

In the Matter of

NORTHWEST CIVIL PROCESS SERVING, INC.,

Case No. 06-01

Issued April 13, 2001

SYNOPSIS

Respondent Northwest Civil Process Serving, Inc. employed Claimant as a process server and failed to pay Claimant minimum wage for all hours Claimant worked, in violation of ORS 652.140. Respondent's failure to pay Claimant the minimum wage was willful and Respondent was ordered to pay civil penalty wages. ORS 653.010; ORS 653.025; ORS 652.140; ORS 652.150; ORS 652.322.

The above-entitled case came on regularly for hearing before Linda A. Lohr, 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 January 4, 2001, at the Salem office of the Bureau of Labor and Industries, located at 3865 Wolverine Street NE, Bldg. E-1, Salem, Oregon.

Cynthia L. Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). John Henry Burlison ("Claimant") was present throughout the hearing and was not represented by counsel. Kevin Lafky, Attorney at Law, represented Northwest Civil Process Serving, Inc. ("Respondent"). Jon Archbold, Respondent's president, was present throughout the hearing as Respondent's corporate representative.

In addition to Claimant, the Agency called Jon Archbold, Respondent's president, and Newell Enos, a Wage and Hour Division compliance specialist, as witnesses.

Respondent called Jon Archbold, Respondent's president, and Mike Riedel, Respondent's former employee, as witnesses.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-23;
- b) Agency exhibits A-1 through A-9 (filed with the Agency's case summary) and A-10 and A-11 (submitted at hearing);
- c) Respondent exhibits R-2 through R-5 (filed with Respondent's case summary) and R-7 (submitted at hearing).

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 February 4, 2000, Claimant filed a wage claim form stating Respondent had employed him from November 10 until December 20, 1999, and failed to pay him the minimum wage for all hours worked. Claimant further alleged Respondent failed to pay him agreed upon mileage expenses.

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 May 22, 2000, the Agency served Respondent with an Order of Determination, numbered 00-0593. The Agency alleged Respondent had employed Claimant during the period November 11 through December 15, 1999, at the rate of \$6.50 per hour and that Claimant had worked a total of 97.25 hours. The Agency further alleged Respondent was required to, but did not, pay Claimant mileage expenses at the rate of \$.31 per mile for a total of 1,736 miles. The Agency concluded Respondent owed Claimant \$650.30 in wages, including mileage expenses, plus interest. The Agency also alleged Respondent's failure to pay was willful and Respondent, therefore, was liable to Claimant for \$1,560.00 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.

4) Respondent, through counsel, filed a timely answer and request for hearing. In its answer, Respondent denied the allegations and affirmatively alleged a financial “inability to pay the wages or compensation at the time they accrued.”

5) On July 31, 2000, the Agency requested a hearing. On August 2, 2000, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:00 a.m. on November 7, 2000. With the Notice of Hearing, the forum included a copy of the Order of Determination, 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 August 9, 2000, Respondent’s counsel requested the hearing be reset due to a previously scheduled civil trial that conflicted with the November 7 hearing date. The Agency did not object to the request and, on August 16, 2000, the ALJ reset the hearing date to January 4, 2001.

7) On August 16, 2000, the forum issued a case summary order requiring the Agency and Respondent to submit case summaries that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any wage and penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by December 20, 2000, and advised them of the possible sanctions for failure to comply with the case summary order. The Agency and Respondent filed timely case summaries.

8) On October 25, 2000, the ALJ assigned was changed from Alan McCullough to Linda A. Lohr.

9) On November 16, 2000, the Agency moved for a discovery order that required Respondent to produce nine categories of documents. The Agency provided a statement indicating the relevance of the documents requested. Respondent filed no response to the Agency's motion. On December 4, 2000, the forum issued an interim order that granted the Agency's motion and required Respondent to produce all of the requested documents to the Agency no later than Monday, December 11, 2000.

10) On November 27, 2000, Respondent moved for a discovery order requiring the Agency to produce four categories of documents. Respondent did not specify the relevance of two of the categories. On November 29, 2000, the Agency filed an objection to Respondent's motion stating the requests in those two particular categories were overly broad and not likely to produce information relevant to Claimant's wage claim.ⁱ On December 5, 2000, the forum granted Respondent's motion for the two categories of requested documents the Agency did not object to and ordered the Agency to produce the documents to Respondent no later than Monday, December 11, 2000.

