

In the Matter of

Gary Rivers, Charles Casteel, and Captain Hooks Salvage & Auto Wrecking, LLP

Case No. 43-05

Final Order of Commissioner Dan Gardner

Issued March 31, 2006

SYNOPSIS

Respondents employed Claimant to work 135 hours between October 13 and November 1, 2003 at the agreed rate of \$15 per hour. Claimant worked 120 straight time and 15 overtime hours. At \$15 per hour, Claimant earned \$2,137.50 and was paid nothing. Respondents were ordered to pay Claimant \$2,137.50 in unpaid, due and owing wages. Respondents' failure to pay the wages was willful and Respondents were ordered to pay \$3,600 in penalty wages. Respondents were also ordered to pay a \$3,600 civil penalty based on their failure to pay overtime wages to Claimant. ORS 652.140(2), ORS 652.150; ORS 653.055; ORS 653.256; ORS 653.261; OAR 839-001-0470; OAR 839-020-0030.

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 January 24, 2006, in the WW Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Jeffrey C. Burgess, an employee of the Agency. Jesus H. Ramos, the wage claimant ("Claimant") was present. Respondent Charles Casteel was present. He was not represented by counsel. Respondent Casteel also acted as authorized representative for Respondent Captain Hooks Salvage & Auto Wrecking LLP. Respondent Gary Rivers was represented at hearing by R. Bruce Dusterhoff, attorney at law.

The Agency called the following witnesses: Claimant; Katy Bayless, Wage & Hour Division compliance specialist; Mischelle Watkins, Captain Hooks's former bookkeeper; and Respondent Gary Rivers.

Respondent Casteel called himself as a witness. Respondent Rivers called himself as a witness.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-12 (submitted or generated prior to hearing) and X-13 through X-16 (submitted or generated after hearing); and
- b) Agency exhibits A-1 through A-7, and A-9 through A-16 (submitted prior to hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On February 17, 2004, Claimant filed a wage claim with the Agency alleging that "Gary Rivers, partner" and "Captain Hooks Wrecking and Auto Salvage, LLP" 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. 03-3797 based upon the wage claim filed by Claimant. The Order of Determination alleged that Respondents Gary Rivers ("Rivers"), Charles Casteel ("Casteel"), and Captain Hooks Salvage & Auto Wrecking LLP ("Captain Hooks") employed Claimant from October 13 to November 1, 2003, at the rate of \$15 per hour; that he earned \$2,137.50

in straight time and overtime wages and was not paid anything; and that Respondents owed him \$2,137.50 in unpaid wages, \$3,600 in penalty wages, and \$3,600 in civil penalties, plus interest; and required that, within 20 days, Respondents 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) Subsequently, Casteel filed an answer and request for hearing on his own behalf and on behalf of Captain Hooks as its authorized representative. R. Bruce Dusterhoff filed an answer and request for hearing on behalf of Rivers.

5) On June 27, 2005, the Hearings Unit issued a Notice of Hearing to Respondents, the Agency, and Claimant stating the time and place of the hearing as 9:00 a.m. on September 7, 2005, in the WW Gregg Hearings Room, Room 1004, State Office Building, 800 N. E. Oregon St., Portland, Oregon.

6) On July 13, 2005, the forum ordered the Agency and Respondents 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 August 26, 2005, and notified them of the possible sanctions for failure to comply with the case summary order.

7) On August 27, 2005, Mischelle Watkins, Captain Hooks's former bookkeeper, requested a postponement on Casteel's behalf because of Casteel's emergency medical condition. Watkins enclosed documentation of Casteel's medical condition.

8) On August 24, 2005, the ALJ issued an interim order granting Casteel's request for postponement on the condition that Casteel, or someone he authorized, file a signed declaration with the Hearings Unit no later than August 31, 2005.

9) On August 26, 2005, the Agency filed its case summary.

10) On August 29, 2005, Casteel filed a signed declaration requesting that Watkins be allowed to act on his behalf regard information concerning his health.

11) On September 1, 2005, the ALJ issued an order rescheduling the hearing to January 24, 2006, and setting a new deadline for filing case summaries.

12) On December 20, 2005, the ALJ was changed from ALJ Linda Lohr to ALJ Alan McCullough.

13) At the start 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.

14) During the hearing, Rivers's attorney moved three times to dismiss the Order of Determination on the basis that Rivers could not be held personally liable because Captain Hooks, Claimant's actual employer, was a limited liability partnership or, in the alternative, a *de facto* limited liability company. The ALJ denied each motion.

15) During the hearing, Rivers's attorney twice moved for summary judgment or dismissal on the issue of Rivers's liability for penalty wages and civil penalties on the basis that the Agency had not shown a willful failure to pay and that Rivers had established his financial inability to pay the wages at the time they accrued. The ALJ denied the motions.

16) During the hearing, the Agency attempted to elicit evidence regarding Rivers's receipt of a substantial amount of funds from an auto accident settlement. Rivers objected because he received the funds two years after Claimant left his

employment with Captain Hooks. The Agency argued that the evidence was relevant to disprove Rivers's affirmative defense of financial inability to pay at the time the wages accrued because Rivers could have sold his claim, before settlement, to a private company in the business of buying claims of that nature for their potential value. The ALJ sustained the objection, but allowed the Agency to make an offer of proof and Rivers's attorney to respond.

17) The Agency asked the ALJ for permission to "submit a request for judicial notice within three days after the hearing that would provide the information that would enable the forum to make an educated ruling" related to the Agency's offer of proof. Specifically, the Agency asked to provide information "about the existence of legitimate businesses in the community that do nothing but lend money to plaintiffs in lawsuits * * * if you have a good, valid, legitimate lawsuit against a solvent third party, there are entities that will pay you cash for assignment of plaintiff's rights." The ALJ denied the Agency's request.

