BRAD AVAKIAN
COMMISSIONER

CHRISTIE HAMMOND
DEPUTY COMMISSIONER

BUREAU OF LABOR AND INDUSTRIES

BEFORE THE COMMISSIONER OF THE BUREAU OF LABOR AND INDUSTRIES OF THE STATE OF OREGON

In the Matter of: **BRUCE CRISMAN, dba Nu West Painting Contractors** Respondent.	Case No. **05-13** FINDINGS OF FACT CONCLUSIONS OF LAW OPINION ORDER

SYNOPSIS

Respondent employed four Claimants in 2011 and 2012 in Oregon at the agreed rates of $9 or $10 per hour. During the weeks at issue, Respondent failed to pay the Claimants all the wages owing them. All four Claimants terminated their employment because they were not being paid. Notice was sent to the employer, who did not dispute the wages owed, but who nevertheless failed to pay any of the wages due, except $600.00, all to one Claimant. The amount of unpaid wages totals $5,160.00 for all four Claimants. The failure to pay was willful. Penalty wages in the amount of $9,120.00 are therefore due for failure to pay at termination. Civil penalties are also due in the additional amount of $9,120.00 for failure to pay overtime wages. ORS 652.140(2), ORS 652.150, ORS 653.055, ORS 653.261, OAR 839-020-0030.

The above-entitled case came on regularly for hearing before Daniel Rosenhouse, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 25, 2013, at the Salem, Oregon office of the Bureau of Labor and Industries (BOLI or the Agency), at 3865 Wolverine Street NE, Building E-1. The Notice of Hearing set the hearing to begin at 11:00AM, but as set forth below, the proceedings did not commence until 11:30AM. They were concluded at approximately 2:05PM.

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BOLI was represented by Case Presenter Chet Nakada, an employee of the Agency.

Wage claimants Abimael Cedillo-Flores (Abimael), Juan Rafael Lopez-Perez (Juan Rafael), and Luis Alberto Sebastian-Gonsalez (Luis) were present throughout the hearing and were not represented by counsel. Claimant Rene Sebastian-Gonsalez (Rene), also not represented by counsel, appeared by telephone during the time of his testimony; he was otherwise not present at the hearing. When referred to collectively, the four wage claimants are referred to herein as the Wage Claimants.

All of the Wage Claimants speak Spanish, and none of them was sufficiently fluent in English to understand the proceedings without translation. Accordingly, Mr. Philip Guttman, certified as an interpreter between English and Spanish pursuant to ORS 45.291, translated the questions to, and answers of, the Wage Claimants during their testimony, as well as at other times they spoke to the Forum. He also simultaneously translated the proceedings or summarized them, for the benefit of the Wage Claimants.

Neither Bruce Crisman (Respondent) nor any representative of his company appeared at the hearing. The Forum delayed the commencement of the hearing from 11:00AM to 11:30AM in order to account for any unexpected event that may have delayed the Respondent's appearance. But no appearance was ever made by the Respondent or any other person on his behalf, nor was any notice give to the Forum explaining his failure to appear. Nonetheless, the Agency presented its prima facie case, as required by OAR 839-050-0330(2).

The Agency called as witnesses all four Claimants and BOLI Compliance Specialist Stan Wojtyla. No other witnesses were called or testified.

The forum received into evidence Agency Exhibits A-1 through A-12. And in addition to the audio record of the hearing, the official record also includes Administrative Exhibits X-1 through X-6.

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

RULINGS AND RESOLUTIONS OF MOTIONS OR OBJECTIONS

For the reasons set forth above, Respondent was and is found to be in default for failing to appear at the hearing. OAR 839-050-0330(1)(d).

As set forth above, the Agency's proposed exhibits were admitted, upon its motion allowed by the ALJ.

The Forum has taken judicial notice of a standard calendar for the years 2011 and 2012.

FINDINGS OF FACT

1) On or about January 11, 2012, the Wage Claimants submitted wage claims to BOLI.

2) The Wage Claimants assigned their wage claims to BOLI.

