

In the Matter of

WILLIAM PRESLEY dba Westside Classic Buicks

Case No. 66-03

Final Order of Commissioner Dan Gardner

Issued October 14, 2003

SYNOPSIS

Respondent suffered or permitted Claimant to work 1,079.5 hours between October 29, 2001, and April 18, 2002. At \$6.50 per hour, Claimant earned \$7,016.75 and was only paid \$2,700. Respondent was ordered to pay Claimant \$4,316.75 in unpaid, due and owing wages. Respondent's failure to pay the wages was willful and Respondent was ordered to pay \$1,560 in penalty wages and \$1,560.00 in civil penalties. ORS 652.140(1), ORS 652.150, ORS 653.025(3), ORS 653.055; OAR 839-010-0470.

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 for the State of Oregon. The hearing was held on June 24-26 and June 29-30, 2003, at the Bureau's Eugene office, located at 1400 Executive Parkway, Suite 200, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Cynthia Domas, an employee of the Agency. Ethan Davis ("Claimant"), the wage claimant, was present throughout the hearing. William Presley ("Respondent") was present throughout the hearing and was not represented by counsel.

The Agency called the following persons as witnesses: Claimant; Margaret Pargeter, Wage and Hour Division compliance specialist; Curt Davis, Claimant's father; Susan Davis, Claimant's mother; Elan Davis, Claimant's brother (telephone); Ray Brock, former co-worker (telephone); Vivian Meyers (telephone), Randy Thom

(telephone), Dick Schuh (telephone), James Misner (telephone), Scott Pickett (telephone), and John Wise IV (telephone).

In addition to himself, Respondent called the following witnesses: Ruth Presley, Respondent's mother; James Presley, Respondent's brother; Jason Presley, Respondent's son; Lee Bryant, John Morehouse, Charles Cardinal, and Ron Lago (telephone).

The forum received into evidence:

- a) Administrative exhibits X-1 through X-9 (submitted or generated prior to hearing);
- b) Agency exhibits A-1, A-2, A-4 through A-26, and A-28 (submitted prior to hearing); and A-29 through A-32 (submitted at hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On September 11, 2002, Claimant filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him.

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 16, 2003, the Agency issued Order of Determination No. 02-3563 based upon the wage claim filed by Claimant. The Order of Determination alleged that Respondent William Presley, dba Westside Classic Buicks, owed a total of \$5,670.38 in unpaid wages and \$1,560 in penalty wages, plus interest, and required

that, within 20 days, Respondent either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) On February 12, 2003, Respondent filed an answer and request for hearing. In his answer, Respondent admitted he paid Claimant \$2700, but denied paying it as a "wage," and alleged that Claimant was not employed by him, that he was financially unable to pay Claimant, and that Claimant's wage claim was satisfied by Claimant's acceptance of a 1972 Chevrolet Impala.

5) On May 13, 2003, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimant stating the time and place of the hearing as 9:30 a.m. on June 24, 2003, at 1400 Executive Parkway, Suite 200, Eugene Oregon.

6) On May 19, 2003, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and a brief statement of the elements of the claim, 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 case summaries by June 13, 2003, and notified them of the possible sanctions for failure to comply with the case summary order.

7) The Agency filed its case summary on June 12, 2003. Respondent did not file a case summary.

8) On June 17, 2003, the Agency filed a motion for a discovery order and to compel answers to interrogatories. The Agency supported its motion with a statement of relevancy and documentation of unsuccessful informal attempts to obtain the requested documents and information.

9) On June 18, 2003, the ALJ granted the Agency's motion.

10) On June 20, 2003, Respondent faxed documents to the Agency case presenter in partial response to the ALJ's discovery order. One page was entitled "Names of my witnesses to call" and listed the following: Mona Hulse, Ruth Presley, Jim Presley, Lee Bryant, Ron Lago, Charles Cardinal, Dick Schuh, George Livisly, Jason Presley, and Road Runner Delivery.

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

11) On the first day of hearing, Respondent asked when his witnesses would be able to testify and the Agency case presenter stated that she would object to all Respondent's witnesses except for Respondent, based on Respondent's failure to submit a case summary and the Agency's resultant lack of opportunity to interview any of Respondent's witnesses. After discussion, the Agency case presenter agreed that the basis for her objection would be cured if she had the opportunity to interview Respondent's witnesses before they testified. The ALJ ruled that the witnesses listed in Respondent's June 20 witness list would be allowed to testify on the condition that Respondent produce those witnesses for interviews with Ms. Domas by noon on June 25.

12) During the hearing, Respondent offered exhibits R-1, R-2, and R-3 into evidence. R-1 was a purchase order showing the trade-in value for a 1972 Chevrolet Caprice. R-2 was Respondent's time clock, and R-3 was a blank timecard used in Respondent's time clock. The Agency objected on the basis that they should have been and were not provided as part of Respondent's case summary. The ALJ sustained the Agency's objection and did not receive these three exhibits.

