the public.

3) At all times material herein, Carlata Bennett, Don Bennett, Clinton Bennett, Clifford Bennett, and Dory Bennett were Elisha, Inc.'s shareholders.

4) During Claimants' employment with Respondent, Respondent had two payroll periods every month. The first was from the 1st to the 15th, the second from the 16th to the end of the month.

5) During Claimants' employment with Respondent, Respondent's employees were allowed to have a guest stay for free in Respondent's rooms if there were vacancies and the employees cleaned the room.

6) In late 1998, Respondent chose to become a franchise of "Choice Motels." This required considerable remodeling to meet franchise standards. Prior to Claimants' employment, Respondent remodeled 20 of its rooms to meet franchise standards. In the summer of 1999, Respondent remodeled the rest of its rooms to meet franchise standards. Don Bennett and Carlata Bennett, whose primary residence is in Willamina, Oregon, lived in Gold Beach most of the summer of 1999 during the remodeling, moving back to Willamina in October 1999.

7) During Claimants' employment with Respondent, Don and Clifford Bennett did all the remodeling work, construction, plumbing, electrical work, carpentry, and repair work on Respondent's facility.

8) During Claimants' employment, Clifford Bennett lived in a house close to Respondent's motel, oversaw housekeeping at Respondent's motel, and made sure that everyone was doing their job and "that operations flowed smoothly."

9) On July 1, 2000, Clinton Bennett assumed the management duties that Clifford Bennett had been performing.

10) In 1999 and 2000, the Bennett family held periodic meetings to discuss the status of Respondent's business and to make future plans for the business. The four wage claimants did not attend these meetings and were not part of the decision-making process concerning Respondent's business operation. All decisions concerning setting motel rates and any significant expense to be incurred by Respondent were made by the Bennett family. Respondent's advertising was done by Elizabeth or Clifford Bennett. Respondent's bookkeeping was done by Elizabeth Bennett. After

Labor Day 1999, Carlata Bennett phoned Clifford Bennett and Claimants Dominguez almost every day to see how things were going at the motel regarding the number of guests, how many maids were used that day, and whether any repairs were needed.

11) The four wage claimants were supervised by and reported to one or more members of the Bennett family throughout their employment with Respondent.

12) At Christmas 1999, the entire Bennett family went to Bend for Christmas vacation and Claimants Dominguez and Thomas were left in charge. Their job was to just to keep things going, and they had no authority to change Respondent's policies.

13) "Big" motels have three regular eight-hour shifts for their employees at nights. Those employees do not usually live on the motel's premises. The employees stay up all night, stay in uniform, and work all night long by the hour. Smaller "mom and pop" motels^v typically offer a "package deal" to night shift employees because they can't afford to pay hourly wages to employees who only check in a few guests and do no other work during the night.

14) In 1999, Respondent suffered a net loss of \$21,801. Respondent spent \$39,966 in salaries and wages (less employment credits), \$12,062 on repairs and maintenance, \$2,597 on rents, \$30,618 on taxes and licenses, and \$11,428 on advertising.

15) In 2000, Respondent suffered a net loss of \$22,354. Respondent spent \$37,636 in salaries and wages (less employment credits), \$22,456 on repairs and maintenance, \$3,906 on rents, \$58,666 on taxes and licenses, and \$12,863 on advertising.

CLAIMANTS THOMAS

16) In the spring of 1999, Claimants Thomas were living in one of Respondent's units and paying rent to Respondent. At the time, V. Thomas was

working as a housekeeper at another local motel. Respondent needed another housekeeper and hired V. Thomas to perform that job, agreeing to pay her \$7.25 per hour. As a housekeeper, V. Thomas stripped and cleaned rooms, emptied trash, and made beds.

17) On May 17, 1999, Claimants Thomas agreed with Carlata Bennett and her family to a “package wrap around”^{vi} deal. There were several parts to the agreement. First, D. Thomas was hired as groundskeeper, a job that had previously been done by Clifford or Clinton Bennett, at the agreed rate of \$7.00 per hour. Second, Claimants Thomas moved into Room 245, a larger unit with two rooms that included a full kitchen, bathroom, and ocean view. It was agreed that Claimants Thomas would pay \$750 per month rent for Room 245, which included laundry and all utilities, as well as an ocean view. It was further agreed that Claimants Thomas would each work for half the rent, so long as D. Thomas worked enough hours to cover half of the rent. Claimants Thomas lived in Room 245 from May 17, 1999, until May 25, 2000.

18) While Claimants Thomas occupied Room 245, its standard overnight rental rate was as follows: May 1999 - \$54.95; June 1999 - \$74.95; July/August 1999 - \$98.95; September 1999 - \$74.95; October 1999 through May 25, 2000 - \$54.95. The value of Room 245 between June 5, 1999, and April 1, 2000, if rented by guests on a nightly basis, was \$24,424.10.

19) Claimants Thomas’s rent was overdue when they agreed to the “package wrap around deal” with the Bennetts, and Respondent would have evicted them in the absence of their “deal.”

20) D. Thomas worked as Respondent’s groundskeeper until on or about May 7, 2000, when he voluntarily quit Respondent’s employment. His job duties included mowing the lawn, caring for Respondent’s plants, pruning and shaping trees, picking up

branches off the ground, raking and picking up leaves, spraying weeds, weeding, hosing off the parking lot, and pruning ivy. He occasionally stripped rooms or did laundry when he was caught up with the groundskeeping or when Respondent's housekeepers were really busy and was paid \$6.50 per hour for this work. He did not supervise anyone, lacked the authority to hire or fire, and did no repair work or work to make Respondent's physical property operate more efficiently. If he observed maintenance problems in Respondent's rooms, he noted them on a report to Don or Cliff Bennett.

21) While employed by Respondent, D. Thomas performed 1216.95 hours of work at \$7 per hour, earning \$8,518.65 in gross wages. He also performed 60.48 hours of work stripping rooms at \$6.50 per hour, earning \$393.12 in gross wages. Altogether, D. Thomas worked 1,277.43 hours and earned \$8,911.77 in gross wages.

22) From May 17 to November 14, 1999, Respondent deducted \$750 from the paychecks of Claimants Thomas for rent. From November 15, 1999, until May 15, 2000, Respondent deducted rent from D. Thomas's paychecks in the amount of \$750 per month, less the rent credit earned by V. Thomas for her night shift work.^{vii}

23) Respondent paid D. Thomas a total of \$5,217.60 by check or cash during his employment. An additional \$3,607.60 was deducted from his pay as rent. Altogether, he was paid \$8,825.20 by check, cash, or rent credit. The difference between the wages earned by D. Thomas (\$8,911.77) and gross wages and rent credit he received (\$8,825.20), is \$86.57.

24) Penalty wages for D. Thomas are computed as follows: $\$8,911.77$ (*total earned during wage claim period*) \div 1216.95 (*total number of hours worked during wage claim period*) = $\$6.98$ per hour (*average hourly wage*) \times 8 hours = $\$55.84$ (*average daily wage*) \times 30 days = $\$1,675$.

25) V. Thomas worked as a housekeeper for Respondent until November 15, 1999. She was Respondent's "head housekeeper" for a period of time before November 15, 1999,^{viii} but was still paid \$7.25 per hour for her housekeeping work. As head housekeeper, she decided how many rooms needed cleaning and divided the rooms between the housekeepers at work that day, then cleaned rooms herself and inspected the rooms cleaned by other housekeepers. As head housekeeper, she spent 75 percent of her time cleaning rooms.

26) On November 15, 1999, V. Thomas's job duties changed. Through the Jobs Plus program, she began working as Respondent's daytime front desk clerk, for which she was paid \$6.50 per hour, plus working office night shifts in relief of A. Dominguez. As front desk clerk, she checked guests in, assigned rooms, took reservations, balanced the till, and added up the hours on her timecards and timecards of the other housekeepers. She performed no repairs or work to make Respondent's physical property operate more efficiently, supervised no one, and had no authority to hire or fire. She also continued to do occasional cleaning at \$7.25 per hour. When she worked night shift, she was Respondent's only employee on duty and worked in the office from 6 p.m. until approximately 10 p.m.,^{ix} then closed the office, balanced the till, and took the night bell to her room for the night. While she was in the office, she performed the same duties that Claimants Dominguez did during their night shift.^x After 10 p.m., she could sleep but remained on call to wake up and assist guests who rang Respondent's night bell. The night bell was rarely rung after the office closed and she did not check in any guests after the office was closed. In the morning, she also prepared continental breakfast, working until 7 a.m. She worked alone during these shifts. For each night shift she worked, Respondent agreed to and did pay her a 2.5 percent commission for every room she rented and credited \$55 towards her rent, in

lieu of pay. V. Thomas did this night shift work until May 15, 2000, working 27 night shifts in all.^{xi} She received no pay for this night shift work other than \$391.40 in commissions and \$1485 (27 night shifts x \$55 = \$1485) in rent credits.

27) V. Thomas was paid in full for her housekeeping work and for her work as daytime front desk clerk.

28) V. Thomas voluntarily quit Respondent's employment on May 25, 2000.

29) V. Thomas earned \$2,281.50 for her 27 night shifts (27 shifts x 13 hours = 351 hours x \$6.50 per hour = \$2,281.50). She was paid a total of \$391.40 in commissions and \$1,485 in rent credits.

30) Penalty wages for V. Thomas are computed as follows: 30 days x 8 hours = 240 x \$6.50 per hour = \$1,560.