3) The Wage Claimants were employed by Respondent to do painting or painting-related work in the construction trades at the following agreed rates of pay—

a. Abimael, at $10/hour;
b. Juan Rafael, at $9/hour;
c. Luis, at $9/hour;
d. Rene, at $10/hour.

4) At all material times, and for at least a few years prior to the time at issue in this Case, Respondent operated a construction painting business, with employees, within the State of Oregon.

5) Abimael worked hours as set forth below, and was entitled to be paid wages in the amounts set forth below—

a. For the week ending Saturday, November 26, 2011, 22.5 hours, for straight-time wages of $225.00;
b. For the week ending December 3, 2011, 22.5 hours, for straight time wages of $225.00;
c. For the week ending December 10, 2011, 40 hours straight time for straight time wages of $400.00, plus 9.5 hours overtime for overtime wages of $142.50, making a total of $542.50;
d. For the week ending December 17, 2011, 40 hours straight time for straight time wages of $400.00, plus 11 hours overtime for overtime wages of $165.00, making a total of $565.00;
e. For the week ending December 24, 2011, 11 hours, for straight time wages of $110.00;
f. For the week ending December 31, 2011, 14 hours, for straight time wages of $140.00;
g. For the week ending January 7, 2012, 13 hours, for straight time wages of $130.00;
h. The amounts above sum to a total earned for Abimael Cedillo-Flores of $1,937.50;
i. He received no pay for the hours set forth above, except $600.00 in cash received on January 14, 2012, resulting in a balance due him of $1,337.50 in wages. His employment terminated no later than January 7, 2012.

6) For each of the three weeks ending July 24, 2011, July 31, 2011, and August 7, 2011, Juan Rafael Lopez-Perez worked 40 hours straight time, for straight time wages of $360.00 plus 16 hours of overtime for $216.00, making a total earned of $1,728.00 [($360 + $216) x 3 = $1,728.00]. He received no pay for these hours worked. His employment terminated no later than August 7, 2011.

7) Luis Alberto Sebastian-Gonsalez worked the same hours as Juan Rafael Lopez-Perez, during the weeks ending July 31, 2011 and August 7, 2011,

earning a total of $1,152.00, including $720.00 of straight time wages and $432.00 in overtime wages. He received no pay for these hours worked. His employment terminated no later than Sunday, August 7, 2011.

8) Rene Sebastian-Gonsalez worked hours as set forth below, and was entitled to be paid wages in the amounts set forth below—

a. For the week ending December 24, 2011, 24.5 hours, for straight time wages of $245.00.
b. For the week ending December 31, 2011, 50 hours, for straight time wages of $400.00 and overtime wages of $150.00.
c. For the week ending January 7, 2012, 20 hours, for straight time wages of $200.00.
d. The amounts above sum to a total earned for Rene Sebastian Gonsalez of $995.50. He received no pay for these hours worked. His employment terminated no later than Saturday, January 7, 2012.

9) Notice of wages due to the Wage Claimants from Respondent for 2011 and 2012 were sent to the Respondent on January 19, 2012.

10) Order of Determination No. 12-0075 was issued by the Agency on April 27, 2012 and was timely served upon and received by the Respondent on May 2, 2012. In pertinent part, the Order of Determination alleges that the Wage Claimants worked for the Respondent during 2011 and 2012, and were due wages and penalty wages for failure to pay wages due at termination and for failure to pay overtime wages.

11) Although Respondent responded to the Notice of wages due and to the Order of Determination, Respondent at no time denied that wages were due to the Wage Claimants or the amount of the wages and penalties alleged by the Agency to be due. The gist of the responses Respondent made was that he intended to make arrangements to pay the wages due and that he thereby claimed or intended not to be responsible for the penalty wages.