11) On December 18, 2000, the Agency filed a motion to strike Respondent's affirmative defense based on Respondent's refusal to comply with the forum's discovery order.

12) On December 21, 2000, the forum issued an interim order denying the Agency's motion to strike Respondent's affirmative defense ruling that the appropriate sanction for failing to comply with a discovery order is the ALJ's refusal to admit evidence that has not been disclosed in response to a discovery order, pursuant to OAR

839-050-0200(11). After the hearing commenced, Respondent withdrew its affirmative defense.

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

14) During the hearing, Respondent offered as evidence documents related to the employment of Respondent employee, Mike Riedel, marked as R-1 for identification and a document prepared by Claimant that summarized Claimant's wage calculations, marked as R-6 for identification. The ALJ excluded R-1 as irrelevant and R-6 as unduly repetitious. After preliminary questioning, the ALJ also excluded Mike Riedel's testimony because Riedel had no direct knowledge of the matters pertaining to Claimant's wage claim. Furthermore, from the offer of proof,ⁱⁱ the ALJ concluded she would not violate her duty to conduct a full and fair inquiry by excluding the proffered testimony.

15) On February 20, 2001, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order. Respondent filed timely exceptions which are addressed in the opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was an Oregon corporation employing one or more individuals to serve legal documents upon individuals and business entities.

2) At all times material herein, Jon Archbold was Respondent's corporate president and Claimant's supervisor. Respondent's principal place of business was located in Salem, Oregon.

3) Sometime prior to November 10, 1999, Respondent placed a work order with the Oregon Employment Department seeking individuals to work as process

servers in the Multnomah, Clackamas, and Washington County area. The Employment Department posted the job as follows:

“REQ: VALID DL, INSURANCE & VEHICLE (BFOQ). GOOD COMMUNICATION, READING & WRITING SKILLS, KNOWLEDGE OF CLACKAMAS/MULTNOMAH/WASHINGTON [sic] COUNTIES. JOB: SERVE LEGAL PAPERS TO BUSINESSES & INDIVIDUALS AT THEIR WORK OR RESIDENCE. 20-30 HRS/WK. PAY: \$7.50–10 PER DELIVERY; USUALLY WILL DELIVER 150-200 PAPERS/MONTH. SERVING PAPERS IN PORTLAND METRO AREA. EMPLOYER GUARANTEES MIN. WAGE, REQUIRED STATEMENT IF NO WAGE GIVEN.”

Under “Additional Requirements” Respondent indicated the job required “Day Shift Swing Shift Non-commercial Drivers License.”

4) After seeing the Employment Department job posting, Claimant applied for employment with Respondent and was interviewed by Archbold, who hired Claimant as a process server on November 10, 1999. Claimant’s first day of work was November 11, 1999.

5) Respondent and Claimant agreed Claimant would receive \$10.00 for every legal document Claimant actually served. Although not told directly by Archbold, Claimant believed he would be paid for any returned document if he attempted service at least three times.

6) On November 10, 1999, Complainant signed an employment agreement that stated, in part:

“The employee shall be responsible for serving and delivering legal documents to individuals, corporations, or firms and agrees to perform these duties expeditiously and professionally. * * * The duties shall be rendered at Employer’s direction and Employee may be directed to perform at such place or places, which will include, but is not limited to all counties throughout the state of Oregon, and at such times as the needs of the Employer may from time-to-time dictate.”

7) Claimant had no prior experience as a process server. When Claimant was hired, Archbold advised Claimant of various methods of serving documents

expeditiously. Claimant was on his own as far as determining when and how documents were served.

8) To perform his job duties, Claimant was required to provide and drive his own car. Driving was an indispensable part of Claimant's job duties. Claimant understood and agreed that under the employment agreement he was not only to use his own vehicle but he was also to "pay for all gas and repairs and maintain a valid drivers [*sic*] license and insurance while employed by Employer."

