

In the Matter of

MAM PROPERTIES, LLC

Case Nos. 27-06 & 28-06

Final Order of Commissioner Dan Gardner

Issued February 9, 2007

SYNOPSIS

Respondent MAM Properties, LLC, employed Claimant from November 8, 2004 through April 3, 2005, at two agreed wage rates for two different shifts, one of which was lower than the minimum wage. Respondent was ordered to pay Claimant \$6,761.11 in unpaid, due, and owing wages. Respondent's failure to pay the wages was willful, and Respondent was ordered to pay Claimant \$1,742 in penalty wages. Respondent was ordered to pay Claimant another \$1,742 as a civil penalty because Respondent's failure to pay the wages included a failure to pay the minimum wage and overtime wages. Respondent was also ordered to pay civil penalties in the amount of \$34,000 as a result of its single violation of ORS 653.045(2), its 11 violations of OAR 839-020-0012, its 11 violations of ORS 653.025 and OAR 839-020-0010, and its 11 violations of ORS 653.261 and OAR 839-020-0030. ORS 652.140(1), ORS 652.150, ORS 653.045, ORS 653.055, ORS 653.256; OAR 839-020-0004(33), OAR 839-020-0010, OAR 839-020-0012, OAR 839-020-0030; OAR 839-020-0083, OAR 839-020-1020.

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 December 12, 2006, at the Salem office of the Bureau of Labor and Industries, located at 3865 Wolverine NE, Building E, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Patrick Plaza, an employee of the Agency. Wage claimant Rosita Blair ("Claimant") was present throughout the hearing and was not represented by counsel. Respondent MAM Properties, LLC, did not appear at the hearing and was held in default.

The Agency called the following witnesses: Claimant; Katy Bayless, BOLI Wage and Hour Division compliance specialist; and Vee Souryammat, Administrative Specialist, BOLI Wage and Hour Division.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-11 (submitted or generated prior to hearing); and
- b) Agency exhibits A-1 through A-30 (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 April 18, 2005, Claimant filed a wage claim with the Agency alleging that Respondents MAM Properties and Chris Washington had employed her and failed to pay wages earned and due to her.

2) At the time she filed her wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent.

3) Claimant brought her wage claim within the statute of limitations.

4) On August 17, 2005, the Agency issued Order of Determination No. 05-1111 based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondents Christine Dean Washington ("Washington"), Sunburst II, LLC, and MAM Properties, LLC, had employed Claimant from November 8, 2004, through April 3, 2005, and owed a total of \$7,720.04 in unpaid wages, \$1,744.80 in penalty wages, and \$1,744.80 in civil penalties, 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.

5) Washington was served with the Order of Determination on September 6, 2005. On October 10, 2005, Washington filed an answer and request for hearing. Her answer stated only: "I have additional information to show that she did not work these hours and that she is not entitled to any wages except the \$364.00." On October 24, 2005, Washington filed a letter granting her the authority to act as the authorized representative for MAM Properties, LLC, in this matter.

6) On October 2, 2005, the Agency issued a Notice of Intent in which MAM Properties, LLC, was named as the Respondent. The Agency sought \$34,000 in civil penalties based on the following allegations:

"Failure to Provide Pay-Stubbs to Employees. During the period of November 8, 2004 through April 3, 2005 Respondent employed Rosita Blair as a non-exempt employee. Respondent paid Claimant every two weeks by check. None of these payments were accompanied by an itemized statement showing, among other required information: gross earnings; amount and description of any deduction from gross earnings; total number of hours worked during that pay period; the rate of pay; the net amount paid; and the time period covered by the payment. This is in violation of ORS 653.045(3) and OAR 839-020-0012. **CIVIL PENALTY OF \$11,000.** 11 Violations – ORS 653.256 and OAR 839-020-1010(1)(g).

"Failure to Make and Keep Required Records Available For Inspection. On May 19, 2005, Agency Compliance Specialist Tim Malloy [sic] requested from Respondent, records related to Claimant's employment. Specifically, Malloy [sic] asked for a record of hours worked each day, total hours worked each work week, weekly straight time earnings due, weekly overtime compensation due, dates of payment, pay periods covered and total paid for the period of November 2, 2004 through April 3, 2005 Respondent failed to make and keep any such work records available for inspection in response to this request, or subsequent requests. This is a violation of ORS 653.045(2) and OAR 839-020-0083(3). **CIVIL PENALTY OF \$1,000.00.** 1 Violation – ORS 653.256 and OAR 839-020-1010(1)(f).

"Failure to Pay Minimum Wages. During each of the eleven pay periods occurring between November 8, 2004 through April 3, 2005, Respondent paid Claimant less than the wages to which she was entitled by failing to

pay the appropriate minimum wage in effect at the time for all hours worked. During this period of time Claimant worked approximately fifty-five (55) 24-hour shifts for which she was paid only \$100.00 per shift. In 2004 Oregon's minimum wage was \$7.05 per hour and effective January 1, 2005 it was increased to \$7.25 per hour. Based on the number of hours Claimant actually worked on these particular shifts, Claimant was paid less than the minimum wages to which she was entitled during each pay period. This is a violation of ORS 653.025 and OAR 839-020-0010(1). **CIVIL PENALTY OF \$11,000.00.** 11 Violations – ORS 653.256(1) and OAR 839-020-1010(1)(b).

“Failure to Pay Overtime Wages. During each of the eleven pay periods occurring between November 8, 2004 through April 3, 2005, Respondent paid Claimant less than the wages she was entitled to by failing to pay overtime for all hours worked over 40 in a seven-day work week. Claimant consistently worked more than 40 hours in the seven-day work weeks comprising each of these pay periods and was entitled to overtime wages that were never paid. This is a violation of ORS 653.261 and OAR 839-020-0030. **CIVIL PENALTY OF \$11,000.00.** 11 Violations – ORS 653.256 and OAR 839-020-1010(1)(b).

“Aggravating Factors: Each violation set forth above is attended by one or more of the following aggravating circumstances, which have been considered pursuant to OAR 839-020-1020 in determining the amount of the penalty: Respondent knew, or should have known, of the violations set forth above and compliance with the laws would not have been difficult. Respondent failed to take appropriate remedial measures to ensure these violations did not occur. These violations have resulted in Claimant not being properly paid over \$7,000.00 in earned wages. Respondent's failure to comply with the law has deprived Claimant of her rights to receive and be privy to legally required information regarding her pay. Respondent's failure to keep and maintain the required records and make them available when requested has deprived the Agency of information necessary to determine if claimant was properly paid for all hours worked and made the Agency's investigation into this matter much more difficult and time-consuming. These violations are quite serious and of great magnitude.”

7) On October 20, 2005, Christine Dean Washington filed an answer and request for hearing in response to the Agency's Notice of Intent, along with a letter granting her the authority to act as the authorized representative for MAM Properties, LLC, in this matter. In her answer, she disputed the assessment of civil penalties. Among other things, she denied that Molloy and BOLI ever asked that she provide documentation related to paying Claimant, denied that Claimant ever worked overtime

hours, denied that Claimant did not receive minimum wage, and alleged that Respondent “has adequate records that meet and exceed ORS 653.045(2) and OAR 839-020-083(3) guidelines.”

8) On October 26, 2006, the Agency filed a “BOLI Request for Hearing” with the forum regarding its Order of Determination and Notice of Intent.

