

**In the Matter of**

**JOHN M. SANFORD, INC.**

**Case No. 04-04**

**Final Order of Commissioner Dan Gardner**

**Issued September 14, 2004**

**SYNOPSIS**

Respondent failed to pay Claimant for all of the hours he had worked at the time he voluntarily quit his employment, in violation of ORS 652.140(2), and is liable for \$1,083 in unpaid wages to Claimant. Additionally, Respondent's failure to pay the wages was willful and Respondent is liable for penalty wages in the amount of \$4,560, pursuant to ORS 652.150. ORS 652.140(2); ORS 652.150; ORS 652.332; OAR 839-001-0470(1)(c).

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The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 4, 2004, at the Oregon State Capitol, Hearing Room # 343, located at 900 Court Street NE, Salem, Oregon.

Jeffrey C. Burgess, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Bradley C. Hunter ("Claimant") was present throughout the hearing and was not represented by counsel. Attorney Joseph E. Penna represented John M. Sanford, Inc. John M. Sanford was present during the entire hearing as Respondent's corporate representative.

In addition to Claimant, the Agency called as witnesses: Newell Enos, BOLI Wage and Hour compliance specialist; Doug Schlatter, Doug Schlatter Logging Company; Peter Reifel, heavy equipment mechanic (qualified as an expert witness); John Sanford, Respondent's president; and Robert Schaffer, logger.

Respondent called the following witnesses: John Sanford, Respondent's president; Dalton Sheffield, feller buncher and Respondent's employee; and Terry Nighswonger, timber cutter.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-6;
- b) Agency exhibits A-1 through A-5, A-9 through A-12, A-14, A-17, A-20, A-22, A-23, A-26, A-27, A-32, A-33, A-36, A-37, A-39, A-49, A-50 (filed with the Agency's case summary), and A-51 (submitted at hearing); and
- c) Respondent exhibits R-2 through R-8 (filed with Respondent's case summary).

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 December 16, 2002, Claimant filed a wage claim form stating Respondent had employed him during the wage claim period of October 1 through November 3, 2002, and failed to pay him all wages that were due when he quit his employment.

2) At the time he filed his wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent.

3) On January 2, 2002, the Agency notified Respondent that Claimant had filed a wage claim with BOLI alleging Respondent owed "unpaid statutory overtime wages of \$1,083.00 at the rate of \$19.00 per hour from October 1, 2002, to November 3, 2002."

4) On May 15, 2003, the Agency issued an Order of Determination numbered 02-4694. In the Order of Determination, the Agency alleged Respondent had employed Claimant during the period June 24 through November 3, 2002, failed to pay Claimant for all hours worked in that period and was liable to Claimant for \$877.75 in unpaid wages, including overtime wages for hours worked in excess of 40 in a given work week, plus interest. The Agency also alleged Respondent's failure to pay all of Claimant's wages when due was willful and Respondent was liable to Claimant for \$5,472 as penalty wages, plus interest. The Order of Determination gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law. Through counsel, Respondent timely filed a request for hearing and a general denial. The Agency sent Respondent a Notice of Insufficient Answer to Order of Determination and Respondent thereafter filed an Amended Answer denying any wages were owed and alleging that Claimant "over-reported his work hours" and "failed to return all equipment to employer upon his termination from employment."

5) On April 1, 2004, the Agency requested a hearing. On April 5, 2004, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:30 a.m. on May 4, 2004. With the Notice of Hearing, the forum included copies of the Order of Determination and Notice of Intent to Assess Civil Penalties, a "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.

6) On April 13, 2004, the ALJ ordered the Agency and Respondent each to submit a case summary 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; a brief statement of the elements of the claim and any

wage and penalty calculations (for the Agency only); and a brief statement of any defenses to the claim (for Respondent only). The ALJ ordered the participants to submit their case summaries by April 23, 2004, and notified them of the possible sanctions for failure to comply with the case summary order.

7) The Agency and Respondent timely filed case summaries.

8) On April 29, 2004, the ALJ received a letter from the Agency stating in pertinent part:

“The purpose of this letter is to notify you, consistent with Agency policy, that the hearing in the above-referenced matter has been scheduled to be held at the state capitol building for security reasons. Although there have been no direct threats of violence, there is reportedly some hostility toward the Claimant by Respondent’s president. This measure is being taken out of an abundance of caution.”

