

**In the Matter of**

**LARSEN GOLF CONSTRUCTION, INC.**

**Case No. 36-03**

**Final Order of Commissioner Dan Gardner**

**Issued May 24, 2004**

**SYNOPSIS**

Respondent employed two wage claimants at an agreed wage and did not pay them all wages earned and due. The first claimant was awarded \$2,581.60 and the second \$1,759.50 in unpaid wages. Respondent's failure to pay the wages was willful, and the first claimant was awarded \$6,386 in penalty wages and the second \$4,320. The second claimant's unpaid wages included overtime wages, and he was awarded an additional \$4,320 in civil penalties. ORS 652.140(1) & (2), ORS 652.150, ORS 653.055(1)(b); OAR 839-010-0470.

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The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries ("BOLI") for the State of Oregon. The hearing was held on April 27, 2004, at BOLI's Salem office located at 3865 Wolverine NE, E-1, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Jeffrey C. Burgess, an employee of the Agency. Respondent did not appear at hearing and was held in default.

The Agency called the following witnesses: Douglas Failing and Juan Guerrero Gomez, wage claimants.

The forum received into evidence:

a) Administrative exhibits X-1 through X-21 (submitted or generated prior to hearing); and

b) Agency exhibits A-1 through A-32 (submitted prior to 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 March 26, 2002, Claimant Failing filed a wage claim with the Agency. He alleged that Respondent had employed him and failed to pay wages earned and due to him.

2) On November 14, 2002, Claimant Failing assigned to the Commissioner of Labor and Industries, in trust for himself, all wages due from Respondent.

3) On April 8, 2002, Claimant Gomez filed a wage claim with the Agency. He alleged that Respondent had employed him and failed to pay wages earned and due to him.

4) On April 5, 2002, Claimant Gomez assigned to the Commissioner of Labor and Industries, in trust for himself, all wages due from Respondent.

5) Both claimants brought their wage claims within the statute of limitations.

6) On September 9, 2002, the Agency served Order of Determination No. 02-1191 on Respondent based upon the wage claim filed by Claimants Failing and Gomez and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of \$4,255.60<sup>i</sup> in unpaid wages, plus interest; \$10,720.80<sup>ii</sup> in penalty wages, plus interest; and \$4,334.40 in civil penalties due to claimant Gomez pursuant to ORS 653.055, 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 September 20, 2002, Respondent, through Scott Larsen, its corporate president and designated authorized representative, filed an answer and request for hearing.

8) On March 25, 2004, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimants Failing and Gomez stating the time and place of the hearing as April 27, 2004, at 9:30 a.m., in Salem, 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.

9) On April 7, 2004, the Agency moved that the hearing be rescheduled to start at 1:00 p.m. on April 27, 2004. Respondent filed no objections and the motion was granted.

10) On April 16, 2004, the Agency filed a motion for partial summary judgment on the following issues:

- a) That Respondent owed claimants Failing and Gomez \$3,507.20 in unpaid wages, plus interest;
- b) That Respondent owes claimants Failing and Gomez \$10,720.80 in penalty wages, plus interest.

11) On April 23, 2004, the Administrative Law Judge issued an interim order granting the Agency's motion for partial summary judgment that read as follows:

**"INTRODUCTION**

"This action arises from an Order of Determination issued by the Agency on June 24, 2002, seeking (a) unpaid wages in the amount of \$2,581.60 as assignee of wage claimant Douglas Failing ('Failing'), along with \$6,386.40 as penalty wages pursuant to ORS 652.150; (b) unpaid wages in the amount of \$1,674.00 as assignee of wage claimant Juan Guerrero Gomez ('Gomez'), along with \$4,334.40 as penalty wages pursuant to ORS 652.150; (c) a civil penalty of \$4,334.40 for Gomez pursuant to ORS 653.055; and (d) interest at the legal rate per annum on these sums until paid. Respondent filed an answer and request for hearing on September

20, 2002, in which Respondent made a number of admissions, but denied owing the total amounts sought by the Agency.