9) On October 27, 2006, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimant stating the time and place of the hearing as 10 a.m., December 12, 2006, at BOLI’s Salem office. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a copy of the Notice of Intent, a document entitled “Summary of Contested Case Rights and Procedures” containing the information required by ORS 183.413, and a copy of the forum’s contested case hearings rules, OAR 839-050-000 to 839-050-0440.

10) On October 31, 2006, the Agency filed a motion to consolidate both cases for hearing and to delete Christine Dean Washington and Sunburst II, LLC, as Respondents from the Agency’s Order of Determination. Respondent did not object and the ALJ granted the Agency’s motions on November 14, 2006.

11) At 10 a.m. on December 12, 2006, Respondent had not yet appeared at the hearing and no one had contacted the Agency case presenter, the ALJ, or the Hearings Unit to state that Respondent would not be making an appearance. By 10:30 a.m., Respondent had still not appeared and the ALJ declared Respondent in default and commenced the hearing.

12) At hearing, the Agency moved to amend the Order of Determination to reduce the amount of unpaid wages sought to \$6,393.54 based on the Agency’s recalculations of the amount of unpaid wages due and owing to Claimant. The ALJ granted the Agency’s motion.

13) After the hearing, the ALJ made an *ex parte* telephone call to the Agency case presenter and asked if the Agency would stipulate that Respondent paid Claimant in full for all hours worked, calculated at the rates Respondent agreed to pay Claimant (\$100 for 24 hour shifts and \$8 per hour for 4 hour shifts), including a \$50 payment for Claimant's single 12 hour shift. The Agency stipulated to that fact.

14) The ALJ issued a proposed order on January 12, 2007, 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) In 2004, the minimum wage in Oregon was \$7.05 per hour. In 2005, the minimum wage in Oregon was \$7.25 per hour.

2) At all times material herein, Respondent MAM Properties, LLC (“Respondent”) was a limited liability company doing business in Salem, Oregon, that engaged the personal services of one or more employees, including Claimant. Christine Dean Washington was its registered agent and sole manager/member. Respondent's registration with the Corporation Division lists Respondent's “principal place of business” as 4042 Gardner Rd SE, Salem, OR 97302.

3) In November 2004, Washington interviewed Claimant and hired her to work as a caregiver at an adult foster care home located at 4042 Gardner Rd. SE in Salem, Oregon. Claimant was hired to work two different shifts, a four hour shift in which she would be assisting another caregiver, and a 24 hour shift, in which she would be a primary caregiver. Washington agreed to pay Claimant \$8 per hour for every four hour shift Claimant worked and \$100 for every 24 hour shift that Claimant worked.

4) Claimant's first day of work for Respondent was November 8, 2004, a Monday, and her last day was April 3, 2005.

5) Respondent did not provide Claimant with an itemized statement of earnings or any other document showing the hours worked by Claimant; rate of pay; amount and description of deductions, if any; net amount paid after deductions; or the pay period for which the payment was made at any time when Respondent paid Claimant.

6) During her 24 hour shifts, Claimant was never able to sleep more than two hours without interruption.

7) Throughout her employment, Claimant completed weekly time sheets provided by Washington. On the time sheets, Claimant recorded the dates, days of the week, and number of hours she worked, then submitted her time sheets to Washington. Claimant copied her timesheets before submitting them to Washington and provided a copy of her timesheets to the Agency.

8) During her employment with Respondent, Claimant worked the following shifts, total hours, and overtime hours per week:

<u>Week Ending</u>	<u>24 hr. shifts/ hrs. worked</u>	<u>4 hr. shifts/ hrs. worked</u>	<u>Total Hrs. worked</u>	<u>OT Hrs.</u>
Nov. 14, 2004	2/48	3/14 ⁱ	62	20
Nov. 21, 2004	2/48	1/4	52	12
Nov. 28, 2004	1/24	4/16	40	0
Dec. 5, 2004	3/72	4/16	88	48
Dec. 12, 2004	3/72	4/16	88	48
Dec. 19, 2004	2/48	3/12	60	20
Dec. 26, 2004	3/72	1/4	76	36
Jan. 2, 2005	1/24	3/12	36	0
Jan. 9, 2005	4/96	0	96	56
Jan. 16, 2005	2/48	1/4	52	12
Jan. 23, 2005	2/48	0	48	8
Jan. 30, 2005	2/48	2/8	56	16
Feb. 6, 2005	3/72	0	72	32
Feb. 13, 2005	3/72	0	72	32
Feb. 20, 2005	3/72	0	72	32
Feb. 27, 2005	4/96	0	96	56
March 6, 2005	5/120	0	120	80
March 13, 2005	5/108 ⁱⁱ	0	108	68
March 20, 2005	4/96	2/8	104	64
March 27, 2005	3/72	2/8	80	40
<u>April 3, 2005</u>	<u>2/48</u>	<u>1/3</u>	<u>51</u>	<u>11</u>
Totals	59/1404	31/125	1529	691

9) Claimant earned a total of \$13,611.11 while in Respondent's employ, calculated as follows:

<u>Week Ending</u>	<u>Earned at min. wageⁱⁱⁱ</u>	<u>Earned at \$8/hr.</u>	<u>OT hours worked</u>	<u>OT earned & OT rate^{iv}</u>
Nov. 14, 2004:	\$ 338.40	\$ 112.00	22	\$ 80.08 (\$3.64)
Nov. 21, 2004:	\$ 338.40	\$ 32.00	12	\$ 42.72 (\$3.56)
Nov. 28, 2004:	\$ 169.20	\$ 128.00	0	\$ 0.00
Dec. 5, 2004:	\$ 507.60	\$ 128.00	48	\$ 173.28 (\$3.61)
Dec. 12, 2004:	\$ 507.60	\$ 128.00	48	\$ 173.28 (\$3.61)
Dec. 19, 2004:	\$ 338.40	\$ 96.00	20	\$ 72.40 (\$3.62)
Dec. 26, 2004:	\$ 507.60	\$ 32.00	36	\$ 127.80 (\$3.55)
Jan. 2, 2005:	\$ 169.20	\$ 96.00	0	\$ 0.00
Jan. 9, 2005:	\$ 696.00	\$ 0.00	56	\$ 203.28 (\$3.63)
Jan. 16, 2005:	\$ 348.00	\$ 32.00	12	\$ 43.80 (\$3.65)
Jan. 23, 2005:	\$ 348.00	\$ 0.00	8	\$ 29.04 (\$3.63)
Jan. 30, 2005:	\$ 348.00	\$ 64.00	16	\$ 58.88 (\$3.68)
Feb. 6, 2005:	\$ 522.00	\$ 0.00	32	\$ 116.16 (\$3.63)
Feb. 13, 2005:	\$ 522.00	\$ 0.00	32	\$ 116.16 (\$3.63)
Feb. 20, 2005:	\$ 522.00	\$ 0.00	32	\$ 116.16 (\$3.63)
Feb. 27, 2005:	\$ 696.00	\$ 0.00	56	\$ 203.28 (\$3.63)
March 6, 2005:	\$ 870.00	\$ 0.00	80	\$ 290.40 (\$3.63)
March 13, 2005:	\$ 783.00	\$ 0.00	68	\$ 246.84 (\$3.63)
March 20, 2005:	\$ 696.00	\$ 64.00	64	\$ 233.60 (\$3.65)
March 27, 2005:	\$ 522.00	\$ 64.00	40	\$ 146.40 (\$3.66)
<u>April 3, 2005:</u>	<u>\$ 348.00</u>	<u>\$ 24.00</u>	<u>11</u>	<u>\$ 40.15 (\$3.65)</u>
Totals	\$10097.40	\$1000.00	691	\$2513.71

10) Respondent paid Claimant every other Friday afternoon throughout Claimant's employment. Respondent paid Claimant both by check and in cash for her work at the agreed upon rates of \$8 per hour for all four hour shifts worked and \$100 for every 24 hour shift worked. During Claimant's employment, there were at least eleven payroll periods in which Claimant was not paid overtime or the minimum wage.

