

**In the Matter of**  
**PAUL SAMUELS dba SAMUELS AUTO BODY**

**Case No. 22-10**

**Final Order of Commissioner Brad Avakian**

**Issued December 15, 2010**

**SYNOPSIS**

Respondent employed Claimant in 2008 at Respondent's auto body and paint shop at the agreed rate of \$10 per hour. Claimant worked a total of 1668 hours, including 1,252 straight time hours and 416 overtime hours. He earned \$12,520 for his straight time work and \$6,240 for his overtime work, for a total of \$18,760, and was only paid \$6,750. Respondent was ordered to pay Claimant a total of \$11,710 as unpaid, due, and owing wages. Respondent's failure to pay the wages was willful, and he was ordered to pay Claimant \$2,400 in penalty wages. Respondent was also ordered to pay \$2,400 in civil penalties based on his failure to pay overtime wages to Claimant. ORS 652.140(2), ORS 652.150, ORS 653.055, ORS 653.261, OAR 839-020-0030.

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The above-entitled case came on regularly for hearing before Alan McCullough, 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 November 16, 2010, at the Salem office of the Oregon Bureau of Labor and Industries, located at 3865 Wolverine Street NE, Building E-1, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Chet Nakada, an employee of the Agency. Wage claimant Byron Nelson (Claimant) was present throughout the hearing and was not represented by counsel. Respondent Paul Samuels did not appear at the hearing and was held in default.

The Agency called the following witnesses: Claimant; BOLI Wage and Hour Division compliance specialist Cristin Casey; and Lowell Davis (telephonic), property lessor to Respondent.

The forum received into evidence:

a) Administrative exhibits X-1 through X-13 (submitted or generated prior to hearing); and

b) Agency exhibits A-1 through A-16<sup>i</sup> (submitted prior to hearing).

Having fully considered the entire record in this matter, I, Brad Avakian, 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 November 17, 2008, Claimant filed a wage claim with the Agency alleging that Paul Samuels had employed him and failed to pay wages earned and due to him. At the same time, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent.

2) On May 22, 2009, the Agency issued Order of Determination No. 08-3470 based on the wage claim filed by Claimant and the Agency's investigation. In pertinent part, the Order alleged that:

- Respondent employed Claimant from March 24, 2008 through October 28, 2008, at the regular rate of \$10 per hour;
- Claimant worked a total of 1,669 hours, of which 417 were overtime hours, earning \$18,775;
- Respondent has only paid Claimant \$7,050, leaving a balance due and owing of \$11,725 in unpaid wages, plus interest thereon at the legal rate per annum from December 1, 2008, until paid;
- Respondent willfully failed to pay these wages and owes Claimant \$2,400 in penalty wages, with interest thereon at the legal rate per annum from January 1, 2009, until paid;
- Respondent paid Claimant less than the wages to which he was entitled under ORS 653.010 to 653.261 and is liable to Claimant for \$2,400 in civil penalties pursuant to ORS 653.055(1)(b), with interest thereon at the legal rate per annum from January 1, 2009, until paid.

3) On June 10, 2009, Respondent filed an answer and request for hearing through attorney Stacy Fletcher in which Respondent, in pertinent part:

- Denied he was Claimant's employer;
- Affirmatively alleged that Claimant was an independent contractor for Samuels Auto Body and was never required to work 40 hours per week;
- Denied that Claimant earned wages at the rate of \$10 per hour;
- Denied that Claimant worked a total of 1,669 hours;
- Denied that he owes Claimant \$11,725 in unpaid wages or any interest;
- Denied that he willfully failed to pay wages to Claimant and alleges that he is not liable for a penalty wages or civil penalties as alleged in the Order;
- Affirmatively alleged a lack of subject matter jurisdiction because Claimant was an independent contractor;
- Affirmatively alleged lack of subject matter jurisdiction because Claimant was the owner of the business;
- Affirmatively alleged lack of jurisdiction because Claimant was paid a commission on services performed and received at least the minimum wage for all hours worked.

4) On June 11, 2010, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimant setting the time and place of hearing for 10:00 a.m. on November 16, 2010, at BOLI's Portland office.

5) On July 7, 2010, the ALJ ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and a brief statement of the elements of the claim, a statement of any agreed or stipulated facts, and any wage and penalty calculations (for the Agency only). The ALJ ordered the participants to submit case summaries by November 5, 2010, and notified them of the possible sanctions for failure to comply with the case summary order.

6) On September 20, 2010, Agency filed a motion for discovery order seeking documents and information. In support of its motion, the Agency attached a copy of a letter dated August 31, 2010, in which the Agency made an informal discovery request for the same documents and information. In addition, the Agency case

presenter stated that the Agency had been informed by Stacy Fletcher that Fletcher was no longer representing Respondent.

7) On September 29, 2010, the ALJ granted the Agency's motion for a discovery order and required Respondent to provide the requested documents and information by October 13, 2010.

8) On October 5, 2010, the Agency filed a motion to change the location of the hearing from Portland to Salem. Respondent did not object to the motion. On October 11, 2010, the ALJ issued an interim order granting the Agency's motion and changed the starting time for the hearing from 10 a.m. to 1 p.m.