31) Claimants Thomas had two children who occupied various separate rooms on a number of occasions between October 4, 1999, and May 25, 2000. Claimants Thomas cleaned the children's rooms after each occupancy.

32) Claimants Thomas never signed an authorization for Respondent to make any deductions from their wages.

CLAIMANTS DOMINGUEZ

33) In June 1999, Respondent advertised in the newspaper for a "couple to work night shift." On June 5, 1999, Claimants Dominguez, a married couple, responded to Respondent's ad. Carlata and Don Bennett interviewed and hired them that same day.

34) Claimants Dominguez were hired to work the night shift in Respondent's office six nights a week. Their primary duty was to check in guests.

35) The Bennetts agreed to pay Claimants Dominguez a "package deal" that consisted of a 2.5 percent commission for all guests whom they checked in, plus free

use of an apartment adjoining the motel office, paid utilities, including cable television and local telephone calls, and free use of Respondent's laundry facilities every Friday in lieu of \$6.50 per hour. The Bennetts did not discuss the value of the "package deal" with Claimants Dominguez. At hearing, Respondent presented evidence that the total value of the "package deal" was \$1195 per month, and that the room occupied by A. and B. Dominguez rented for \$40 per night from October 4, 1999, through March 27, 2000.

36) Before Respondent hired Claimants Dominguez, Respondent had employed only one person to work the night shift. From that experience, the Bennetts found that one person on night shift created a problem because of the stress caused by the need for one person to be on the premises at all times. They concluded that hiring a couple might work better.^{xii} Carlata and Don Bennett suggested to Claimants Dominguez that one of them get another job so they could earn enough money to support their family, as Respondent's job didn't pay enough to support a family.

37) Crystal Ripley, Respondent's office manager, and the Bennetts provided on the job training to Claimants Dominguez during their first two to three weeks on the job.

38) Throughout their employment with Respondent, Claimants Dominguez performed the following duties on night shift: showing rooms to potential guests, having guests fill out registration forms, taking guests' money, answering Respondent's telephone and taking telephone reservations from guests, logging reservations into Respondent's computer (A. Dominguez only), assisting guests in checking out, making up a "maid sheet" in the morning for Respondent's head housekeeper showing the occupancy status of Respondent's rooms, providing guests with extra towels or pillows, giving guests toilet plungers or "plunging" toilets for them, replacing light bulbs,

replacing televisions that did not work, balancing out Respondent's till each night before leaving the office, and preparing continental breakfast in the morning. On each night shift they worked, Claimants Dominguez were Respondent's only employees on duty.

39) During their night shift, one or both Claimants Dominguez were always in Respondent's office from the time it started until around 10 p.m., when they locked the office. They balanced Respondent's till after the office was closed, then went into their apartment for the night. They kept a bell in their room and were on call to assist guests who had already checked in or prospective guests who rang Respondent's night bell until relieved in the morning by one of the Bennetts or a day shift desk clerk. After 11 p.m., Claimants Dominguez could sleep, but at least one had to be on the premises at all times during their work shift and within hearing range of the bell, and one had to respond to the bell. They usually took turns in answering the bell. Another employee took the receivables that came in during the night shift to the bank the next morning.

40) After the office closed, Claimants Dominguez were seldom called on to assist guests who had already checked in. They checked in a total of 82 guests after the office closed between June 12, 1999 and July 11, 2000.

41) Shortly after Claimants Dominguez were hired, the Bennetts gave them the option of cleaning rooms and doing laundry at \$6.50 per hour during the day to earn additional money. Claimants Dominguez often exercised this option and were paid \$6.50 per hour for every hour that they performed this work.

42) Claimants Dominguez's night shift work started at 6 p.m. in June 1999, at 5 p.m. in July and August 1999, and at 6 p.m. after Labor Day 1999. It ended at 10 p.m. from June 5 through June 11, 1999; at 6:30 a.m. from June 12, 1999, until the end of September 1999; and at 9 a.m. from October 1-31, 1999.

43) When business was brisk, Claimants Dominguez often simultaneously performed night shift duties. For example, while A. Dominguez was helping a guest in the office, B. Dominguez might be helping a guest on the phone.

44) Throughout the employment of Claimants Dominguez, Respondent's office door was locked from 10 p.m. until 6 a.m. in the summer, and 9 p.m. until 6 a.m. in the winter, when the office opened for continental breakfast. However, Respondent kept its "open" sign lit 24 hours a day, even if there were no vacancies, so that any guest who needed assistance after office hours could get help.

45) One of the Bennetts began preparing continental breakfast at 6:30 a.m. and opened Respondent's office at 7 a.m. between June 5 and the end of September 1999.

46) Claimants Dominguez did no plumbing, electrical work, carpentry, or other types of construction, repairs, or work to make Respondent's physical property operate more efficiently. On one occasion, A. Dominguez painted a room during Respondent's remodeling project.

47) From October 1 until October 31, 1999, A. Dominguez or B. Dominguez usually prepared continental breakfast and were responsible for Respondent's guests until 9 a.m.

48) Claimants Dominguez had some authority to negotiate room rates, but were only authorized to go as low as \$49.99 in the summer and \$29.99 in the winter. Claimants Dominguez lacked the authority to change or ignore any of Respondent's other policies.

49) Claimants Dominguez had the authority to refuse to rent to potential guests.

50) If a guest complained about his or her room, Claimants Dominguez had the authority to move them to another room, which could include an upgrade.

51) While Claimants Dominguez were employed by Respondent, the head housekeeper would bring in a list of supplies needed by the motel and put it in the office. Outside salesmen from janitorial companies regularly came to Respondent's office and picked up the lists from the employee on duty in the office. The salesmen then ordered the supplies and had them delivered to Respondent. Cliff and Beth Bennett purchased the food supplies for Respondent's continental breakfasts at Costco, except for milk, which was purchased out of town by the Bennetts.

52) When Claimants Dominguez called in housekeepers in the morning, they relied on Respondent's set policy that one housekeeper was to be called in for every ten rooms that needed cleaning.

53) B. Dominguez voluntarily quit Respondent's employment on October 31, 1999, but continued living with A. Dominguez at Respondent's apartment.

54) From November 1, 1999, through July 11, 2000, A. Dominguez performed the same night shift duties that he and B. Dominguez had previously performed together, including preparing continental breakfast.

55) There was no evidence presented to indicate that Claimants Dominguez had any supervisory authority, including the authority to hire and fire, during their employment with Respondent.

56) For three months during his employment with Respondent, A. Dominguez went to Taekwondo classes in Brookings twice a week with Clifford Bennett, leaving for class at 4:45 p.m., and arriving back at Respondent's motel at about 7 p.m.^{xiii}

57) The value of the room occupied by A. and B. Dominguez between June 5, 1999, and April 1, 2000, if rented by guests on a nightly basis, was \$7,240.

58) Claimants Dominguez continued living in Respondent's apartment until April 1, 2000, at which time they rented another apartment in Gold Beach for \$350 per month. Effective July 12, 2000, A. Dominguez voluntarily quit Respondent's employment. Between April 1 and July 11, 2000, he was required to sleep in his former apartment adjoining Respondent's office during his night shift. He did not live in that apartment during the day.

59) Pursuant to Respondent's policy,^{xiv} Claimants Dominguez's children lived rent-free in Respondent's vacant rooms during a large part of A. Dominguez's employment with Respondent. Claimants Dominguez stripped and cleaned these rooms after use by their children. The room occupied by Claimants Dominguez's oldest son could not be rented because the plumbing did not work.

60) Respondent did not create or maintain a record of the hours worked by Claimants Dominguez on night shift, and Claimants Dominguez did not maintain a contemporaneous record of the hours that they worked. However, Respondent did maintain a record showing the time that persons working night shift during the employment of Claimants Dominguez "balanced out" each night and the identity of that person. The forum has relied on Respondent's record to determine the number of night

shifts worked by Claimants Dominguez. Where Respondent's record does not identify the employee who worked a particular night and Claimants Dominguez allege they worked that night, the forum has credited them as having worked that night.

61) Claimants Dominguez worked the following number of night shifts between June 5 and October 31, 1999: June (23), July (27), August (27), September (25), and October (27), for a total of 129 night shifts.

62) The basic night shift schedule worked by Claimants Dominguez during their joint employment was the following: June 5 to June 11, 1999 (6 p.m. to 10 p.m.); June 12 to July 2, 1999 (6 p.m. – 6:30 a.m./12.5 hours per shift); July 3 – October 1, 1999 (5 p.m. – 6:30 a.m./13.5 hours per shift); and October 2 to October 31, 1999 (6 p.m. – 9 a.m./15 hours per shift). Where the calendar of hours worked created by Claimants Dominguez indicated fewer hours on a shift, the forum has used the lesser figure in its calculations of their hours worked.

63) Claimants Dominguez each worked the following hours on night shift in each workweek^{xv} between June 5 and October 31, 1999: June 5 -11 (29); June 12-18 (75); June 19-25 (75); June 26 – July 2 (75); July 3-9 (78); July 10-16 (91); July 17-23 (91); July 24-30 (78); July 31-August 6 (78); August 7-13 (91); August 14-20 (52); August 21-27 (91); August 28-September 3 (78); September 4-10 (78); September 11-17 (91); September 18-24 (78); September 25-October 1 (91); October 2-8 (82); October 9-15 (82); October 16-22 (82); October 23-29 (82); October 30-31 (30).