11) During Claimant's employment, Respondent issued two paychecks to Claimant that bounced, causing Claimant to file her wage claim. Those checks were in the respective amounts of \$364 and \$962.50. After Claimant left Respondent's employment, she was eventually able to cash Respondent's NSF check for \$962.50.

12) Claimant's last day of work for Respondent was April 3, 2005. After that, Washington discharged Claimant by removing her name from Respondent's work

schedule and telling Claimant she would mail her final check to her. Including the two checks that bounced but were later made good, Respondent paid Claimant in full for all hours worked at the agreed upon rates of \$8 per hour for all 4 hour shifts and \$100 for all 24 hour shifts. In total, Respondent paid Claimant \$6,850, calculated as follows:

- a) 58 x 24 hour shifts at \$100 = \$5800
- b) 1 x 12 hour shift at \$50 = \$50
- c) 125 hours at \$8 per hour = \$1,000
- d) \$5800 + \$50 + \$1,000 = \$6,850

13) Respondent owes Claimant \$6,761.11 in unpaid, due and owing wages (\$13,611.11 earned - \$6,850 paid = \$6,761.11 owed).

14) When Claimant initially filed her wage claim on April 18, 2005, she complained that she was owed \$1690.50 in unpaid wages, based on the two bounced checks for \$364 and \$962.50 and Respondent's failure to pay her \$364 for the work she performed from March 22-27, 2005.

15) On May 2, 2005, BOLI's Wage & Hour Division mailed a letter entitled "Notice of Wage Claim" to Respondent. In part, the letter read:

"You are hereby notified that ROSITA G BLAIR has filed a wage claim with the Bureau of Labor and Industries alleging:

"Unpaid regular wages of \$1,690.50 at the rates of \$8.00 per day and \$100.00 per day from February 01, 2005 to March 27, 2005.

"IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address."

16) On May 12, 2005, BOLI received a response from Respondent. The response included a copy of BOLI's May 2, 2005, letter and a copy of a purported letter to Claimant dated April 27, 2005, that read as follows:

"4/27/05

"RE: Contract work for Summerset Estates

“Rose, the state finished there [sic] investigation into the complaints and have [sic] been able to substantiate neglect during your shift in a particular incident. I have enclosed your final check.

“I appreciate your hard work.

“Thanks

“Chris Dean Washington, MAM Properties LLC”

17) On May 16, 2005, Washington faxed a letter to BOLI that read as follows:

“May 16, 2005

“Attn: Erika Martinez

“RE: Summerset Estates/Rosita Blair Reference. 05-1111

“I had faxed you on May 12, 2005 in regards to this claim. I received notice from the bank that Rose has cashed her check in the amount of \$962.50 Check #2570. I can not get a copy of the front and back yet, I will be able to print it by tomorrow am. I will fax you a copy.

“Thanks

“Chris Dean Washington”

18) Tim Molloy, a BOLI Wage & Hour Division compliance specialist, was assigned to investigate Claimant’s wage claim. On May 19, 2005, he mailed a letter to Washington at 4042 Gardner Rd. SE, Salem, OR 97302 that referenced “Claimant: Rosita G. Blair.” In part, the letter read:

“Oregon Revised Statute 653.045 and the Oregon Administrative Rule 839-020-0080 require employers to maintain and preserve certain employee time and payroll records. These records must be kept for two years and made available to the bureau upon request. The bureau may assess a civil penalty of \$1,000.00 for failing to maintain and preserve required payroll and other records, and an additional \$1,000.00 civil penalty for failing to provide these records as required.

“Please send a record of the actual hours worked each day, total hours worked each week, weekly straight time earnings due, weekly overtime compensation due, dates of payment, pay period covered and total paid, for the time period 11-02-04 through 04-03-05.

“* * * * *

“Please respond, in writing, by 06-09-05, with the requested records or offer a settlement that the claimant might accept.”

19) On June 9, 2005, Molloy mailed a follow-up letter to Washington. In part, the letter read:

“Please be advised that Oregon Revised Statute 653.045 and the Oregon Administrative Rule 839-020-0080 require employers to maintain and preserve certain employee time and payroll records. These records must be kept for two years and made available to the bureau upon request. The bureau may assess a civil penalty of \$1,000.00 for failing to maintain and preserve required payroll and other records, and an additional \$1,000.00 civil penalty for failing to provide these records as required.

“* * * * *

“I would prefer to resolve this matter prior to litigation. However, without your cooperation, this is not possible. You may stop this action by responding no later than **June 20, 2005** with the appropriate records and information pertinent to this matter. Be aware that if you do not provide the requested records, I will make a determination of wages owed based upon the documents at hand.”

The letter was mailed certified, attention Chris Washington, to the 4042 Gardner Rd SE address. The letter was received and signed for on June 15, 2005.

20) On June 14, 2005, Washington faxed eight of Claimant’s time sheets to the Agency covering the weeks ending January 23, 2005; January 30, 2005; February 6, 2005; February 20, 2005; March 6, 2005; March 13, 2005; March 20, 2005; and March 27, 2005. The time sheets showed the dates and hours worked by Claimant.

21) On June 22, 2005, Molloy sent another certified letter to Washington that referenced Claimant’s wage claim. Washington received the letter on June 24, 2005.

The letter read:

“Dear Chris Washington:

“Attached to this letter is a history of the Bureaus [sic] attempt to collect all of the documents needed to resolve this case. You have produced some of them but I am still missing many of the documents that we spoke about. They are listed below:

“1. The employee claims that check number 4372 (DATE: March 25, 2005) came back non sufficient funds. You told me she cashed it and it went through and that you would send me a copy of a bank statement indicating this.

"2. Claimant states she should have received a second check. The amount of wages should be the same as the above mentioned check. You said she has been paid and that you would provide me proof of this.

"3. Claimant states she started working for you on November 2, 2004. You stated that this date is incorrect. You said you would send me documents proving a later starting date.

"We have given you **ample time**. If I do not receive the above stated items by June 28, 2005, I will determine a final amount owed to the claimant.

"This figure will be based on the information given to me by the claimant. The final amount owed will also be higher than what the claimant is asking because:

"1. The payment schedule of \$100 per 24 hour shift will not be used to calculate wages. Instead, 24 hour shift work will be considered 24 hours worked (Example: \$7.25 x 24 - **\$173.76** amount owned [sic] per 24 hour shift).

"2. All hours worked in excess of 40 per workweek will be at time and a half.

"3. I will be looking at the total hours worked from the date of hired [sic].