12) Credibility of the Witnesses. The testimony of Compliance Specialist Stan Wojtyla was credible. The recollections of the Wage Claimants, particularly Rene and Luis, were less than certain as to the details of exactly when they worked and the exact periods of time for which they were not paid. There were discrepancies between the written information in some of the wage claims and the testimony of the Wage Claimants at the hearing. This is understandable, considering the time that has passed since the time the work was performed. The testimony of all the Wage Claimants at the hearing was, by no means, more favorable to them than the information originally supplied in the filed wage claims. Most notably, Luis testified that the statement in his written wage claim that his wages were $10/hour was incorrect; that his actual agreed rate of pay was $9/hour. Had he continued to maintain that the rate of pay set forth in his wage claim was correct, it appears there would have been no one at the hearing who would have contradicted him. Thus, although my findings of fact with respect to the hours they worked are not always consistent with the original claims filed by the Wage Claimants, I find that they were honestly trying to present their best recollections to the Forum and that the testimony of all of them was credible in the essentials, particularly with respect to the fact of their employment, the rate of pay, and the identity of their employer. The finding of general credibility with respect to hours worked and dates of employment is consistent with the legal principles respecting evidence of hours and rate of pay, as discussed below.

CONCLUSIONS OF LAW

1) All of the Wage Claimants were suffered or permitted to work by the Respondent and were, in fact, knowingly and intentionally employed by the Respondent during 2011 and/or 2012, and are therefore entitled to unpaid wages

from the Respondent, plus interest from 5 days after the last day worked. ORS 652.140.

2) Each Wage Claimant is entitled to penalty wages from Respondent on account of the failure to receive all wages due at termination of their employment, as to each Wage Claimant, in the amount of the Wage Claimant's hourly rate ($10 for Abimael and Rene, and $9 for Juan Rafael and Luis) multiplied by 240, plus interest thereon from 35 days after the last day of employment. ORS 652.150.

3) Each Wage Claimant is entitled to a civil penalty from Respondent on account of the failure to receive the overtime wages to which each is entitled, in the same amounts as set forth in Conclusion of Law #2, above. ORS 653.055.

4) The Respondent is liable, as to each Wage Claimant, for the actual amount of wages, proven by credible evidence at the hearing, even if that amount is more than the amount alleged to be owed in the Order of Determination that was served on the Respondent.

5) Likewise, interest on the wages found due will also run from the date the evidence shows the wages to be due, rather than from the date alleged in the Order of Determination.

6) As assignee of the claims of all the Wage Claimants, the Agency is the proper party to which an award should be made.

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

OPINION

CLAIMANTS' WAGE CLAIMS

In this case, where the Respondent did not appear at the hearing and moreover, failed to contest the allegations that he employed the Wage Claimants and failed to contest the amount of the unpaid wages, it is the Agency's responsibility merely to establish a prima facie case. OAR 839-050-0330. To do this, the Agency must prove the following elements: 1) As to each Wage Claimant, that the Respondent employed him; 2) The pay rate upon which Respondent and Claimants agreed; 3) The amount and extent of work Claimant performed for Respondent; and 4) Claimant performed work for which he was not properly compensated. *See, In the Matter of Letty Lee Sesher,* 31 BOLI 255, 261 (2011); *In the Matter of E.H. Glaab*, 32 BOLI 60, 66 (2012).

Each Wage Claimant testified that he was employed by the Respondent. The testimony of Stan Wojtyla and the Agency's file, i.e., Exhibits A-1 through A-12, corroborate that testimony by showing that the Respondent, although he responded to the Order of Determination (Ex. A-8), and the Notice of Wage Claim (Ex. A-7, pages 1 and 4), never disputed that he employed any of the Wage Claimants. Thus, a prima facie case was established as to the first element—employment by the Respondent.

The same can be said as to the second element, rate of pay. I have, however, reduced the rate of pay for Luis Sebastian-Gonsalez from $10/hour to $9/hour because he acknowledged that, the Agency's allegations notwithstanding, his agreed rate of pay was $9 per hour. As to the other Wage Claimants, there was no discrepancy in the evidence. $10/hour was the rate of pay for Abimael Cedillo-Flores and Rene Sebastian-Gonsalez; $9/hour was the

rate of pay for Juan Rafael Lopez-Perez and Luis Sebastian-Gonsalez. Thus, the first two elements were established by the Agency as to each Wage Claimant.