9) At the start of hearing, the ALJ verbally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

10) The ALJ issued a proposed order on June 10, 2004, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Respondent did not file exceptions. The Agency timely filed exceptions, which are addressed in the Opinion section of this Final Order.

#### **FINDINGS OF FACT – THE MERITS**

1) At all times material, Respondent John M. Sanford, Inc. was an Oregon corporation engaged in “contract cutting” for logging companies and engaged the personal services of one or more persons in Oregon.

2) At all times material, John M. Sanford was Respondent’s president.

3) Respondent, through Sanford, hired Claimant on June 24, 2002, as a “feller buncher operator.” Respondent agreed to pay Claimant \$19 per hour. Sanford

told Claimant he could work as many hours per week as needed to perform his job. Feller buncher work is typically unsupervised.

4) Throughout his employment, Claimant operated a Timbco T445-D feller buncher equipped with a series of saws, referred to as a “hot saw,” on the end of a boom which was designed to fell and bunch trees. The Timbco feller buncher most resembles an excavator and has many heavy moving parts that must be maintained daily.

5) Claimant performed all of his work in the forest and was unsupervised. The time he started and stopped work each day varied depending on the season. During fire season, his work hours were subject to “humidity closures” and “fire danger closures.” When the wind or humidity reached certain levels, Claimant was required to shut down his feller buncher to prevent sparks from igniting dry forest materials. During extreme fire danger, all logging machines were required to be shut down at 1 p.m. every day. During fire season, Claimant often started work as early as midnight, but otherwise started work around 4:30 a.m. each day.

6) In addition to his felling and bunching duties, Claimant was responsible for maintaining the Timbco feller buncher. Routine daily maintenance included refueling, lubricating all moving parts with a hand grease gun, checking the oil, coolant, and hydraulic fluid levels, and clearing debris from all moving parts, including the boom area, the “hot saw’s” teeth, and the exhaust manifold. Refueling the machine each evening usually took about ten minutes and the rest of the routine chores about 50 minutes. The feller buncher had several hoses that needed frequent replacement. When Claimant had to replace a hose, he drove to the nearest town with an auto shop and purchased a replacement hose. Depending on where Claimant was working, the nearest town could be up to two hours away. Some hoses are more difficult than others

to replace, so the actual time Claimant spent replacing them varied. Claimant was also responsible for making minor repairs because there were no mechanics available in the forest. If maintenance or minor repair work was not done thoroughly or correctly, the feller buncher became a fire hazard. Proper maintenance also enhanced the machine's efficiency, which increased its time in operation. During fire season, Claimant was particularly conscientious about clearing forest debris from the machine. Beginning in August 2002, the time he spent on daily maintenance increased by about an hour.

7) Claimant recorded his work hours on a time sheet Respondent provided for that purpose. The time sheet included a column titled "sale" that showed the particular contract Claimant was working under and additional columns for Claimant's "bunching hours" and "maintenance hours." Respondent billed the logging companies directly for the feller buncher operator's hours, but did not bill them for "down time" on the machine or for the maintenance hours.

8) Claimant submitted his hours to Sanford by mail every two weeks and Sanford paid him by check twice per month. The first check each month was a \$1,500 "draw" and the balance was paid two weeks later. Sanford, in turn, submitted a billing to the logging company, who then paid Respondent.

9) In August 2002, Sanford asked Claimant about the extra maintenance hour per day Claimant had recorded on his time sheets. Sanford had compared Claimant's time sheets with "the other guys" and perceived that Claimant was spending more time on maintenance than necessary. Claimant responded that he needed to maintain the equipment because it was a hot, dry summer and asked Sanford what he wanted him to do about the maintenance. Sanford did not respond and Claimant continued to care for the equipment in his customary manner. Claimant continued recording all of his maintenance time on his time sheets and Sanford continued to pay

him for all of the hours he recorded, including the additional maintenance hour. Sanford did not discipline Claimant or question him again about his maintenance hours.

10) In September and October 2002, Respondent sent invoices to Valley View Logging & Cutting, Inc. for a "Gold Beach" contract that consistently showed Claimant worked one more "bunching hour" per work day than Claimant had reported on his time sheets or told the company's owners. When Valley View paid Respondent for the work, Valley View's owners deducted the "over billing" from the payments.