"As I have stated before, it is my obligation to investigate claims and to ensure that state labor laws and rules are followed properly. This includes minimum wage rules and regulations. If these rules and regulations are not followed, it is my responsibility to collect all wages owed to the former employee.

"If we proceed to a court hearing the obligation to keep records of daily weekly hours of work will be at the forefront. Courts in similar cases have ruled that it is the responsibility of the employer to control the workforce. At the first notice of an employee not meeting your expectations you had the responsibility to terminate the employee.

"Oregon Revised Statute 653.045 and the Oregon Administrative Rule 839-020-0080 require employers to maintain and preserve certain employee time and payroll records. These records must be kept for two years and made available to the bureau upon request. The bureau may assess a civil penalty of \$1,000.00 for failing to maintain and preserve required payroll and other records, and an additional \$1,000.00 civil penalty for failing to provide these records as required.

"We expect to receive a certified check for **\$728.00** (two pay checks each = \$364) by June 28, 2005 or supply us me [sic] with the above listed documents. In addition to the wages owed, penalty wages and attorney fees have accrued.

"If you have any further questions, feel free to call me."

22) On June 29, 2005, Washington faxed a letter dated June 26, 2005, to Molloy in which she stated:

“RE: Rosita Blair

“I have attached the following timesheet: 3/21/05-3/27/05 These hours have not been paid. In the amount of \$332.00.

“The other amount of \$364.00 for the dates of 3/15/05-3/20/05 she was issued a check from Sunburst account Ck #4372 dated 3/21/05. This has been negotiated, I have ordered a copy.

“In conclusion, Rose is owed \$332.00.

“Chris”

Washington attached copies of Claimant’s time cards for the weeks ending March 20 and March 27, 2005.

23) In early July, 2005, Molloy left BOLI’s employment and Claimant’s wage claim was reassigned to BOLI Wage & Hour Division compliance specialist Katy Bayless. On July 6, 2005, Bayless sent a certified letter to Washington that referenced Claimant’s wage claim. Washington received the letter on July 8, 2005. In part, the letter read:

“Dear Employer:

Since you have not responded to our letter of June 22, 2005 with sufficient evidence to prove your position, it has become necessary to begin the Administrative Process. We will soon serve upon you an Order of Determination and ultimately a judgment in this matter.

“You are advised that as of this date, in addition to the \$2,230.00 in wages owed, penalty wages have accrued to the amount of \$3,840.00. This amount does not include interest or attorney fees.

“Please provide a daily work record for Rosita G. Blair. If you do not have such a record, there may be civil penalties of \$2,000.00 assessed.

“Please be advised the [sic] Oregon Revised Statute 653.045 and Oregon Administrative Rule 839-020-0080 requires [sic] employers to maintain and preserve certain employee time and payroll records. These records must be kept for two years and made available to the bureau upon request. The bureau will assess a civil penalty of \$1,000.00 for failing to maintain and preserve required payroll and other records, and an additional \$1,000.00 civil penalty for failing to provide these records as required.

“We would prefer to resolve this matter prior to litigation. However, without your cooperation, this is not possible. You may stop this action by responding no later than July 20, 2005 with payment or, if you dispute the claim, with the appropriate records and/or information pertinent to this matter.

“Please send a check or information to our Salem office. If you have any questions, please feel free to contact me at the address or phone number listed below.”

24) On or about September 9, 2005, Washington sent a check for \$364.00 to Bayless that was intended as a check for unpaid wages to Claimant. Imprinted on the check were the words: “MAM PROPERTIES, LLC, 4042 Gardener Rd., Salem, OR 97302, TEL: 503-362-6590.”

25) Penalty wages for Claimant under ORS 652.150 are computed as follows:^v \$10,097.40 earned at minimum wage of \$7.05 per hour or \$7.25 per hour + \$1,000 earned at \$8 per hour = \$11,097.40. $\$11,097.40 \div 1,529$ hours worked = average wage of \$7.26 per hour. $\$7.26 \times 8$ hours $\times 30$ days = \$1,742.40, rounded to \$1,742.^{vi}

26) Civil penalties under ORS 653.055 are computed in the same manner as penalty wages under ORS 652.150 and equal \$1,742.

27) Claimant, Bayless, and Souryammat were all credible witnesses.

ULTIMATE FINDINGS OF FACT

1) In 2004, the minimum wage in Oregon was \$7.05 per hour. In 2005, the minimum wage in Oregon was \$7.25 per hour.

2) At all times material herein, Respondent MAM Properties, LLC was a limited liability company doing business in Salem, Oregon, that employed Claimant.

3) In November 2004, Respondent, through its managing member Washington, hired Claimant to work as a caregiver at an adult foster care home located at 4042 Gardner Rd. SE in Salem, Oregon. Washington agreed to pay Claimant \$8 per hour for every four hour shift and \$100 for every 24 hour shift that Claimant worked.

4) Claimant worked for Respondent from November 8, 2004, through April 3, 2005.

5) Respondent paid Claimant every two weeks throughout her employment. Respondent never gave Claimant an itemized statement of earnings or any other document showing the hours worked by Claimant; rate of pay; amount and description of deductions, if any; net amount paid after deductions; or the pay period for which Claimant was paid.

6) Claimant worked 1404 hours for which she was entitled to be paid the minimum wage and 125 hours for which she was entitled to be paid \$8 per hour, for a total of 1529 hours. Of those hours, 691 were overtime hours for which Claimant was entitled to be paid time and a half. Claimant worked eleven payroll periods in which she was entitled to be paid minimum wage and overtime and Respondent did not pay her either minimum wage or overtime.

7) Claimant earned a total of \$13,611.11 while in Respondent's employ and was only paid \$6,850, leaving \$6,761.11 in unpaid, due, and owing wages.

8) On May 2, 2005, BOLI's Wage & Hour Division made a written demand to Respondent, on Claimant's behalf, for unpaid wages of \$1,690. On June 22, 2005, BOLI's Wage & Hour Division made another written demand to Respondent, on Claimant's behalf, for \$728 in unpaid wages. On July 6, 2005, BOLI's Wage & Hour Division made a written demand to Respondent, on Claimant's behalf, for unpaid regular wages of \$2,230. On August 17, 2005, the Agency issued Order of Determination No. 05-1111 based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent employed Claimant from November 8, 2004, through April 3, 2005, and owed a total of \$7,720.04 in unpaid wages, and demanded that Respondent pay the wages or request a hearing.

9) On May 19, 2005, BOLI's Wage & Hour Division mailed a letter to Respondent in which it requested that Respondent provide, by June 9, 2005, a record of the actual hours worked each day and total hours per week by Claimant, weekly straight time earnings due, weekly overtime compensation due, pay periods covered, and total wages paid from November 2, 2004, through April 3, 2005. On July 6, 2005, BOLI's Wage & Hour Division mailed a follow-up letter to Respondent that asked Respondent to provide a daily work record for Claimant.

10) In response to these letters, Respondent provided only copies of Claimant's weekly time sheets reflecting work Claimant performed over the eight week period beginning January 17, 2005, and ending March 27, 2005. The only information contained on the time sheets was Claimant's name, the days of the week and corresponding dates, the time Claimant started work during her 24 hour shifts, and the time Claimant started and ended work on the days she worked four hour shifts.

11) Penalty wages for Claimant under ORS 652.150 equal \$1,742.