13) During the hearing, Respondent claimed that Claimant had telephoned Mona Hulsey and intimidated her from testifying. Respondent asked the ALJ to do something about this situation. The ALJ gave Respondent three options: (1) The ALJ would issue a subpoena for Hulsey; (2) If Respondent did not want a subpoena, the ALJ would leave the record open for Hulsey's testimony until the end of the hearing; (3) Respondent could testify as to what Hulsey told him concerning Claimant's alleged intimidation and the ALJ would give Respondent's testimony its appropriate weight. Respondent did not exercise any of these three options.

14) At the conclusion of Respondent's testimony, the Agency moved to amend the Order of Determination to allege a violation of ORS 653.045 and OAR 839-020-0080, based on Respondent's failure to keep records of the hours and dates worked by Claimant. The Agency did not seek additional penalties. The ALJ granted the motion over Respondent's objection, based on Respondent's testimony that he kept no records of the dates and hours worked by Claimant.

15) The ALJ issued a proposed order on August 14, 2003, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Both Respondent and the Agency filed exceptions. Those exceptions are discussed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent William Presley owned and operated a used car sales business in Eugene, Oregon under the assumed business name of Westside Classic Buicks ("Westside"), employing at least one person.

2) Respondent's primary business was selling "classic" cars. The "classic" cars were American cars, mainly Buicks, built between 1954 and the early 1970s.

3) At all times material herein, Westside was located at 1701 W. 11th in Eugene. On the same lot, Respondent owned and operated an auto stereo installation business under the assumed business name of Sound Installation Services.

4) On or about October 28, 2001, Respondent and Claimant agreed that Claimant would start work the next day selling cars for Respondent at the agreed rate of \$200 commission per car sold. They also agreed that Claimant would perform mechanical work for Respondent and that Claimant would be paid for that work. Claimant and Respondent never agreed on the rate of pay Claimant would receive for mechanical work. There was no discussion about the length of time that Claimant would work on Respondent's lot.

5) Claimant started work for Respondent on October 29, 2001. On April 1, 2002, he gave notice of his intent to quit on April 18, 2002. His last day of work for Respondent was April 18, 2002.

6) Claimant's primary duty at Respondent's lot was selling cars. Other duties he performed included: picking up a car at an adjacent podiatrist's office at least once a week for Respondent to clean and vacuum; delivering and picking up Respondent's cars to and from auto glass and brake and muffler shops located adjacent to Respondent's business; answering phones; detailing cars; washing cars; painting engines; selling cell phones; performing mechanical work; and showing stereos to customers of Sound Installations.

7) While working for Respondent, Claimant also performed work for Peterson Auction Group ("PAG"), a business owned by his father, Curt Davis. When Claimant started work, Respondent agreed that Claimant could promote PAG's business on Respondent's premises. Claimant brought a stack of PAG fliers and left them on

Respondent's front counter for customers, who sometimes picked up the fliers. Claimant also talked to customers about PAG.

8) While Claimant worked for Respondent, PAG had several cars consigned on Respondent's lot. Claimant also brought his motorcycle to Respondent's lot and left it on display in an attempt to sell it. Claimant's motorcycle was not consigned to Respondent.

9) While Claimant worked for Respondent, Respondent's business hours were 10 a.m. to 6 p.m. on Monday through Saturday and noon to 5 p.m. on Sunday.

10) Respondent made no record of the dates or hours worked by Claimant.

11) Claimant wrote down the hours he purportedly worked in a spiral notebook each day that he worked for Respondent, along with a brief description of mechanical work he had performed or car sales he had made.

12) Claimant worked a total of 1,079.5 hours during his employment with Respondent. Computed at \$6.50 per hour, Claimant earned a total of \$7,016.75. He was paid only \$2700 and is owed \$4,316.75 in unpaid wages.

13) Penalty wages are computed as follows: $8 \text{ hours} \times \$6.50 \text{ per hour} \times 30 \text{ days} = \$1,560$.

14) Respondent gave Claimant a 1972 Chevrolet Caprice Classic that Claimant wanted in March 2001, before Claimant left Respondent's employment. Respondent gave the car to Claimant after a discussion with Claimant concerning Claimant's potential wage claim. The value of this car was not established at hearing.

15) Claimant used none of his own equipment while working at Respondent's lot and made no financial investment in Respondent's business.

16) Claimant did not sign an authorization for Respondent to deduct any money from his wages.