64) B. Dominguez worked 859 hours of straight time and 819 hours of overtime on night shift between June 5 and October 31, 1999. Calculated at \$6.50 per hour, she earned \$5,583.50 for her straight time work. Calculated at \$9.75 per hour, she earned \$7,985.25 for her overtime work. In total, she earned \$13,568.75. The only pay she received for this work was \$454.40 in commissions.

65) A. Dominguez worked the following number of night shifts between November 1, 1999, and July 11, 2000: November (21), December (22), January (22), February (26), March (26), April (23), May (24), June (23), and July (7), for a total of 194 night shifts.

66) A. Dominguez's basic night shift work schedule between November 1, 1999, and July 11, 2000, was 6 p.m. to 9 a.m., for a total of 15 hours per shift. Where the calendar of hours worked created by A. Dominguez indicates fewer hours per shift, the forum has used the lesser figure in its calculations of his hours worked.

67) A. Dominguez worked the following hours on night shift in each workweek from November 1, 1999, through July 11, 2000: November 1-5 (45)^{xvi}; November 6-12 (73); November 13-19 (58); November 20-26 (73); November 27-December 3 (58); December 4-10 (58); December 11-17 (73); December 18-24 (88); December 25-31 (88); January 1-7 (88); January 8-14 (88); January 15-21 (88); January 22-28 (58); January 29-February 4 (73); February 5-11 (73) February 12-18 (103); February 19-25 (103); February 26-March 3 (88); March 4-10 (88); March 11-17 (103); March 18-24 (73); March 25-31 (103); April 1-7 (88); April 8-14 (88); April 15-21 (73); April 22-28 (58); April 29-May 5 (73); May 6-12 (88); May 13-19 (88); May 20-26 (73); May 27-June 2 (88); June 3-9 (88); June 10-16 (88); June 17-23 (88); June 24-30 (88); July 1-7 (73); July 8-14 (58).

68) In total, A. Dominguez worked 2,269 hours of straight time and 2,289 hours of overtime on night shift between June 5, 1999, and July 11, 2000. Calculated at \$6.50 per hour, he earned \$14,748.50 for his straight time work. Calculated at \$9.75 per hour, he earned \$22,317.75 for his overtime work. In total, he earned \$37,066.25.

69) Respondent paid A. Dominguez \$798.32 in commissions for his night shift work in 1999, and \$1,140.52 in commissions for his night shift work in 2000, for a total of \$1,938.84.

70) On or about May 15, 2000, A. Dominguez gave two weeks' notice to Respondent and Respondent placed an ad in the newspaper for a replacement. A week later, A. Dominguez asked for his job back. He also asked for a \$350 raise for his night shift work to pay the rent on the Dominguez's new apartment, to which the Bennetts agreed. On May 20, 2000, Respondent gave A. Dominguez a \$350 paycheck. On June 20, 2000, Respondent gave A. Dominguez another \$350 paycheck.

71) On July 16, 2000, Respondent issued a final paycheck to A. Dominguez in the amount of \$146.77.

72) Respondent owes B. Dominguez \$13,114.35 in unpaid wages that are due and owing.

73) Respondent owes A. Dominguez \$35,127.41 in unpaid wages that are due and owing.

74) Respondent owes Claimants Dominguez each \$1,560 in penalty wages, computed as follows: $30 \text{ days} \times 8 \text{ hours} = 240 \times \$6.50 \text{ per hour} = \$1,560$.

75) Claimants Dominguez never signed an authorization for Respondent to make any deductions from their wages.

EVIDENCE PRESENTED BY EXPERT WITNESSES

76) The U.S. Department of Labor publishes a document entitled "Dictionary of Occupational Titles" ("DOT"). It provides a detailed description of various occupations and is relied on as the "bible" by vocational rehabilitation counselors in determining the suitability of a particular occupation for clients. DOT's various job

descriptions provide a summary of work duties and activities and reflect jobs that actually exist. Many of them overlap.

77) DOT's job descriptions all contain an SVP ("specific vocational preparation") rating, from 1-10. The SVP is the combined amount of training and work experience generally necessary to acquire the skills to perform the described job. However, the fact that a person's combined training and work experience rates an SVP lower than the SVP rating for any particular DOT job description does not per se mean that they will be unable to perform that job.

78) The DOT contains a job description (187.117-038) for "Manager, Hotel Or Motel," that states, in pertinent part:

"Manages hotel or motel to ensure efficient and profitable operation: Establishes standards for personnel administration and performance, service to patrons, room rates, advertising, publicity, credit, food selection and service, and type of patronage to be solicited. * * * Allocates funds, authorizes expenditures, and assists in planning budgets for departments. Interviews, hires, and evaluates personnel. Answers patrons' complaints and resolves problems. Delegates authority and assigns responsibilities to department heads. Inspects guests' rooms, public access areas, and outside grounds for cleanliness and appearance. Processes reservations and adjusts guests' complaints when working in small motels or hotels."

This DOT specifies an SVP time of "7." An SVP of "7" requires 2-4 years of vocational preparation time.

79) The only two duties contained in DOT's job description for "Manager, Hotel or Motel" that were performed by Claimants Dominguez or V. Thomas on night shift were: "Answers patrons' complaints and resolves problems" and "Processes reservations and adjusts guests' complaints when working in small motels or hotels."

80) The DOT contains a job description (238.367-038) for "Hotel Clerk" that states, in pertinent part:

"Performs any combination of following duties for guests of hotel or motel: Greets, registers, and assigns rooms to guests. Issues room key * * * Transmits and receives messages, using telephone or telephone

switchboard. Answers inquiries pertaining to hotel services; registration of guests; and shopping, dining, entertainment, and travel directions. Keeps records of room availability and guests' accounts, manually or using computer. Computes bill, collects payment, and makes change for guests. * * * Makes and confirms reservations. May post charges, such as room * * * or telephone, to ledger, manually or using computer. * * *

This DOT specifies an SVP of "4." An SVP of "4" indicates 3-6 months of vocational preparation time.

81) While working night shift, Claimants Dominguez and V. Thomas performed all the duties listed in the DOT's "Hotel Clerk" job description.

82) The DOT contains a job description (406.684-014) for "Groundskeeper, Industrial Commercial" that states, in pertinent part:

"Maintains grounds of * * * commercial * * * property, performing any combination of following tasks: Cuts lawns, using hand mower or power mower. Trims and edges around walks, flower beds, and walls, using clippers, weed cutters, and edging tools. Prunes shrubs and trees to shape and improve growth or remove damages leaves, branches, or twigs, using shears, pruners, or chain saw. Sprays lawn, shrubs, and trees with fertilizer, herbicides, and insecticides, using hand or automatic sprayer. Rakes and bags or burns leaves, using rake. Cleans grounds and removes litter, using spiked stick or broom. * * * Plans grass, flowers, trees, and shrubs, using gardening tools. Waters lawn and shrubs, using hose or by activating fixed or portable sprinkler system. * * * May perform variety of laboring duties, common to type of employing establishment."

This DOT specifies an SVP of "3." An SVP of "3" indicates 1-3 months of vocational preparation time.

83) D. Thomas's duties as groundskeeper were among the duties listed in the DOT description for "Groundskeeper, Industrial Commercial."

84) Conducting or supervising something as a business, especially the executive function of planning, organizing, coordinating, directing, controlling, and supervising the business activity with responsibility for results, is consistent with vocational experts' understanding of what management is and with job descriptions of management positions set out in the DOT. An assistant manager does the same type

of duties, with less responsibility. A managerial position is one that ultimately makes decisions, that exercises leadership, allocates human resources, handles hiring and firing, and impacts the financial decisions of the business.

85) No evidence was presented related to training and work experience of D. Thomas and Claimants Dominguez prior to their employment with Respondent. V. Thomas was employed as a motel maid at the time Respondent hired her, but no other evidence was presented related to her prior training and work experience.

CREDIBILITY FINDINGS

86) Angel Dominguez's testimony was credible concerning his daily work schedule and the duties that he performed. However, Respondent's contemporaneous documentation showing the night shifts Dominguez worked was a more reliable record than the record of shifts worked that Dominguez created after his employment, and the forum has relied on Respondent's documentation wherever it conflicted with Dominguez's record.

87) Brenda Dominguez's testimony was credible concerning her daily work schedule and the duties that she performed. However, Respondent's contemporaneous documentation showing the night shifts B. Dominguez worked was a more reliable record than the record of shifts worked that Angel Dominguez created on B. Dominguez's behalf after her employment, and the forum has relied on Respondent's documentation wherever it conflicted with Dominguez's record.

88) Vicki Thomas's testimony was extremely confusing concerning the method by which she kept her timecards and the means by which she calculated her unpaid wages. She also testified, in contrast to A. Dominguez's credible testimony, that A. Dominguez worked the day shift immediately following her night shift. Her testimony regarding her own duties on night shift between 6 p.m. and 7 a.m., the basis of her

wage claim, was consistent and unimpeached and the forum has credited it in its entirety. However, Respondent's contemporaneous documentation showing the night shifts she worked was a more reliable record than the record of shifts worked that Angel Dominguez created on her behalf after her employment, and the forum has relied on Respondent's documentation to determine the number of night shifts she worked. The forum has also credited Carlata Bennett's testimony that V. Thomas was credited \$55 per night shift towards her rent over V. Thomas's that she was only credited \$50 based on documentation contained on V. Thomas's timecards.