9) Claimant worked exclusively out of his own home located in Milwaukie, Oregon. Archbold mailed packets of legal documents to Claimant about once a week from Respondent's principal place of business in Salem, Oregon. Each packet contained 20 - 40 legal documents ready for service. Each legal document was accompanied by a "return of service" to be processed by Claimant after the document was served. Claimant was expected to adhere to Respondent's written policies and procedures set forth, in part, as follows:

"When you receive your work, each document will be accompanied by a RETURN OF SERVICE. The return will be filled in with the name, address, date and other vital service information. You will fill in date and time of service, how it was served (personally, substitute service, or office-service), and where it was served if the address is different from that originally printed on the return. You will also need to sign it. Be sure to print hard so that it goes through all five copies.

"Except for garnishments, service on all other papers should be attempted AT LEAST three times, during various times of the day and evening. ALL attempts must be noted on the green copy of the Return, along with any other information you might obtain. Any problems, address or vehicle information, physical descriptions, etc. should be written on the green slip. The more information the better. If a defendant has moved, indicate who has told you this (new resident, neighbor, manager, etc.) and attempt to get a forwarding address or phone number. If you need to drop-serve a paper, record the incident along with a physical description of the person you served. Take the time to document every attempt, any difficult situations, or any new information. * * *

"After serving the paper, the return of service should be returned to the office within 24 hours (excluding holidays and weekends)."

Claimant followed Respondent's written policies and procedures for serving and returning documents.

10) Claimant's preparations for serving documents began at home. Claimant mapped out a route using a "Thomas Guide" and used the address furthest from his home as the midpoint for his route. He usually attempted to serve between six and ten documents each way between his home and the midpoint address. He tried to serve the documents in a "loop" that started from his home and ended at his home. The number of miles Claimant drove each workday varied. Where feasible, Claimant served documents on businesses during the day and on individuals in the evening and on weekends in accordance with Respondent's initial advice. Claimant's preparatory activities prior to leaving his home each workday took up to an hour. He did some of the required paperwork when he returned home or the next morning. He packed up and mailed to Respondent undelivered documents and returns of service in accordance with Respondent's policies. He did not keep a record of his time spent in preparatory or concluding activities and did not include that time in his wage claim.

11) When Claimant started working for Respondent, Claimant's wife created a computer spreadsheet detailing each document Claimant was assigned to serve, the date, day of the week, and time each document was served or service was attempted, the hours and mileage for each document's service and attempted service, and postage costs for the returns of service. Columns divided each category and each document was referred to by the name of the individual or business to be served.

12) Claimant recorded his hours and mileage during each workday on a notepad. At the end of his workday, or the following morning, Claimant transferred the information from his notepad to the computer spreadsheet.

13) Respondent did not require Claimant to turn in a time sheet and kept no record of Claimant's hours worked. Respondent tracked the documents Claimant was assigned on a computer spreadsheet titled "Papers Issued, by Server" that included the date the documents were "received,"ⁱⁱⁱ the "case number," the "debtor's name," and the "date & time served." Respondent's spreadsheet for Claimant for the month ending November 30, 1999, lists approximately 118 "debtors" and the date and time 27 of the "debtors" were served. The spreadsheet also shows the amount earned by Claimant for 27 "papers served" as \$270. For the month ending December 31, 1999, Respondent's spreadsheet for Claimant lists 56 "debtors" and the date and time 20 of the "debtors" were served. That spreadsheet shows the amount Claimant earned for 20 "papers served" as \$200. Most, if not all, "debtors" named in Respondent's spreadsheets for November and December, correspond directly with the names listed on Claimant's spreadsheet. The dates and times of service of the 47 documents with completed service are exactly the same as the dates and times recorded by Claimant.

14) When Claimant was hired he was given a form on Respondent's letterhead captioned "Business Mileage Per Employee and Hours Worked 1999." The form required employees to certify "that the above mileage is the actual business mileage I drove during the respective months, as indicated by my initials. I acknowledge that this will be initialed each month prior to my receiving my payroll check and/or mileage reimbursement each month and that the employer is not responsible for its accuracy."

15) Throughout Claimant's employment, Respondent paid its employees on the 10th of each month for the previous month of work.