11) On Friday, November 1, 2002, Claimant left work and drove a company truck home to Klamath Falls as he regularly did every weekend. Over the weekend, Claimant was offered a job operating a feller buncher in Klamath Falls at the same pay rate he received from Respondent. The new job was scheduled to start the following Monday and Claimant decided to accept the job after unsuccessful attempts to reach Sanford to discuss the offer. On November 3, 2002, Sanford returned Claimant's telephone calls. Claimant told him he had accepted the job in Klamath Falls because it was closer to home and he did not want to pass up an opportunity to spend more time with his family. He also told Sanford that since he had to start his new job immediately, he would return the company truck on the following weekend. Sanford became angry and called Claimant a "son of a bitch."

12) After Claimant quit his employment, he immediately mailed his final time sheets to Respondent. Claimant recorded 200 straight time hours and 90 overtime hours on his time sheets between September 29 and November 3, 2002. The following week, Sanford called Claimant and accused him of "padding" his hours and informed him that he would adjust Claimant's paycheck accordingly. He also made some accusations and threats about some tools and his truck. Claimant became angry and

told Sanford that he could come to Klamath Falls and pick up the truck, which was parked in front of Claimant's house with the tools locked inside.

13) On November 9, 2002, Sanford sent Claimant his final paycheck in the net amount of \$1,303.94 and included a letter written on company letterhead that stated in pertinent part:

"You will notice on your pay stub that I deducted several hours, this is time that you wrote down but didn't work according to your maintenance sheet. One example of time you wrote down but didn't work is me seeing you on the freeway where you couldn't have been if you had worked until 2 p.m. like you claimed.

"Also like we talked about on the phone and I questioned you several times, you[r] time[s] for the last couple of months have hours on them that you did not work but you wrote down and were paid for. Example on the Gold Beach job the logger wrote down everyday when you got there and when you left (since he was paying by the hour) and you wrote down 2 hours per day more than you worked. On that job alone the time that you cheated me worked out to \$842.40, including the cost for payroll such as work comp, simple IRA, etc. I have several witnesses that will testify to when you showed up and when you left. It is amazing you claim to be working at night but when the new operator gets down to the machine the lights don't work on it, how where [sic] you working at night? Writing down time and being paid for work that you didn't do is call [sic] theft and I will press charges if you don't make restitution. And remember that is just one job there is more time than just that one job.

"Also there are tools missing from the machine. Are they in the truck? Where is the truck? If the tools aren't in the truck and if the ones in the truck are missing then I will expect to be paid for them.

"Sincerely,

"John M. Sanford"

Claimant's final paycheck covered the period beginning September 29 through November 3, 2002. Claimant received an itemized statement with his final paycheck that shows he was paid \$19 per hour for 200 straight time hours and \$28.50 per hour for 52 overtime hours for a total gross amount of \$5,282, less lawful deductions.

14) Sanford informed the sheriff's office that his company truck was stolen and named Claimant as the perpetrator. He eventually had the truck towed from Claimant's

address in Klamath Falls. Claimant was never arrested or prosecuted for theft of the truck. The company tools were inside the truck and Claimant prepared an inventory of the truck's contents that the tow truck driver acknowledged and signed when the truck was towed.

15) From September 29 until November 3, 2002, Claimant worked 290 hours, including 90 overtime hours. He earned a total of \$6,365 but was paid only \$5,282 for those hours as of the hearing date. Respondent had not paid Claimant for all of the hours Claimant worked at the time he quit his employment, leaving an amount still due and owing for wages of \$1,083.

16) Respondent did not plead or show a financial inability to pay the wages at the time they accrued.

17) Claimant's demeanor was sincere and his testimony was straightforward and responsive. He had a clear recollection of pertinent facts and did not embellish his testimony in any way. His testimony regarding the hours he spent on maintenance duties was bolstered by other credible witness testimony and by Respondent's history of paying Claimant for the same number of hours performing maintenance work. While Claimant's reaction to Sanford's name calling may not have been the wisest course to take, his testimony that he never intended to deprive Sanford of the company truck was entirely believable and his action does not detract from his overall credibility. The forum credits Claimant's testimony in its entirety.

18) Sanford's testimony that Claimant "padded" his maintenance hours on his time sheets beginning in August 2002 was disingenuous. Notwithstanding that he consistently paid Claimant for those hours through September 2002, credible evidence shows it was Sanford who inflated Claimant's hours when billing on Respondent's contract with the logging company. However, Sanford was forthcoming about the

reductions he made from Claimant's final paycheck and acknowledged that, even according to his own calculations, Claimant was shorted \$136.75 in wages. The forum therefore credits Sanford's testimony where it was consistent with other credible testimony or was a statement against interest.