“On April 16, 2004, the Agency filed a motion for partial summary judgment, contending that the admissions contained in Respondent’s answer entitled the Agency to partial summary judgment for the sum of \$3,570.20 in unpaid wages and \$10,720.80 in penalty wages, together with interest on those sums on the legal rate until paid. The Agency’s motion did not address the civil penalty sought pursuant to ORS 653.055(1)(b).

#### **“SUMMARY JUDGMENT STANDARD**

“A motion for summary judgment may be granted where no genuine issue as to any material fact exists and a participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings. *OAR 839-050-0150(4)(B)*. The standard for determining if a genuine issue of material fact exists is as follows:

‘ \* \* \* No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at [hearing].’

“*In the Matter of Cox and Frey Enterprises, Inc.*, 21 BOLI 175, 178 (2000).

#### **“UNPAID WAGES**

##### **“A. Claimant Gomez**

“In the Order of Determination, the Agency alleged Gomez worked at the agreed rate of \$18 per hour for Respondent, that Gomez worked 158 straight time hours and one hour of overtime between February 24 and March 25, 2002, that Gomez earned a total of \$2,871, and that Gomez has only been paid \$1,197. In its answer, Respondent admitted that Gomez was employed at the agreed rate of \$18 per hour during the time period alleged. Respondent also affirmatively alleged that ‘Juan Gomez worked a total of 160 hrs, 8.5 hours of which was worked over 40 hrs in a given week.’ One and one-half times \$18 per hour is \$27 per hour, Gomez’s overtime rate. ORS 633.261; OAR 839-020-0030.

“Based on Respondent’s admission, the forum calculates that Gomez earned a total of \$2,956.50 (151.5 hours x \$18 per hour = \$2,727; 8.5 hours x \$27 = \$229.50; \$2,727 + \$229.50 = \$2,956.50). Respondent’s answer did not specifically admit or deny that Gomez had been paid \$1,197, but did acknowledge that ‘\$1,197.00’ had been paid to the claimants. Based on Respondent’s failure to deny that the \$1,197 had been paid to Gomez as alleged in the Agency’s Order of Determination,

the forum concludes that Respondent paid Gomez \$1,197, leaving \$1,759.50 in unpaid wages to which Gomez is entitled.<sup>iii</sup>

**B. Claimant Failing.**

“In its Order of Determination, the Agency alleged that Failing worked for Respondent at the rate of \$4,613.17 per month<sup>iv</sup> and \$26.61 per hour<sup>v</sup> and earned \$2,581.60, that Respondent has not paid Failing any wages, and that Respondent owes Failing \$2,581.60 in unpaid wages. In its answer, Respondent admitted that Failing was employed at the rate of \$4,613.17 per month during the time period alleged.

“In its answer, Respondent admitted that there was ‘a balance due and owing of \$3,507.20’ in ‘unpaid wages’ to the ‘claimants.’ The forum has already calculated that Respondent has admitted owing \$1,759.50 in unpaid wages to Gomez. Since there are only two wage claimants, Respondent’s admission that it owes ‘\$3,507.20’ creates an admission, by inference, that Respondent owes Failing the sum of \$1,747.70 in unpaid wages.

**C. Distribution of Summary Judgment Award for Unpaid Wages**

“Based on Respondent’s admissions, there is no genuine issue of material fact that \$3,507.20 in unpaid wages are due to Gomez and Failing, and that \$1,759.50 of that total is owed to Gomez and \$1,747.70 owed to Failing. The Agency’s motion for partial summary judgment for unpaid wages due to Gomez and Failing in the amount of \$3,507.20 is **GRANTED**. The forum awards \$1,759.50 to Gomez and \$1,747.70 to Failing. Failing’s entitlement to the remaining \$833.90 unpaid wages in dispute (\$2,581.60 - \$1,747.70 = \$833.90) must be established at hearing.

**“PENALTY WAGES**

“In its Order of Determination, the Agency alleged that Gomez is entitled to \$4,334.40 in penalty wages and Failing entitled to \$6,386.40 in penalty wages based on Respondent’s alleged willful failure to pay their wages. In its answer, Respondent denied that its failure to pay claimants their unpaid wages was willful, alleging that it unsuccessfully tried to pay Gomez and Failing their wages. Respondent alleged it was unable to pay Failing because he disappeared from the job and would not come to Respondent’s office to pick up his check. Respondent alleged that Gomez’s paycheck was initially withheld because he did not turn in keys and equipment, and that Respondent tried to pay Gomez his check by mail ‘[a]fter further investigation’ but Respondent’s ‘check was returned with insufficient address.’