17) On September 24, 2002, BOLI's Wage and Hour Division sent a letter to Respondent notifying him that Claimant had filed a wage claim and demanding that Respondent immediately send a check for \$6,773.75 in "unpaid minimum and overtime wages of \$6,773.75 at the rate of \$6.50 per hour from October 29, 2001 to April 18, 2002" if Claimant's claim was correct.

18) On November 20, 2002, Margaret Pargeter, a compliance specialist employed by BOLI's Wage and Hour Division, sent a letter to Respondent stating that Claimant's wage claim had been assigned to her for resolution and that she had calculated Claimant's unpaid wages and they amounted to \$5,670.38. Pargeter enclosed a copy of her calculations and asked that Respondent send a check for that amount or submit evidence that Claimant did not work the hours claimed or that her computations were incorrect. Respondent did not respond to this letter.

19) On December 4, 2002, Pargeter sent a second letter to Respondent stating that an Order of Determination would be issued soon based on Respondent's failure to respond to her letter. Pargeter's letter again requested payment of \$5,670.38 "in wages owed" or "appropriate records and/or information pertinent to this matter" if Respondent disputed the claim.

20) Respondent sent no payment in response to Pargeter's letters and had not paid Claimant any additional wages at the time of hearing.

21) On June 23, 2003, Claimant telephoned Lee Bryant and asked him if he was going to testify for Respondent and if Respondent was asking him to lie about anything. Bryant said "no" and Claimant replied "Good, because I wouldn't want to come over and thump on your head." The forum finds that Bryant did not perceive this as a serious threat for three reasons. First, Bryant chuckled as he gave this testimony. Second, he sat within a few feet of Claimant while giving his testimony and did not

display any discomfort at Claimant's presence. Third, he testified that he was not afraid of Claimant and he did not feel that he or his family were in danger.

22) Vivian Meyers, Chawn Flesher, Dick Schuh, Scott Pickett, James Misner, Ron Lago, and Elan Davis were credible witnesses and the forum has credited their testimony in its entirety.

23) John Morehouse and Lee Bryant were credible witnesses, but the forum has not relied on their testimony because it shed no light on any material issues in the case.

24) Margaret Pargeter was a credible witness. Her testimony, which was based in part on a review of her investigative notes, was straightforward and unimpeached. The forum has credited her testimony in its entirety.

25) The testimony of John Wise was given no weight because he testified that he observed Claimant at work at Respondent's lot in the "summer months," a physical impossibility.

26) Curt Davis, Claimant's father, was not a credible witness. The acerbic tone of his voice during cross examination showed that he disliked Respondent. He testified that he dropped Claimant off at Respondent's lot prior to 8 a.m. on weekdays and at 9 or 10 a.m. on Sundays, both times that were earlier than those testified to by Claimant and that were considerably earlier than Respondent was open for business. He also testified that PAG, the business he owned, had no vehicles on Respondent's lot during Claimant's employment that were not consigned, which was contrary to Claimant's testimony. The forum has not relied on his testimony because of his bias and testimony that was contradicted by more credible evidence.

27) Randy Thom was a longtime friend of Claimant. He answered questions directly, did not exaggerate the number of times he saw Claimant at work, and had a

clear recollection of his observations of Claimant at Respondent's shop. With one exception, the forum has credited his testimony in its entirety. That exception is his testimony that he saw Claimant at Respondent's shop at 9 a.m.

28) Ray Brock's testimony concerning the specific jobs performed by Claimant, Charles Cardinal, Ruth Presley, and Jim Presley was credible. His testimony concerning the hours worked by different persons at Respondent's lot, including Claimant, was not credible because it contradicted more credible evidence or contained assertions of facts that he could not have observed. For example, he testified that Respondent was not open on Sundays, an otherwise undisputed fact. He also testified that Ruth Presley was there "pretty much all day long," an assertion contradicted by every other witness who testified as to her hours at Respondent's lot. Finally, he testified that Claimant left work at 7 p.m., but could not have known this from observation because Brock left work at 5 p.m.

29) Charles Cardinal demonstrated a marked bias towards Respondent in his demeanor and testimony. His testimony that he was on Respondent's lot 40-50 hours per week during the wage claim period doing work for Respondent's benefit, despite being paid as little as \$500 total and a maximum of \$2,000, and that he still hangs out at Respondent's lot, was evidence of this bias. Many of his answers were evasive. He pointedly avoided giving a direct answer to the ALJ's question as to whether or not he was Respondent's employee, yet volunteered information that was potentially detrimental to Claimant. For example, when asked if Claimant came in late he answered in the affirmative, then began an unsolicited explanation of the reason why Claimant was late. On cross examination, the Agency case presenter had to ask him three times if he had discussed the case with other Respondent witnesses the previous day while waiting to testify before he gave an answer responsive to the question, and

even then it was an indirect answer. He made unsolicited putdowns about his co-workers instead of responding directly to questions, an indicator that he did not take the proceeding seriously.¹ His three felony convictions, including one conviction for theft, further detracted from his credibility. The forum has only credited his testimony that was corroborated by other credible evidence.