19) All of the other witnesses testified credibly.

#### **ULTIMATE FINDINGS OF FACT**

1) At all times material, Respondent was an Oregon corporation that engaged the personal services of one or more persons in Oregon, including Claimant, who was Respondent's employee.

2) Claimant worked as a feller buncher for Respondent between June 24 and November 3, 2002, at the agreed wage of \$19 per hour. Claimant's overtime rate was \$28.50 per hour.

3) From September 29 through November 3, 2002, Claimant worked 290 hours, including 90 overtime hours. Respondent owed Claimant total wages of \$6,365 for these hours and to date has paid only \$5,282, leaving unpaid wages of \$1,083.

4) Claimant quit Respondent's employment without notice on November 3, 2002, and more than 30 days have passed since Claimant's wages became due.

5) Written notice of nonpayment of wages was sent to Respondent on behalf of Claimant on January 2, 2003.

6) Respondent willfully failed to pay Claimant wages owed to him in the amount of \$1,083 and is liable for penalty wages.

7) Penalty wages, computed in accordance with ORS 652.150 and OAR 839-001-0470(1)(c), equal \$4,560 ( $\$19 \text{ per hour} \times 8 \text{ hours per day} = \$152 \text{ per day} \times 30 \text{ days} = \$4,560$ ).

## **PROPOSED CONCLUSIONS OF LAW**

1) At all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

2) The actions, inaction, statements, and motivations of John M. Sanford, Respondent's president, are properly imputed to Respondent.

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

4) Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid within five days, excluding Saturdays, Sundays and holidays, after Claimant quit his employment without notice. Respondent owes Claimant \$1,083 in unpaid, due and owing wages.

5) Respondent is liable for \$4,560 in penalty wages under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due upon termination of employment as provided in ORS 652.140(2).

6) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant his earned, unpaid, due and payable wages and the penalty wages, plus interest on all sums until paid. ORS 652.332.

## **OPINION**

The Agency was required to prove: 1) that Respondent employed Claimant; 2) any pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) that Claimant performed work for which he was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230, 262-63 (2000). Respondent does not dispute that it employed Claimant during the period between September 29 and November 3,

2002, or that it agreed to pay Claimant \$19 per hour. Respondent also does not dispute that it did not pay Claimant for all of the hours he reported on his time sheets, but justifies its refusal to pay by alleging Claimant did not work all of the maintenance hours he reported.

Respondent produced no evidence to support its contention that Claimant “over-reported” his maintenance hours during the period at issue in this matter. Sanford, Respondent’s president, admitted he was never present on the job site where Claimant worked and acknowledged that he continued to pay for additional maintenance hours even after he questioned Claimant about them in August 2002. Moreover, Claimant credibly testified that when Sanford raised the issue in August, Claimant accounted for the additional time spent on maintenance and when he asked Sanford about continuing to perform additional maintenance chores, Sanford did not reply. Evidence showed Claimant continued to maintain the Timbco feller buncher at the level he thought necessary and Respondent continued to pay him for the hours he reported until Claimant voluntarily quit in November 2002.

Notably, Respondent established the system by which Claimant kept a record of his own work hours, used that system until Claimant voluntarily quit Respondent’s employment, and never questioned or disciplined Claimant for “over-reporting” his hours after Sanford’s single inquiry about the hours in August 2002. Moreover, Respondent kept no independent record of Claimant’s hours worked and had no evidence, beyond its bare assertion, that Claimant had not worked the hours he claimed. ORS 653.045 requires an employer to keep records of the actual hours worked each week by each employee. Respondent cannot use its established system of tracking work hours to circumvent its statutory duty to keep a record of Claimant’s work hours. *In the Matter of Marion Nixon*, 5 BOLI 82, 88 (1986).

This forum has consistently held that if an employer disputes the number of hours claimed by a wage claimant, then “it is the employer’s burden to produce all appropriate records to prove the precise hours and wages involved.” *In the Matter of Barbara Coleman*, 19 BOLI at 265. Moreover, an employer has the duty to know the amount of wages due an employee and that amount is due upon termination of the employee’s employment. *Id.* at 265.