“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. *In the Matter of Usra Vargas*, 22

BOLI 212, 222 (2001). ORS 652.150(2) further provides that the penalty may not exceed 100 percent of the employee's unpaid wages unless the employer fails to pay the full amount of the employee's unpaid wages 'within 12 days after written notice of such nonpayment is sent to the employer by or on behalf of the employee.'

"In this case, Respondent received written notice that Gomez and Failing were due unpaid wages sometime between June 24 and September 20, 2002.<sup>vi</sup> The Order of Determination directed Respondent to pay the Commissioner the amount of the wage claims. Respondent admitted in its answer that \$3,507.20 in unpaid wages was due and owing to Gomez and Failing, but did not enclose a check with its answer and there is no evidence that it has subsequently paid any of those wages.<sup>vii</sup> Respondent's admission that it owes \$3,507.20 in unpaid wages to Gomez and Failing establishes Respondent's knowledge that it knew that amount of wages was due to Gomez and Failing, but did not pay those wages. Respondent's defense that it attempted to pay Gomez and Failing their unpaid wages fails because it could have satisfied the undisputed amount of the wage claims by merely following the instructions in the Order of Determination and sending a check for that amount to the Commissioner. Based on Respondent's admission that it owes \$3,507.20 in unpaid wages, the forum concludes that Respondent acted voluntarily and as a free agent in failing to pay those wages. See *In the Matter of Westland Resources, Inc.*, 23 BOLI 276, 280 (2002). Respondent's failure to pay claimants' wages was willful and Gomez and Failing are entitled to penalty wages. The Agency's motion that it be granted partial summary judgment on the issue of Respondent's liability for penalty wages for Gomez and Failing is **GRANTED**.

#### **"AMOUNT OF PENALTY WAGES**

"Respondent failed to pay all unpaid wages to Gomez and Failing within 12 days after the Agency sent written notice of nonpayment of those wages to Respondent in its Order of Determination. Consequently, Gomez and Failing are entitled to 30 days of penalty wages, the maximum allowed by ORS 652.150. In this case, penalty wages for Gomez are calculated by multiplying his hourly rate of pay times eight (8) hours for each day the wages are unpaid, then multiplying that sum by 30 days. ORS 652.150, OAR 839-001-0470. See *In the Matter of Stephanie Nichols*, 24 BOLI 107, 122 (2002). Using this formula, Gomez is entitled to \$4,320 in penalty wages (\$18 per hour x 8 hours x 30 days = \$4,320). The Agency's motion for an award of penalty wages to Gomez is **GRANTED**, and Gomez is awarded \$4,320 in penalty wages.

"Failing's circumstances are different. In the Order of Determination, the Agency alleged two separate pay rates for Failing -- \$4,613.17 per month and \$26.61 per hour, and did not explain the basis for those two different rates. In its Order of Determination, the Agency did not allege how many hours Failing worked and Respondent did not agree to a number in its

answer, but admitted that Failing was paid \$4,613.17 per month. The Agency provided no evidence in support of its motion to indicate whether Failing was paid on a salary or hourly basis or the number of hours that Failing worked. If Failing was paid on an hourly basis, penalty wages are calculated by multiplying the hourly rate of pay times eight hours, then multiplying that sum by 30 days. If he was paid on a salary basis, the forum must first determine his hourly rate 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.' OAR 839-001-0470(d). Without evidence showing how many hours Failing worked, or whether he worked on a salary or hourly basis, the forum is unable to calculate the penalty wages due to Failing. The Agency's motion for a specific monetary award of penalty wages for Failing is **DENIED**. Failing's specific entitlement to penalty wages must be established at hearing.

**"SUMMARY**

"The Agency is granted partial summary judgment as to the following matters:

"(1) Claimant Gomez is awarded \$1,759.50 in unpaid, due, and owing wages, plus interest at the legal rate from May 1, 2002, until paid.