30) Jason Presley, Respondent's son, was not entirely credible. Given the undisputed fact that Claimant's primary job duty was to sell cars, Presley's testimony that it was not Claimant's responsibility to talk to customers or answer phones was not believable. He testified that Ruth Presley worked at Respondent's lot seven days per week, which contradicted her testimony and earlier statement to Pargeter that she did not work on Sundays. Finally, his testimony contained at least one internal inconsistency – his statements that Ray Brock did not work for Respondent while he worked there and that Ray Brock was hired and came in to detail cars in that same time period. The forum has credited Presley's testimony where it was corroborated by other credible evidence or undisputed.

31) James Presley, Respondent's brother, was a study in contrasts. On direct examination, he answered questions in a straightforward manner. During cross examination, he became hostile, argumentative, and uncooperative. An example of this was when the agency case presenter asked him "During the break that we just had, you had an opportunity to review your notes, didn't you?" and he answered "I had the opportunity to go to the restroom, too." This dramatic change in demeanor detracted markedly from his credibility and the forum has only relied on his testimony where it was corroborated by other credible evidence or was undisputed.

32) Ruth Presley, Respondent's mother, gave testimony that was only partly credible because of a significant prior inconsistent statement and her bias against

Claimant. During the agency's investigation, she told Pargeter that she worked at Respondent's lot from 1 p.m. to 6 p.m., Monday through Friday. At hearing, she testified that she arrived at work at 9:45 a.m. and worked Monday through Saturday. Her bias against Claimant was demonstrated in testimony that deprecated Claimant's work performance. For example, when asked what Claimant did, she answered "Just walk around the lot and look at the cars. Once in a while talk to what I presumed was a customer." Despite her claim to have been on Respondent's lot virtually all the time that Claimant was there, she also asserted that she never saw Claimant sell a car or "fill out anything." This was contrary to Respondent's admission that Claimant sold at least four cars, and that they all required filling out paperwork. The forum has only relied on her testimony where it was corroborated by other credible evidence or was undisputed.

33) Claimant's testimony was not entirely credible because of evasiveness in some of his testimony, at least one internal inconsistency, a significant omission in his wage claim, and his exaggeration concerning the hours that he worked and his job responsibilities. Consequently, the forum has only relied on his testimony where it was corroborated by other credible evidence or was undisputed. Where no other credible evidence was presented, the forum has credited Claimant's testimony wherever it conflicted with Respondent's testimony.

Claimant testified unequivocally on direct examination that he only worked one other place during his employment with Respondent, and then only one weekend when he worked for his father. On cross examination, he was asked if he had worked for Dick Schuh during that period of time. His successive responses were: "I may have"; "I very well could have"; "I may have possibly worked for him"; and "I cannot recall at this time if I did or didn't." These responses are not consistent with those that a candid, straightforward witness would have given.

Claimant claimed he was entitled to a \$200 commission based on the sale of a 1971 Monte Carlo that was sold immediately after the PAG auction. On direct, Claimant testified that he put together a deal “that went half to PAG and half to [Respondent].” On cross examination, he admitted that all the money went to PAG.

The circumstances by which the 1972 Caprice came into Claimant’s possession remain murky, but the weight of the evidence showed that Claimant desired to have the vehicle, that it had substantial value, and that it came into Claimant’s possession after a discussion concerning his potential wage claim. Despite this, Claimant failed to mention the car in his wage claim. Although the forum has not allowed the value of the car as a setoff, it views Claimant’s omission as a negative reflection on his credibility.

Claimant testified that on the average day Respondent’s four business phones would “ring off the hook” from 8 a.m. until Respondent locked the doors as late as 8 or 9 p.m. However, Claimant’s calendar showed that he was only at work before 9 a.m. three times and that he only worked as late as 8 p.m. on three days during his entire employment. These occasions all came in the last month of his employment. This testimony as to events that Claimant could not have observed demonstrate a tendency to exaggerate. Claimant testified that he was Respondent’s general manager and that Respondent agreed to pay him a salary of \$1,000 per month in addition to a \$200 commission for each vehicle sold. Other than Claimant’s testimony, the Agency presented no evidence to support Claimant’s claim that he was Respondent’s general manager, despite having the opportunity to examine numerous witnesses who would have been a witness to that fact if it was true. Claimant’s record of hours worked shows that he went to work on December 30 but “couldn’t get in” because “Jason [Presley] didn’t show.” This was a day when Respondent was on vacation. Claimant’s claim of being Respondent’s general manager is inconsistent with him not having a means of

entering Respondent's car lot to open the business. The forum has discredited Claimant's testimony that he was Respondent's general manager and concludes that his duties were limited to those described in Finding of Fact 6 -- The Merits, and that his primary duty was selling cars.