In this case, Respondent offered no evidence of any kind to show that Claimant did not work the hours he reported on his time sheets. The forum, therefore, has accepted Claimant’s credible statement and the record he maintained at Respondent’s behest of the number of hours he worked and concludes that Respondent is liable to Claimant for unpaid wages in the amount of \$1,083.

### **PENALTY WAGES**

The forum may award penalty wages where a respondent willfully fails to pay any wages due to any employee whose employment ceases. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission willfully if he or she acts, or fails to act, intentionally, as a free agent, and with knowledge of what is being done or not done. *In the Matter of Usra Vargas*, 22 BOLI 212, 222 (2001).

In this case, Sanford admits he knew as early as August 2002 that Claimant was recording an additional hour per day for maintenance. Although he initially questioned the additional hours per week, Sanford did not discipline Claimant for spending an excessive amount of time on maintenance, always paid him for the additional hours recorded, and never accused him of “padding” his hours until after Claimant voluntarily quit his employment. Instead, Sanford admits he purposely deducted “several hours” from Claimant’s final pay check that had been duly recorded on Claimant’s time sheet.

From these facts, the forum infers Respondent voluntarily and as a free agent failed to pay Claimant all of the wages he earned between September 29 and November 3, 2002, at the time Claimant terminated his employment without notice. Respondent acted willfully and is liable for penalty wages pursuant to ORS 652.150.

Penalty wages, therefore, are assessed and calculated in accordance with ORS 652.150 in the amount of \$4,560. This figure is computed by multiplying \$19 per hour by 8 hours per day multiplied by 30 days. See ORS 652.150 and OAR 839-001-0470(1)(c).

### **AGENCY'S EXCEPTION**

The Agency takes exception to the amount awarded as penalty wages and to the forum's calculation of penalty wages as set forth in the proposed order.

OAR 839-001-0470(1) provides, in pertinent part:

“(b) The employee's wages will continue to accrue at the employee's *hourly rate of pay* times eight (8) hours for each day the wages are unpaid.

“(c) The maximum penalty will be no greater than the employee's *hourly rate of pay* times 8 hours per day times 30 days.

“(d) Except as provided in subsection (e), the wages of an employee that are computed at a rate *other than an hourly rate* (e.g. salaries) will be reduced to an hourly rate for penalty computation purposes by dividing the total wages earned during the wage claim period (the period for which wages are owed and upon which the wage claim is based) by the total number of hours worked during the wage claim period.

“(e) Notwithstanding subsection (d), when wages are earned based on commission, bonus, piece rate, or other methods not based on hours worked, the wages will be reduced to an hourly rate for penalty computation purposes by dividing the total wages earned in the last 30 calendar days of employment by the total number of hours worked in the last 30 calendar days of employment. If the employee was employed for less than 30 days, the total wages earned during the entire period of employment will be divided by the number of hours worked during the entire period of employment.” (emphases added)

The Agency, citing *In the Matter of Westland Resources Group LLC<sup>i</sup>* and *In the Matter of Sharon Kaye Price<sup>ii</sup>*, argues that the rule has been consistently interpreted by

this forum “to take into account overtime worked during the wage claim period and changes in rate of pay.” The Agency’s contention is not wholly accurate.

This forum has consistently held that where more than one wage rate is earned during a wage claim period, it is the agency’s policy when determining the penalty wages “to compute the average hourly wage during the wage claim period, no matter how many wage rates applied. As a starting point, only the wage rates used and wages earned during the actual wage claim period are used to determine the average hourly wage.<sup>iii</sup> The equation is as follows: Total earned during the wage claim period divided by the total number hours worked during the wage claim period, multiplied by eight hours, multiplied by 30 days.” *In the Matter of Burrito Boy, Inc.*, 16 BOLI 1, 20 (1997). See also, *In the Matter of Mark Johnson*, 15 BOLI 139, 142-43 (1996) (holding that when more than one hourly rate is paid during a wage claim period and when a bonus is paid in addition to the hourly rate of pay, the agency’s policy is to calculate an *average* hourly wage as a base factor for computing penalty wages).

In *Westland Resources* and *Price*, the claimants earned more than one wage rate during the wage claim periods and the forum correctly applied the above formula to come up with an average hourly wage as a base factor for computing penalty wages. In this case, Claimant did not earn more than one wage rate during the wage claim period.