89) David Thomas testified credibly concerning the number of days he worked per week, his job duties, and the extent of his authority and responsibilities. However, the calendar of hours worked that A. Dominguez created on his behalf contemporaneous with the filing of his wage claim was only an estimate and differed from the work time shown on his timecards. The forum has relied on Respondent's summary of D. Thomas's timecards to establish the exact number of hours he worked and the amounts he was paid.

90) Carlata Bennett was a credible witness and the forum has credited her testimony except on one issue, the extent of authority Claimants Dominguez had to lower room rents. This was based on her conflicting assertions that Claimants Dominguez had unlimited authority to lower room rents to whatever level it took to keep a guest from taking their business to another motel and that they had the authority to lower room rents "within reason" to keep prospective guests.

91) Clinton and Elizabeth Bennett were credible witnesses and the forum has credited their testimony in its entirety.

92) Clifford Bennett's testimony that Claimant A. Dominguez was given the option of doing groundskeeping was inconsistent with the testimony of every other

witness. Also, his testimony that Claimants Dominguez had “no limitations” on their authority to lower room rates to keep customers was not credible. The forum has credited the remainder of his testimony.

93) Susan Foster and Francine Geers, both vocational rehabilitation counselors, testified as expert witnesses for the Agency and Respondent, respectively, as to the proper job classification of the four wage claimants. Their qualifications as vocational experts were roughly equivalent. Foster testified that Claimants Dominguez and V. Thomas did not manage or assist in managing and that D. Thomas did not perform maintenance. As might be expected, Geer expressed opposite opinions. Although both articulated rational reasons to support their opinions, the forum has given more weight to Foster’s testimony for two primary reasons. First, Geer’s opinion focused primarily on job descriptions in the DOT, and concluded that Claimants Dominguez and V. Thomas were engaged in management or assisting management because they performed several functions listed in the DOT’s description for “Manager, Hotel Or Motel.” In contrast, Foster’s opinion was based on her expert understanding of “management” in the real world of work and in the DOT. She clearly articulated the duties and responsibilities that would justify classifying an employee as engaging in “management” or “assisting in management” and the reasons why Claimants Dominguez and V. Thomas did not fit into those categories. Second, Geer testified that the “purpose” of a maintenance person living on a motel’s premises was so that he or she could perform repairs whenever needed. There was no testimony that D. Thomas ever performed any repairs. Geer also testified that a “live-in” manager would make management decisions and would have to be able to deal with any issue that arose. This does not comport with the actual job duties and discretion allotted to Claimants Dominguez and V. Thomas during night shift.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Elisha, Inc. was an Oregon corporation doing business as Econo Lodge at Gold Beach in Gold Beach, Oregon, and an employer who suffered or permitted its employees, including Claimants, to work and engaged the personal services of one or more employees, including Claimants.

2) At all times material herein, Respondent was a motel and a multi-unit accommodation within the meaning of ORS 653.020(9) with 38 rooms available to rent to the public.

3) Claimant V. Thomas was employed by Respondent from spring 1999 until May 25, 2000, when she quit Respondent's employment. From November 15, 1999, through May 15, 2000, she worked 27 shifts as night shift clerk. On each of these shifts, she was Respondent's only employee on duty and worked in Respondent's office from 6 p.m. until approximately 10 p.m. before returning to her room in Respondent's motel for the night. After 10 p.m. she was free to sleep, but was on call to wake up and assist any guests who rang Respondent's night bell until 7 a.m. the next morning. She was not a manager and did not assist in the management of Respondent's motel. She performed no repairs or work to make Respondent's physical property operate more efficiently. During her 27 night shifts, she earned \$2,281.50 and received \$1485 in rent credits and \$391.40 in commissions.

4) D. Thomas worked as Respondent's groundskeeper from May 17, 1999, until on or about May 7, 2000, when he quit Respondent's employment. His primary job duties were those of a laborer and he did not perform any repairs or work to make Respondent's physical property operate more efficiently. He did not manage or assist in the management of Respondent's business. He earned \$8,911.77 in gross wages and received \$8,825.20 in gross wages and rent benefits.

5) On May 17, 1999, Claimants Thomas and Respondent agreed that Claimants Thomas would pay \$750 per month rent for the apartment that they occupied in Respondent's motel, which included all utilities, and that Respondent would deduct this amount from their paychecks. Subsequently, V. Thomas agreed to work as relief clerk on night shift in exchange for a \$55 rent credit for each night shift and a commission on each room she rented.

6) Respondent owes V. Thomas \$1,890.10 in unpaid, due and owing wages for her night shift work.

7) Respondent owes D. Thomas \$3,694.17 in unpaid, due and owing wages.

8) Respondent's failure to pay V. Thomas all wages due and owing was willful and Respondent owes V. Thomas \$1,560 in penalty wages.

9) Respondent's failure to pay D. Thomas all wages due and owing was willful and Respondent owes D. Thomas \$1,675 in penalty wages.

10) Respondent hired both Claimants Dominguez on June 5, 1999, to work Respondent's night shift in Respondent's office, with the primary duty of checking in guests. Respondent agreed to pay Claimants Dominguez a 2.5 percent commission for all guests whom they checked in, plus free use of an apartment adjoining the motel office, paid utilities, except for their telephone, and free use of Respondent's laundry facilities every Friday in lieu of \$6.50 per hour.

11) The specific duties performed by Claimants Dominguez on night shift included showing rooms to potential guests, having guests fill out registration forms, taking guests' money, answering Respondent's telephone and taking telephone reservations from guests, logging the reservations into Respondent's computer, assisting guests in checking out, making up a "maid sheet" in the morning for Respondent's head housekeeper showing the occupancy status of Respondent's

rooms, providing guests with extra towels or pillows, giving guests toilet plungers or “plunging” toilets for them, replacing light bulbs, replacing televisions that did not work, balancing out Respondent’s till each night before leaving the office, and preparing continental breakfast in the morning. On each night shift they worked, Claimants Dominguez were Respondent’s only employees on duty.

12) Between June 5 and October 31, 1999, Claimants Dominguez were jointly responsible for night shift duties from the time their night shift started until it ended in the morning. They kept a bell in their room and were on call to assist guests who rang Respondent’s night bell until relieved by the day shift office clerk or one of the Bennetts each morning. They could sleep after 11 p.m., but at least one had to be on the premises at all times during night shift and within hearing range of the bell, and one of them had to respond to the bell. They were required to sleep in their apartment in Respondent’s motel.

13) The night shift worked by A. and B. Dominguez extended from 6 p.m. until 10 p.m. from June 5-11, 1999; from 6 p.m. until 6:30 a.m. from June 12 to September 30, 1999; and from 6 p.m. until 9 a.m. from October 1 until October 31, 1999.

14) B. Dominguez quit Respondent’s employment on October 31, 1999, but continued living in the apartment with A. Dominguez. From November 1, 1999, through July 11, 2000, the night shift worked by A. Dominguez extended from 6 p.m. until 9 a.m. A. Dominguez quit Respondent’s employment on July 11, 2000.

15) Claimants Dominguez did not perform any repairs or work to make Respondent’s physical property operate more efficiently and did not manage or assist in the management of Respondent’s business.

16) B. Dominguez worked 859 hours of straight time and 819 hours of overtime on night shift between June 5 and October 31, 1999. Calculated at \$6.50 per

hour, she earned \$5,583.50 for her straight time work. Calculated at \$9.75 per hour, she earned \$7,985.25 for her overtime work. In total, she earned \$13,568.75. The only pay she received for this work was \$454.40 in commissions, leaving \$13,114.35 in unpaid wages that are due and owing.

17) A. Dominguez worked 2,269 hours of straight time and 2,289 hours of overtime on night shift between June 5, 1999, and July 11, 2000. Calculated at \$6.50 per hour, he earned \$14,748.50 for his straight time work. Calculated at \$9.75 per hour, he earned \$22,317.75 for his overtime work. In total, he earned \$37,066.25. Respondent paid A. Dominguez \$798.32 in commissions for his night shift work in 1999, and \$1,140.52 in commissions for his night shift work in 2000, for a total of \$1,938.84. Respondent owes A. Dominguez \$35,127.41 in unpaid wages that are due and owing.

18) Respondent's failure to pay all wages due and owing to A. and B. Dominguez was willful and Respondent owes Claimants Dominguez each \$1,560 in penalty wages.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent Elisha, Inc. was an employer and Claimants Dominguez, and Claimants Thomas were employees subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and 653.010 to 653.261. During all times material, Respondent employed Claimants.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414, ORS 653.040, ORS 653.256, ORS 653.261.

3) Respondent violated ORS 652.140(2) by failing to pay Claimant David Thomas all wages earned and unpaid by May 12, 2000, five days after he voluntarily quit Respondent's employment, excluding Saturdays, Sundays and holidays. Respondent owes D. Thomas \$3,694.17 in unpaid, due and owing wages.

4) Respondent is liable for \$1,675 in penalty wages to Claimant David Thomas. *Former* ORS 652.150; *former* OAR 839-001-0470(1).

5) Respondent violated ORS 652.140(2) by failing to pay Claimant Vicki Thomas all wages earned and unpaid by June 1, 2000, five days after she voluntarily quit Respondent's employment, excluding Saturdays, Sundays and holidays. Respondent owes V. Thomas \$1,890.10 in unpaid, due and owing wages.