The number of hours Claimant claimed to have worked was inconsistent with the preponderance of credible evidence in the record. In all, Claimant claimed to have worked a total of 1,287.75 hours. During his employment, Respondent was open for business from 10 a.m. to 6 p.m., Monday through Saturday, and from noon to five p.m. on Sundays. Claimant's contemporaneous calendar shows him starting work at least an hour before Respondent opened and leaving work at least an hour after Respondent closed on numerous occasions. Based on Claimant's and Respondent's testimony that Claimant agreed to work for a \$200 commission per vehicle sale, Claimant provided no credible explanationⁱⁱ for presence on Respondent's lot during hours when there was no potential for earning money, *i.e.* no customers to buy vehicles.

34) William Presley, the Respondent, was not a credible witness and the forum has only credited his testimony where it was corroborated by other credible evidence. The forum has made this determination based on his demeanor, prior inconsistent statements, internal inconsistencies in his testimony, and contradictions with more credible evidence.

Because Respondent represented himself, his testimony on direct was in narrative form. That testimony was smooth and cohesive. During cross examination, he was combative, uncooperative, and argumentative, and became quite testy while responding to questions concerning the frequency of his absences from his business. This marked change in demeanor detracted from the credibility of his testimony.

In correspondence with the Agency prior to the hearing, Respondent stated in one letter that he gave Claimant a 1970 Caprice Classic, and in a second letter stated it was a 1972 Impala. At hearing, the evidence was undisputed that the car in question was a 1972 Caprice Classic. Respondent further stated in his pre-hearing correspondence that “[Claimant] did receive the payments he listed [in his wage claim] as remuneration for sales he made of cars and for various repairs he made on Westside Classics inventory.” At hearing, Respondent claimed he had paid Claimant a total of \$3,060 in checks and cash as “loans.” In response to the Agency’s interrogatory, Respondent stated he had no employees between October 2001 and May 2002. In contrast, at hearing Respondent acknowledged that he had two persons working on his lot – Ray Brock and Robert Hinkle – who punched a time clock and whom he considered to be “employees.”

Respondent’s hearing testimony contained several internal inconsistencies. First, Respondent testified that Claimant showed up at Respondent’s lot on Sundays for varying lengths of time. On cross, he testified that he was the only person who worked on the lot on Sundays. Second, he testified that his business only sold one car in November 2001 and none in December 2001. Subsequently, he testified that he personally sold four of the five cars Claimant claimed to have sold in November 2001 and agreed that Claimant sold one car in December 2001, not disputing the dates on which Claimant claimed that the cars were sold.

Finally, Respondent’s testimony concerning the cars he claimed to have sold was contradicted by Claimant’s calendar showing the dates Respondent was absent from the lot. Those dates were not disputed by Respondent. That calendar showed that Respondent was not at work on the dates on which he claimed to have sold six specific vehicles.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent William Presley did business in Eugene, Oregon under the assumed business name of Westside Classic Buicks and employed one or more individuals in Oregon.

2) Respondent hired Claimant on October 29, 2001, to sell vehicles on Respondent's lot. Respondent and Claimant agreed that Claimant would receive a \$200 commission for every vehicle that he sold. Respondent and Claimant also agreed that Claimant would be paid for any mechanical duties that he performed.

3) Claimant worked 1,079.5 hours while employed by Respondent, earning a total of \$7,016.75 when computed at Oregon's minimum wage of \$6.50 per hour. His last day of work was April 18, 2002. At the time of hearing, Respondent had only paid him \$2,700.

4) Respondent owes Claimant \$4,316.75 in unpaid, due and owing wages.

5) On September 24, 2002, November 20, 2002, and December 4, 2002, written notice of nonpayment of Claimant's wages was made by the Agency and received by Respondent. More than 12 days have passed and Respondent has not paid Claimant the wages due and owing to him.

6) Respondent's failure to pay all unpaid, due and owing wages to Claimant was willful and he is entitled to penalty wages in the amount of \$1,560.

7) Respondent failed to pay Claimant the minimum wage to which Claimant was entitled under ORS 653.055 and Claimant is entitled to civil penalties of \$1,560.

8) Respondent did not make a record of the actual hours worked each week and each pay period by Claimant.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an Oregon employer who suffered or permitted Claimant to work. ORS 653.010(3) & (4).

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent. ORS 652.310 to ORS 652.332, ORS 653.025.

3) Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid on April 18, 2002, Claimant's last day of work. Respondent owes Claimant \$4,316.75 in unpaid, due and owing wages.

4) Respondent is liable for \$1,560 in penalty wages to Claimant. ORS 652.150; OAR 839-001-0470(1).