18) At the request of Rivers's attorney, the ALJ left the record open until 5 p.m. on January 31, 2006, for him to ask permission to submit a brief on the issue of Rivers's liability as a member of a limited liability partnership.

19) On January 31, 2006, Rivers's attorney made a request to file a post-hearing memorandum. On February 3, 2006, the ALJ issued an Interim Order directing the Agency, Rivers, and Casteel, if he so desired, to file a post-hearing memorandum by February 17, 2006, on the following issues:

- a) Rivers is not personally liable in this matter because he was a partner in Captain Hooks, a limited liability partnership, or in the alternative, a de facto limited liability corporation.
- b) If Rivers is personally liable for Claimant's unpaid wages, he is not liable for the penalty wages or civil penalties sought by the Agency in its Order of Determination based on the facts of the case.

20) On February 17, 2006, Rivers's attorney and the Agency, through the Attorney General's office, filed post-hearing memoranda.

21) The ALJ issued a proposed order on March 9, 2006, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) On October 8, 2003, Respondents Casteel and Rivers filed a document entitled "Application for Registration – Limited Liability Partnership" with the Oregon Secretary of State, Corporation Division. Among other entries, the application contained the following handwritten information:

Name: "Captain Hooks Salvage and Auto Wrecking, LLP"

Principal Office Address: "32450 S. Molalla Ave., Molalla, OR 97038"

Address Where the Division May Mail Notices: "17380 SW 63rd, Lake Oswego, OR 97035"

Name and Address of at Least Two Partners: "Charles Casteel, 37911 SW Laurelwood Dr., Gaston, OR 97119; Gary Rivers, 8275 SW Elligson Rd., Wilsonville, OR 97070"

Brief Statement of Primary Business Activity: "Salvage, Auto Repair, Towing"

Execution: signatures and printed names of "Charles Casteel" and "Gary Rivers" and "Partner" written after each under the heading of "**Title or Capacity**"

Contact Name: "Gary Rivers"

2) On October 8, 2003, "Captain Hooks Salvage and Auto Wrecking LLP" registered with the Oregon Secretary of State, Corporation Division, under the assumed business name "Captain Hooks Salvage and Auto Wrecking." The registration listed the "principal place of business" as "34250 S Molalla Ave., Molalla, OR 97038" and the authorized representative as "Gary Rivers, 17380 SW 63rd, Lake Oswego, OR 97035."

3) As of October 8, 2003, Casteel and Rivers intended to enter into a partnership that was a business venture for profit and would conduct auto salvage,

wrecking, and towing. They planned to split any profit from the business on a “40, 40, and 20” basis, with Casteel and Rivers each taking 40% and 20% to go back into the business “to keep it going.”

4) Casteel’s and Rivers’s oral agreement to enter into partnership included conditions that they would each contribute specified assets to Captain Hooks. Casteel agreed to contribute \$20,000 in cash, three used tow trucks that could be made “operational,” and the use of his existing wrecking yard and associated “wrecking license” in Molalla. Rivers agreed to contribute three “operational” tow trucks, his existing lease on the property, and the utility and phone bills. Casteel and Rivers made these contributions. The title to the six tow trucks remained in Casteel’s and Rivers’s individual names. The lease remained in Rivers’s name and the wrecking yard and wrecking license remained in Casteel’s name.

5) Throughout the life of the partnership, Casteel and Rivers conducted business as Captain Hooks at a shop located at 17380 SW 63rd, Lake Oswego, OR 97035 (the “shop”).

6) During the week of October 6-12, 2003, Claimant asked Rivers for a job as an auto body technician. Rivers agreed to hire him. Rivers and Claimant agreed that Claimant would be paid \$15 per hour, to be paid “monthly.”

7) When Rivers hired Claimant, he gave him a business card that had the words “Captain Hooks Wrecking and Auto Salvage, LLP” printed on it.

8) Claimant began work in the shop on October 13, 2003. He worked at the shop through November 1, 2003, performing bodywork to restore a Suburban owned by Rivers. The purpose of the work was so that the Suburban could be painted and sold and the proceeds invested in Captain Hooks. Rivers told Claimant what he wanted done on the Suburban. As Claimant worked, Rivers looked at his work and gave him

some suggestions and specific instructions regarding how to do the work. Casteel never directed Claimant's work.

9) The shop had two "sides" to it. Claimant started work on the Suburban on the "towing" side. At some point, the Suburban was moved to the other "side," where Claimant continued working. Claimant worked in the shop and used Rivers's welding equipment and grinders to do his work.

10) Claimant did not work for anyone else between October 13 and November 1, 2003.

11) Claimant maintained an accurate, contemporaneous written record of his work hours while he worked for Respondents.

12) During the workweek of October 13 through October 19, 2003, Claimant worked the following dates and hours for Respondents: 10/13 (8); 10/14 (8), 10/15 (8), 10/16 (8), 10/17 (8), 10/18 (6), for a total of 40 straight time and six overtime hours.

13) During the workweek of October 20 through October 26, 2003, Claimant worked the following dates and hours for Respondents: 10/20 (8.5); 10/21 (7), 10/22 (8), 10/23 (8), 10/24 (8.5), 10/25 (8.5), for a total of 40 straight time and eight overtime hours.

14) During the workweek of October 27 through November 2, 2003, Claimant worked the following dates and hours for Respondents: 10/27 (8.5); 10/28 (8), 10/29 (8), 10/31 (8), 11/1(8) for a total of 40 straight time and .5 overtime hours.

15) Claimant's overtime wage rate was \$22.50 per hour ($\$15 \times 1.5 = \22.50).

16) In total, Claimant earned \$2,137.50 while employed by Respondents (120 straight time hours \times \$15 = \$1,800; 15 overtime hours \times \$22.50 = \$337.50; \$1,800 + \$337.50 = \$2,137.50).

