

In the Matter of
SABAS GONZALEZ, dba GONZALEZ FAMILY RESTAURANT

Case No. 36-99

July 2, 1999

SYNOPSIS

Gonzalez Family Restaurant, Inc., operated a restaurant and employed Claimant as a dishwasher and cook. Gonzalez Family Restaurant, Inc., paid Claimant less than the minimum wage, did not pay Claimant one and one-half times the minimum wage for his overtime hours, and failed to pay Claimant all wages due upon termination. The corporation later dissolved, but Respondent continued operating the restaurant as the successor to Gonzalez Family Restaurant, Inc. As successor to the corporation, Respondent is liable for the unpaid wages due and owing Claimant, plus interest. Respondent is not, however, liable either for civil penalty wages or for a penalty the Agency sought to impose for Gonzalez Family Restaurant, Inc.'s failure to keep and maintain records of the hours Claimant worked. ORS 652.140, 652.150, 653.025(2), 653.045, 653.055(1), 653.261(1), and OAR 839-020-0030(1).

The above-entitled case came on regularly for hearing before Erika L. Hadlock, 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 May 18, 1999, in the Bureau of Labor and Industries office at 3865 Wolverine Street NE, #E-1, Salem, Oregon.

Cynthia Domas, an employee of the Bureau of Labor and Industries ("BOLI" or "the Agency") represented the Agency. Wage claimant Martin Sanchez was present throughout the hearing and was not represented by counsel. Neither Respondent nor his counsel was present at the hearing.

The Agency called two witnesses: Claimant Martin Sanchez and Agency compliance specialist Gerhard Taeubel.

Agency Exhibits A-1 through A-5, attached to the Agency's case summary, were offered and received into evidence. During the hearing, the Agency offered Exhibit A-6, which was received into evidence. The evidentiary record closed on May 18, 1999.

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

FINDINGS OF FACT – PROCEDURAL

1) On or about July 17, 1998, Claimant filed a wage claim with the Agency. He alleged that he had been employed at the Gonzalez Restaurant, owned by Sabas Gonzalez from January 1, 1998, through June 30, 1998. Claimant further alleged that he was not paid all the wages he had earned.

2) When he filed the wage claim, Claimant completed an assignment of wages.

3) Claimant brought his wage claim within the statute of limitations. 4) On November 4, 1998, the Agency served Gonzalez Family Restaurant, Inc. (through service on its counsel, Michael T. Barrett), with an Order of Determination dated October 30, 1998. The Order of Determination alleged that Gonzalez Family Restaurant, Inc., had employed Claimant from January 1, 1998, through June 30, 1998, and owed Claimant \$7560.00 in earned and unpaid wages, \$1749.60 as penalty wages, and interest on both amounts. The Order of Determination required Gonzalez Family Restaurant, Inc., within 20 days, either to 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 or about December 4, 1998, Gonzalez Family Restaurant, Inc., filed an Answer and Request for Hearing in which it denied all allegations in the Order of Determination.

6) On March 10, 1999, the Agency served an Amended Order of Determination on Respondent Sabas Gonzalez dba Gonzalez Family Restaurant as Successor to Gonzalez Family Restaurant, Inc. The Amended Order of Determination identified “Sabas Gonzalez dba Gonzalez Family Restaurant as Successor to Gonzalez Family Restaurant, Inc.” as the employer. The remaining substantive allegations in the Amended Order of Determination were similar to those in the original Order of Determination; the significant change was in the identity of Respondent-Employer. The Amended Order of Determination was dated March 4, 1999, and was served on both Respondent individually and on his attorney, Michael T. Barrett.

7) On March 8, 1999, the Agency served a Notice of Intent to Assess Civil Penalties on Sabas Gonzalez, both individually and as the registered agent of Gonzalez Family Restaurant, Inc. The Notice of Intent identified two respondents: Gonzalez Family Restaurant, Inc., and Sabas Gonzalez dba Gonzalez Family Restaurant. The Notice of Intent alleged that “Respondent” employed Claimant and violated ORS 653.045 by failing to make and maintain payroll records. The Notice of Intent required that Respondents file an answer and request a contested case hearing within 20 days if they wished to contest this charge. Included with the Notice of Intent was a document titled “SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES.”