Contrary to the Agency’s argument, the forum normally has not computed an “average” hourly rate in those cases where a claimant was paid at one hourly rate during the wage claim period with no alternative form of compensation, even if the unpaid wages included overtime earnings. See generally, *In the Matter of Larsen Golf Construction, Inc.*, 25 BOLI \_ (2004) (computing one claimant’s unpaid wages at \$18 per hour for straight time and \$27 per hour for overtime work performed, but computed penalty wages by multiplying his hourly wage rate (\$18 per hour) by 8 hours per day by

30 days); *In the Matter of Millennium Internet*, 25 BOLI \_ (2004) (computing claimant's unpaid wages at \$22 per hour for straight time and \$33 per hour for overtime work performed, but computed penalty wages by multiplying claimant's hourly wage rate (\$22 per hour) by 8 hours per day by 30 days); *In the Matter of Adesina Adeniji*, 25 BOLI \_ (2004) (computing claimant's unpaid wages at \$6.90 per hour for straight time and \$10.35 per hour for overtime work performed, but computed penalty wages by multiplying claimant's hourly wage rate (\$6.90 per hour) by 8 hours per day by 30 days); *In the Matter of Barbara Blair*, 24 BOLI 89 (2002) (computing claimant's unpaid wages at \$10 per hour for straight time and \$15 per hour for overtime work performed, but computed penalty wages by multiplying claimant's hourly wage rate (\$10 per hour) by 8 hours per day by 30 days); *In the Matter of Stan Lynch*, 23 BOLI 34, 38-39 (2002) (computing claimants' unpaid wages at their straight time rates and at one and one-half times their regular rate of pay for hours worked exceeding 40 in a work week, but computed penalty wages by multiplying their hourly wage rates by 8 hours per day by 30 days); *In the Matter of Ilya Simchuk*, 22 BOLI 186, 192 (2001) (computing claimant's unpaid wages at \$10 per hour for straight time and \$15 per hour for overtime work performed, but computed penalty wages by multiplying claimant's hourly wage rate (\$10 per hour) by 8 hours per day by 30 days); *In the Matter of Danny Vong Phuoc Truong*, 21 BOLI 217, 224 (2001) (computing claimant's unpaid wages at \$8.75 per hour for straight time and \$13.13 per hour for overtime work performed, but computed penalty wages by multiplying claimant's hourly wage rate (\$8.75 per hour) by 8 hours per day by 30 days); *In the Matter of R.L. Chapman Ent. Ltd.*, 17 BOLI 277, 281 (1999) (computing penalty wages by multiplying claimants' hourly wage rates by 8 hours per day by 30 days, even though one claimant's unpaid wages included overtime earnings); *In the Matter of Harold Zane Block*, 17 BOLI 150, 155-56 (1998) (computing claimant's unpaid

wages at \$5.50 per hour for straight time and \$8.25 per hour for overtime work performed, but computed penalty wages by multiplying claimant's hourly wage rate (\$5.50 per hour) by 8 hours per day by 30 days); *In the Matter of David Creager*, 17 BOLI 102, 106-07 (1998) (computing claimant's unpaid wages at \$5.00 per hour for straight time and \$7.50 per hour for overtime work performed, but computed penalty wages by multiplying claimant's hourly wage rate (\$5.50 per hour) by 8 hours per day by 30 days); *In the Matter of Graciela Vargas*, 16 BOLI 246, 249 (1998) (computing claimants' unpaid wages at their straight time rates and at one and one-half times their regular rate of pay for hours worked exceeding 40 in a work week, but computed penalty wages by multiplying their hourly wage rates by 8 hours per day by 30 days); *In the Matter of Diran Barber*, 16 BOLI 190, 192-93 (1997) (computing claimant's unpaid wages at \$4.75 per hour for straight time and \$7.13 per hour for overtime work performed, but computed penalty wages by multiplying claimant's hourly wage rate (\$4.75 per hour) by 8 hours per day by 30 days); and *In the Matter of Jewel Schmidt*, 15 BOLI 236, 239 (1997) (computing claimant's unpaid wages at \$5.00 per hour for straight time and \$7.50 per hour for overtime work performed, but computed penalty wages by multiplying claimant's hourly wage rate (\$5.00 per hour) by 8 hours per day by 30 days).

The Agency argues that its policy and at least one prior BOLI case “[apply] the [average hourly rate] formula to overtime hours.” The policy, actually an “interpretation” set forth in the Wage and Hour Division “Field Operations Manual” pertaining to “Penalty Wage Computations,” in pertinent part, states:

“For an employee paid on an hourly or salary basis:

“Divide the total wages earned during the wage claim period by the total number of hours worked during the wage claim period to determine the employee's hourly rate of pay during the period of time covered by the claim.