16) Each pay period, Claimant received two checks from Respondent. One check was written on Respondent's "payroll" account, and included some, but not all, of

the standard payroll deductions. The other check, written on Respondent's "operating" account, was intended as payment for Claimant's auto expenses and there were no deductions noted. Respondent recorded the amounts Claimant was paid out of each account in separate ledgers. One ledger was titled "auto expenses." The other ledger was called, informally, a "control sheet for payroll."

17) Between November 11 and November 30, 1999, Claimant worked 61.5 hours. Based on the minimum wage rate of \$6.50 per hour, Claimant earned \$399.75 for hours worked in November. On or about December 10, 1999, Respondent paid Claimant wages of \$135.00, less certain payroll deductions. Respondent also paid Claimant \$185 for November auto expenses. Both amounts were recorded on the control sheet and auto expense ledger, respectively.

18) On December 11, 1999, Claimant gave Respondent written notice that he was quitting his employment with Respondent effective December 20, 1999. In his notice Claimant noted he was only making "between \$4.00 and \$5.00 per hour." Claimant gave his notice following a telephone conversation with Respondent whereby Claimant expressed his dissatisfaction with the amount he received in his paycheck. Respondent advised Claimant during their telephone discussion that Claimant would not be paid for documents he attempted but failed to serve, even if Claimant had made three attempts to serve a document.

19) Between December 1 and December 20, 1999, Claimant worked 35.75 hours. The last day Claimant attempted to serve documents was December 15, 1999. Based on the minimum wage rate of \$6.50 per hour, Claimant earned \$232.38 for hours worked in December. On or about January 10, 2000, Respondent paid Claimant \$100, less certain payroll deductions, for Claimant's work in December. Respondent also paid

Claimant \$100 for December auto expenses. Those amounts were recorded on Respondent's control sheet and auto expense ledger, respectively.

20) On Respondent's fourth quarter 1999 tax report filed with the Employment Department, Archbold certified, on behalf of Respondent, that Claimant's total subject wages were \$135 for the quarter. On Respondent's first quarter 2000 tax report, Archbold certified that Claimant's total subject wages were \$100 for that quarter. Archbold did not report the hours worked by Respondent's employees, including Claimant, on the reports submitted to the Employment Department. However, hours for each listed employee were handwritten on a copy of the 1999 fourth quarterly report Respondent submitted as an exhibit at hearing. On the copy there was a handwritten notation that Claimant had worked six hours.

21) Agency compliance specialist Enos was assigned to investigate Claimant's wage claim. During his investigation, Enos spoke with Archbold, Respondent's president, and memorialized his conversation. Archbold told Enos he kept no records pertaining to Claimant's hours because he did not think he was required to do so since Claimant was paid on a piece rate basis. Archbold told Enos there was no agreement for mileage reimbursement. Archbold acknowledged he paid Claimant with two checks and that one was for wages and the other for Claimant's auto expenses. Enos' testimony was credible and consistent with the contact report he prepared during the wage claim investigation.

22) Claimant's testimony was generally credible. He testified in a straightforward manner and on key points his testimony was bolstered by his contemporaneous record of hours worked. That record was, in turn, corroborated by Respondent's own records. Claimant's records were detailed and included a significant number of names, dates and times that would have been difficult, if not impossible, to

reconstruct after the fact. The forum relied considerably on Claimant's records in making its findings of fact. Regarding the auto expenses, Claimant's testimony is more problematic. Both Claimant and Respondent were curiously reluctant to acknowledge Respondent's payment for auto expenses during Claimant's employment. Both, in fact, denied payment was ever made despite substantial evidence to the contrary. Claimant's testimony on this issue was vague and appeared to be based on genuine confusion about Respondent's reasons for paying him each pay period with two separate checks. Because there are two checks for each pay period, the forum discounts Claimant's testimony that Respondent did not pay his auto expenses. The forum, however, has credited Claimant's contemporaneous record in its entirety.^{iv}