8) On or about March 23, 1999, attorney Michael T. Barrett filed an Answer and Request for Contested Case Hearing on behalf of Respondent Sabas Gonzalez dba Gonzalez Family Restaurant as Successor to Gonzalez Family Restaurant, Inc. Although the Answer explicitly identified itself only as an Answer to the Amended Order of Determination, it contained an admission that “employer” had not kept written payroll records. That admission was directly relevant only to the charge in the Notice of Intent,

not to allegations in the Amended Order of Determination, and the Agency appears to have accepted the Answer as responding to both charging documents.

9) The March 23, 1999, Answer and Request for Hearing includes admissions that “employer” had employed Claimant, that employer was subject to the provisions of Oregon law that require record keeping, and that employer did not keep written payroll records. Employer denied the remaining allegations and requested a hearing.

10) On March 29, 1999, the Agency requested a hearing in this matter. On April 2, 1999, the Hearings Unit issued a Notice of Hearing stating that the hearing would commence at 10:00 a.m. on Tuesday, May 18, 1999, in the Agency office in Salem, Oregon. With the Notice of Hearing, the forum sent another copy of the “SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES” and a copy of the forum’s contested case hearings rules, OAR 839-050-0000 to 839 –050-0440.

11) The Notice of Hearing identified “SABAS GONZALEZ dba GONZALEZ FAMILY FAMILY RESTAURANT” as the sole Respondent. Consequently, as the ALJ noted at the beginning of the contested case hearing, the Agency could proceed only against Gonzalez individually, and not against the corporation, in the contested case proceeding. Throughout the remainder of this Order, all references to “Respondent” are references to Sabas Gonzalez, dba Gonzalez Family Restaurant.

11) On April 16, the forum issued a case summary order requiring the Agency and Respondent to submit summaries of the case that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; and, for the Agency only, any wage, damages, and penalties calculations. The forum ordered the participants to submit their case summaries by May 7, 1999, and notified them of the possible sanctions for failure to comply with the case summary order.¹

12) The Agency submitted a timely case summary that included five exhibits. Respondent submitted no case summary.

13) By motion dated May 6, 1999, postmarked May 7, 1999, and mailed to the Agency office in Salem rather than to the Hearings Unit, Respondent, through attorney Barrett, requested a postponement of the hearing and of the deadline for submitting case summaries. The Agency opposed the motion.

14) As the ALJ explained at the beginning of the contested case hearing, on May 11, 1999, she attempted to contact Barrett by calling the telephone number listed in the Oregon State Bar Directory. That number had been disconnected. She then called the Oregon State Bar to determine whether it had a more current telephone number for Barrett. It did not. The ALJ then searched an Internet telephone directory for attorney Michael T. Barrett, located in Salem, Oregon. That directory gave the same disconnected telephone number that was listed in the Oregon State Bar directory. It also, however, listed a facsimile transmission number that was working. On the morning of May 11, 1999, the ALJ sent the following facsimile transmission to that number:

“Dear Mr. Barrett:

“I am faxing this letter to you at (503) 588-3624, a number I obtained on the Internet, because you have not provided me with a telephone number and the number in the OSB Directory ((503) 588-1989) has been disconnected. Please contact me immediately by telephone at (503) 731-4467 so I can arrange a telephonic hearing on your pending motion in the Gonzalez case. If I do not hear from you by 3:00 p.m. this afternoon, I will rule on the motion without a hearing.”

15) Later that morning, the ALJ received a telephone call from the Vandermay Law Firm in Salem, Oregon. The person who called had received the facsimile transmission and stated that Barrett used to work at the firm, but had not been there for four years.

16) By order dated May 11, 1999, the forum denied Respondent's motion for a postponement and required him to submit his case summary by noon on Friday, May 14, 1999:

"By motion dated May 6, 1999, postmarked May 7, 1999, and addressed to the Oregon Bureau of Labor and Industries' Salem office, rather than BOLI's Hearings Unit in Portland, Respondent has requested a postponement of the hearing currently set for May 18, 1999. Respondent's counsel cites two reasons for the request: 1) Respondent is absent from Oregon because of the illness of his mother; and 2) Respondent's counsel is involved in a Lane County case that currently is set for May 18, 1999. The Agency opposes the motion.