"(2) Claimant Failing is awarded \$1,747.70 in unpaid, due, and owing wages from March 1, 2002, until paid.<sup>viii</sup>

"(3) Respondent is liable for 30 days of penalty wages to Gomez and Failing.

"(4) Claimant Gomez is awarded \$4,320 in penalty wages, plus interest at the legal rate from June 1, 2002, until paid.

"The hearing will commence as scheduled for the purpose of establishing the total amount earned by Failing, the amount of penalty wages without which Failing is entitled, and to determine whether Gomez should be awarded civil penalties pursuant to ORS 653.055(1)(b)."<sup>ix</sup>

This ruling is **AFFIRMED**.

12) At the start of the hearing, Respondent had not appeared or notified the forum that it would not be appearing at the hearing. The ALJ waited 30 minutes past the time set for hearing before declaring Respondent in default and commencing the hearing.

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

14) On May 11, 2004, the ALJ issued a proposed order and notified the participant they were entitled to file exceptions to the proposed order. No exceptions were filed.

### **FINDINGS OF FACT – THE MERITS**

1) During all times material herein, Respondent was an Oregon corporation that engaged the personal services of one or more employees in Oregon.

2) Respondent employed Claimant Failing from February 1 through February 13, 2002, at the salary of \$4,613.67 per month. Respondent paid Failing on the first of each month. Failing's salary was based on a 40 hour workweek and converts to an hourly rate of \$26.61 per hour ( $\$4,613.67 \times 12 \text{ months} = \$55,364.04 \div 52 \text{ weeks} = \$1,064.58 \div 40 \text{ hours} = \$26.61 \text{ per hour}$ ).

3) Claimant Failing worked 97 hours between February 2 and February 13, 2002, earning \$2,581.60. Respondent has not paid him for any of those hours.

4) Claimant Failing quit Respondent's employment on February 13, 2002.

5) The Agency mailed written notice to Respondent on March 29, 2002, demanding that Respondent pay Claimant Failing \$6,813.67 in unpaid wages.

6) Penalty wages are computed as follows for Claimant Failing:  $\$26.61 \text{ per hour} \times 8 \text{ hours} = \$212.88 \times 30 \text{ days} = \$6,386.^x$

7) Respondent employed Claimant Gomez from February 24 through March 25, 2002, at the wage rate of \$18 per hour. Claimant Gomez worked 151.5 straight time hours and 8.5 overtime hours in that time period, earning \$2,956.50. Respondent paid Gomez \$1,197 for his hours worked from February 24 through March 9, 2002 and did not pay Gomez anything for the work he performed after March 9, 2002.

- 8) Respondent fired Claimant Gomez on March 26, 2002.
- 9) Respondent still owes Claimant Gomez \$1,759.50 in earned and unpaid wages.
- 10) Respondent created a check stub for Claimant Gomez for the period "03/11/2002 – 03/24/2002" on which was printed that Gomez had worked 77 regular hours and 8.5 overtime hours.
- 11) The Agency mailed written notice to Respondent on April 9, 2002, demanding that Respondent pay Claimant Gomez \$1,737 in unpaid wages.
- 12) Penalty wages are computed as follows for Claimant Gomez: \$18 per hour x 8 hours = \$144 x 30 days = \$4,320.

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

- 1) During all times material herein, Respondent was an Oregon employer that engaged the personal services of one or more employees.
- 2) Claimant Failing was employed by Respondent between February 1, and February 13, 2002, when he voluntarily quit Respondent's employment.
- 3) Claimant Gomez was employed by Respondent between February 24 and March 25, 2002, when he was fired.
- 4) Claimant Failing was employed at the salary of \$4,613.67 per month.
- 5) Claimant Gomez was employed at the agreed wage of \$18 per hour.
- 6) Claimant Failing earned \$2,581.60 in the wage claim period and has not been paid anything for his work.
- 7) Claimant Gomez earned \$2,956.50 in the wage claim period and has only been paid \$1,197 for work performed between February 24 and March 9, 2002. Respondent still owes Gomez \$1,759.50 in unpaid, due and owing wages, including 8.5 hours of overtime earned after March 9, 2002.