12) Civil penalties under ORS 653.055 equal \$1,742.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200, ORS 652.310 to 652.405, and ORS 653.010 to 653.261.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 653.025, ORS 653.256, ORS 653.261, ORS 652.310 to 652.405.

3) Respondent violated ORS 652.140(1) by failing to pay to Claimant Rosita Blair all wages earned and unpaid not later than April 4, 2005. Respondent owes Claimant \$6,761.11 in unpaid, due, and owing wages.

4) Respondent's failure to pay Claimant all wages due and owing was willful and Respondent owes Claimant \$1,742 in penalty wages. ORS 652.150.

5) Respondent failed to pay Claimant the minimum wage and overtime wages to which Claimant was entitled, in violation of ORS 653.025, ORS 653.261, and OAR 839-020-0030, and is liable to Claimant for \$1,742 in civil penalties. ORS 653.055.

6) On 11 occasions when Claimant was paid, Respondent willfully failed to provide Claimant with a written itemized statement including the elements required by OAR 839-020-0012(1), constituting 11 violations of OAR 839-020-0012(1).

7) Respondent willfully failed to make 13 of Claimant's time cards available for inspection by BOLI in violation of ORS 653.045(2) and OAR 839-020-0083(3).

8) On 11 occasions when Claimant was paid, Respondent willfully failed to pay Claimant the minimum wage for all hours worked, constituting 11 violations of ORS 653.025 and OAR 839-020-010(1).

9) On 11 occasions when Claimant was paid, Respondent willfully failed to pay Claimant overtime wages for all hours worked in excess of 40 hours per week, constituting 11 violations of ORS 653.261 and OAR 839-020-0030.

10) The Commissioner has the authority to assess civil penalties for willful violations of ORS 653.025, ORS 653.045, ORS 653.261, OAR 839-0010(1), OAR 839-0012(1), OAR 839-020-0030, and OAR 839-020-0083(3). The imposition of \$34,000 in civil penalties is an appropriate exercise of the Commissioner's discretion. ORS 653.256.

OPINION

DEFAULT

When a Respondent defaults, the agency needs only to establish a prima facie case to support the allegations in its charging document in order to prevail. *In the*

Matter of Okechi Village & Health Center, 27 BOLI 156, 161 (2006). Unsworn and unsubstantiated assertions contained in a Respondent's answer may be considered, but are overcome whenever they are contradicted by other credible evidence in the record. *In the Matter of Bukovina Express*, 27 BOLI 184, 199 (2006).

CLAIMANT'S WAGE CLAIM

To establish Claimant's wage claim in a default, the Agency must present credible evidence of the following: 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 she was not properly compensated; and 4) The amount and extent of work Claimant performed for Respondent. *In the Matter of Captain Hooks, LLC*, 27 BOLI 211, 222 (2006).

RESPONDENT EMPLOYED CLAIMANT

Respondent and Claimant agree that Respondent was a limited liability company and an Oregon employer and that Respondent employed Claimant at an adult foster care home in Salem, Oregon.

AGREED RATES OF PAY

Claimant worked two different shifts while employed by Respondent. One shift was 24 hours long, and the other was only four hours long. Respondent and Claimant agree that Respondent agreed to pay Claimant \$100 for every 24 hour shift and \$8 per hour for every four shift that Claimant worked.

CLAIMANT PERFORMED WORK FOR WHICH SHE WAS NOT PROPERLY COMPENSATED

The Agency stipulated that Claimant was paid for all hours worked at the rate that Respondent agreed to pay her, and there is no evidence that Respondent paid her any more than that sum. However, Claimant was entitled to far more. For her 24 hour shifts, she was paid only \$4.17 per hour (\$100 divided by 24 hours = \$4.17), far below

the minimum wage to which she was legally entitled.^{vii} In addition, Claimant's credible testimony established that she worked a large number of overtime hours and that she did not receive any overtime pay.

THE AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT

The final element of the Agency's case requires proof of the amount and extent of work performed by the claimant. In this case, the Agency provided copies of all of Claimant's weekly time sheets on which Claimant wrote a contemporaneous record of her hours worked that Respondent relied upon to compute her pay. Those time sheets establish that Claimant worked 1529 hours in total -- 1404 hours on 24 hour shifts and 125 hours on four hour shifts.^{viii} Of those hours, 691 were overtime hours. During the 24 hour shifts, Claimant was never able to sleep for more than two hours without interruption, and there was no express or implied agreement between Respondent and Claimant regarding excluding a bona fide regularly scheduled sleeping period from hours worked. See OAR 839-020-0042(2). Consequently, Claimant is entitled to be paid the minimum wage for all 24 hours of her 24 hour shifts. Because there was no evidence that Respondent had an established workweek, the forum has computed Claimant's overtime pay based on a workweek that began on Monday, the first day of the week that Claimant began work and the first day within the scope of her wage claim.^{ix} Claimant earned a total of \$13,611.11 and was paid only \$6,850, leaving unpaid, due and owing wages in the amount of \$6,761.11.^x

CLAIMANT IS OWED \$1,742 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). It is

undisputed that: (1) Respondent, through Washington, knowingly agreed to pay Claimant a wage for working a 24 hour shift that was substantially below Oregon's minimum wage; (2) Respondent, through Washington, was aware of the total hours that Claimant worked; (3) Respondent, through Washington, knowingly paid Claimant a wage for working a 24 hour shift that was substantially below Oregon's minimum wage; and (4) Respondent, through Washington, failed to pay Claimant overtime wages for any week in which Claimant worked overtime. There is no evidence that Washington, Respondent's agent, acted other than as a free agent in underpaying Claimant. Finally, the Agency provided documentary and testimonial evidence that it made the written demand required by ORS 652.150 for Claimant's wages in the amount of \$7,720.04.^{xi} Consequently, the forum assesses the penalty wages in the manner provided for in ORS 652.150 (hourly rate - \$7.26 x eight hours per day x 30 days = \$1,742).

CLAIMANT IS OWED \$1,742 IN CIVIL PENALTIES UNDER ORS 653.055

In its Order of Determination, the Agency alleged that Claimant is entitled to a civil penalty of \$1,742 based on Respondent's failure to pay Claimant "the wages to which Claimant was entitled under ORS 653.010 to 653.261." ORS 653.055 provides that the forum may award civil penalties to an employee when his or her employer pays that employee less than the wages to which he or she is entitled under ORS 653.010 to 653.261. "Willfulness" is not an element.^{xii} Here, Claimant was not paid the minimum wage for the work she performed in her 24 hour shifts and was not paid overtime wages for any work she performed in excess of 40 hours in a work week. The statutory requirement to pay the minimum wage is found in ORS 653.025, and the separate requirement to pay overtime wages is contained in ORS 653.261 and OAR 839-020-0030, the Agency rule interpreting ORS 653.261. As both of these statutes fall within the range of statutes set out in ORS 653.055, Respondent's failure to pay the minimum wage and 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 - \$7.26 x eight hours per day x 30 days = \$1,742).

RESPONDENT VIOLATED OAR 839-020-0012 BY FAILING TO PROVIDE ITEMIZED STATEMENTS TO CLAIMANT

The Agency alleged that Respondent violated ORS 653.045(3) and OAR 839-020-0012 on each of the 11 occasions that Respondent paid Claimant by failing to accompany its payment with an itemized statement showing “gross earnings; amount and description of any deduction from gross earnings; total number of hours worked during that pay period; the rate of pay; the net amount paid; and the time period covered by the payment.” The statute and rule contain different requirements and the forum addresses them separately.