"OAR 839-050-0150(5) governs motions for postponements and provides:

"(a) Any participant making a request for a postponement of any part of the contested case proceeding must state in detail the reason for the request. The administrative law judge may grant the request for good cause shown. In making this determination, the administrative law judge shall consider:

"(A) Whether previous postponements have been granted;

"(B) The timeliness of the request;

"(C) Whether a participant has previously indicated it was prepared to proceed

"(D) Whether there is a reasonable alternative to postponement; for example, submitting a sworn statement of a witness; and

"(E) The date the hearing was originally scheduled to commence.

"(b) The administrative law judge shall issue a written ruling either granting or denying the motion and shall set forth the reasons therefore[.]"

"In this case, neither participant previously has requested a postponement, and the case is scheduled to be heard on the date initially set forth in the Notice of Hearing. Nonetheless, neither of the grounds cited by Respondent constitutes "good cause" for a postponement. First, Respondent's counsel does not indicate whether the Lane County case was set before or after the Notice of Hearing was issued in this matter. If the court case was set after this contested case hearing was scheduled, he should have asked for a continuance in that matter. Counsel does not assert that he made any attempt to resolve the potential conflict by rescheduling the court case. Second, Respondent's counsel apparently has known of a possible conflict with a court case for some time and could have resolved any conflict weeks ago. (See Agency's Response to Respondent's Motion for Continuance, Exhibit A-1). Indeed, in a letter

dated April 6, 1999, the Agency case presenter stated that she would not object to rescheduling the contested case hearing to another day during the same week of May. (*Id.*) The case presenter asked Respondent's counsel to call her to discuss a mutually acceptable date, but received no response. (*Id.*, Exhibits A-1, A-2, A-3) Under the circumstances, the scheduling conflict of Respondent's counsel does not amount to good cause for postponement of the hearing at this late date.

"Respondent's motion also states that he is absent from Oregon because of the illness of his mother in Mexico. The motion does not, however, indicate how long Respondent (or his lawyer) has known of this illness, how long Respondent has been absent from Oregon, or even whether the illness is such that Respondent's presence in Mexico is advisable. Nor does the motion include any documentation -- such as an affidavit of Respondent or Respondent's counsel -- supporting the few factual assertions made. These somewhat vague and unsupported assertions do not constitute good cause for postponement of the hearing, especially at this late date.

"For these reasons, the motion for postponement is **DENIED**. The hearing shall commence at 10:00 a.m. on May 18, 1999, at BOLI's office at 3865 Wolverine Street NE, #E-1, Salem, Oregon, as stated in the Notice of Hearing. To minimize any hardship on Respondent, he may appear in person or by telephone, as he chooses. Should Respondent wish to appear by telephone, he or his attorney shall promptly notify this forum of the telephone number at which Respondent may be reached on the day of the hearing. The Agency will pay any long-distance and international telephone charges associated with any such appearance.

"The forum also **DENIES** Respondent's associated motion to postpone the due-date for case summaries to 10 days before a new date for the contested case hearing. Respondent shall submit his case summary by this Friday, May 14, 1999. In addition to filing and serving the case summary by mail, Respondent shall ensure that both the Hearings Unit and the Agency case presenter **receive** complete copies of the case summary -- including exhibits -- no later than **12:00 noon** on Friday, May 14, 1999.

"Finally, the forum notes that it had wished to conduct a telephonic hearing on Respondent's motion but was unable to do so because Respondent's counsel, Michael T. Barrett, has not provided this forum with a telephone number. The telephone number listed in the 1999 Oregon State Bar directory has been disconnected, and the Bar does not have a more current telephone for Mr. Barrett. The Agency case presenter appears to have experienced the same difficulty reaching Mr. Barrett by telephone for the last several weeks. (*Id.*, Exhibits A-2, A-3). Mr. Barrett shall immediately notify the forum and the Agency case presenter of a telephone number at which he may be reached."

That ruling is hereby affirmed.

17) On the afternoon of May 14, 1999, the ALJ asked the Agency case presenter whether she had received a case summary or any other communication from Respondent. The case presenter stated she had not. The ALJ informed the case presenter that the Hearings Unit also had received no case summary or other communication from Respondent. This ex parte contact was disclosed on the record during the contested case hearing.

18) The contested case hearing was scheduled to begin at 10:00 a.m. on May 18, 1999. Neither Respondent nor his attorney appeared at that time. After waiting one-half hour for Respondent or his attorney to appear, the ALJ explained the issues involved in the hearing and the procedures governing the conduct of the hearing, and the Agency presented its case.