I now address together the final two elements—Claimants performed work for which they were not properly compensated, and the amount and extent of work each Claimant performed for Respondent. These two issues can be described as determining the amount of work, *i.e.*, the number of hours, for which each Claimant was not compensated, and the amount of compensation to which each Wage Claimant is therefore entitled. Because the evidence was not always consistent, I address these elements in more detail. Each Wage Claimant is discussed separately.

Abimael Cedillo-Flores

Although there is basic consistency between his wage claim and the Order of Determination, ambiguity arises because of anomalies on the calendar on his Wage Claim, which allegedly shows hours worked on the identified days. For example, page 1 of Ex. A-12 (an Exhibit disclosed and offered at the hearing for the first time) lists the days of the week from November 22 through December 5, 2011 as the day after their actual day on a real calendar. Page 2 of the same exhibit, covering December 7 through December 20 lists the days and dates accurately. Page 3 is incorrect as to December 30 (it lists it as a Thursday; it is actually a Friday), but is correct as to January 1 and 2.

These errors raise questions as to the entire reliability of the calendar and the records of hours kept by Mr. Cedillo-Flores. The errors make it difficult to determine hours worked, particularly within a particular workweek for purposes of determining overtime hours. However, these errors do not affect the resolution of

the basic issue—that Mr. Cedillo-Flores, and the other workers, were definitely not paid the wages they were owed.

Moreover, it is primarily the employer's responsibility to keep records of the actual hours worked each pay period by each employee. ORS 653.045(1)(b). At hearing, it is the employee's responsibility merely to show the amount and extent of work done as a matter of just and reasonable inference; once that is done, the burden shifts to the employer to show the precise amount of work or to negate the showing of the employee. If the employer fails to produce such evidence, wages may be awarded to the employee, even though the award is approximate. *Nash v. Resources, Inc.*, 982 F. Supp. 1427, at 1435 (D. Or. 1997). Here, the employer has not produced any evidence of the precise amount of work nor has he produced any evidence negating the employees' evidence.

My best approximation of the actual hours worked by Mr. Cedillo-Flores is set forth in Finding of Fact 5). He is due $1,337.50 in wages.

Notwithstanding the fact that the Order of Determination seeks only $1,137.50 on behalf of Mr. Cedillo-Flores, and that the Agency is not allowed to amend that document to change the amount due. OAR 839-050-0440(4), Mr. Cedillo-Flores is still allowed to recover the actual wages that he earned. *In the Matter of John M. Sanford*, 26 BOLI 72, 86 (2004). Accordingly, I find that the Respondent is liable for $1,337.50 in wages to Mr. Cedillo-Flores, plus interest at the legal rate on that amount from January 13, 2012, which is five business days after his termination of employment. ORS 652.140(2)(c).

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Juan Rafael Lopez-Perez

There are no inconsistencies or anomalies with respect to the wages due to Juan Rafael Lopez-Perez. The Respondent is liable for $1,728.00 in wages to him, plus interest from August 12, 2011, 5 business days after his termination.

Luis Alberto Sebastian-Gonsalez

Luis Alberto Sebastian-Gonsalez testified that his rate of pay was $9/hour, rather than the $10/hour set forth in the Order of Determination and in his wage claim. I find his testimony to be more credible than the information written down in the documentary evidence. Luis was very unsure in his testimony of the hours that he worked and for which he was unpaid. He did seem fairly certain, however, that he worked the same hours as Juan Rafael and that Juan Rafael was likely to have kept better and more accurate records of hours worked than did Luis. On the other hand, Juan Rafael testified that he did not always work together on the same crew with the other Wage Claimants—that they were generally split into two different work crews.