17) During Claimant's employment, Casteel told Claimant that he and Rivers were partners. During his employment, Claimant understood that Rivers and Casteel were partners and that he was working for a business named Captain Hooks Salvage and Auto Wrecking, LLP.

18) During his employment, Claimant asked both Rivers and Casteel for his wages. Rivers told Claimant to talk with Casteel, and Casteel told Claimant to talk with Rivers. Neither Rivers nor Casteel paid Claimant anything for his work.

19) As of the date of hearing, Claimant had still not been paid anything for his work.

20) Claimant's last day of work was Saturday, November 1, 2003. That day, Claimant again asked Respondent Rivers for his paycheck. Rivers told him to come back on Monday. Claimant returned to the shop on November 3, 2003, to get his paycheck, but Rivers was not there. Claimant asked Casteel for his pay. Casteel gave Claimant \$10 for gas and told him to ask Rivers for his pay. After that, Claimant did not return to the shop to get his paycheck because he did not have the money for gas to commute between his home in Forest Grove and Lake Oswego.

21) Claimant did not perform any work for Respondents after November 1, 2003.

22) No lease payments were paid on the property used by Captain Hooks during the life of the partnership. About two years later, Rivers paid \$100,000 in back lease payments to the lessor of the property.

23) On December 5, 2003, BOLI's Wage & Hour Division sent a letter to "Captain Hooks Salvage and Auto Wrecking LLP, 17380 SW 63rd, Lake Oswego, OR 97035." The letter contained a notification that Claimant "Jesus H. Ramos" had filed a wage claim with BOLI claiming "[u]npaid wages of 2,025.00 at the rate of \$15.00 per

hour from October 13, 2003 to November 11, 2003, and also * * * expenses in the amount of \$26.89.”

24) On February 26, 2004, Wage & Hour Division compliance specialist Katy Bayless sent a letter to “Captain Hooks Salvage and Auto Wrecking LLP, 17380 SW 63rd, Lake Oswego, OR 97035” that included the following language:

“Since you have not responded to our letter dated December 5, 2003, it has become necessary to begin the Administrative Process. * * *

“You are advised that as of this date, in addition to the \$2,137.00 in wages owed, penalty wages have accrued to the amount of \$7,200.00. * * *”

Bayless “cc’d” a copy of the letter to Casteel and Rivers. No evidence was presented to show that Casteel and Rivers did not receive the letters.

25) On November 20, 2003, Casteel filed a “Cancellation” of “Limited Liability Partnership” with the Oregon Secretary of State, Corporation Division. The cancellation applied to “Captain Hooks Wrecking and Auto Salvage, LLP.” It was signed by “Charles Casteel” in the capacity of “partner/owner.” On the same day, the Oregon Secretary of State processed the cancellation of “Captain Hooks Wrecking and Auto Salvage, LLP” and involuntarily cancelled Captain Hooks’s assumed business name.

26) Shortly after November 20, 2003, Casteel came to the shop and removed the three tow trucks he had purchased for use by the partnership. Rivers kept his three tow trucks at the shop.

27) At some point prior to November 20, 2003, Casteel wrote a check on Captain Hooks’s checking account to Mischelle Watkins, Respondents’ bookkeeper, which was signed by Watkins. The purpose of the check was to pay Watkins’s mortgage. There was no evidence showing the amount of the check or the amount of any unpaid wages owed to Watkins at the time of the payment.

28) Casteel and Watkins were the only persons who had signing authority on the Captain Hooks checking account. When Casteel cancelled the partnership, he went

to the bank with Rivers, withdrew the remaining \$10 in Captain Hooks's checking account, and gave it to Rivers. Casteel also signed over the authority for the checking account to Rivers.

29) At the time Claimant was employed by Captain Hooks, Rivers lived in a "5th wheeler" with his wife in a trailer park and "was having trouble putting food on [his] table." He was barely making enough money to pay the trailer park rent and utilities.

30) In 1999, Rivers was involved in a "near-fatal car wreck." He has not worked for pay since August 19, 1999, and has had numerous surgeries on his foot as a result of the wreck.

31) During Claimant's employment with Captain Hooks, Rivers lacked the personal financial resources to pay the lease or utilities on the property used by Captain Hooks. Some time after the Secretary of State canceled the partnership, Rivers received notice that he would be evicted if he did not pay the rent.ⁱ Rivers did not pay, was evicted, and was no longer able to access the property. At the time, Rivers had 60 "junk" cars on the premises, along with personal property, including tools and car parts. Later, the landlord disposed of all Rivers's property.

32) On June 3, 2004, in response to the Order of Determination, Rivers wrote a letter to the Wage and Hour Division related to "Captain Hooks Salvage and Auto Wrecking LLP." He signed it as "Gary Rivers – former partner."

33) On June 11, 2004, Casteel sent a letter to the Wage and Hour Division, in response to the Order of Determination, in which he stated, among other things, that "Gary Rivers and I formed an informal partnership that was never carried forth over 60 days."

34) Claimant maintained a calm demeanor throughout his testimony. His testimony was internally consistent and he answered questions directly. He was not

impeached on cross examination. The forum has credited his testimony in its entirety with regard to the dates and hours he worked for Respondents, his working conditions, and his agreed rate of pay.