19) The Agency requested that a Spanish interpreter be present throughout the hearing. Accordingly, Robert Mogle, an Oregon certified interpreter, was present throughout the hearing, translated the proceedings in their entirety for the benefit of Claimant, and translated Claimant's testimony. Prior to interpreting the proceedings, Mogle stated his credentials on the record and took an oath or affirmation to translate the proceedings truthfully and accurately to the best of his ability.

20) Neither Respondent nor his counsel appeared at any time during the hearing and the ALJ declared Respondent to be in default. The record closed on May 18, 1999, after the Agency presented its case.

21) During the hearing, on her own motion, the ALJ corrected the case caption to delete the second word "FAMILY." The caption on the proposed order is the correct case caption.

22) The ALJ issued a proposed order on June 4, 1999, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The forum received no exceptions.

FINDINGS OF FACT – THE MERITS

1) From January 1, 1998, through June 30, 1998, claimant worked as a dishwasher and cook at the Gonzalez Family Restaurant, located in Salem, Oregon, under the supervision of Sabas Gonzalez. At least one other person worked at the restaurant, chef Manuel Chavez.

2) As of July 23, 1998, Gonzalez Family Restaurant, Inc. was an active Oregon corporation doing business in Oregon. Since July 1997, its registered agent had been Sabas Gonzalez. Gonzalez was responsible for the day-to-day operation of the restaurant and paid its employees.

3) On September 30, 1998, the corporation Gonzalez Family Restaurant, Inc. was involuntarily dissolved. The restaurant continued in operation.

4) The Agency's original Order of Determination was dated October 30, 1998, and identified Gonzalez Family Restaurant, Inc. as having been Claimant's employer. Gonzalez Family Restaurant, Inc., denied all allegations in the Order of Determination.

5) The Agency's Amended Order of Determination, dated March 4, 1999, identified Claimant's employer as Sabas Gonzalez dba Gonzalez Family Restaurant as Successor to Gonzalez Family Restaurant Inc. In his Answer to the Amended Order of Determination, Respondent Sabas Gonzalez dba Gonzalez Family Restaurant as Successor to Gonzalez Family Restaurant Inc. admitted that Claimant was his employee. The forum infers from this admission, as well as the evidence regarding the corporate status of Gonzalez Family Restaurant, Inc., that Gonzalez Family Restaurant, Inc., employed Claimant from January 1, 1998, through June 30, 1998. The forum also

infers that Respondent Sabas Gonzalez dba Gonzalez Family Restaurant is the successor to Gonzalez Family Restaurant, Inc.

6) The forum has accepted Claimant's credible testimony regarding the number of hours he worked at the Gonzalez Family Restaurant. During the first five months he was employed by Gonzalez Family Restaurant, Inc., Claimant worked six days per week, at least 12 hours per day. In June 1998, chef Chavez did not work at the restaurant. Consequently, Claimant worked every day that month, again at least 12 hours per day. On the calendar he completed during the BOLI investigation, Claimant indicated that he had worked exactly 12 hours per day. Claimant testified credibly at hearing that he reported only 12 hours each day because he wanted to be sure he did not claim he had worked more hours than he really had.²

7) On behalf of Gonzalez Family Restaurant, Inc., Sabas Gonzalez paid Claimant \$500.00 in wages every two weeks, regardless of the number of hours Claimant worked. Respondent admitted that fact during an interview with Agency compliance specialist Taeubel, who speaks Spanish and was assigned to investigate Claimant's wage claim. The last time Gonzalez paid Claimant, he gave Claimant only \$250.00 because Claimant had worked only one week during the normal two-week pay period. The forum has calculated the total amount of money Gonzalez Family Restaurant, Inc. paid Claimant to be **\$6500.00** (26 weeks worked x \$250.00/week).

8) Despite Taeubel's request, Gonzalez never provided him with a record of the hours Claimant worked. Gonzalez admitted to Taeubel that he did not make or maintain such records. He also admitted that fact in his Answer. During an interview with Taeubel, Gonzalez further admitted that he made no deductions from Claimant's wages for taxes, Social Security, or workers' compensation insurance, a fact corroborated by Claimant.

9) During his investigation, Taeubel interviewed chef Chavez, who confirmed that Claimant had worked at the Gonzalez Family Restaurant.

10) The Agency subpoenaed Chavez to testify at the contested case hearing, but he did not appear.