It is difficult to choose the most credible from among these varying stories. Keeping in mind, once more, that the primary responsibility for tracking hours is the employer's, and that in the absence of clearly reliable evidence, it is permissible to make an approximation, I have chosen to believe that Luis Alberto Sebastian-Gonsalez worked the same hours as Juan Rafael Lopez-Perez—56 hours per week, rather than the 50 hours reported in his Wage Claim and in the Order of Determination. But I also find that he was unpaid for only two weeks—the weeks ending July 31 and August 7, 2011, as claimed in his Wage Claim, rather than the 3 weeks that Juan Rafael was unpaid. Consequently, his total

earned, at his admitted rate of $9 per hour, is $1,152.00, as set out in Finding of Fact 7).

Notably, the Order of Determination served on the Respondent only seeks $1,100.00 in wages for Luis. For the same reasons as stated above respecting Abimael, I nevertheless find that wages may be recovered from the Respondent in the amount of $1,152.00 for Luis, plus interest on that amount from August 12, 2011, the date five days after his termination from work.

Rene Sebastian-Gonsalez

Rene Sebastian-Gonsalez was also very uncertain of the hours he worked and for which he was unpaid. Before admitting he really didn't remember very well, he testified that the period for which he wasn't paid was November and December 2011, rather than the summer of 2011. The summer of 2011 is the time period in the BOLI calculation (Ex. A-3, page 1), his Wage Claim (Ex. A-3 at pages 2-3 and 6), and the Order of Determination (Ex. A-8, page 5).

On the other hand, page 7 of Ex. A-3, also apparently a part of Rene's Wage Claim, lists his unpaid work time as having occurred in December 2011 and January 2012, which is closer to his initial testimony. Adding still more difficulty with his list on page 7 is that it, like Abimael's list discussed above, incorrectly associates days of the week with dates—he lists December 22 and 23 as a Wednesday and Thursday instead of the actual Thursday and Friday.

For the reasons explained above with respect to Abimael, these anomalies raise questions of reliabiliy. But also for the reasons stated above, the questions raised are not so great as to make me unable to approximate the wages due. Accordingly, I find, as set forth in Finding of Fact 8), that Rene is owed wages by the Respondent in the amount of $995.50, plus interest at the

legal rate from January 13, 2012. These determinations and calculations are based primarily upon page 7 of Exhibit A-3, claiming hours in December 2011 and January 2012, rather than the calendar at page 6, of Exhibit A-3, upon which the Agency seems to have based its calculations.

PENALTY WAGES

Penalty wages are awarded when a respondent's failure to pay wages at termination of employment was willful. ORS 652.150. 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 was an experienced employer. It is difficult to imagine how Respondent could have paid wages or failed to pay wages without having met the standards set out in *Sabin*. Respondent never claimed otherwise.

The method of calculation for payment of penalty wages is set out in ORS 652.150(1). The evidence was that notice of nonpayment was sent to the Respondent, as required by ORS 652.150(2) and that payment was still not made, within 12 days as required by the statute, or at any other time. Interest on said penalties runs from 30 days after the date the wages were due to be paid. Where the last day worked was earlier than that alleged in the Order of Determination, interest runs from the date established by the evidence. *In the Matter of Francisco Cisneros*, 21 BOLI 190, 213 (2001), *aff'd without opinion*, *Cisneros v. Bureau of Labor and Industries*, 187 Or App 114, 66 P3d 1030 (2003).

Penalty wages when the employee earns $10/hour, as did Abimael Cedillo-Flores and Rene Sebastian-Gonsalez are $2,400.00 ($10 x 40 hours x 30 days = $2,400.00). Penalty wages when the employee earns $9/hour, as did Luis Sebastian-Gonsalez and Juan Rafael Lopez-Perez are $2,160.00 ($9 x 40 hours x 30 days = $2,160.00).

CIVIL PENALTY

In addition to the penalty for failure to pay wages due at termination, ORS 653.055 provides that an employer is responsible to pay a civil penalty to an employee if the employer pays that employee less than the wages to which he or she is entitled under ORS 653.010 to 653.261. ORS 653.055(1)(b). This includes overtime wages. "Willfulness" is not an element. *In the Matter of Letty Lee Sesher,* 31 BOLI 255, 264 (2011). As set out in the Findings of Fact, all of the Wage Claimants earned overtime pay. None of them was paid their overtime pay.