35) Mischelle Watkins, the bookkeeper for Captain Hooks, drove Casteel to the hearing, and was very solicitous towards Casteel at the start of the hearing and during her testimony. She was instrumental in getting Casteel to file the LLP cancellation with the Secretary of State. At one point during her testimony, she even had a brief discussion with Casteel about his daily water requirement. In contrast, she was openly hostile in her facial expressions towards Rivers and exhibited a negative attitude towards Rivers before the hearing and during her testimony. For example, in her August 24, 2005, letter requesting a postponement on Casteel's behalf, she wrote "it seems that Mr. Rivers has once again escaped any kind of consequences for his lying and cheating behavior." At hearing, when asked if Rivers and Casteel ever formalized their partnership agreement, she testified that nothing was ever "formally drawn up," then volunteered that the reason was because "Mr. Rivers wouldn't take responsibility or sit down to create that so it never happened." When asked "Captain Hooks Salvage, do you know if it was able to generate some revenue to help pay bills?" she answered "If there was revenue from this organization it went in Gary's pocket; it was cash." She also testified that "Mr. Casteel was taken in by Gary Rivers, who created a sham." As a result of this obvious and open bias, the forum has only credited her testimony where it was either uncontroverted or corroborated by other credible evidence.

36) Casteel was a sympathetic witness due to his physical condition. He appeared in a wheelchair and the ALJ observed that he appeared to be in physical discomfort throughout the hearing. Casteel expressed extremely hostile feelings towards Rivers before and during the hearing, revealing a bias that detracted

substantially from his credibility. For example, in a letter dated June 11, 2004, he stated that “Gary Rivers stole money from me, made decisions without my input and told ludicrous and ridiculous lies. * * * Mr. Rivers has no conscience.” In the same letter, Casteel provided a letter to BOLI in which he stated that Rivers had “leased two shops side by side in the same building * * * [o]ne under Midway Towing and one under Captain Hooks. Jesus was working in the Midway Towing Shop at all times while he was there.” Claimant, whom the forum has found to be a credible witness, directly contradicted this statement, testifying that he worked first in one shop, then the other. At hearing, Casteel exhibited a negative attitude towards Rivers in his tone of voice and caustic comments. For example, after Casteel and Rivers had angrily addressed one another during Casteel’s cross examination of Rivers, Casteel’s final comment was -- “All I know, everything was a shady deal.” As a result of this obvious and open bias, the forum has only credited Casteel’s testimony where it was either uncontroverted or corroborated by other credible evidence.

37) Rivers also presented himself as a sympathetic witness due to his physical condition related to his 1999 auto accident. However, the forum disbelieved his testimony that he had nothing to do with the preparation of a purported employment “contract” prepared for Claimant’s signature by Watkins. That four page document refers specifically to Claimant and Gary Rivers, refers to Claimant as an “employee,” and states that “Captain Hooks” agrees to “an hourly rate of pay = \$15.00 p/hour.” Because these facts correspond to undisputed testimony, the forum has believed Watkins’s testimony that she prepared it at Rivers’s instruction for Claimant’s signatures.ⁱⁱ On direct examination, as a hostile witness, Rivers repeatedly failed to directly respond to questions by interrupting the Agency case presenter in the midst of a question to state his views. This also detracted from his credibility. At hearing, Rivers

exhibited a bias against Casteel in his negative tone of voice and caustic comments. He blamed Casteel for Captain Hooks's failure to pay Claimant, claiming he had no control over the situation. This lack of objectivity detracted from his credibility. As a result, the forum has only credited Rivers's testimony where it was undisputed or corroborated by other credible evidence.

38) Bayless's testimony primarily involved authenticating documents she generated or obtained during the course of her investigation and explaining the contents of those documents. Her testimony was undisputed and the forum has credited her testimony in its entirety.

39) Penalty wages are computed as follows for Claimant, in accordance with ORS 652.150 and OAR 839-001-0470(1): \$15.00 per hour x 8 hours x 30 days = \$3,600.

40) ORS 653.055 civil penalties wages are computed as follows for Claimant, in accordance with ORS 652.150 and OAR 839-001-0470(1): \$15.00 per hour x 8 hours x 30 days = \$3,600.

ULTIMATE FINDINGS OF FACT

1) On October 8, 2003, Respondents Casteel and Rivers became partners in a business with the assumed business name of Captain Hooks Salvage and Auto Wrecking.

2) Rivers, on behalf of Captain Hooks, hired Claimant as an auto body technician at the agreed rate of \$15 per hour.

3) Claimant worked for Captain Hooks under Rivers's supervision in the shop from October 13 through November 1, 2003, using tools and equipment owned by Rivers. Claimant voluntarily left Captain Hooks's employment.

4) Claimant worked a total of 120 straight time hours and 15 overtime hours for Captain Hooks, earning \$1800 in straight time wages and \$337.50 in overtime wages.

5) At the time of the hearing, Respondents had not paid Claimant any wages.

6) Respondents willfully failed to pay Claimant his wages.

7) On February 26, 2004, Wage & Hour Division compliance specialist Katy Bayless sent a letter to Respondents advising that Respondents owed Claimant \$2,137.00 in unpaid wages and the penalty wages had accrued in the amount of \$7,200.

8) Penalty wages are computed as follows for Claimant, in accordance with ORS 652.150 and OAR 839-001-0470(1): \$15.00 per hour x 8 hours x 30 days = \$3,600.

9) ORS 653.055 civil penalties are computed as follows, in accordance with ORS 652.150 and OAR 839-001-0470(1): \$15.00 per hour x 8 hours x 30 days = \$3,600.

CONCLUSIONS OF LAW

1) During all times material herein, Respondents Captain Hooks, Gary Rivers, and Charles Casteel were employers and Claimant Jesus Ramos was an employee subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and ORS 653.010 to 653.261. During all times material, Respondents employed Claimant.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein. ORS 652.310 to 652.414.

3) Respondents violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid not later than November 7, 2003, five business days, excluding Saturdays, Sundays and holidays, after November 1, 2003, the day that

Claimant quit without notice. Respondents owe Claimant \$2,137.50 in unpaid, due and owing wages.

4) Respondents' failure to pay Claimant all wages due and owing was willful and Respondents owe Claimant \$3,600 in penalty wages pursuant to ORS 652.150.