5) Respondent is liable for \$1,560 in civil penalties to Claimant. ORS 653.055.

6) Respondent violated ORS 653.045 and OAR 839-020-0080(1)(g) by failing to make a record of the actual hours worked each week and each pay period by Claimant.

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

OPINION

INTRODUCTION

This case involves wage claims by Claimant Ethan Davis, whom the Agency alleges worked at Respondent's car lot. Respondent acknowledges that Claimant performed work at his car lot, but denies that Claimant was his employee or is owed any wages. In order to prevail in this matter, the Agency is required to prove, by a preponderance of the evidence, the following four elements: 1) Respondent employed

Claimant; 2) The pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) Claimant performed work for which they were 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).

A. Respondent employed Claimant.

Respondent asserted in his answer that Claimant was never his employee. At hearing, he explained that he could not afford another employee in October 2001 and agreed to let Claimant sell cars on his lot on a commission basis as a favor to Claimant, with Claimant able to come and go as he liked. Respondent's defense fails for several reasons.

First, there was undisputed evidence that Claimant performed other work on Respondent's lot besides selling cars, for Respondent's benefit, including mechanical work for which Respondent had agreed to pay him.ⁱⁱⁱ

Second, the relevant definition of "employ" includes "to suffer or permit to work." ORS 653.010(3). Respondent was aware of the work that Claimant was performing and there was no evidence that Respondent ever told Claimant to leave Respondent's lot or not to perform a particular job.

Third, the Agency established that Claimant was not an independent contractor. This is an affirmative defense that Respondent has the burden of proving. *In the Matter of Leslie Elmer DeHart*, 18 BOLI 199, 206-07 (1999). This forum uses an "economic reality" test to determine whether a wage claimant is an employee or independent contractor under Oregon's wage collection laws. *In the Matter of Ann L. Swanger*, 19 BOLI 42, 53 (1999). The focal point of the test is "whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which [he] renders [his] services." *Id.* The forum considers five factors to gauge the degree of the

worker's economic dependency, with no single factor being determinative: (1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and alleged employer; (3) the degree to which the worker's opportunity for profit and loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship. *Id.*

In this case, Respondent controlled the hours that Claimant could perform his work (the hours Respondent's lot was open); Claimant had no investment in the business and had no opportunity for profit or loss because of his lack of ownership interest; the skill and initiative required of him was that required of any car salesperson; and there was no fixed date for Claimant's employment to cease. All these factors indicate an employer-employee relationship.

Finally, Respondent's testimony concerning the employment status of Charles Cardinal, who was not a car salesman and worked 40-50 hours per week on Respondent's lot during Claimant's employment, doing work for Respondent's benefit, indicated that Respondent's definition of an "employee" varies considerably from the applicable definition in ORS 653.010(3).

In conclusion, Respondent's defenses fail and the forum concludes that Claimant was Respondent's employee during the wage claim period.

B. Claimant was entitled to Oregon's minimum wage.

Claimant and Respondent both testified that Respondent agreed to pay Claimant a \$200 commission for each vehicle sold. Respondent contends that Claimant sold only five vehicles and therefore was entitled to be paid only \$1,000. Respondent is wrong. Employers are free to pay employees solely by commission so long as the commission rate does not result in an employee earning less than minimum wage for all hours worked. *In the Matter of Anne L. Swanger*, 19 BOLI 42, 56 (1999); ORS 653.035(2).

Here, Claimant was entitled to be paid the minimum wage rate of \$6.50 per hour for all hours worked, less any commission payments received.

C. Claimant performed work for which he was not properly compensated.

Claimant was paid a total of \$2,700. At \$6.50 per hour, this means Claimant was paid for 415 hours of work, or 10+ workweeks of 40 hours. Respondent and Claimant agree that Claimant worked on Respondent's lot from October 29, 2001, through April 18, 2002, a period covering approximately 25 weeks. This means that Respondent paid Claimant in full only if Claimant averaged 16.6 hours per week (415 hours ÷ 25 weeks) of work or less throughout his employment with Respondent. There is no reliable evidence in the record to support a conclusion that Claimant was on Respondent's lot for this minimal amount of time. Consequently, the forum concludes that Claimant performed work for which he has not yet he has not been properly compensated. The question is how much work.

D. The amount and extent of Claimant's work.

ORS 653.045 requires an employer 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. *In the Matter of Diran Barber*, 16 BOLI 190 (1997), quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946).