ORS 653.045(3) requires employers to “supply each of the employer’s employees with itemized statements of amounts and purposes of deductions in the manner provided in ORS 652.610.” In order to prevail, the agency must provide credible evidence that (1) respondent made wage payments to claimants; (2) respondent made deductions from claimants’ wage payments; and (3) respondent did not provide the itemized statement required by ORS 652.610 at the time respondent made the wage payments. *In the Matter of Gary Lee Lucas*, 26 BOLI 198, 215 (2005). There was no evidence presented to show that Respondent ever took any deductions from Claimant’s pay. Consequently, the forum finds that Respondent did not violate ORS 653.045(3).

In contrast, OAR 839-020-0012(1) requires employers to furnish employees with a comprehensive “written itemized statement of earnings” whenever “the employee receives a compensation payment from the employer.” The itemization of deductions

required by ORS 653.045(3) is only one of the required elements. To comply with OAR 839-020-0012(1), the statement must include:

- “(a) The total gross payment being made;
- “(b) The amount and a brief description of each and every deduction from the gross payment;
- “(c) The total number of hours worked during the time covered by the gross payment;
- “(d) The rate of pay;
- “(e) If the worker is paid on a piece rate, the number of pieces done and the rate of pay per piece done;
- “(f) The net amount paid after any deductions;
- “(g) The employer’s name, address and telephone number;
- “(h) The pay period for which the payment is made.”

The elements set out in subsections (a), (c), (d), and (h) are the same as the elements the Agency alleged were missing from Respondent’s itemized statements. The Agency used the credible testimony of Claimant to establish that she received 11 “compensation payments,” *i.e.* wage payments, from Respondent and that Respondent never gave her any kind of itemized statement with her wage payments. Based on this evidence, the forum concludes that Respondent committed 11 violations of OAR 839-020-0012.

The Agency sought a \$1,000 civil penalty for each violation of OAR 839-020-0012. The Commissioner may assess a civil penalty against “any person who willfully violates” OAR 839-020-0012. ORS 653.256. “Willfully” is defined in OAR 839-020-0004(33) as follows:

“‘Willfully’ means knowingly. An action is done knowingly when it is undertaken with actual knowledge of a thing to be done or omitted or action undertaken by a person who should have known the thing to be done or omitted. A person ‘should have known the thing to be done or omitted’ if the person has knowledge of facts or circumstances which, with reasonably diligent inquiry, would place the person on notice of the thing to be done or omitted to be done. A person acts willfully if the person has the means to inform himself or herself but elects not to do so. For purposes of these rules, the employer is presumed to know the requirements of ORS 653.010 to 653.261 and these rules.”

In this case, the action in question was Respondent's failure to provide Claimant with an itemized statement each of the 11 times that Claimant was paid. Pursuant to 839-020-0004(33), Respondent is presumed to have known the requirements of OAR 839-020-0012. Based on this presumption, the forum finds that Respondent willfully violated OAR 839-020-0012 on 11 occasions.

CIVIL PENALTIES

In determining the appropriate civil penalties, the forum may consider the aggravating and mitigating factors set out in OAR 839-020-1020. Those factors are set out below:

- “(a) The history of the employer in taking all necessary measures to prevent or correct violations of statutes or rules;
- “(b) Prior violations, if any, of statutes or rules;
- “(c) The magnitude and seriousness of the violation;
- “(d) Whether the employer knew or should have known of the violation;
- “(e) The opportunity and degree of difficulty to comply;
- “(f) Whether the employers' action or inaction has resulted in the loss of a substantive right of an employee.”

It is the employer's responsibility to provide the Commissioner with any mitigating evidence concerning the amount of civil penalties to be assessed. OAR 839-020-1020(2); *In the Matter of Alphabet House*, 24 BOLI 262, 283 (2003).

A. Aggravating circumstances.

The Agency alleged and presented credible evidence of several aggravating circumstances.

First, Respondent knew, or should have known, of the violations. Although there was no evidence presented that Respondent, through Washington, had actual knowledge of the requirements of OAR 839-020-0012 when Claimant was paid, Respondent, as an employer, still had a duty to know the laws that regulate employment in Oregon. *In the Matter of Okechi Village & Health Center*, 27 BOLI 156, 169 (2006).

Accordingly, the forum finds that Respondent should have known, of the violations. OAR 839-020-1020(1)(d).

Second, it would not have been difficult for Respondent to comply with the requirements of OAR 839-020-0012. There is no evidence that Respondent was impeded in any manner from creating itemized statements to give to Claimant when she was paid. OAR 839-020-1020(1)(e).

Third, there is no evidence that Respondent took any measures to ensure that these violations did not occur. OAR 839-020-1020(1)(a).

Fourth, Respondent's failure to comply with the law deprived Claimant of her rights to receive and be privy to legally required information regarding her pay. OAR 839-020-1020(1)(f).

Fifth, Respondent's failure to provide Claimant with itemized statements was a serious violation because it potentially affected her substantive rights, in that one of the purposes of the statute is to afford workers an opportunity to verify that they have been paid correctly for all hours worked. OAR 839-020-1020(1)(c); *In the Matter of Rodrigo Ayala Ochoa*, 25 BOLI 12, 52 (2003), *affirmed without opinion*, 196 Or App 639 (2004). Respondent's violations were of substantial magnitude because: (1) the number of violations – 11; and (2) an indirect result of the violations was that Claimant was underpaid by nearly \$7,000; a fact she was unaware of until BOLI commenced its investigation.

B. Mitigating circumstances.

There are no mitigating circumstances.

C. Amount of civil penalties.

The Commissioner is authorized to assess a civil penalty “not to exceed \$1,000” for each violation of OAR 839-020-0012. Based on the aggravating circumstances, the

forum finds that \$1,000 per violation, for a total of \$11,000, is an appropriate civil penalty.

RESPONDENT VIOLATED ORS 653.045(2)

The Agency alleged that Respondent violated ORS 653.045(2) and OAR 839-020-0083(3) by failing to make and keep the following work records available for inspection in response to the Agency's May 19, 2005, request:

“[A] record of hours worked each day, total hours worked each work week, weekly straight time earnings due, weekly overtime compensation due, dates of payment, pay periods covered and total paid for the period of November 2, 2004 through April 3, 2005.”

ORS 653.045(2) provides that “[e]ach employer shall keep the records required by subsection (1) of this section open for inspection or transcription by the commissioner or the commissioner’s designee at any reasonable time.” In turn, ORS 653.045(1) includes the requirement that employers shall:

“[M]ake and keep available to the Commissioner * * * for not less than two years a record or records containing:

“* * * * *

“b) The actual hours worked each week and each pay period by each employee.

“* * * * *.”

OAR 839-020-0083(3) interprets ORS 653.045(2) to require that “[a]ll records required to be preserved and maintained by these rules shall be made available for inspections and transcription by the Commissioner or duly authorized representative of the Commissioner.”