6) Respondent is liable for \$1,560 in penalty wages to Claimant Vicki Thomas. *Former* ORS 652.150; *former* OAR 839-001-0470(1).

7) Respondent violated ORS 652.140(2) by failing to pay Claimant Angel Dominguez all wages earned and unpaid by July 18, 2000, five days after he voluntarily quit Respondent's employment, excluding Saturdays, Sundays and holidays. Respondent owes A. Dominguez \$35,127.41 in unpaid, due and owing wages.

8) Respondent is liable for \$1,560 in penalty wages to Claimant Angel Dominguez. *Former* ORS 652.150; *former* OAR 839-001-0470(1).

9) Respondent violated ORS 652.140(2) by failing to pay Claimant Brenda Dominguez all wages earned and unpaid by November 5, 1999, five days after she voluntarily quit Respondent's employment, excluding Saturdays, Sundays and holidays. Respondent owes B. Dominguez \$13,114.35 in unpaid, due and owing wages.

10) Respondent is liable for \$1,560 in penalty wages to Claimant Brenda Dominguez. *Former* ORS 652.150; *former* OAR 839-001-0470(1).

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

OPINION

INTRODUCTION

This case involves four wage claims by four persons who worked at Respondent's motel. In order to prevail in this matter, the Agency is required to prove, by a preponderance of the evidence, the following four elements: 1) Respondent employed Claimants; 2) The pay rate upon which Respondent and Claimants agreed, if it exceeded the minimum wage; 3) Claimants performed work for which they were not properly compensated; and 4) The amount and extent of work Claimants performed for Respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230, 262-63 (2000).

ANGEL AND BRENDA DOMINGUEZ

The claims of Claimants Dominguez only involve the work they performed on night shift. Respondent agreed to pay Claimants Dominguez a commission on room rentals, plus allowing them to live in Respondent's motel apartment free of charge, in exchange for their night shift duties. The Agency alleges that Claimants Dominguez are entitled to the statutory minimum wage of \$6.50 per hour, including overtime at the rate of \$9.75 per hour, from the time their night shift started each day until they were relieved of duties the next morning.

A. Claimants Dominguez were not excluded employees under ORS 653.020(9).

Respondent argued that Claimants Dominguez were excluded from Oregon's minimum wage and overtime requirements based on the exclusion provided in ORS 653.020(9). That language reads:

"ORS 653.010 to 653.261 does not apply to any of the following employees:

"(9) An individual domiciled at multiunit accommodations designed to provide other people with temporary or permanent lodging, for the purpose of maintenance, management or assisting in the management of same."

Respondent and the Agency stipulated that Claimants Dominguez were individuals “domiciled at multiunit accommodations designed to provide other people with temporary or permanent lodging.” The issue is whether or not their domicile was “for the purpose of maintenance, management or assisting in the management” of Respondent’s motel. If the domicile of Claimants Dominguez was for one of these purposes, their wage claims, which are based on Oregon’s minimum wage law, must be dismissed. If not, Claimants Dominguez are owed a substantial amount of unpaid wages.

Where statutory interpretation is required, the forum must attempt to discern the legislature’s intent. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993). To do that, the forum first examines the text and context of the statute. *Id.* The text of the statutory provision itself is the starting point for interpretation and the best evidence of the legislature’s intent. *Id.* Also relevant is the context of the statutory provision, which includes other provisions of the same statute and other related statutes. *Id.* at 611. If the legislature’s intent is clear from the text and context of the statutory provision, further inquiry is unnecessary. *Id.* The forum may also consider legislative history, but only if the intent of the legislature is not clear from a text and context inquiry.^{xvii} Relying on *PGE*, the forum begins its analysis of ORS 653.020(9) by an examination of the statutory text and context.

ORS 653.020(9) creates a statutory exclusion from minimum wage and overtime for employees in the shoes of Claimants Dominguez whose domicile is “for the purpose of maintenance, management or assisting in the management” of the multiunit accommodations in which they are domiciled. The words “maintenance” and “management” are not defined in ORS Chapter 653 or BOLI’s administrative rules, nor is the phrase “assisting in the management.” There is no case law on point. Because these words are not defined anywhere in the statute or related statutes and they are words of common usage, the forum ascribes to them their plain, natural and ordinary meaning. *Young v. State of Oregon*, 161 Or App 32, 36, rev den 329 Or 447 (1999) (citing *PGE* at 611).

The ordinary meaning of “management” is “the conducting or supervising of something (as a business); esp : the executive function of planning, organizing, coordinating, directing, controlling, and supervising any industrial or business project or activity with responsibility for results.” *Webster’s Third New Int’l Dictionary* 1372 (unabridged ed 1993). The forum adopts this definition for the purpose of determining if Claimants Dominguez fall within the “management” exclusion in ORS 653.020(9). To fall in the category of an employee who “assist[s] in management,” that employee must also perform management functions, albeit at a level of lesser responsibility. The duties and responsibilities of Claimants Dominguez were undisputed and are described in detail in Findings of Fact 38-39, and 46-52 – The Merits. None of those duties or responsibilities fit within *Webster’s* definition of “management” or lend support to Respondent’s alternate claim that Claimants Dominguez assisted in management by performing management functions of lesser responsibility.

The forum likewise rejects the opinion of Geer, Respondent's vocational expert, that Claimants Dominguez were managers or "assistant managers" based on the fact that they answered and remedied guests' complaints about their rooms and processed reservations, duties that are among those listed in the DOT description for "Manager, Hotel Or Motel." The forum notes that reservation processing is also a duty listed under DOT's description of "Hotel Clerk" and that most of the duties performed by Claimants Dominguez fit within DOT's "Hotel Clerk" description.

Undisputed evidence that Clifford Bennett supervised Respondent's operation during the day and that all decisions having more than a minimal financial impact on Respondent's motel were made by the Bennetts, with no input from Claimants Dominguez, further supports the conclusion^{xviii} that the work performed by Claimants Dominguez does not fit within the meaning of "management" contained in ORS 653.020(9).

In its answer, Respondent also asserts that Claimants Dominguez were employed for the purpose of "maintenance" of Respondent's facility. The ordinary meaning of "maintenance" is "the labor of keeping something (as building or equipment) in a state of repair or efficiency." *Webster's* at 1362. The forum adopts this definition for the purpose of determining if Claimants Dominguez fall within the "maintenance" exclusion in ORS 653.020(9). There was no evidence that B. Dominguez ever performed any duties on night shift that could possibly fit within this definition. A. Dominguez occasionally changed light bulbs or plunged toilets when guests requested his help, and painted one room to assist Respondent in their remodeling. According to Respondent's vocational expert, a maintenance person is someone who performs

“repairs.” Here, all actual repairs and upkeep were performed by Don and Clifford Bennett. The forum rejects Respondent’s argument that changing light bulbs or plunging toilets on an occasional basis transforms an employee who has no other maintenance duties into an employee who is employed “for the purpose of maintenance.”

In conclusion, Respondent bears the burden of proving, by a preponderance of the evidence, that Claimants Dominguez fall within one of the statutory exclusions set out in ORS 653.020(9). Respondent did not meet that burden, and the forum finds that Claimants Dominguez were not excluded from coverage by Oregon’s minimum wage and overtime laws.

B. Claimants Dominguez are entitled to Oregon’s minimum wage rate.

The Bennetts agreed to pay Claimants Dominguez a “package deal” that consisted of a 2.5 percent commission for all guests whom they checked in, plus free use of an apartment adjoining the motel office, paid utilities, including cable television and local telephone calls, and free use of Respondent’s laundry facilities every Friday in lieu of \$6.50 per hour. As there is no evidence that Claimants Dominguez and Respondent agreed to a higher wage rate, the forum concludes that any wages owed to Claimants Dominguez should be computed at the statutory minimum wage rate of \$6.50 per hour. *In the Matter of Toni Kuchar*, 23 BOLI 265, 274 (2002).

C. Claimants Dominguez performed work for which they were not properly compensated.

Respondent argued that even if Claimants Dominguez fall outside the purview of ORS 653.020(9), they were still properly compensated for their work. Respondent’s argument is based on two premises. First, that Respondent is entitled to a setoff for the fair market value of the lodging and facilities provided to Claimants Dominguez, which

Respondent states was \$1195 per month. Second, that Claimants Dominguez only worked a total of 27 hours per week in Respondent's summer season and a total of 30 hours per week the rest of the year. Respondent's arguments must fail for reasons discussed below.

1. Respondent was not entitled to a setoff.

ORS 653.035(1) allows an employer to deduct from the minimum wage "the fair market value of lodging, meals, or other facilities or services furnished by the employer for the private benefit of the employee." Lodging and other facilities or services "are furnished for the private benefit of the employee when [they] are not required by the employer." OAR 839-020-0025(7). Lodging and other facilities or services are "required by the employer when * * * [t]he provision of lodging or other facilities or services is necessary in order for the employer to maintain an adequate work force at the times and locations the employer needs them." OAR 839-020-0025(7)(d). In this case, Respondent provided lodging and facilities to Claimants Dominguez so that they would be available on Respondent's premises to Respondent's guests or prospective guests at all times during the night. On the nights Claimants Dominguez worked, no one else was available to assist Respondent's guests. Claimants Dominguez could not have met Respondent's availability requirement if they had not lived in Respondent's apartment, leaving Respondent without an "adequate work force." Consequently, the forum concludes that the lodging and facilities that Respondent provided to Claimants Dominguez was for Respondent's benefit, not for the private benefit of Claimants Dominguez.^{xix}

In addition, Respondent claims that the value of lodging provided to the children of Claimants Dominguez should be set off against the wages of Claimants Dominguez. The forum rejects this claim based on Respondent's undisputed policy of allowing

relatives of Respondent's employees to stay for free in vacant rooms if the employees cleaned the rooms. Claimants Dominguez followed this policy in allowing their children to stay in Respondent's vacant rooms. Also, undisputed evidence showed that the rooms occupied by the Dominguez's oldest son could not be rented because its plumbing didn't work.