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 Usra A. Vargas*, 22 BOLI 212, 221 (2001). This forum will accept 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 -- where that testimony is credible. *In the Matter of Graciela Vargas*, 16 BOLI 246, 254 (1998). In this case, Respondent produced no records and rested its defense on the claim that he never employed Claimant and therefore had no reason to keep records. In contrast, Claimant produced a contemporaneous written record of the dates and hours he purportedly worked. The forum has found those records only partially credible because Claimant, who thought he was working for commission only, did not provide a credible explanation to explain his presence on Respondent's lot during hours when Respondent was not open for business and Claimant had no opportunity to earn money. Claimant's claim that he was Respondent's general manager, which could have justified the hours claimed, was not credible for reasons described in Finding of Fact 33 – The Merits. However, based on Respondent's failure to rebut the dates Claimant claimed to have worked or establish Claimant's absence during Respondent's business hours on any specific date, the forum has credited Claimant with having worked during Respondent's business hours on all days he claims to have worked. Where Claimant's notes show that he started work later than Respondent's opening time, the forum has credited Claimant as having worked the hours between his arrival time and Respondent's closing time. For example, Claimant's notes show he worked from 11 a.m. – 7 p.m. on November 14, 2001, and the forum has only credited him with seven hours work (11 a.m. – 6 p.m.) In all, Claimant's work time amounted to 1,079.5 hours. Computed at \$6.50 per hour, Claimant earned \$7,016.75. He was paid only \$2,700 and is owed \$4,316.75 in unpaid wages.

THE 1972 CHEVROLET CAPRICE CLASSIC

Respondent alleged in his answer that Claimant's wage claim had already been satisfied by Claimant's acceptance of a 1972 Chevrolet from Respondent. At hearing,

Respondent established that he had acquired a 1972 Chevrolet Caprice Classic as a trade-in, that Claimant wanted the car, and that he conveyed it to Claimant after Claimant left Respondent's employment. There was no evidence that Claimant and Respondent ever executed a written agreement connected with this transaction that settled Claimant's potential^{iv} wage claim or that Respondent and Claimant expressly agreed that conveyance of the vehicle would constitute full settlement of Claimant's claim.

Oregon's wage and hour laws provide only two possible exceptions that would justify a reduction in Claimant's award of unpaid wages based on Respondent's claim. Both are found in ORS 652.610. First, ORS 652.610(3) allows an employer to withhold or deduct an employee's wages if "[t]he deductions are authorized in writing by the employee, are for the employee's benefit, and are recorded in the employer's books[.]" The forum concludes that Respondent's conveyance of the Caprice Classic is not properly categorized as a withholding or deduction because it occurred well after the payroll period in which Claimant's wages were due.^v Even if it could be considered as a withholding or deduction, Respondent's claim would still fail because Claimant did not authorize the transaction in writing and there was no evidence that it was recorded in Respondent's books. Second, ORS 652.610(4) provides that "[n]othing in this section * * shall * * * diminish or enlarge the right of any person to assert and enforce a lawful setoff * * * on due legal process." Assuming, *arguendo*, that ORS 652.610(4) applies to these facts, Respondent's defense must fail because the conveyance of the Caprice Classic was not a "setoff." The Oregon Supreme Court has defined "setoff" as a "money demand by the defendant against the plaintiff arising upon contract and constituting a debt *independent of and unconnected with the cause of action* set forth in the complaint." *Rogue River Management Company v. Shaw*, 243 Or 54, 59 (1966)

(internal quotation marks omitted; emphasis in original). In this case, there was no debt, as Claimant owed no money to Respondent, and the wages in question were dependent on and connected with Claimant's wage claim.

Finally, the forum notes that Respondent's failure to establish the value of the Caprice Classic would prevent it from applying ORS 652.610(3) or (4) in any event.^{vi} In conclusion, Respondent must pursue any claim that he has against Claimant based on the conveyance of the 1972 Chevrolet Caprice Classic in another forum.

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 his employees. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238 (1983). Because Respondent hired Claimant and was usually present at his car lot during business hours, the forum concludes that he knew Claimant's hours of work. There was no evidence that Respondent acted other than voluntarily or as a free agent in not paying Claimant for the work he performed during the wage claim period. The evidence shows that he simply chose not to pay Claimant. Therefore, Claimant is entitled to penalty wages.

Claimant voluntarily quit, giving 18 days' advance notice of his intention to quit, and his wages became due at the end of his last workday, April 18, 2002. More than 12 days have elapsed since written notice of Claimant's wage claim was sent to and received by Respondent, and more than 30 days have elapsed since Claimant's last

workday. Penalty wages are therefore assessed and calculated pursuant to ORS 652.150 (8 hours x \$6.50 per hour x 30 days = \$1,560).

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). Oregon’s minimum wage requirements are contained in ORS 653.025 and fall within the range of wage entitlement encompassed by ORS 653.055. The Agency established by a preponderance of the evidence that Respondent failed to pay Claimant at least the minimum wage of \$6.50 per hour for every hour Claimant worked for Respondent. Therefore, Respondent is liable for \$1,560 in civil penalties as provided in ORS 652.150. This figure is computed by multiplying \$6.50 per hour x 8 hours x 30 days.