5) Respondents failed to pay Claimant for 15 overtime hours and are liable for \$3,600 in civil penalties under ORS 653.055.

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

OPINION

In order to prevail in this matter, the Agency is required to prove the following four elements by a preponderance of the evidence: 1) Respondents employed Claimant; 2) The pay rate upon which Respondents and Claimant agreed, if it exceeded the minimum wage; 3) Claimant performed work for which he was not properly compensated; and 4) The amount and extent of work Claimant performed for Respondents. *In the Matter of Gary Lee Lucas*, 26 BOLI 198, 210 (2005)

RESPONDENTS EMPLOYED CLAIMANT

The following facts were undisputed: (1) Claimant was employed by the partnership that registered with the Secretary of State under the name Captain Hooks Salvage and Auto Wrecking LLP; (2) Rivers and Casteel were the only partners in the business; and (3) Rivers interviewed and hired Claimant, directed his work, and provided the tools and equipment that he used to perform his work. This undisputed evidence establishes that a partnership formed by Rivers and Casteel and registered under the name of Captain Hooks Salvage and Auto Wrecking LLP employed Claimant.

The issue of liability, which Rivers raised at hearing, is a separate issue that will be discussed later.

RESPONDENTS AGREED TO PAY CLAIMANT \$15 PER HOUR

Claimant and Rivers both testified that Rivers, on behalf of the partnership, agreed to pay Claimant \$15 per hour for his work. The forum accepts this credible testimony as fact and concludes that Claimant's agreed rate of pay was \$15 per hour.

CLAIMANT PERFORMED WORK FOR WHICH HE WAS NOT PROPERLY COMPENSATED

Undisputed evidence established that Claimant performed work for Respondents and that he has been paid nothing for his work.

THE AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENTS

The final element of the Agency's case requires proof of the amount and extent of work performed by the claimants. The Agency's burden of proof can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. *Gary Lee Lucas, at 211*. In this case, the Agency provided a credible, contemporaneous record of Claimant's work hours that showed Claimant worked 120 straight time hours and 15 hours of overtime for Respondents, and Respondents did not dispute that record. Consequently, the forum concludes that Claimant worked 120 straight time hours and 15 hours of overtime for Respondents. It was undisputed that Respondents have paid Claimant nothing for this work. As a result, Claimant is owed \$1,800 in straight time wages (120 hours x \$15 per hour = \$1,800) and \$337.50 in overtime wages (15 x \$22.50 per hour = \$337.50), for a total of \$2,137.50.

CLAIMANT IS OWED \$3,600 IN PENALTY WAGES

The forum may award penalty wages where a respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency.

Rather, a respondent commits an act or omission "willfully" if he or she acts (or fails to act) intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent Rivers raised the affirmative defense of financial inability to pay in his answer.ⁱⁱⁱ However, neither Casteel nor Captain Hooks raised this defense in their answer and the forum may not consider the financial inability of either Casteel or the partnership to pay Claimant's wages in deciding whether to award penalty wages.^{iv}

Respondents did not dispute Claimant's hourly wage, the amount Claimant was owed, or that he performed all his work on Captain Hooks's property, using tools and equipment provided by Rivers, under Rivers's general direction. Although there was no testimony about the extent to which Casteel observed Claimant's work, Casteel did not contest the Agency's allegation that Claimant worked 135 hours for Captain Hooks. Casteel also did not produce any evidence to show that he was absent from Captain Hooks's premises during Claimant's work hours or that he was not contemporaneously aware of the amount and extent of Claimant's work. From these facts, the forum infers that both Rivers and Casteel were aware of the amount and extent of the work performed by Claimant.

Although Respondents maintained at hearing that Captain Hooks was "undercapitalized," they agreed that Casteel contributed \$20,000 to the business when it started up, that no partnership assets were used to make lease payments on the property used by Captain Hooks, that an unspecified amount was paid out to cover Watkins's mortgage payment, and that there was only \$10 left in Captain Hooks's checking account when Casteel bailed out of the partnership on November 20, 2003. However, Claimant's last day of work was November 1, 2003, and his wages were due no later than November 7, 2003. Respondents presented no specific evidence to show

the partnership's financial status at that time or how the remainder of Respondents' start-up money was spent.

The facts show that Respondents knew the amount of wages earned by Claimant, that they chose to spend the partnership funds on expenses other than Claimant's wages, and they acted as free agents in making this choice. The Agency provided documentary and testimonial evidence that it made the written demand for Claimant's wages required by ORS 652.150. Consequently, the forum assesses the penalty wages in the manner provided for in ORS 652.150 (hourly rate - \$15 x eight hours per day x 30 days = \$3,600).

In a post-hearing memorandum, Rivers, asserted that penalty wages cannot exceed Claimant's total unpaid wages because the Agency presented no proof that either Casteel or Rivers "received written notice of demand to pay wages directed to them personally." ORS 652.150(2) provides that:

"If the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation unless the employer fails to pay the full amount of the employee's unpaid wages or compensation within 12 days after receiving the written notice. If the employee or a person on behalf of the employee fails to send the written notice, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation. * * *"

The Agency presented proof that it had sent notice to Respondents at Captain Hooks's business address on December 5, 2003, and on February 26, 2004,^v but no proof that either Casteel or Rivers actually received those letters. However, the Agency's Order of Determination ("Order") also constitutes a written notice of nonpayment. The Order states that Claimant is owed \$2,137.50 in unpaid wages and includes the following language: "[p]ursuant to ORS 652.332, the employer is hereby directed to pay the Commissioner of the Bureau of Labor and Industries the amount of the wage claims * * *." The Order, as well as the Agency's letters, constitutes "written notice of

nonpayment” within the meaning of ORS 652.150(2). There is no dispute that it was received by both Casteel and Rivers, or that they failed to pay Claimant’s wages within 12 days after receiving the Order of Determination, despite the fact that they did not dispute the amount of unpaid wages at hearing. Consequently, Rivers’s argument fails.