2. "Work" performed by Claimants Dominguez.

Respondent's calculations of the hours worked by Claimants Dominguez is based on two faulty assumptions. First, that Claimants Dominguez only "worked" from 6 to 10 p.m. in the summer, and from 6 to 9 p.m. and 7:30 to 9 a.m. in the winter, with an extra 30 minutes credited for each shift to account for the average number of night interruptions. Second, that because the night shift job could be performed by only person and had been in the past, Respondent was only required to pay the wages that one employee working those hours would have received.

WORK TIME

Claimants Dominguez's night shift began at 5 p.m. in the summer and at least one of them was in the office balancing accounts after 10 p.m. almost every night of their joint employment. A. Dominguez frequently "balanced out" after 9 p. m. and often later than 10 p.m. after B. Dominguez quit Respondent's employment. The evidence was undisputed that Claimants Dominguez slept after they went to their apartment for the night except when they were interrupted by guests who had already checked in or guests seeking to check in. The Agency contends that this sleep time should count as work time, while Respondent asserts that Claimants Dominguez should only be credited as having worked the actual time that their sleep was interrupted by guests. The forum relies on OAR 839-020-0042 to resolve this conflict. Its relevant provisions state:

“Under certain conditions an employee is considered to be working even though some of his/her time is spent in sleeping or in certain other activities.

“* * * * *

“Employees residing on employer’s premises * * *: An employee who resides on his/her employers’ premises on a permanent basis * * * is not considered as working all the time he/she is on the premises. Ordinarily, he/she may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he/she may leave the premises for purposes of his/her own. To determine the exact hours worked, any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted.”

The key phrases in this rule are “reasonable agreement” and “complete freedom from all duties.” There was no evidence of any agreement between the Bennetts and Claimants Dominguez as to the hours that would be counted as work time. The only agreement was the general hours that Claimants Dominguez would be in the office each shift and that one of them would be available at whatever time during the night a guest or potential guest needed help. Respondent did not instruct Claimants Dominguez that only one of them should be available during the night, and they both answered the night bell. Although their nocturnal interruptions may have varied in frequency, neither ever had “complete freedom from all duties” after they went to bed at night. After B. Dominguez quit, A. Dominguez had sole responsibility for Respondent’s guests throughout the night. Under OAR 839-020-0042, the sleeping time of Claimants Dominguez must be counted as work time.

RESPONDENT WAS REQUIRED TO PAY FOR THE WORK TIME OF BOTH CLAIMANTS DOMINGUEZ

Respondent hired both A. and B. Dominguez because Respondent’s prior experience of employing a single person on night shift had been less than satisfactory. As stated earlier, the agreement between the Bennetts and Claimants Dominguez was that either A. or B. Dominguez would always be available. During the Dominguez’s joint

employment, the Bennetts did not designate specific shifts that either A. or B. Dominguez were responsible for and never instructed either A. or B. Dominguez not to work a particular shift. Consequently, both considered themselves as available for work throughout their shift. It is an employer's duty to exercise control and see that work is not performed if it does not want work to be performed. OAR 839-020-0040(4). Any work that is "suffered or permitted" is work time. OAR 839-020-0040(2). The forum concludes that both Claimants Dominguez were entitled to be paid for all hours in their scheduled night shifts. Based on **Respondent's** minimal estimate of work hours per shift, this work time amounts to 54 hours per week (27 hours x 2) from June to August 1999, 60 hours per week (30 hours x 2) in September and October 1999, and 30 hours per week from November 1999 to July 2000. This comes to a total of 1292 hours worked on night shift.^{xx} At \$6.50 per hour, Claimants Dominguez earned \$14,898. They received only \$2,393.24 in commissions for this work. When the value of the lodging, services and facilities received by Claimants Dominguez is discounted, Claimants Dominguez received considerably less in commissions^{xxi} than they earned. This satisfies the third element of the Agency's prima facie case.

D. Amount and extent of work performed by Claimants Dominguez.

The forum relies on Respondent's contemporaneous record showing the identity of persons who "balanced out" each night during the employment of Claimants Dominguez to determine the specific night shifts they worked. Where Respondent's record does not identify the employee who worked a particular night shift and Claimants Dominguez allege they worked that night, the forum has credited them with having worked that night.

Findings of Fact 61 through 68 – The Merits show the forum's calculations of the amount of work performed by Claimants Dominguez and the amounts earned by each.

Summarized, Claimants Dominguez were both credited with work hours of 6 to 10 p.m. from June 5-11, 1999; from 6 p.m. to 6:30 a.m. from June 12 to July 2, 1999; from 5 p.m. to 6:30 a.m. from July 3 to October 1, 1999; and from 6 p.m. to 9 a.m. from October 2-31, 1999. A. Dominguez was credited with work hours of 6 p.m. to 9 a.m. from November 1, 1999, to July 11, 2000.

The forum concedes that this calculation of work hours is not exact. Where the forum concludes that an employee performed work for which he or she was not properly compensated, it is the employer's burden to produce records to prove the precise hours involved. *In the Matter of Westland Resources*, 23 BOLI 276, 286 (2002). In this case, those records would show the exact times that the night shifts of Claimants Dominguez started and ended each day of their employment. Respondent did not maintain this type of record. Where an employer does not produce the relevant records, the Commissioner may rely on evidence produced by the Agency "to show the amount and extent of the employee's work as a matter of just and reasonable inference and then may award damages to the employee, even though the result be only approximate." *Id.* Here, the forum has relied primarily on records produced by Respondent to establish the particular night shifts worked by Claimants Dominguez and upon testimony by the Bennetts and Claimants Dominguez to establish the approximate beginning and ending time of each of those shifts. Based on undisputed evidence concerning the terms and conditions of the employment of Claimants Dominguez and the application of the law to those facts, the forum has credited Claimants Dominguez as having worked all the hours between the beginning and end of their night shift, including the time they were sleeping. The net result is that Respondent owes A. Dominguez \$35,127.41 and B. Dominguez \$12,114.35 in unpaid wages.

DAVID THOMAS

Respondent contends that D. Thomas was excluded from Oregon's minimum wage requirements because he was "domiciled" at Respondent's motel "for the purpose of maintenance." ORS 653.020(9).

Respondent and the Agency stipulated that Claimants Thomas were "domiciled at multiunit accommodations designed to provide other people with temporary or permanent lodging." The issue is whether D. Thomas's employment was "for the purpose of maintenance" of Respondent's motel.

The forum has already determined that the word "maintenance," as used in ORS 653.020(9), means "the labor of keeping something (as building or equipment) in a state of repair or efficiency."^{xxii} There is no evidence that D. Thomas ever performed any repairs or work to make Respondent's physical property operate more efficiently and undisputed testimony that Don and Clifford Bennett performed all repairs and upkeep on Respondent's motel. D. Thomas's job was that of a laborer doing groundskeeping duties such as mowing the lawn, pulling weeds, and pruning bushes. These duties do not fall within the definition of "maintenance" that the forum has adopted. Consequently, the forum concludes that D. Thomas was not subject to exclusion from Oregon's minimum wage requirements under ORS 653.020(9).

Undisputed evidence and the ALJ's calculations established that D. Thomas worked 1216.95 hours at \$7 per hour and 60.48 hours at \$6.50 per hour, earning \$8,911.77 in gross wages. He was paid a total of \$5,217.60 by check or cash. An additional \$3,607.60 was deducted from his pay as rent that Respondent claims as a lawful setoff, bringing his total compensation to \$8,825.20 if the forum determines that Respondent is entitled to its claimed setoff. If so, Respondent still owes D. Thomas \$86.57 in unpaid, due and owing wages ($\$8,911.77 - \$8,825.20 = 86.57$). If not,

Respondent owes D. Thomas \$3,694.17 in unpaid wages. The forum must consider several statutes and administrative rules in making this determination.

As a starting point, ORS 653.035 and OAR 839-020-0025(1) allow employers to deduct from the minimum wage the “fair market value of lodging, meals or other facilities or services furnished by the employer for the private benefit of the employee.” OAR 839-020-0025(3) provides, in part, that “[t]hese provisions apply to all facilities or services furnished by the employer as compensation to the employee regardless of whether the employer calculates charges for such facilities or services as additions to or deductions from wages.” OAR 839-020-0025(7) provides that lodging or other facilities or services are furnished for the private benefit of the employee when they are not required by the employer and sets out four specific circumstances when the employer will be deemed to have “required” lodging. Those circumstances are:

- “(a) Acceptance of the lodging or other facilities or services is a condition of the employee’s employment; or
- “(b) The expense is incurred by an employee who must travel away from the employee’s home on the employer’s business; or
- “(c) The acceptance of the lodging * * * is involuntary or coerced; or
- “(d) The provision of the lodging * * * is necessary in order for the employer to maintain an adequate work force at the times and locations the employer needs them.”