The overtime penalty is calculated by the same method as the penalty for failure to pay wages at termination. ORS 653.055(1)(b). Thus, additional penalties are owed to each of the Wage Claimants in the same amount as set forth above respecting failure to pay wages at termination. Interest runs on the overtime penalty from the date the wages were due.

ORDER

NOW, THEREFORE, as authorized by ORS 652.140(2), ORS 652.150, ORS 653.055, ORS 653.261, and ORS 652.332, and as payment of the unpaid wages, penalty wages, and civil penalties, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondent Bruce Crisman** to pay, by delivering to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-

2180, certified checks payable to the Bureau of Labor and Industries, which is to hold said funds in trust for the Wage Claimants, in the following amounts, but reduced by lawful deductions as described in 5., below:

1. On account of wages and penalties awarded for Abimael Cedillo-Flores

    a. For gross unpaid wages, ONE THOUSAND THREE HUNDRED THIRTY-SEVEN DOLLARS AND FIFTY CENTS ($1,337.50), plus interest at the legal rate on that amount from January 13, 2012; plus

    b. For penalties under ORS 652.150, TWO THOUSAND FOUR HUNDRED DOLLARS ($2,400.00), plus interest at the legal rate on that amount from February 13, 2012; plus

    c. For penalties under ORS 653.055, TWO THOUSAND FOUR HUNDRED DOLLARS ($2,400.00), plus interest at the legal rate on that amount from January 13, 2012.

2. On account of wages and penalties awarded for Juan Rafael Lopez-Perez

    a. For gross unpaid wages, ONE THOUSAND SEVEN HUNDRED TWENTY-EIGHT DOLLARS ($1,728.00), plus interest at the legal rate on that amount from August 12, 2011; plus

    b. For penalties under ORS 652.150, TWO THOUSAND ONE HUNDRED SIXTY DOLLARS ($2,160.00), plus interest at the legal rate on that amount from September 12, 2011; plus

    c. For penalties under ORS 653.055, TWO THOUSAND ONE HUNDRED SIXTY DOLLARS ($2,160.00), plus interest at the legal rate on that amount from August 12, 2011.

3. On account of wages and penalties awarded for Luis Alberto Sebastian-Gonsalez

    a. For gross unpaid wages, ONE THOUSAND ONE HUNDRED DOLLARS ($1,100.00), plus interest at the legal rate on that amount from August 12, 2011; plus

    b. For penalties under ORS 652.150, TWO THOUSAND ONE HUNDRED SIXTY DOLLARS ($2,160.00), plus interest at the legal rate on that amount from September 12, 2011; plus

c. For penalties under ORS 653.055, TWO THOUSAND ONE HUNDRED SIXTY DOLLARS ($2,160.00), plus interest at the legal rate on that amount from August 12, 2011.

4. On account of wages and penalties awarded for Rene Sebastian-Gonsalez

a. For gross unpaid wages, NINE HUNDRED NINETY-FIVE DOLLARS and fifty cents ($995.50), plus interest at the legal rate on that amount from January 13, 2012; plus

b. For penalties under ORS 652.150, TWO THOUSAND FOUR HUNDRED DOLLARS ($2,400.00), plus interest at the legal rate on that amount from February 13, 2012; plus

c. For penalties under ORS 653.055, TWO THOUSAND FOUR HUNDRED DOLLARS ($2,400.00), plus interest at the legal rate on that amount from January 13, 2012.

5. The principal amounts set forth immediately above, in Sections 1a, 2a, 3a, and 4a, are gross amounts of wages due and shall be reduced by the legally required deductions for state and federal taxes and other legal deductions that are appropriate for the Wage Claimant for whom the payment is being made. Respondent, at the time of submitting the payments to BOLI, shall provide a written record, as would generally be required on a paycheck, of the amounts of deductions taken, and shall designate the reasons therefor. Respondent shall forward such deducted taxes to the appropriate governmental agencies to the extent otherwise required by law.

DATED this 26 day of August, 2013.

Brad Avakian, Commissioner

ISSUED ON 8-26-13