23) Archbold's testimony was contradicted on several key points by prior inconsistent statements, including documentary evidence he created. He testified that all money Respondent paid to Claimant was for wages, despite his own paperwork showing half the money paid to Claimant was by a separate check written on Respondent's "operating" account. During the wage claim investigation, Archbold acknowledged that the second check paid out of that account each pay period was for Claimant's auto expenses. Moreover, on three separate occasions he stated three different amounts were paid to Claimant. In a letter to compliance specialist, Enos, during the investigation, Archbold claimed Claimant was paid \$520 for "about 27 or 28" hours of work. In the "Employer Response" form Archbold submitted during the investigation, Archbold claimed Claimant was paid \$320 for 18 hours in November and 14.10 hours in December. He then certified to the Employment Department, on behalf of Respondent, that Claimant was paid a total of \$235 for his work in November and December. None of those amounts match Respondent's spreadsheets for Claimant showing Respondent's calculation that Claimant earned \$470 for 47 "papers served." In

addition, Archbold identified the Agency's copy of the original 1999 fourth quarter tax report as the one he certified to the Employment Department as "true and accurate and [filed] under penalty of false swearing." The original, filed with the Employment Department, did not list the hours worked by each employee. By contrast, the copy Respondent offered as evidence during the hearing showed Archbold's handwritten entries of hours purportedly worked by each listed employee, including a notation that Claimant worked six hours in December. To compound the problem, Archbold's entry for Claimant on the altered document contradicts his previous statement to the Agency that Claimant worked 14.10 hours in December. Accordingly, the forum has given no weight to Respondent's testimony where it conflicts with other credible evidence in the record or his previous statements against interest to the agency compliance specialist. To determine the amount Respondent actually paid to Claimant, the forum relied on the figures Archbold certified to the Employment Department because they were exactly the same as those recorded in Respondent's internal payroll documents maintained during Claimant's employment.

ULTIMATE FINDINGS OF FACT

- 1) Respondent at all times material herein was an Oregon corporation doing business in the state of Oregon and engaged the personal services of one or more employees in the operation of that business.
- 2) Respondent employed Claimant between November 10 through December 20, 1999, as a process server.
- 3) Respondent and Claimant agreed Claimant would be paid \$10.00 for every document Claimant served on an individual or business entity.
- 4) The state minimum wage during 1999 was \$6.50 per hour.
- 5) Claimant notified Respondent in writing, on December 11, 1999, of his intent to quit his employment with Respondent, effective December 20, 1999.

6) Claimant worked 97.25 hours between November 10 and December 20, 1999. At the minimum wage of \$6.50 per hour, Claimant earned \$632.13 in wages.

7) Respondent owes Claimant \$397.13, which represents \$632.13 wages earned, minus \$235 in wages paid to Claimant by Respondent.

8) Respondent willfully failed to pay Claimant the \$397.13 in earned, due and payable wages. Respondent has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.

9) Civil penalty wages, computed pursuant to ORS 652.150, equal \$1,560.

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 * * * .

“ * * * * *

“(12) ‘Work time’ includes both time worked and time of authorized attendance.”

Respondent employed Claimant by suffering or permitting him to work for Respondent as a process server.

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.

3) ORS 653.025 requires that:

“ * * * 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:

“ * * * * *

“(3) For the calendar years after December 31, 1998, \$6.50.”

Respondent was prohibited from employing or agreeing to employ Claimant at a wage rate less than \$6.50 per hour for each hour of work time. Respondent paid Claimant less than that rate, in violation of ORS 653.025.

4) ORS 652.140(2) provides:

“When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours’ notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. * * * ”

Claimant quit his employment after giving Respondent more than 48 hours notice of his intent to quit employment. Respondent violated ORS 652.140(2) by failing to pay Claimant immediately all wages earned and unpaid when Claimant quit his employment on December 20, 2000. Those wages amount to \$397.13.

5) 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 rate 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 a financial inability to pay the wages or compensation at the time they accrued.”

Respondent is liable for \$1,560 in civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(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 civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

A preponderance of the credible evidence on the whole record establishes Respondent employed Claimant during the wage claim period and willfully failed to pay Claimant all wages earned and payable, when due.