CLAIMANT IS OWED \$3,600 IN CIVIL PENALTIES UNDER ORS 653.055

In its Order of Determination, the Agency also sought \$3,600 in civil penalties based on Respondents’ alleged failure to pay Claimant “less than the wages to which Claimant was due under ORS 653.010 to 653.261.” When an employer 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. “Willfulness” is not an element.^{vi} ORS 653.055; *Cornier v. Paul Tulacz, DVM PC*, 176 Or App 245 (2001); *In the Matter of TCS Global Corp.*, 25 BOLI 1, 15 (2003). See also *In the Matter of Larson Golf Construction, Inc.*, 25 BOLI 204, 216 (2004); *In the Matter of William Presley*, 25 BOLI 56, 73 (2003), *aff’d Presley v. Bureau of Labor and Industries*, 200 Or App 113, 112 P3d 485 (2005). Here, the unpaid wages include an undisputed 15 hours of unpaid overtime wages that Claimant earned during the wage claim period. The statutory requirement to pay overtime is contained in ORS 653.261 and OAR 839-020-0030, the Agency rule interpreting the statute. In addition, the affirmative defense of financial inability to pay at the time wages accrued set out in ORS 652.150 is not available under ORS 653.055. Therefore, Respondents’ failure to pay overtime wages to Claimant entitles Claimant to a civil penalty, in addition to the penalty wages awarded under ORS 652.150. The civil penalty is computed in the same manner as ORS 652.150 penalty wages (hourly rate - \$15 x eight hours per day x 30 days = \$3,600).

LIABILITY FOR CLAIMANT’S UNPAID WAGES, PENALTY WAGES, AND CIVIL PENALTIES

Under Oregon law, “the association of two or more persons to carry on as co-owners a business for profit creates a partnership, whether or not the persons intend to create a partnership.” ORS 67.055(1). ORS 67.055(4) provides:

- “In determining whether a partnership is created, the following rules apply:
- “(a) Factors indicating that persons have created a partnership include:
 - “(A) Their receipt of or right to receive a share of profits of the business;
 - “(B) Their expression of an intent to be partners in the business;
 - “(C) Their participation or right to participate in control of the business;
 - “(D) Their sharing or agreeing to share losses of the business or liability for claims by third parties against the business; and
 - “(E) Their contributing or agreeing to contribute money or property to the business.”

Here, both Casteel and Rivers testified as to their right to receive a share of profits that Captain Hooks generated, that they intended to be partners, that they participated and had the right to participate in the control of the business, that they both suffered losses in the business, and that they both intended to and did contribute money or property to Captain Hooks. The forum therefore concludes that Captain Hooks was a partnership during Claimant’s employment.

ORS 67.105 defines the extent of a partner’s liability. It provides, in relevant part:

“(1) Except as otherwise provided in this section, all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.

“* * * * *

“(3)(a) An obligation of a partnership incurred while the partnership is a limited liability partnership, whether arising in contract, tort or otherwise, is solely the obligation of the partnership. A partner is not personally liable, directly or indirectly, by way of indemnification, contribution or otherwise, for such an obligation solely by reason of being or so acting as a partner.

“(b) Notwithstanding paragraph (a) of this subsection, a partner of a limited liability partnership shall continue to be liable for any obligation of the

partnership for which the partner was liable before the partnership became a limited liability partnership.”

Unless an exception exists, a partner is jointly and severally liable for all debts of the partnership. In this case, Rivers claimed the exception in ORS 67.105(3)(a) which excuses partners from personal liability for any obligations of the partnership if the obligation arises “while the partnership is a[n] LLP.” In the alternative, he asserted he was not personally liable because Captain Hooks was entitled to the *de facto* legal status of a limited liability company (“LLC”) based on the intent of Casteel and Rivers. Although Casteel did not raise these issues, the same argument applies to him. In addition, Rivers argued that if he was held personally liable for the unpaid wages, he should not be held liable for penalty wages based on his personal financial inability to pay those wages at the time they accrued.

Limited liability partnerships (“LLPs”) are a form of partnership that the Oregon legislature created in 1997. Partnership conditions, regulations, and liabilities for LLPs and its member partners are contained in ORS 67.500 to 67.680.

Rivers contends that he is entitled to the liability exception in ORS 67.105(3) (a) because he and Casteel registered their partnership as an LLP with the Secretary of State. ORS 67.590 states the procedure by which a partnership becomes an LLP:

“(1) After the approval required by ORS 67.500(3), a partnership may become a limited liability partnership by delivering an application for registration to the office of the Secretary of State for filing.

“* * * * *

“(4) The filing of an application for registration establishes that the partnership has satisfied all conditions precedent to the qualification of the partnership as a limited liability partnership.”

It is undisputed that Casteel and Rivers delivered an application for registration to the office of the Secretary of State for filing on October 8, 2003, and that the Secretary of State accepted the application. This meets the statutory procedural formalities for

registering a partnership as an LLP. However, there is another hurdle that Rivers and Casteel cannot cross.

As a threshold matter, ORS 67.500(1) sets out eligibility criteria that a partnership must meet before it can become an LLP. It provides:

“(1) Notwithstanding any other provision of this chapter, a partnership, not including a limited partnership, may register as a limited liability partnership or apply for authority as a foreign limited liability partnership only if it:

“(a) Renders professional service; or

“(b) Is affiliated with a limited liability partnership or a foreign limited liability partnership that renders professional service and renders services related to or complementary to the professional service rendered by, or provides services or facilities to, the limited liability partnership or foreign limited liability partnership that renders professional service.”