As stated above, one of the records requested by the Agency was “the actual hours worked each week” by Claimant. Claimant worked 21 weeks for Respondent. Each week she recorded her hours on a weekly time sheet, which she then copied before giving the originals to Respondent. In response to the Agency’s request, Respondent provided only eight of Claimant’s 21 weekly time sheets. The remaining 13

weekly time sheets in the record were provided by Claimant. The presence of these 21 weekly time sheets in the record shows that Respondent **made** a record of the actual hours worked per week by Claimant. However, Respondent violated ORS 653.045(3) by failing to make the records available to the Commissioner for inspection in response to Molloy's May 19, 2005, written request. The forum further infers that Respondent failed to keep the other 13 weekly time sheets available for inspection. Had Respondent kept these records, it would have provided them when it provided the other eight weekly time sheets.^{xiii} Respondent's failure to keep and make these 13 weekly time sheets available to the Commissioner for inspection is a violation of ORS 653.045(2). Pursuant to 839-020-0004(33), Respondent is presumed to have known the requirements of ORS 653.045(2), and there is undisputed evidence that Respondent received the Agency's request for Claimant's weekly time sheets. Accordingly, the forum finds that Respondent's violation of ORS 653.045(2) was willful.

CIVIL PENALTIES

The Agency sought to assess a \$1,000 civil penalty for Respondent's violation of ORS 653.045(2). In determining the appropriate civil penalties, the forum considers the following aggravating and mitigating factors.

A. Aggravating circumstances.

The Agency alleged and presented credible evidence of several aggravating circumstances.

First, Respondent knew, or should have known, of the violations. Respondent received the Agency's request for records and did not provide all the requested records. In the Agency's request, Respondent was further notified that failure to maintain and provide those records was a violation of Oregon law and BOLI's administrative rules. OAR 839-020-1020(1)(d).

Second, it would not have been difficult for Respondent to comply with the requirements of ORS 653.045(2). Respondent kept and provided copies of 8 of Claimant's weekly time sheets and there is no evidence that Respondent was impeded in any manner from keeping and providing the other 13 to the Agency in response to its request. OAR 839-020-1020(1)(e).

Third, there is no evidence that Respondent took any measures to ensure that these violations did not occur. OAR 839-020-1020(1)(a).

Fourth, Respondent's failure to keep and provide all of Claimant's weekly time sheets was a serious violation because it potentially affected Claimant's substantive rights, in that one of the purposes of the statute is to afford give BOLI the opportunity to verify that employees have been paid correctly for all hours worked. OAR 839-020-1020(1)(c); *Ochoa* at 52. Respondent's violation was of substantial magnitude because: (1) the number of time sheets Respondent failed to keep and provide – 13; and (2) Respondent's failure to keep and provide these records made the Agency's investigation of Claimant's wage claim much more difficult and time consuming.

B. Mitigating circumstances.

There are no mitigating circumstances.

C. Amount of civil penalties.

The Commissioner is authorized to assess a civil penalty "not to exceed \$1,000" for each violation of ORS 653.045(2). ORS 653.256. Based on the aggravating circumstances, the forum finds that the \$1,000 civil penalty sought by the Agency is an appropriate assessment.

RESPONDENT COMMITTED 11 VIOLATIONS OF ORS 653.025 AND OAR 839-020-0010

The Agency alleged that Respondent violated ORS 653.025 and OAR 839-020-0010(1) by failing to pay Claimant at least the applicable minimum wage for all hours worked on each of the 11 occasions that Respondent paid Claimant.

ORS 653.025 provides, in pertinent part, that “no employer shall employ or agree to employ any employee at wages computed at a rate lower than * * * a rate adjusted for inflation [for years after 2003].” OAR 839-020-0010(1) requires employers to pay employees “no less than the applicable minimum wage for all hours worked.” In 2004, Oregon’s minimum wage was \$7.05 per hour, and in 2005 it was \$7.25 per hour.

Claimant’s weekly time sheets show that she worked at least one 24 hour shift during each week of her employment. Throughout her employment, she was paid only \$100 for each 24 hour shift, which equals a wage of \$4.17 per hour (\$100 divided by 24 hours = \$4.17). This was less than the minimum wage in 2004 and 2005. Because Respondent agreed to pay Claimant \$8 per hour for her shorter shifts, Claimant was entitled to that higher rate of pay for those hours and the forum does not consider the pay she received for her shorter shifts in determining whether Claimant was paid the minimum wage for all hours worked. As Claimant worked at least one 24 hour shift during each week of her employment for which she was not paid the minimum wage, it necessarily follows that she was not paid the minimum wage during any of her 11 bi-weekly payroll periods. Respondent’s failure to pay Claimant at least the minimum wage during 11 pay periods constitutes 11 violations of ORS 653.025 and OAR 839-020-0010(1). Respondent knowingly agreed to pay Claimant less than the minimum wage for her 24 hour shifts, paid her less than the minimum wage for each those shifts, and Respondent is presumed to know the law. Accordingly, the forum finds that Respondent’s 11 violations were willful.

CIVIL PENALTIES

The Agency sought to assess a \$1,000 civil penalty for each of Respondent's 11 violations of ORS 653.025 and OAR 839-010-0010(1). In determining the appropriate civil penalties, the forum considers the following aggravating and mitigating factors.

A. Aggravating circumstances.

The Agency alleged and presented credible evidence of several aggravating circumstances.

First, Respondent knew or should have known of the violations. Respondent is presumed to know the minimum wage, yet agreed to pay Claimant \$100 for each 24 hour shift and paid Claimant that amount. OAR 839-020-1020(1)(d).

Second, Respondent relied on Claimant's weekly time sheets, which contained an accurate account of the number of hours that Claimant worked during her 4 hour and 24 hour shifts, to compute Claimant's pay. Consequently, Respondent had an opportunity to comply with the requirements of ORS 653.025 and OAR 839-010-0010(1) each time Claimant was paid, but failed to do so. OAR 839-020-1020(1)(e).

Third, there is no evidence that Respondent took any measures to ensure that these violations did not occur. OAR 839-020-1020(1)(a).

Fourth, Respondent's failure to pay Claimant the minimum wage was a serious violation because it affected Claimant's substantive right to be paid the minimum wage. The 11 violations were of great magnitude because: (1) Claimant was underpaid approximately \$3 per hour^{xiv} during a total of 1404 hours worked;^{xv} (2) Claimant was underpaid a total of \$6,761.11; and (3) Two of Claimant's checks bounced and were only made good after she left Respondent's employment. OAR 839-020-1020(1)(c).

B. Mitigating circumstances.

There are no mitigating circumstances.

C. Amount of civil penalties.

The Commissioner is authorized to assess a civil penalty “not to exceed \$1,000” for each violation of ORS 653.025 and OAR 839-020-0010(1). ORS 653.256. Based on the aggravating circumstances, the forum finds that \$1,000 per violation, for a total of \$11,000, is an appropriate civil penalty.

RESPONDENT COMMITTED 11 VIOLATIONS OF ORS 653.261 AND OAR 839-020-0030

The Agency alleged that Respondent violated ORS 653.261 and OAR 839-020-0030 by failing to pay Claimant overtime for all hours worked over 40 in each seven-day work week on each of the 11 occasions that Respondent paid Claimant.

ORS 653.261(1) provides, in pertinent part:

“The Commissioner of the Bureau of Labor and Industries may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to, minimum meal periods and rest periods, and maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of such employees when computed without benefit of commissions, overrides, spiffs and similar benefits.”