MINIMUM WAGE

In its case summary filed prior to hearing, Respondent generally defended its position by stating that Claimant “is not entitled to a ‘minimum wage’ under the facts and circumstances of this case.” However, in its answer and at hearing, Respondent did not assert and the forum does not find any exemption or exclusion from the coverage of the Minimum Wage Law, ORS 653.010 to 653.261, or the Wage and Hour Laws, ORS chapter 652, for Respondent or Claimant. Respondent had the duty to raise such an exemption or exclusion as an affirmative defense in its answer and present evidence to support its defense. Respondent did not do so and, as such, has waived the defense. *In the Matter of Sunnyside Enterprises of Oregon, Inc.*, 14 BOLI 170 (1995); OAR 839-050-0130(2).

ORS 652.025 prohibits employers from paying their non-exempt workers at a rate less than \$6.50 per hour for each hour of work time. ORS 653.055(1) provides that:

“[a]ny employer who pays an employee less than the [minimum wage] is liable to the employee affected:

“(a) For the full amount of the wages, less any amount actually paid to the employee by the employer, * * * and,

“(b) For civil penalties provided in ORS 652.150.”

ORS 653.055(2) states:

“[a]ny agreement between an employee and an employer to work at less than the [minimum wage] is no defense to an action under subsection (1) of this section.”

Credible evidence based on the whole record establishes Respondent agreed to pay Claimant at a rate that amounts to less than \$6.50 per hour. Respondent’s apparent reliance on the agreement to pay Claimant at a piece rate as a defense in this proceeding is misplaced. While Respondent is free to pay its employees at any rate and by any method, including a piece rate method, the agreed rate or method of

compensating an employee must not result in an employee receiving less than the minimum wage for all hours worked. Here, Respondent's agreement to pay Claimant at a piece rate, irrespective of the hours Claimant actually worked, provides no defense to Claimant's claim for minimum wages and civil penalties.

HOURS WORKED

ORS 653.045 requires Respondent to keep and maintain proper records of wages, hours and other conditions and practices of employment. Where the forum concludes an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. Where the employer produces no records, the Commissioner may rely on evidence produced by the Agency "to show the amount and extent of the employee's work as a matter of just and reasonable inference and then may award damages to the employee, even though the result be only approximate." *In the Matter of Diran Barber*, 16 BOLI 190 (1997), quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946).

Here, Respondent kept no record of the days or hours Claimant worked. This forum has previously accepted, and will accept, the credible testimony of a claimant as sufficient evidence to prove work was performed and from which to draw an inference of the extent of that work. *In the Matter of Graciela Vargas*, 16 BOLI 246 (1998). Claimant's testimony was credible as to the amount and extent of the work he performed. In addition, Claimant kept a contemporaneous record of the hours he worked and the miles he drove during the course of his employment. That record also included a reasonably accurate account of the papers he was assigned to serve with the dates he attempted service and the dates and times he accomplished service consistent with Respondent records produced at hearing. The forum concludes,

therefore, that Claimant performed work for which he was improperly compensated and the forum may rely on the evidence Claimant produced showing the hours he worked as a matter of just and reasonable inference.

Respondent, on the other hand, produced no persuasive evidence to “negative the reasonableness of the inference to be drawn from the [Claimant’s] evidence.” *Id.* at 255, quoting *Mt. Clemens Pottery Co.*, 328 US at 687-88. The records Respondent did produce only served to corroborate the amount and extent of Claimant’s work recorded contemporaneously by Claimant.

The forum finds Claimant performed 97.25 hours of work for Respondent. He was entitled to receive at least the statutory minimum wage rate of \$6.50 per hour, for a total of \$632.13. Respondent paid a total of \$235 in wages. Respondent owes Claimant \$397.13 in unpaid wages.

WORK TIME

Respondent contended at hearing that Claimant was not entitled to wages for time spent commuting to and from work.

OAR 839-020-0045 provides in pertinent part:

“(1) Home to work in an ordinary situation: An employee who travels from home before his/her regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment, whether he/she works at a fixed location or at different job sites. Normal travel from home to work is not work time.