“Notwithstanding any other provision of this chapter” is an unambiguous, unequivocal restrictive clause that limits LLP status to a specific class of partnerships – those that “[render] professional service” or “[are] affiliated with a limited liability partnership * * * that renders professional service and renders services related to or complementary to the professional service rendered by * * * or provides services or facilities to, the limited liability partnership * * * that renders professional service.”

“Professional service” means “the service rendered by a professional.” ORS 67.005(13). “Professional” is defined in ORS 67.005(12) to include persons who are licensed under Oregon Revised Statutes the laws of another state as accountants, attorneys, chiropractors, dentists, landscape architects, naturopaths, nurse practitioners, psychologists, physicians, podiatrists, radiologic technologists, real estate appraisers, and “[o]ther persons providing to the public types of personal service or services substantially similar to those listed [above] that may be rendered lawfully only pursuant to a license.”

It is undisputed that neither Rivers nor Casteel were licensed to pursue any of the professions listed in OAR 67.005(12) and did not provide any services that a licensed professional in one of the enumerated professions is licensed to provide. However, Rivers argued that he and Casteel, under the LLP of Captain Hooks, provided “professional services” because they fit into the category of a “person[s] providing to the public types of personal service or services substantially similar * * * that may be rendered lawfully only pursuant to a license.” The license in question is the wrecking certificate owned by Casteel, which presumably was obtained from the state pursuant to the provisions of ORS 822.100 to 822.150.^{vii}

Under ORS 822.100(1), a “wrecker certificate” entitles the holder to do the following:

“(a) Carr[y] on or conduct[], in whole or in part, the business of buying, selling or dealing in vehicles for the purpose of wrecking, dismantling, disassembling and offering for sale the used vehicle components thereof.

“(b) Carr[y] on or conduct[], in whole or in part, the business of buying, selling or dealing in vehicles for the purpose of wrecking, dismantling, disassembling or substantially altering the form of any motor vehicle.

“(c) Carr[y] on or conduct[], in whole or in part, the business of selling at wholesale wrecked, dismantled, disassembled or substantially altered vehicles.

“(d) Engage[] in the activity of wrecking, dismantling, disassembling or substantially altering vehicles including the crushing, compacting or shredding of vehicles.”

The forum is left with the task of determining whether the business activities described in ORS 67.100(1) are “substantially similar” to any of the types of personal service provided by persons licensed to practice the professions set out in ORS 67.005(13)(a)-(m). This requires the forum to determine the meaning of the words “substantially similar.”

Where statutory interpretation is required, the forum must attempt to discern the legislature’s intent. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993).

See also *In the Matter of Elisha, Inc.*, 25 BOLI 125, 148 (2004), *aff'd without opinion*, *Elisha, Inc. v. Bureau of Labor and Industries*, 198 Or App 285, 108 P3d 1219 (2005). To do that, the forum first examines the text and context of the statute. *Id.* The text of the statutory provision itself is the starting point for interpretation and the best evidence of the legislature's intent. *Id.* Also relevant is the context of the statutory provision, which includes other provisions of the same statute and other related statutes. *Id.* at 611. If the legislature's intent is clear from the text and context of the statutory provision, further inquiry is unnecessary.

The words "substantially similar" are not defined in ORS Chapter 67 and the forum has found no case law on point. Because these words are not defined anywhere in the statute or related statutes and they are words of common usage, the forum ascribes to them their plain, natural and ordinary meaning. *Young v. State of Oregon*, 161 Or App 32, 36, *rev den* 329 Or 447 (1999) (citing *PGE* at 611). See also *Elisha* at 148.

The ordinary meaning of "similar" is "1 : having characteristics in common : very much alike * * * 2 : alike in substance or essentials * * *." *Webster's Third New Int'l Dictionary* 2120 (unabridged ed 2002). The ordinary meaning of "substantially" is "in a substantial manner." *Id.* at 2280. In this context, the ordinary meaning of "substantial" is "sharing the nature of[.]" *Id.*

The types of personal services provided by Captain Hooks -- auto salvage, wrecking, and towing -- have nothing in common with the types of professional personal services that accountants, attorneys, chiropractors, dentists, landscape architects, naturopaths, nurse practitioners, psychologists, physicians, podiatrists, radiologic technologists, real estate appraisers are licensed to provide. Accordingly, the forum concludes that the personal service or services provided by Casteel and Rivers doing

business as Captain Hooks were not “substantially similar” to the personal service or services provided by the types of professionals listed in ORS 67.005(13)(a)-(m). As a result, the LLP name that Casteel and Rivers registered with the Secretary of State did not acquire the legal status of an LLP, and Casteel and Rivers are jointly and severally liable for the obligations incurred by Captain Hooks under ORS 67.105(1), including Claimant’s unpaid wages, penalty wages, and civil penalties. ORS 67.105(1).

Rivers alternatively argued that if Captain Hooks was not an LLP, then it was a *de facto* limited liability company (“LLC”). This argument fails because an LLC, as a matter of law, cannot exist until the LLC’s “articles of organization” have been “execut[ed] and deliver[ed] to the [Secretary of State] for filing.” ORS 63.044. No such events happened here.

In conclusion, Casteel and Rivers are jointly and severally liable for Claimant’s unpaid wages and the civil penalty awarded to Claimant. Casteel is also jointly and severally liable for Claimant’s penalty wages. Rivers’s liability for Claimant’s penalty wages is discussed below.

RIVERS’S PERSONAL LIABILITY FOR PENALTY WAGES

In his answer, Rivers raised the affirmative defense of financial inability to pay Claimant’s wages at the time they accrued. This defense was not plead by Casteel or Captain Hooks and only applies to Rivers’s personal liability. An employer bears the burden of proving this defense. *In the Matter of Debbie Frampton*, 19 BOLI 27, 41 (1999). Rivers testified that, at the time Claimant worked for Captain Hooks, he lacked the personal financial resources to pay the lease or utilities on the property used by Captain Hooks, that he lived in a “5th wheeler” with his wife in a trailer park, that he “was having trouble putting food on [his] table,” and was barely making enough money to pay

the trailer park rent and utilities. He also testified he had not worked for pay since August 1999.