A review of the facts shows that none of these circumstances apply to D. Thomas. He was already living in one of Respondent’s units with V. Thomas when Respondent hired him. It was unnecessary for him to live at Respondent’s motel in order for him to perform his groundskeeper or housekeeping work. There is no evidence that Respondent required him to live at Respondent’s motel as a condition of his employment or that his acceptance of the lodging and free utilities in Room 245 was involuntary or coerced. The forum concludes that D. Thomas’s lodging and utilities

were for the “private benefit” of D. Thomas under ORS 653.035 and OAR 839-020-0025(7).

OAR 839-020-0025(2)(a) provides that “fair market value” may be established by the employer’s showing of “[t]he amount actually and customarily charged for comparable * * * lodging, facilities or services to consumers who are not employees of the employer.” In this case, that amount was \$24,424.10,^{xxiii} calculated at seasonal overnight rates. There was no evidence that Respondent had a monthly rate for Room 245 for guests. Respondent charged V. and D. Thomas \$750 month for rent, laundry and utilities, and deducted \$3,607.60 from D. Thomas’s check for approximately half the rent. D. and V. Thomas’s testimony that they were able to rent a much larger apartment for \$450 per month after leaving Respondent’s employment is irrelevant to a determination of “fair market value” under OAR 839-020-0025(2)(a). The amount deducted from D. Thomas’s check was far less than half of the fair market value of Room 245, and the forum concludes that Respondent met its burden of showing that the amount of the deduction met the “fair market” requirement of ORS 653.035(1).

An employer who has met the conditions of ORS 653.035(1), OAR 839-020-0025(1), OAR 839-020-0025(7), and OAR 839-020-0025(2)(a) has an additional hurdle to clear. OAR 839-020-0025(5) provides, in pertinent part, that “[t]he provisions of section (1) of this rule apply only when the following conditions are continuously met: (a) The employer has met the conditions of ORS 652.310(3)[.]” ORS 652.310(3) sets out additional requirements that must be satisfied before an employer can “deduct * * * any portion of an employee’s wages” and lists five circumstances in which deductions are allowed. Subsection (b) is the only circumstances applicable to this case. It allows deductions if they “are authorized in writing by the employee, are for the employee’s

benefit, and are recorded in the employer's books." OAR 839-020-0025(3) interprets ORS 652.610(3)(b) in the following language:

"In order for the employer to be able to claim credit toward the minimum wage for providing meals, lodging or other facilities or services furnished to an employee, the deduction of these costs must have been authorized by the employee in writing, the deduction must have been for the private benefit of the employee, and the deduction must be recorded in the employer's books * * * in accordance with the provisions of ORS 652.610."

Here, the evidence was undisputed that neither D. nor V. Thomas wrote an authorization for Respondent to deduct rent from their paychecks. Accordingly, the forum concludes that the conditions of ORS 652.610 and OAR 839-020-0025(3) were not met and that Respondent was not entitled to deduct rent from D. Thomas's wages or to claim a rent credit toward the minimum wage.

As an affirmative defense, Respondent argues it is entitled to a setoff for the amount of rent deducted from the wages of D. and V. Thomas. ORS 652.610(4) provides that "[n]othing in this section * * * shall * * * diminish or enlarge the right of any person to assert and enforce a lawful setoff * * * on due legal process." Assuming, *arguendo*, that ORS 652.610(4) applies to these facts, Respondent's defense must fail because the rent deductions or credits are not a "setoff." The Oregon Supreme Court has defined "setoff" as a "money demand by the defendant against the plaintiff arising upon contract and constituting a debt *independent of and unconnected with the cause of action* set forth in the complaint." *Rogue River Management Company v. Shaw*, 243 Or 54, 59 (1966) (internal quotation marks omitted; emphasis in original). In this case, there was no debt, as the rent in question had already been paid, and the wages in question were dependent on and connected with the wage claims of Claimants Thomas.

In conclusion, Respondent owes D. Thomas \$3,694.17 in unpaid, due and owing wages (\$8,911.77 gross earned wages - \$5,217.60 cash payments = \$3,694.17).

VICKI THOMAS

During her wage claim period, V. Thomas worked as a housekeeper, day shift office clerk, and night shift relief for Claimants Dominguez. Her claim is based solely on the night shifts that she worked in relief for Claimants Dominguez.

Respondent raised its ORS 543.020(9) affirmative defense again, arguing that V. Thomas was excluded from Oregon's minimum wage and overtime requirements because she lived at Respondent's motel "for the purpose of maintenance, management or assisting in the management [of the motel]."

V. Thomas's job duties and responsibilities on night shift are set out in detail in Finding of Fact 26 – The Merits. There is no evidence that she performed any "maintenance" duties. Her duties were essentially the same as those performed on night shift by Claimants Dominguez, and the forum rejects Respondent's argument that she engaged in "management" or "assist[ed] in management" for the same reasons that it rejected Respondent's identical argument regarding Claimants Dominguez.

The Agency alleged that V. Thomas's night shift lasted from 6 p.m. until 7 a.m. and that V. Thomas should be credited with working 13 hours each shift. Respondent argued that V. Thomas's only "work" time was the time she spent in the office, and that the \$55 rent credit she received for each night shift was more than ample to compensate her for this time, calculated at \$6.50 per hour. For the same reasons stated in the section of this Opinion discussing the wage claims of Claimants Dominguez, the forum agrees with the Agency and finds that V. Thomas worked 13 hours on each of her night shifts. Based on Respondent's records, the forum has determined that V. Thomas worked 27 night shifts in all, for a total of 351 hours. In total, she earned \$2,281.50 on night shift (351 hours x \$6.50 per hour = \$2,281.50). She received \$391.40 in commissions and \$1485 in rent credits (27 shifts x \$55 =

\$1485). For the same reasons stated in the section of this Opinion discussing the wage claim of D. Thomas, the forum disallows the \$1485 as setoff against V. Thomas's earned wages. The forum allows the commission received by V. Thomas to be applied to the minimum wage due to her.^{xxiv}

In conclusion, Respondent owes V. Thomas \$1,891.10 in unpaid, due and owing wages (\$2,281.50 gross earned wages -\$391.40 commissions = \$1,890.10).

PENALTY WAGES

The Agency sought penalty wages for all four claimants. Under ORS 652.150, 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. *Westland Resources*, 23 BOLI at 280. Respondent, through the Bennetts, was aware of the hours worked and duties performed by all four wage claimants. The forum infers from this knowledge that Respondent acted voluntarily and as a free agent in failing to pay the four wage claimants all the wages they earned. Respondent's failure to apprehend the correct application of the law and Respondent's actions based on this incorrect application does not exempt Respondent from a determination that it willfully failed to pay wages earned and due to the claimants. *In the Matter of Scott Miller*, 23 BOLI 243, 262 (2002). The forum therefore concludes that Respondent's failure to pay claimant's wages was willful.

Respondent raised the statutory affirmative defense of financial inability to pay the wages at the time they were earned, providing evidence of net losses in 1999 and 2000. However, the tax forms that showed the net losses also showed that Respondent spent substantial sums on repairs and maintenance, rents, taxes and licenses, and advertising in those years. No financial inability exists if an employer continues to

operate a business or chooses to pay certain debts and obligations in preference to employee's wages. *In the Matter of Debbie Frampton*, 19 BOLI 27, 41 (1999). Consequently, the forum assesses penalty wages in the amount of \$1,560 for Claimants Dominguez and V. Thomas and in the amount of \$1,675 for D. Thomas. The forum's penalty wage computations are set out in Findings of Fact 24, 30, and 75 – The Merits.

ATTORNEY FEES

Respondent claimed attorney fees in its answer. There is no provision for attorney fees in the statutes or rules governing the contested case hearing in this matter, and Respondent's request is denied.

RESPONDENT'S EXCEPTIONS

Respondent filed several exceptions. The forum addresses them in the order Respondent presented them.

First, Respondent excepted to the ALJ's conclusion that Claimants Dominguez and Thomas were not exempt from Oregon's minimum wage and overtime requirements under ORS 653.020(9). Respondent cited *Baxter v. MJB Investors*, 128 Or App 338, 876 P2d 331 (1994) in support of its exception. In *Baxter*, the court stated "the only employees who undeniably fit within [the terms of ORS 653.020(9)] are hotel, motel and apartment managers who live on the premises." *Baxter* simply restates the obvious and does not assist Respondent's case. Respondent's problem in this case is not that the ALJ ignored *Baxter* in the Proposed Order, but that Claimants Dominguez and Thomas were not "managers."

Respondent cites *State ex rel Dunn v. Ayers*, 112 Mont. 120, 113 P2d 785, 788 (1941) for the proposition that "assisting in the management," as used in ORS 653.020(9), equals "an assistant" who is "an employee whose duties are to help his superior and who must look to him for his authority to act." The forum rejects this

argument for two reasons. First, this forum is not bound by decisions of Montana courts. Second, Respondent's argument would exclude every employee working at a motel who is also domiciled at the motel from the coverage of Oregon's minimum wage and overtime requirements, in that all employees work under the direction of a manager and assist the manager in following his or her direction. Had the legislature intended this result, it could have easily written ORS 653.020(9) to cover all employees of a multiunit accommodation who were also domiciled there. It did not. The fact that the legislature used the words "assisting in the *management*," not "assisting the *manager*" further denotes that the exemption was only intended to apply to individuals who actually perform management duties, not all individuals who take direction from management. (emphasis added)

The Proposed Order correctly interprets ORS 653.020(9) and properly states why none of the wage claimants are exempt from Oregon's minimum wage and overtime laws under its provisions. Respondent's exception is overruled.