“ * * * * *

“(3) Travel time that is all in a day’s work: Time spent by an employee in travel as part of his/her principal activity must be counted as hours worked. * * *”

In this case, Claimant did not travel from home “before” his regular workday. Claimant’s workday began at home with preparatory activities that were an integral part of the principal activity for which he was hired – serving legal documents on various individuals and businesses in a tri-county area. Claimant’s workday ended at home

where Claimant finished the paperwork required by Respondent's written and verbal policies. See OAR 839-020-0043. Claimant's travel time started after his workday began and finished before his workday ended, thus, all of Claimant's travel time is compensable as travel "all in a day's work." Because Claimant did not keep a record of how much time he spent on preparatory and concluding activities, and did not include those hours in his wage claim, the forum has not credited Claimant's time spent on those activities as hours worked for wage calculation purposes. The forum has only considered the fact that Claimant necessarily spent some time each workday engaged in those activities in determining the extent to which Claimant's travel time is compensable.

Respondent's argument at hearing that Claimant did not use his time efficiently when attempting to serve documents is without merit. Respondent never assigned specific hours or days of the week for serving documents. Claimant's principal activity was travel and he was free to plan his various routes for the day without Respondent's input. There is no credible evidence in the record to substantiate Claimant traveled more miles than reasonably necessary to serve documents in the tri-county area to which he was assigned. Even if he did travel routes that were less expeditious than others, Respondent "suffered or permitted" Claimant to expend an indeterminate amount of time traveling from place to place to serve documents. Work time is all time an employee is required or permitted to be on duty or at a prescribed place or places. ORS 653.010(12). All of Claimant's time spent driving and attempting to serve legal documents on individuals and businesses is compensable work time.

MILEAGE EXPENSES

Under Oregon law the Commissioner has the authority to enforce wage claims which are defined in ORS 652.320(9) as "an employee's claim * * * for compensation for

the employee's own personal services." It has long been the policy of the Bureau of Labor and Industries that unpaid job-related expenses can be included in a wage claim if there has been an explicit agreement between the parties that the employer would pay for such expenses or if the employer in fact does pay other such expenses. *In the Matter of Jack Crum Ranches, Inc.*, 14 BOLI 258 (1995); *In the Matter of Sylvia Montes*, 11 BOLI 268 (1993); *In the Matter of All Season Insulation Company, Inc.*, 2 BOLI 264 (1982).

In this case, Respondent and Claimant agree there was no explicit agreement that Respondent reimburse Claimant for his mileage expenses. A preponderance of the credible evidence, however, demonstrates clearly Respondent did in fact pay such expenses each pay period. Documentary evidence, including Respondent's payroll documents produced at hearing, shows Respondent paid Claimant \$185 for "auto expenses" for the pay period ending November 30, 1999, and \$100 for "auto expenses" for the pay period ending December 31, 1999. Contrary to his testimony at hearing, Respondent's president, Jon Archbold, told the Agency compliance specialist during the investigation that he gave Claimant two checks each pay period, a paycheck and one intended as reimbursement for auto expenses. Moreover, the wages Claimant received from Respondent's "payroll" account, separate from and in addition to the auto expenses, are exactly what Respondent certified to the Employment Department as Claimant's "total subject wages" for the pay periods at issue. The forum, therefore, concludes Respondent reimbursed Claimant for auto expenses notwithstanding Respondent's - and Claimant's - protests to the contrary.

The Agency claimed Claimant was entitled to a mileage rate of \$.31 per mile as reimbursement for a total of 1,736 miles. Despite the payments made to Claimant, reimbursable expenses are governed by explicit agreement. As this forum has pointed

out previously, the employer is free to set the terms and conditions of an expense reimbursement, and an employee may accept or reject those terms. *In the Matter of Central Pacific Freight Lines*, 7 BOLI 272 (1989). Here, the evidence shows there was a tacit agreement, but no agreed rate. Because the Agency has failed to show a specific agreement, the forum is not authorized to award Claimant additional reimbursement for auto expenses.^v

PENALTY WAGES

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. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

Respondent, as an employer, had a duty to know the amount of wages due to its employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238 (1983). Respondent asserted that Claimant was not entitled to the minimum wage “under the facts and circumstances in this case.” The facts and law prove otherwise. Respondent’s failure to apprehend the correct application of the law and Respondent’s actions based on this incorrect application do not exempt Respondent from a determination that it willfully failed to pay wages earned and due. *In the Matter of Locating, Inc.*, 14 BOLI 97 (1994), *aff’d without opinion*, *Locating, Inc. v. Deforest*, 139 Or App 600, 911 P2d 1289 (1996); *In the Matter of Mario Pedroza*, 13 BOLI 220 (1994). Respondent admits it was not paying Claimant the minimum wage and the evidence shows the failure to pay the minimum wage was intentional. From these facts, the forum infers Respondent voluntarily and as a free agent failed to pay

Claimant all of the wages he earned between November 11 through December 20, 1999. Respondent acted willfully and is liable for penalty wages under ORS 652.150.