8) Written notice of nonpayment of unpaid wages due to Claimants Failing and Gomez were sent to Respondent on behalf of Failing and Gomez on March 29 and April 9, 2002, respectively.

9) Penalty wages are computed as follows for Claimant Failing: \$26.61 per hour x 8 hours = \$212.88 x 30 days = \$6,386.

10) Penalty wages are computed as follows for Claimant Gomez: \$18 per hour x 8 hours = \$144 x 30 days = \$4,320.

### **CONCLUSIONS OF LAW**

1) During all times material herein, Respondent was an employer and Claimants Failing and Gomez 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 Failing all wages earned and unpaid by February 20, 2002, five days after he voluntarily left his employment, excluding Saturdays, Sundays and holidays. Respondent owes Claimant Failing \$2,581.60 in unpaid, due and owing wages. Respondent violated ORS 652.140(1) by failing to pay Claimant Gomez all wages earned and unpaid by March 27, 2002, the first business day after discharging him. Respondent owes Claimant Gomez \$1,759.50 in unpaid, due and owing wages.

4) Respondent is liable for \$6,386 in penalty wages to Claimant Failing. Respondent is liable for \$4,320 in penalty wages to Claimant Gomez. ORS 652.150.

5) Respondent is liable for \$4,320 in civil penalties to Claimant Gomez. ORS 653.055(1)(b).

6) 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 Failing and Gomez their earned, unpaid, due and payable wages, plus penalty wages, plus civil penalties to Claimant Gomez, plus interest on all sums until paid. ORS 652.332.

## OPINION

### CLAIMANT GOMEZ

The facts regarding Claimant Gomez's wage claim are undisputed. Respondent's liability for his unpaid wages and penalty wages and the specific amount of those wages was resolved in the Administrative Law Judge's interim order granting the Agency's motion for partial summary judgment. The only remaining issue is Respondent's liability for civil penalties under ORS 653.055.

Where a Respondent pays an employee "less than the wages to which the employee is entitled under ORS 653.010 to 653.261," the forum may award civil penalties to the employee. ORS 653.055; *Cornier v. Paul Tulacz, DVM PC*, 176 Or App 245 (2001); *In the Matter of TCS Global Corp.*, 25 BOLI 1, 15 (2003). See also *In the Matter of William Presley*, 25 BOLI 56, 73 (2003), *appeal pending*. Here, the unpaid wages are an undisputed 8.5 hours of unpaid overtime wages that Claimant Gomez earned during the wage claim period. The statutory requirement to pay overtime is contained in ORS 653.261 and OAR 839-020-0030, the Agency rule interpreting the statute. Therefore, Respondent's failure to pay overtime wages to Gomez subjects Respondent to civil penalties in addition to the penalty wages awarded pursuant to ORS 652.150. Civil penalties are computed in the same manner as penalty wages under ORS 652.150, so Gomez is entitled to \$4,320 in civil penalties.<sup>xi</sup>

## **CLAIMANT FAILING**

When a Respondent defaults, the Agency must establish a prima facie case supporting the allegations of the charging document in order to prevail. *In the Matter of Venus Vincent*, 24 BOLI 155, 163 (2003). When an employer produces no records of hours or dates worked by the wage claimant, the commissioner may rely on evidence presented by the Agency, including credible testimony by the claimant, to show the amount and extent of work performed by the claimant. *In the Matter of Stan Lynch*, 23 BOLI 34, 44 (2002).

It was undisputed that Respondent employed Claimant Failing during the wage claim period at the salary of \$4,613.67 per month, that Respondent owes Failing at least \$1,747.70 in unpaid wages, and that Respondent paid Failing nothing for the work he performed during the wage claim period. Claimant Failing credibly testified that his salary was based on a 40 hour workweek and that he worked a total of 97 hours during the wage claim period. He supported his testimony with a calendar on which he had contemporaneously noted the dates and hours he worked during the wage claim period. Agency calculations established that Failing's salary converts to an hourly rate of \$26.61 per hour and that Failing earned \$2,581.60 during the wage claim period.