Second, Respondent excepts to the ALJ's conclusion that Claimant David Thomas was not domiciled "for the purpose of maintenance" of Respondent's motel. Respondent relies on the DOT's description of "Groundskeeper," which begins with the phrase "[m]aintains grounds of * * * commercial property" and also includes the phrase "[m]ay perform ground maintenance duties, using tractor equipped with attachments * * *" to support this conclusion. DOT's description gives the forum a broader perspective on D. Thomas's duties but is not determinative of whether D. Thomas performed "maintenance" duties as contemplated by ORS 653.020(9). That determination must be made by a *PGE* analysis, which the ALJ correctly performed in the Proposed Order. Furthermore, there was no evidence that D. Thomas ever operated a tractor, and

Finding of Fact 83 – The Merits has been modified to reflect this. Respondent's exception is overruled.

Third, Respondent's exception that, prior to the Proposed Order, BOLI's consistent interpretation of ORS 653.020(9), as stated in writing by an employee of its Technical Assistance Division, was that ORS 653.020(9) applied to managers, assistant managers, and maintenance employees. R presented no actual evidence that it relied on this statement and did not raise an estoppel defense. The ALJ's conclusion that Claimants Dominguez and Thomas were not managers or maintenance employees, and did not assist in the management of Respondent's motel is not at odds with Respondent's exception. Respondent's exception is overruled.

Fourth, Respondent contends its failure to pay Claimants Dominguez and Thomas was not "willful" and Respondent should not have to pay penalty wages. Respondent does not disagree with the definition of "willful" that the forum has traditionally relied on. However, Respondent contends that "when the agency affirmatively misstates its position to employers, and an employer affirmatively acts upon the agency's misstatements then the willfulness (sic) element is specifically negated because of the Respondent's detrimental reliance on the agency's misstatements." Here, there is no evidence that the agency made any misstatements that Respondent relied upon. Instead, Respondent incorrectly applied the law. Respondent's exception is overruled.

Fifth, Respondent excepts to the conclusion that it was financially able to pay, in that it relied on the advice of the agency in setting Claimants' wages. This exception has no basis in law or fact and is overruled.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages and penalty wages it owes as a result of its violations of ORS 652.140

(2), the Commissioner of the Bureau of Labor and Industries hereby orders **Elisha, 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:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Angel R. Dominguez in the amount of THIRTY SIX THOUSAND SIX HUNDRED EIGHTY SEVEN DOLLARS AND FORTY ONE CENTS (\$36,687.41), less appropriate lawful deductions, representing \$35,127.41 in gross earned, unpaid, due, and payable wages and \$1,560 in penalty wages, plus interest at the legal rate on the sum of \$35,127.41 from August 1, 2000, until paid, and interest at the legal rate on the sum of \$1,560 from September 1, 2000, until paid.

(2) A certified check payable to the Bureau of Labor and Industries in trust for Brenda L. Dominguez in the amount of FOURTEEN THOUSAND SIX HUNDRED SEVENTY FOUR DOLLARS AND THIRTY FIVE CENTS (\$14,674.35), less appropriate lawful deductions, representing \$13,114.35 in gross earned, unpaid, due, and payable wages and \$1,560 in penalty wages, plus interest at the legal rate on the sum of \$13,114.35 from December 1, 1999, until paid, and interest at the legal rate on the sum of \$1,560 from December 1, 1999, until paid.

(3) A certified check payable to the Bureau of Labor and Industries in trust for David L. Thomas in the amount of FIVE THOUSAND THREE HUNDRED SIXTY NINE DOLLARS AND SEVENTEEN CENTS (\$5,389.17), less appropriate lawful deductions, representing \$3,694.17 in gross earned, unpaid, due, and payable wages and \$1,675 in penalty wages, plus interest at the legal rate on the sum of \$3,694.17 from September 1, 2000, until paid, and interest at the legal rate on the sum of \$1,675 from October 1, 2000, until paid.

(4) A certified check payable to the Bureau of Labor and Industries in trust for Vicki L. Thomas in the amount of THREE THOUSAND FOUR HUNDRED FIFTY DOLLARS AND TEN CENTS (\$3,450.10), less appropriate lawful deductions, representing \$1,890.10 in gross earned, unpaid, due, and payable wages and \$1,560 in penalty wages, plus interest at the legal rate on the sum of \$1,890.10 from July 1, 2000, until paid, and interest at the legal rate on the sum of \$1,560 from August 1, 2000, until paid.

ⁱ Hereafter, Cohen is referred to as "Foster" because of her stated preference to be called Susan Foster.

ⁱⁱ Only pages 3 and 6 of R-20 were received, and only page 1 of R-21 was received.

ⁱⁱⁱ The Order of Determination sought \$41,374.30 for A. Dominguez for work performed from June 5, 1999, to July 12, 2000, and \$15,810.84 for B. Dominguez for work performed from June 5, 1999, to October 31, 1999.

^{iv} The Order of Determination sought \$1,560.00 each for Claimants Dominguez.

^v Carlata Bennett characterized Respondent's motel as a "mom and pop" motel.

^{vi} In her testimony, Carlata Bennett frequently referred to the arrangements with Claimants Dominguez and Thomas as a "package wrap around" or "package deal."

^{vii} See Finding of Fact 26 – The Merits, *infra*.

^{viii} Neither participant presented any reliable evidence to establish the dates or hours that V. Thomas worked as head housekeeper. There was no evidence that she worked as head housekeeper after November 15, 1999.

^{ix} Claimant Thomas testified that she worked until 10 p.m. Respondent's records indicate that she "balanced out" Respondent's till each shift between 10 and 11 p.m., except for one occasion when she balanced out after 11 p.m. and five occasions when she balanced out before 10 p.m.

^x See Findings of Fact 38-39 – The Merits, *infra*.

^{xi} The forum bases its conclusion that V. Thomas worked 27 night shifts on Exhibit R-11, Respondent's summary showing the identity of the persons who worked each night shift during the employment of Claimants Dominguez.

^{xii} Carlata Bennett specifically testified that "we had learned in the past when one person gets strapped into the motel, they become tired; they get to the point that they get tired of being there all the time and so it created a problem, so we thought if we went with a couple, that both would be able to handle it at their discretion, needing only one at a time. We have only one person there now. We have had all years since then."

^{xiii} No evidence was presented as to the specific time period that A. Dominguez attended Taekwondo classes. The forum infers that A. Dominguez attended 24 classes (12 weeks x 2 classes per week). Since it is Respondent's burden to establish claimed hours that were not worked and Respondent has not presented any evidence as to the dates, the forum has further inferred that A. Dominguez attended these classes during a period of time when he started work at 6 p.m. and subtracted 24 hours from its computation of the total overtime hours worked by A. Dominguez.

^{xiv} See Finding of Fact 7 – The Merits, *supra*.

^{xv} Claimants Dominguez began work for Respondent on June 5, a Saturday. Since there is no evidence in the record as to Respondent's workweek, the forum has determined that their workweek began on Saturday, the day Claimants Dominguez began work, and ended on the next Friday. See *In the Matter of Burrito Boy, Inc.*, 16 BOLI 1, 13 (1997)

^{xvi} This workweek began on October 30, giving Claimant Dominguez 35 hours of overtime for the workweek of October 30-November 5.

^{xvii} Even if the intent of the legislature was not clear from a text and context inquiry, an inquiry into legislative history would not aid the forum in determining the intent of the legislature when it adopted the statutory exclusion under consideration. The management and maintenance exclusion was adopted by the legislature in 1977 in Enrolled HB 2312, 1977 Oregon Laws, Ch. 238, Sec. 1(11). The written minutes and exhibits accompanying HB 2312 and tapes of related legislative hearings contain no references to this exclusion.

^{xviii} Claimants Dominguez had the discretionary authority to lower room rates to a sum set by the Bennetts if necessary to keep a customer, but there was no evidence presented that the Bennetts delegated any other authority to them to make policy or financial decisions impacting Respondent's business operation.

^{xix} See, e.g., *In the Matter of Rainbow Auto Parts and Dismantlers*, 10 BOLI 66, 72-73 (1991) (where claimant occupied a mobile home located on the business property and acted as night watchman at respondent's request, the mobile home was not a facility furnished for the employee's private benefit.)

^{xx} This total is based on the assumption that Claimants Dominguez worked 54 hours in each of 13 weeks and 60 hours in each of 8 weeks, and that A. Dominguez worked 30 hours in each of 37 weeks.

^{xxi} ORS 653.035(2) allows employers to "include commission payments as part of the applicable minimum wage." Since the "package deal" agreed to by Claimants Dominguez and Respondent was in lieu of minimum wage, the forum has credited the commissions received by Claimants Dominguez toward the minimum wage owed to them.

^{xxii} The forum again notes that Respondent's vocational expert testified that the purpose of having a maintenance person on the premises is so they can do repairs whenever needed.

^{xxiii} See Finding of Fact 18 – The Merits, *supra*. This averages out to about \$2,000 per month for the 12 months that Claimants Thomas lived in Room 245.

^{xxiv} See fn. 21, *supra*.