11) The forum observed Claimant carefully throughout the hearing and found his testimony generally to be credible. He gave straightforward answers to questions and did not go out of his way to portray Respondent in a bad light. For example, Claimant readily admitted that Respondent had paid him \$500.00 cash every two weeks, a fact he easily could have denied. Moreover, certain aspects of Claimant's testimony were corroborated by the information Taeubel received from Respondent and from employee Chavez, such as the fact that Claimant worked at the Gonzalez Family Restaurant and the amount of wages he was paid.

12) In some respects, Claimant was a relatively unsophisticated witness. He had difficulty reading some of the exhibits, even though they were printed in Spanish, and testified that a friend helped him complete some of the wage claim forms. The forum believes that Claimant's difficulty in reading explains why the work calendar he completed indicates incorrectly that each of the six months he worked began on a Sunday. Rather than rely on those calendars, the forum has completed its own calculations of the wages due Claimant based on his credible testimony regarding the days on which he worked, as reflected in Findings of Fact -- the Merits 6, 15, and 16.

13) In 1998, the minimum wage in Oregon was \$6.00 per hour.

14) Pursuant to ORS Chapter 653 (Minimum Wages), OAR 839-020-0030 (Payment of Overtime Wages) and Agency policy, the Agency calculated Claimant's total earned wages to be \$13,560.00. From that amount, the Agency subtracted the \$6000.00 it calculated Gonzalez had paid Claimant, with the result being that the

Agency alleged that Respondent owed Claimant \$7560.00. The Agency also calculated that Respondent owed Claimant penalty wages of \$1,749.60.

15) The forum agrees with Taeubel's calculation of the number of hours Claimant worked from January 1, 1998, through May 30, 1998, and the amount Gonzalez Family Restaurant, Inc. was required to pay him for those hours -- \$11,304.00.

16) The forum disagrees, however, with Taeubel's calculations for May 31 through June 30, 1998, because they do not include the wages Claimant earned by working on Tuesdays. Consequently, to the \$2256.00 the Agency calculated Claimant earned during that period, the forum has added \$432.00 (4 Tuesdays x 12 hours/Tuesday x \$9.00/hour)³ for a total of \$2688.00 for the period May 31 through June 30, 1998. This brings the total amount of wages Claimant earned to **\$13,992.00**.

ULTIMATE FINDINGS OF FACT

1) During the period January 1, 1998, through June 30, 1998, Gonzalez Family Restaurant, Inc. was an Oregon corporation that engaged the personal services of one or more persons in the state of Oregon, including Claimant.

2) The state minimum wage during 1998 was \$6.00 per hour.

3) From January 1, 1998, through May 30, 1998, Claimant worked 1548 hours for Gonzalez Family Restaurant, Inc., 672 of which were hours worked in excess of 40 per week. From May 31, 1998, through June 30, 1998, Claimant worked 360 hours, 176 of which were hours worked in excess of 40 per week. For all these hours, Claimant earned a total of \$13,992.00. Gonzalez Family Restaurant, Inc. paid Claimant only \$6,500.00 and, therefore, owed Claimant \$7492.00 in earned and unpaid compensation on the day Claimant's employment terminated.

4) Gonzalez Family Restaurant, Inc. was involuntarily dissolved on September 30, 1998. Respondent Sabas Gonzalez dba Gonzalez Family Restaurant was

thereafter, at all material times, the successor to Gonzalez Family Restaurant, Inc. Respondent, therefore, owed Claimant **\$7492.00** in earned and unpaid wages.

5) Gonzalez Family Restaurant, Inc., did not make or keep available to the Commissioner of the Bureau of Labor and Industries a record or record containing the actual hours worked by Claimant.

CONCLUSIONS OF LAW

1) ORS 653.010 provides, in pertinent part:

"(3) 'Employ' includes to suffer or permit to work; * * * .

"(4) 'Employer' means any person who employs another person * * * ."

ORS 652.310 provides, in pertinent part:

"As used in ORS 652.310 to 652.414, unless the context requires otherwise:

"(1) 'Employer' means any person who in this state, directly or through an agent, engages personal services of one or more employees and includes * * * any successor to the business of any employer * * * .

"(2) 'Employee' means any individual who otherwise than as copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled."