Claimant gave Respondent more than 48 hours notice of his intent to quit his employment. His wages were due and payable on December 20, 1999. See ORS 652.140. At hearing, Respondent withdrew its defense of inability to pay the wages owed Claimant. Penalty wages, therefore, are assessed and calculated in accordance with ORS 652.150 in the amount of \$1,560. This figure is computed by multiplying \$6.50 per hour by 8 hours per day multiplied by 30 days. See ORS 652.150 and OAR 839-001-0470.

RESPONDENT'S EXCEPTIONS

Respondent excepts to certain factual findings, ultimate factual findings, and the associated conclusions of law and opinion in the proposed order as they relate to Claimant's work time and Respondent's payment of mileage expenses.

A. Work Time Exception

Respondent takes exception to Proposed Finding of Fact – The Merits 7 on the ground the evidence does not support the finding that “Claimant was on his own.” The finding states, “Claimant was on his own as far as determining when and how documents were served” and is based on Respondent's testimony.

Respondent also excepts to the Proposed Ultimate Findings of Fact 6-8 arguing Claimant “spent his time in an unreasonable and unproductive fashion” and the ALJ erred by not permitting testimony from an employee who could have testified to what was “reasonable for a normal process server.” Respondent merely reiterates his argument at hearing. The work time issue was adequately covered in the opinion and Respondent's exceptions on that point are denied.

B. Auto Expenses Exception

Respondent excepts to those portions of Proposed Findings of Fact – The Merits 17 and 19 that relate to the payment of auto expenses on the ground the existing employment agreement controls whether or not Respondent paid those expenses. To the contrary, Respondent’s actions determine whether he paid the expenses. The documentary evidence along with Respondent’s previous acknowledgement to the Agency established conclusively that he did in fact reimburse Claimant for auto expenses. Respondent has not otherwise explained why he would characterize some of Claimant’s “wages” as reimbursement for auto expenses. Instead, the forum properly relied on Respondent’s certified quarterly tax reports as credible evidence of the wages paid during Claimant’s employment period.

C. Claimant’s credibility

Respondent excepted to that portion of Proposed Finding of Fact – The Merits 22 that states Claimant’s testimony was “generally credible.” Respondent did not otherwise assert specific challenges to the finding. The assessment of Claimant’s credibility is supported by substantial evidence in the record and Respondent’s exception is denied.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, Respondent **Northwest Civil Process Serving, Inc.**, is hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant John Henry Burlison, in the amount of ONE THOUSAND NINE HUNDRED AND FIFTY SEVEN DOLLARS AND THIRTEEN CENTS (\$1,957.13), less appropriate lawful deductions, representing \$397.13 in gross earned, unpaid, due and payable wages and \$1,560 in penalty wages, plus interest at the legal rate on the sum of \$397.13 from

December 20, 1999, until paid and interest at the legal rate on the sum of \$1,560 from January 20, 2000, until paid.

ⁱ The Agency's objection filed on November 29, 2000, though part of the original record, was not initially marked as an administrative exhibit and, therefore, not admitted into the record with the other administrative exhibits when the hearing commenced on January 4, 2001. On the ALJ's own motion, the exhibit was subsequently marked as administrative exhibit X-23 and admitted into the record.

ⁱⁱ As the offer of proof, Respondent's counsel summarized the matters Riedel was expected to address in his testimony.

ⁱⁱⁱ There was no testimony describing who received the documents on the listed dates.

^{iv} See *infra* Findings of Fact – The Merits 11 & 12.

^v Had there been a notation on the auto expense checks showing a basis, e.g., 800 miles @ \$.31 per mile, the forum could have inferred an explicit agreement to pay the auto expenses at that rate.