Pursuant to ORS 653.261, the Commissioner has promulgated OAR 839-020-0030, an administrative rule regulating payment of overtime wages. In pertinent part, that rule provides:

“(1) * * * [A]ll work performed in excess of forty (40) hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed without benefits of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1). * * *”

The forum has already determined that Claimant worked in excess of 40 hours per week in 19 of the 21 weeks that she was employed by Respondent, that Respondent paid her every two weeks during 11 pay periods, and that Respondent never paid

Claimant any overtime pay. Since the two weeks in which Claimant did not work overtime were not consecutive,^{xvi} the forum also concludes that Respondent earned overtime pay in all 11 pay periods. By not paying Claimant overtime in any of the 11 pay periods in which she earned overtime pay, Respondent committed 11 violations of ORS 653.261 and OAR 839-020-0030(1). Respondent was aware of the number of overtime hours Claimant worked each week and should have known it was required to pay Claimant overtime wages, yet failed to do so. Accordingly, the forum finds that Respondent's 11 violations were willful.

CIVIL PENALTIES

The Agency sought to assess a \$1,000 civil penalty for each of Respondent's 11 violations of ORS 653.025 and OAR 839-010-0010(1). In determining the appropriate civil penalties, the forum considers the following aggravating and mitigating factors.

A. Aggravating circumstances.

The Agency alleged and presented credible evidence of several aggravating circumstances.

First, Respondent knew or should have known of the violations. Respondent is presumed to know the law, yet failed to pay Claimant any overtime wages despite having knowledge of the exact number of hours Claimant worked each week. OAR 839-020-1020(1)(d).

Second, Respondent relied on Claimant's weekly time sheets, which contained an accurate account of the number of hours that Claimant worked during her 4 hour and 24 hour shifts, to compute Claimant's pay. Consequently, Respondent had an opportunity to comply with the requirements of ORS 653.261 and OAR 839-010-0030 each time Claimant was paid, but failed to do so. OAR 839-020-1020(1)(e).

Third, there is no evidence that Respondent took any measures to ensure that these violations did not occur. OAR 839-020-1020(1)(a).

Fourth, Respondent's failure to pay Claimant overtime wages was a serious violation because it affected Claimant's substantive right to be paid overtime wages. The 11 violations were of great magnitude because Claimant was not paid for 691 hours of overtime worked, resulting in unpaid overtime wages in the amount of \$2513.71. OAR 839-020-1020(1)(c).

B. Mitigating circumstances.

There are no mitigating circumstances.

C. Amount of civil penalties.

The Commissioner is authorized to assess a civil penalty "not to exceed \$1,000" for each violation of ORS 653.261 and OAR 839-020-0030. ORS 653.256. Based on the aggravating circumstances, the forum finds that \$1,000 per violation, for a total of \$11,000, is an appropriate civil penalty.

ORDER

NOW, THEREFORE, as authorized by ORS 652.140(1), ORS 652.150, ORS 653.055, and ORS 652.332 and as payment of the unpaid wages, penalty wages, and a civil penalty, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **MAM Properties, LLC** 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 Rosita G. Blair, in the amount of TEN THOUSAND TWENTY FIVE DOLLARS AND ELEVEN CENTS (\$10,025.11), less appropriate lawful deductions, representing \$6,761.11 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from May 1, 2005, until paid; \$1,742 in penalty wages, plus interest at the legal rate on that sum from June 1, 2005, until paid; and \$1,742 as a civil penalty, plus interest at the legal rate on that sum from June 1, 2005, until paid.

NOW, THEREFORE, as authorized by ORS 653.256, and as payment of the civil penalties assessed as a result of its violations of ORS 653.045 (2), OAR 839-020-0012, ORS 653.025, OAR 839-020-0010, ORS 653.261, and OAR 839-020-0030, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **MAM Properties, LLC**, 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 the amount of THIRTY FOUR THOUSAND (\$34,000), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order and the date Respondent **MAM Properties, LLC**, complies with the Final Order.

ⁱ Includes one 6 hour shift.

ⁱⁱ Includes one 12 hour shift.

ⁱⁱⁱ Hours through December 31, 2004, calculated at \$7.05 per hour; hours after January 1, 2005 calculated at \$7.25 per hour.

^{iv} The overtime rate shown is 50% of Claimant's weighted weekly wage, calculated by totaling Claimant's weekly earnings, dividing that sum by the total hours worked by Claimant, then multiplying that sum by 50%. For example, the week ending November 13, 2004, Claimant worked two 24 hour shifts, two 4 hours shifts, and one 6 hour shift, earning \$338.40 (48 hours x \$7.05 per hour) and \$112.00 (14 hours x \$8 per hour). $\$338.40 + \$112.00 = \$450.40$; $\$450.40 \div 62 \text{ hours} = \7.27 ; $\$7.27 \times .50 = \3.64 per hour.

^v See *In the Matter of Westland Resources, Inc.*, 23 BOLI 276, 282 (2002) (where more than one wage rate is paid during the wage claim period, penalty wages are computed by taking the total earned during the wage claim period, dividing that figure by the total number of hours worked during the wage claim period, multiplying that figure by eight hours, and multiplying again by 30 days).

^{vi} See *In the Matter of Staff, Inc.*, 16 BOLI 97, 119 (1997) (pursuant to agency policy, penalty wages are rounded off to the nearest dollar).

^{vii} See *In the Matter of Adesina Adeniji*, 25 BOLI 162, 170 (2004) (an agreement to pay at a fixed rate includes the statutory requirement to pay the minimum wage, and an employee's compensation, however calculated, must result in the employee being paid at the least the minimum wage for all hours worked).

^{viii} See Finding of Fact 8 -- The Merits.

^{ix} Cf. *In the Matter of Burrito Boy, Inc.*, 16 BOLI 1, 13 (1997) (where there was no evidence that respondent had an established work week – that is, a period of seven consecutive 24 hour periods commencing on a particular day – for purposes of computing claimant's overtime, the forum followed agency policy of considering the work week to begin on the day claimant commenced work in the pay period in question).

^x At hearing, the Agency amended its Order of Determination to reduce the amount of unpaid wages sought to \$6,393.54, based on the Agency's recalculations. However, evidence presented by the Agency showed that Claimant was owed the greater amount of \$6,761.11. When credible evidence establishes a

wage claimant is owed wages exceeding those alleged in the charging or amended charging document, the Commissioner has the authority to award the greater amount of unpaid wages. *In the Matter of John M. Sanford, Inc.*, 26 BOLI 72, 86 (2004), *amended* 26 BOLI 110 (2004).

^{xi} See *In the Matter of Captain Hooks, LLC*, 27 BOLI 211, 224 (2006) (the Agency's Order of Determination constitutes a written notice of nonpayment).

^{xii} *Id.* at 225.

^{xiii} Cf. *In the Matter of Okechi Village & Health Center*, 27 BOLI 156, 168-69 (2006) (where the hearing record included evidence that respondent maintained and provided the agency with a record of claimant's actual work hours, including his original time cards, but despite the agency's repeated requests and ample opportunity to do so, respondent failed to make a second claimant's payroll records available for the agency's inspection, the forum inferred that respondent did not make records pertaining to the second claimant or it would have provided them when it provided the first claimant's payroll records).

^{xiv} This figure does not include computation for overtime wages.

^{xv} See Finding of Fact 8 -- The Merits, *supra*.

^{xvi} See Finding of Fact 8 -- The Merits, *supra*.