EXCEPTIONS

A. The Agency’s exception.

The Agency excepted to the ALJ’s omission of any reference to the \$1,560 civil penalties sought by the Agency in the Order of Determination based on ORS 653.055(1)(b). The Agency’s exception is well taken and the forum has awarded Claimant an additional \$1,560 in civil penalties.

B. Respondent’s exceptions.

Respondent filed a number of exceptions, most of them relating to the ALJ’s assessment of the credibility of witnesses. Specifically, Respondent filed exceptions to Proposed Findings of Fact – The Merits 4, 11, 14, 15, 23, 32, and 33, Proposed Ultimate Finding of Fact 2, and four statements in the Proposed Opinion.

1. Exceptions to Proposed Findings of Fact – The Merits.

Respondent's exceptions to Proposed Findings 4 and 11 are denied because those findings are supported by substantial evidence.

Proposed Finding 14 has been modified to comport with Respondent's testimony concerning when Respondent gave Claimant the '72 Chevrolet Caprice.

Respondent's exception to Proposed Finding 15 is denied because there was no evidence that Claimant used his own tools. The fact that Claimant may have cleaned and repaired his own vehicles is not material because there is no evidence that Respondent forbade him from doing those repairs while he worked for Respondent.

Respondent's exception to Proposed Finding 23 is denied for the reason that the testimony of Morehouse and Bryant has already been given appropriate weight.

Respondent's request that the testimony of Ruth Presley, as summarized in Proposed Finding 32, be reconsidered is denied because it has already been appropriately characterized and Respondent's statement does not accurately describe her testimony.

Respondent's exception to Proposed Finding 33 is denied because it does not add anything to the forum's assessment of Claimant's credibility.

2. Exceptions to Proposed Ultimate Findings of Fact.

Respondent's exception to Proposed Ultimate Finding of Fact 2 is denied because it is supported by substantial evidence.

3. Exceptions to Proposed Opinion.

Respondent excepts that Claimant's performance of work on other cars than Respondent's cars shows Respondent did not employ Claimant. This exception is denied for the same reason that Respondent's exception to Proposed Finding of Fact 15 – The Merits was denied.

Respondent excepted that he told Claimant he was not needed and didn't need to be at work. Respondent may have told Claimant that, but here was no evidence that he did not allow Claimant to stay and work.

Respondent excepted that Claimant worked at other places while employed by Respondent. The evidence shows Claimant spent the vast majority of his working time at Respondent's business, and there was no evidence that Claimant received any income from PAG.

Respondent excepted to the forum's failure to take time off Claimant's award of wages based on Claimant's testimony that he took "long extended leaves from respondent's lot, 2 to 4 hours per day." This was not Claimant's testimony. Furthermore, the burden was on Respondent to produce records or credible testimony to show specific hours that Claimant did not work. Respondent produced neither, and Respondent's exception is denied.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages Respondent owes as a result of his violations of ORS 652.140(1), the Commissioner of the Bureau of Labor and Industries hereby orders **William Presley** 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 Ethan Douglas Davis in the amount of SEVEN THOUSAND FOUR HUNDRED THIRTY SIX DOLLARS and SEVENTY FIVE CENTS (\$7,436.75), less appropriate lawful deductions, representing \$4,316.75 in gross earned, unpaid, due and payable wages, \$1,560 in penalty wages, and \$1,560 in civil penalties, plus interest at the legal rate on the sum of \$4,316.75 from May 1, 2002, until paid, and interest at the legal rate on the sum of \$3,120 from June 1, 2002, until paid.

ⁱ In response to three questions about the type of work that Jason Presley, Ray Brock, and Robert Hinkle did, Cardinal gave the following answers: “As little as possible”; “Running the buffer and his mouth”; and “Robert is unteachable.”

ⁱⁱ As indicated in the previous paragraph, the forum does not believe that Claimant was Respondent’s general manager and has not considered that testimony as a plausible explanation for his presence on Respondent’s lot when Respondent was not open to the public for business.

ⁱⁱⁱ See Finding of Fact 6 – The Merits, *supra*.

^{iv} The forum uses the term “potential” because it appeared that Claimant had not yet filed his wage claim with BOLI at the time Respondent conveyed the Caprice Classic to him.

^v Although no evidence was presented to establish Respondent’s regular payday, ORS 652.120(2) mandates that “[p]ayday shall not extend beyond a period 35 days from the time that such employees entered upon their work[.]”

^{vi} Exhibit R-1 showed that Respondent assigned a trade-in allowance of \$2495 to the Caprice Classic, but R-1 was not received as evidence. See Finding of Fact 12 – Procedural, *supra*.