From January 1, 1998, through June 30, 1998, Gonzalez Family Restaurant, Inc., was an employer and Claimant was its employee subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.414, and 653.010 to 653.261. At all material times after September 30, 1998, Respondent was Claimant's "employer" for purposes of ORS 652.310 to 652.414 and rules promulgated thereunder.

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

3) ORS 653.025 requires that, except in circumstances not relevant here:

"* * * for each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages computed at a rate lower than:

"* * * * *

"(2) For calendar year 1998, \$6.00."

Oregon law required Gonzalez Family Restaurant, Inc., to pay Claimant at a fixed rate of at least \$6.00 per hour. Gonzalez Family Restaurant, Inc., failed to pay Claimant at that rate, in violation of ORS 653.025(2).

4) ORS 653.261(1) provides:

"The Commissioner of the Bureau of Labor and Industries may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to, minimum meal periods and rest periods, and maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of such employees when computed without benefit of commissions, overrides, spiffs, and similar benefits."

OAR 839-020-0030(1) provides that, except in circumstances not relevant here:

"* * * all work performed in excess of forty (40) hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed without benefits of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1)."

Oregon law required Gonzalez Family Restaurant, Inc., to pay Claimant one and one-half times his regular hourly rate, in this case the minimum wage of \$6.00 per hour, for all hours worked in excess of 40 per week. Gonzalez Family Restaurant, Inc., failed to pay Claimant at the overtime rate, in violation of OAR 839-020-0030(1).

6) ORS 652.140 provides, in pertinent part:

"(1) Whenever an employer discharges an employee or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge or termination shall become due and payable not later than the end of the first business day after the discharge or termination.

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

Claimant's credible testimony proves that June 30, 1998, was his last day of work, but the record does not establish whether Claimant quit or was fired. Even assuming, however, that Claimant quit without notice, his wages would have been due no later than July 8, 1998. Gonzalez Family Restaurant, Inc., violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid by that date.

8) As admitted successor to Gonzalez Family Restaurant, Inc., Respondent is liable for the wages owed to Claimant. Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant his earned, unpaid, due, and payable wages. ORS 652.332.

9) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Agency policy is not to hold successor employers liable for penalty wages under ORS 652.150. *In the Matter of Gerald Brown*, 14 BOLI 154, 169 (1995). Respondent is not liable for penalty wages.

10) ORS 653.045 provides, in pertinent part:

"(1) Every employer required by ORS 653.025 or by any rule, order or permit issued under ORS 653.030 to pay a minimum wage to any of the employer's employees shall make and keep available to the Commissioner of the Bureau of Labor and Industries for not less than two years, a record or records containing:

"(a) The name, address and occupation of each of the employer's employees.

"(b) The actual hours worked each week and each pay period by each employee.

"(c) Such other information as the commissioner prescribes by the commissioner's rules if necessary or appropriate for the enforcement of ORS 653.010 to 653.261 or of the rules and orders issued thereunder.

"(2) Each employer shall keep the records required by subsection (1) of this section open for inspection or transcription by the commissioner or the commissioner's designee at any reasonable time."

ORS 653.256 provides, in pertinent part:

"(1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$1,000.00 against any person who willfully violates ORS 653.030, 653.045, 653.050, 653.060 or 653.261 or any rule adopted pursuant thereto. However, no civil penalty may be assessed for violations of rules pertaining to the payment of overtime wages."

For purposes of these statutes, "employer" means "any person who employs another person," and does not incorporate the concept of successor liability. ORS 653.010(4). *Compare* ORS 652.310(1) (including "any successor to the business of any employer" in the definition of "Employer"; the definition applies only to ORS 652.310 to 652.414). Respondent was not Claimant's employer for purposes of ORS 653.045 and the commissioner lacks authority to assess a civil penalty against Respondent for Gonzalez Family Restaurant, Inc.'s violation of that statute.

OPINION

RESPONDENT AS "EMPLOYER" FOR PURPOSES OF THE WAGE CLAIM

During the period of Claimant's employment -- January 1 through June 30, 1998 -- Gonzalez Family Restaurant, Inc. was an active corporation. The corporation later

was dissolved, and Respondent admitted that he was Claimant's employer as *successor* to Gonzalez Family Restaurant, Inc. That admission brings Respondent within the statutory definition of an "employer" that may be held liable for the wages that Gonzalez Family Restaurant, Inc., failed to pay Claimant.