“Multiply this rate by 8 (hours) X a maximum of 30 days.”

While ordinarily the Agency's rule interpretations are afforded great deference, the interpretation in this case conflicts with the rule's language. A plain reading of OAR 839-001-0470(1)(d) shows that only those "wages of an employee that are computed at a rate *other than an hourly rate* (e.g. salaries) will be reduced to an [average] hourly rate for penalty computation purposes." (emphasis added) Otherwise, the "maximum penalty will be no greater than the employee's *hourly rate of pay* times 8 hours per day times 30 days." (emphasis added) OAR 839-001-0470(1)(c). The Agency's rule is consistent with the language set forth in ORS 652.150; therefore, the forum concludes that the statute and rule override the Agency's internal interpretation.

As the Agency points out, the forum previously has applied the average hourly rate formula in at least one case where the claimant was paid at one hourly rate during the wage claim period with no alternative form of compensation, and where the unpaid wages included overtime earnings. See *In the Matter of Norma Amezola*, 18 BOLI 209, 215 (1999). Such application departs from the majority of cases that are consistent with the Agency's rule. Absent an explanation or rationale for the departure, the forum finds the case an anomaly and to the extent that it deviates from the applicable law pertaining to penalty wage computations, *Amezola* is overruled. The forum's calculation of the penalty wages in this case is correct and the Agency's exception to the amount awarded as penalty wages is DENIED.<sup>iv</sup>

Finally, the forum has determined the Agency erroneously computed Claimant's unpaid wages by basing the amount on his entire employment period rather than the wage claim period (the period for which wages are owed and upon which the wage claim is based). Undisputed evidence shows Claimant earned \$6,365 between September 29 and November 3, 2002, and was paid only \$5,282, leaving unpaid wages of \$1,083. Respondent admitted he intentionally deducted hours from Claimant's final

paycheck that Claimant duly reported on his time sheets. Respondent has an absolute duty under ORS 652.140 to pay the wages that are really due even if the amount due exceeds the amount alleged in the Agency's charging document. *In the Matter of Mary Stewart-Davis*, 13 BOLI 188, 199 (1994), *citing In the Matter of Handy Andy Towing, Inc.*, 12 BOLI 284, 294 (1994); *Garvin v. Timer Cutters, Inc.*, 61 Or App 497 (1983). Moreover, where credible evidence establishes a wage claimant is owed wages exceeding those alleged in the charging document, the commissioner has the authority to award the greater amount of unpaid wages. *In the Matter of Stan Lynch*, 23 BOLI 34, 44 (2002). The forum therefore has modified the factual findings, conclusions of law, and the order herein to reflect the correct amount Respondent must pay Claimant in earned, unpaid, due and payable wages.

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, **John M. Sanford, Inc.** is hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Bradley C. Hunter, in the amount of FIVE THOUSAND SIX HUNDRED FORTY THREE DOLLARS (\$5,643), representing \$1,083 in gross earned, unpaid, due and payable wages, less appropriate lawful deductions, and \$4,560 in penalty wages, plus interest at the legal rate on the sum of \$1,083 from December 1, 2002, until paid and interest at the legal rate on the sum of \$4,560 from January 1, 2003, until paid.

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<sup>i</sup> 23 BOLI 276, 286 (2002)

<sup>ii</sup> 21 BOLI 78, 89-90 (2000)

<sup>iii</sup> In this case, the Agency erroneously computed the amount of wages owed using Claimant's entire employment period rather than the wage claim period which evidence shows was from September 29 through November 3, 2002.

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<sup>iv</sup> The forum notes that the failure to pay overtime in this case exposed Respondent to civil penalties under ORS 653.055. Civil penalties are computed in the same manner as penalty wages under ORS 652.150. See *In the Matter of Larsen Golf Construction, Inc.*, 25 BOLI \_ (2004), citing *Cornier v. Paul Tulacz, DVM PC*, 176 Or App 245 (2001) and *In the Matter of TCS Global Corp.*, 24 BOLI 246, 260 (2003). The Agency, however, did not allege a violation of the requirement to pay overtime under ORS 653.261 or amend its charging document to conform to the evidence at hearing. The forum therefore is precluded from awarding civil penalties in this case.