Based on Respondent's admissions, Failing's credible testimony, and the Agency's calculations, the forum concludes that Failing earned \$2,581.60 and was not paid anything, entitling him to an award of \$2,581.60 in unpaid, due and owing wages.

Respondent's liability for penalty wages to Failing was established in the ALJ's interim order granting partial summary judgment to the Agency. The actual amount of penalty wages Respondent owes to Failing is computed by reducing Failing's monthly salary of \$4,613.67 to an hourly rate of \$26.61.<sup>xii</sup> \$26.61 multiplied by 8 hours equals

\$212.88, and \$212.88 multiplied by 30 days equals \$6,386, the amount of penalty wages to which Failing is entitled.

### ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages, penalty wages, and civil penalties Respondent owes as a result of its violations of ORS 652.140(1), ORS 652.140(2), and ORS 653.055(1)(b), the Commissioner of the Bureau of Labor and Industries hereby orders **Larsen Golf Construction, 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 Claimant Douglas Failing in the amount of EIGHT THOUSAND NINE HUNDRED SIXTY SEVEN DOLLARS and SIXTY CENTS (\$8,967.60), less appropriate lawful deductions, representing \$2,581.60 in gross earned, unpaid, due and payable wages and \$6,386 in penalty wages, plus interest at the legal rate on the sum of \$2,581.60 from March 1, 2002, until paid, and interest at the legal rate on the sum of \$6,386 from April 1, 2002, until paid.

(2) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Juan Guerrero Gomez in the amount of TEN THOUSAND THREE HUNDRED NINETY NINE DOLLARS and FIFTY CENTS (\$10,399.50), less appropriate lawful deductions, representing \$1,759.50 in gross earned, unpaid, due and payable wages, 4,320 in penalty wages, and \$4,320 as a civil penalty, plus interest at the legal rate on the sum of \$1,759.50 from May 1, 2002, until paid, and interest at the legal rate on the sum of \$8,640 from June 1, 2002, until paid.

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<sup>i</sup> The Agency alleged \$2,581.60 was due to Failing and \$1,674 was due to Gomez.

<sup>ii</sup> The Agency alleged \$6,386.40 was due to Failing and \$4,334.40 was due to Gomez.

<sup>iii</sup> When the Agency proves a wage claimant is owed wages exceeding those sought in the Agency's Order of Determination, the commissioner has the authority to award the higher amount of unpaid wages. *In the Matter of Francisco Cisneros*, 21 BOLI 190, 213 (2001), *aff'd without opinion*, *Cisneros v. Bureau of Labor and Industries*, 187 Or App 114, 66 P. 3d 1030 (2003).

<sup>iv</sup> The Agency alleged this amount in Exhibit A to the Order of Determination, which shows the total unpaid wages allegedly due to Failing.

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<sup>v</sup> The Agency alleged this amount in Exhibit B to the Order of Determination, which shows the total penalty wages allegedly due to Failing.

<sup>vi</sup> The Order of Determination was issued on June 24, 2002, and Respondent's answer is dated September 20, 2002.

<sup>vii</sup> See ORS 652.160, which requires that "[i]n case of dispute over wages, the employer must pay, without condition, and within the time set by ORS 652.140, all wages conceded by the employer to be due \* \* \*."

<sup>viii</sup> At hearing, the ALJ amended his Interim Order to read: "Claimant Failing is awarded \$1,747.70 in unpaid, due, and owing wages, **plus interest at the legal rate** from March 1, 2002, until paid." (*change in bold*)

<sup>ix</sup> At hearing, the ALJ amended his Interim Order to read: "The hearing will commence as scheduled for the purpose of establishing the total amount earned by Failing, the amount of penalty wages **to** which Failing is entitled, and to determine whether Gomez should be awarded civil penalties pursuant to ORS 653.055(1)(b)." (*change in bold*)

<sup>x</sup> Pursuant to Agency policy, civil penalty wages are rounded to the nearest dollar. *In the Matter of Staff, Inc.*, 16 BOLI 97, 119 (1997).

<sup>xi</sup> See Finding of Fact 12 – The Merits, *supra*.

<sup>xii</sup> See Finding of Fact 2 – The Merits, *supra*.