Even if the forum believed all of Rivers's testimony, his defense would fail. Because Captain Hooks was a partnership, the real question is whether the partnership had sufficient assets to pay Claimant's wages on November 7, 2003. If so, then Casteel and Rivers are jointly and severally liable, regardless of Rivers's personal financial situation. To meet its burden of proof, an employer must provide specific information as to the financial resources and expenses of both the business and the employer personally during the wage claim period, including submission of records from which that information came. See *In the Matter of Westland Resources*, 23 BOLI 276, 281 (2002); *In the Matter of Graciela Vargas*, 16 BOLI 246, 257 (1998); *In the Matter of U. S. Telecom International*, 13 BOLI 114, 122-23 (1994); *In the Matter of Lois Short*, 5 BOLI 277, 288 (1986). Testimony of an employer, even when found credible, is ordinarily insufficient in and of itself to establish an inability to pay. *Vargas*, at 257. The only evidence provided regarding Captain Hooks's expenses was that a check was made out to Watkins on an undisclosed date to cover her mortgage payment and that only \$10 was left in Captain Hooks's checking account as of November 20, 2003. This evidence is insufficient to meet Rivers's burden of proof, and the forum finds Rivers jointly and severally liable for Claimant's penalty wages.

DUE PROCESS

In his post-hearing memorandum, Rivers argued that the Agency conceded that Captain Hooks was an LLP because it addressed both demand letters to "Captain Hooks Salvage and Auto Wrecking LLP," because the Claimant stated on his wage claim form that "Captain Hooks Wrecking and Auto Salvage, LLP" was the "NAME OF EMPLOYER'S BUSINESS," and because the Agency captioned its case summary in

the following words: GARY RIVERS AND CHARLES CASTEEL AND CAPTAIN HOOKS SALVAGE & AUTO WRECKING LLP.” Rivers argued that if the Agency intended to question the existence of the LLP, “it was required to allege the impropriety of the LLP in its charging documents” and “it violates Respondents’ due process rights to present them with new facts and new allegations in the middle of the hearing.” Rivers cites OAR 839-050-0060(1) in support of its argument.

OAR 839-050-0060(1) contains the following language:

“1) A charging document will contain:

“(a) A reference to the particular statutes or administrative rules involved in the violation;

“(b) A short and concise statement of the matters that constitute the violation; and

“(c) A statement of the remedies sought and, when appropriate, the penalty imposed.”

Rivers argued that the Agency’s failure “to allege the impropriety of the LLP in its charging documents” constitutes a failure to include a “statement of the matters that constitute the violation,” which in turn violated Rivers’s due process rights. Rivers is mistaken. The “impropriety of the LLP” is not a “matter” that constituted an alleged “violation.” Rather, it is a matter that relates to the joint and several liability of Casteel and Rivers, both whom were named, along with Captain Hooks, as the employer in the Agency’s Order. The forum concludes that Rivers’s due process rights were not violated.^{viii}

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and ORS 653.256 and as payment of the unpaid wages, penalty wages, and civil penalties Respondents owe as a result of their violations of ORS 652.140(2) and ORS 653.055(1), the Commissioner of the Bureau of Labor and Industries hereby orders **Charles Casteel** and **Gary Rivers** to

deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

A certified check payable to the Bureau of Labor and Industries in trust for Claimant Jesus H. Ramos in the amount of NINE THOUSAND THREE HUNDRED THIRTY SEVEN DOLLARS and FIFTY CENTS (\$9,337.50), less appropriate lawful deductions, representing \$2,137.50 in gross earned, unpaid, due and payable wages, \$3,600 in penalty wages, and \$3,600 in civil penalties, plus interest at the legal rate on the sum of \$2,137.50 from November 1, 2003, until paid, and interest at the legal rate on the sum of \$7,200 from January 1, 2004, until paid.

ⁱ There was no evidence presented as to the date of Rivers's eviction.

ⁱⁱ The document contains numerous places for Claimant to sign and date.

ⁱⁱⁱ See *In the Matter of Graciela Vargas*, 16 BOLI 246, 256 (1998) (the defense of financial inability to pay wages at the time they accrue is an affirmative defense).

^{iv} See OAR 839-050-0130(2) ("The failure of the party to raise an affirmative defense in the answer is a waiver of such defense"); *Vargas at 256* (the affirmative defense of financial ability to pay wages at the time they accrue is waived if not raised in the employer's answer).

^v See Findings of Fact ## 23 and 24 – The Merits, *supra*.

^{vi} Compare ORS 652.150(1) ("if an employer willfully fails to pay any wages * * * of any employee whose employment ceases, * * * then as a penalty * * * the wages * * * shall continue[.]")

^{vii} "Wreckers" are regulated under ORS 822.100 to 822.150. Based on Casteel and Rivers's testimony, the forum takes judicial notice that they could not have legally conducted Captain Hooks's business of auto salvage and wrecking without a certificate obtained under those statutes. However, the wrecker certificate was not offered as evidence and there was no testimony about the specific means by which Casteel obtained the certificate. As an aside, it also appears that Casteel and Rivers were required to obtain a supplemental wrecker certificate in order to conduct a wrecking business at Captain Hooks under Casteel's license. ORS 822.135(1)(b).

^{viii} Compare *Drayton v. Department of Transportation*, 186 Or App 1, 62 P3d 430 (2003) (reversed and remanded because the Department based its decision on a rule that was not cited in its notice of violation).