MINIMUM WAGE AND OVERTIME

ORS 653.025(2) prohibited employers, during 1998, from paying their employees at a rate less than \$6.00 for each hour of work time. OAR 839-020-0030 provides that all work performed in excess of forty hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay. Gonzalez Family Restaurant, Inc., was legally obliged to pay Claimant at least \$6.00 per hour worked up to forty per week, plus one and one-half times that wage for all hours worked in excess of forty per week.

WORK TIME

This forum has ruled repeatedly that, pursuant to ORS 653,045, it is the employer's duty to maintain accurate records of the hours and days an employee works. *See, e.g., In the Matter of Diran Barber*, 16 BOLI 190 (1997); *In the Matter of Tina Davidson*, 16 BOLI 141, 148 (1997). Where the forum concludes that an employee was employed and was improperly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise amounts involved. *In the Matter of Diran Barber*, 16 BOLI at 196. Where the employer produces no records, the Commissioner may rely on the 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 'may then award damages to the employee, even though the result be only approximate.'" (*Id.*; citation omitted).

Here, Gonzalez Family Restaurant, Inc., kept no records of the days or hours that Claimant worked. The forum has accepted Claimant's credible testimony that he worked at least 12 hours every day that he worked at the restaurant, and has credited him with 12 hours for each of those days. Claimant's credible testimony establishes that he worked a total of 1908 hours for Gonzalez Family Restaurant, Inc., 848 of which were hours worked in excess of 40 per week. For all these hours, Claimant earned a total of \$13,992.00, based on the minimum wage of \$6.00 per hour. Claimant's testimony, corroborated by Respondent's statement to Taeubel, also establishes that Gonzalez Family Restaurant, Inc., paid him only \$6500.00. Consequently, Respondent, as successor to the corporation, owes Claimant **\$7492.00** (\$13,992.00 - \$6500.00) in earned and unpaid compensation.

PENALTY WAGES

The Agency alleged that Respondent owes Claimant penalty wages of \$1749.60 for willfully failing to pay Claimant all the wages he was due. It is Agency policy, however, not to hold successor employers liable for penalty wages. *In the Matter of Gerald Brown*, 14 BOLI at 169. Accordingly, this Order does not assess civil penalty wages against Respondent.

VIOLATION OF ORS 653.045

The Agency asks this forum to impose a \$1000.00 civil penalty against Respondent for violating ORS 653.045, which requires employers to make and keep available records of the number of hours worked by each employee. Respondent has admitted that that he did not keep records of the hours Claimant worked. At the time Claimant was employed at the restaurant, however, Respondent acted as the agent of Gonzalez Family Restaurant, Inc., and was not Claimant's employer. The definition of "employer" that applies to ORS 653.045 is "any person who employs another person,"

and does not incorporate the concept of successor liability. ORS 653.010(4). Consequently, Respondent, who is liable for unpaid wages *only* as the successor to Gonzalez Family Restaurant, Inc.,⁴ is not an "employer" for purposes of ORS 653.045, and cannot be made to pay a penalty for the corporation's violation of that statute.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages he owes as a result of violations of ORS 653.025(2), ORS 652.140, and OAR 839-020-0030(1), the Commissioner of the Bureau of Labor and Industries hereby orders **Sabas Gonzalez dba Gonzalez Family Restaurant as Successor to Gonzalez Family Restaurant, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries in trust for Martin Sanchez in the amount of SEVEN THOUSAND FOUR HUNDRED NINETY-TWO DOLLARS (**\$7492.00**), less appropriate lawful deductions, in earned, unpaid, due, and payable wages, plus interest at the legal rate on that sum from July 8, 1998, until paid.

¹ After the close of the contested case hearing, the ALJ discovered that her Case Summary Order had not been included in the Administrative Exhibits admitted at the beginning of the hearing. On her own motion, the ALJ received the Case Summary Order as Exhibit X-9a.

² Respondent told Agency compliance specialist Taeubel that Claimant had worked for him only eight or nine hours each day. The forum disbelieves that report because it was not supported by any documentary evidence and because Claimant's contrary testimony was credible.

³ All of the hours Claimant worked on Tuesdays were additional hours in excess of 40 per week. Consequently, Respondent was required to pay Claimant one and one-half times the minimum wage for those hours.

⁴ As stated above, Respondent is liable for unpaid wages because the definition of "employer" for the purposes of wage claims does include the concept of successor liability. ORS 652.310(1).