9) On November 10, 2010, the Agency and Respondent filed a joint motion for a prehearing conference. The ALJ conducted and recorded a telephonic prehearing conference with Mr. Nakada and Respondent Samuels from 3:32 p.m. to 3:45 p.m. on November 10. During the conference, Respondent stated that he had just learned of the case summary order because his former attorney did not forward that order to him. Respondent stated that he wished to file a case summary. With Respondent's concurrence, the ALJ stated that he would have a copy of the case summary order sent as a .PDF attachment to Respondent's e-mail address. The ALJ also ruled that Respondent could have an extension until noon on November 15 to submit his case summary, and that it must be received by the Hearings Unit in Portland and by Mr. Nakada by that time. The case summary was mailed to Respondent's e-mail address (bj\_swindling@yahoo.com) at 4:08 p.m. on November 10, 2010. The Hearings Unit Coordinator ("HUC") also sent a copy of the case summary order by regular and certified mail to Respondent on November 12. On November 15, the HUC received signed confirmation from the U. S. Post Office that Respondent had received the certified mail.

10) Respondent did not make an appearance at the hearing and did not notify the Agency or the ALJ that he would not appear at the time and place set for hearing. The ALJ waited until 1:30 p.m., then declared Respondent in default and commenced the hearing.

11) At hearing, the ALJ granted the Agency's motion to amend the Order of Determination to reduce the wages sought from \$11,725 to \$11,710.

12) The ALJ issued a proposed order on December 1, 2010, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

#### **FINDINGS OF FACT – THE MERITS**

1) On September 10, 1997, Samuels Autobody & Paint Works, L.L.C. registered as a domestic limited liability company with the Oregon Secretary of State Corporation Division. Paul Samuels was listed as registered agent and member, with a member address of 2810 Liberty Street NE, Salem, Oregon.

2) Lowell J. Davis and K. Sharon Davis own a building and land located at 2810 and 2820 Liberty Street NE, Salem, Oregon ("the Davis property"). In 1998 they entered into a lease agreement with Respondent Samuels ("Respondent"), acting as an individual, for rental of the property located at that address consisting of "[a]pproximately 4,100 square feet of shop and office space to be used as auto body and paint works."

3) Samuels Autobody & Paint Works, L.L.C. was involuntarily dissolved by the Corporation Division on November 4, 1999.

4) Respondent continued to lease and pay rent on the Davis property until August 2010, including all of 2008, when Respondent abandoned the property after Lowell Davis threatened him with eviction for nonpayment of rent. Throughout the

lease, Respondent paid rent to Davis by transferring money directly into Davis's bank account.

5) After the LLC dissolved, Respondent continued to operate an auto body and paint shop at the Davis property under the name Samuels Auto Body & Paint Works, including all of 2008.

6) In March 2008, Claimant was working at Sterling Auto, another local auto body and paint shop, doing the same type of work that he performed for Respondent. Respondent, who knew Claimant from school, solicited Claimant to work for Respondent. At the end of March 2008, Claimant agreed to work for Respondent. Respondent agreed to pay him \$400 a week for working 8:00 a.m. to 5:30 p.m., Monday through Friday. Claimant began work for Respondent on March 24, 2008. When Claimant began work, Respondent had him fill out a W-4 form.

7) During Claimant's employment, Claimant did masking, painting prep, job estimates, sales service, painting, and had general managerial authority over the shop.

8) Respondent provided Claimant with a uniform consisting of three identical shirts and pants. Each shirt had the words "Byron" and "Samuels' Auto Body & PAINT WORKS" monogrammed above its two pockets. Claimant wore the uniform to work every day.

9) During Claimant's employment, Respondent paid for and provided him with 80 business cards containing Respondent's business name and address and Claimant's name, with the words "Shop Manager" printed under Claimant's name. Claimant was expected to hand these cards out to potential customers.

10) Claimant's workday began at 8 a.m., when he opened Respondent's shop. He ate lunch every day at the shop but was always on call or "overseeing something" related to Respondent's business while he ate. His workday generally ended between

6:45 p.m. and 7 p.m., when he finished closing up Respondent's shop for the day. Respondent set Claimant's work hours.

11) Claimant invested no money in Respondent's business and did no advertising for Respondent's business. While employed by Respondent, there was no evidence that Claimant did any other gainful work.

12) Respondent provided the tools that Claimant used while working for Respondent. Claimant did not use any of his own tools while performing work for Respondent.

13) While employed by Respondent, Claimant maintained a hand written contemporaneous record of his hours worked, the amount of money he was paid, and the dates that he was paid. Except for Claimant's final paycheck, Respondent always paid Claimant in cash.

14) Respondent did not maintain any time records showing the hours that Claimant worked.

15) Claimant worked the following hours while employed by Respondent:

<u>Week Ending</u>	<u>Total Hours</u>	<u>ST<sup>ii</sup> Hours</u>	<u>OT<sup>iii</sup> Hours</u>
3/29/08	54.5	40	14.5
4/5/08	54.75	40	14.75
4/12/08	54.75	40	14.75
4/19/08	53.5	40	13.5
4/26/08	59.75	40	19.75
5/3/08	54.75	40	14.75
5/10/08	54	40	14
5/17/08	59	40	19
5/24/08	54.75	40	14.75
5/31/08	43.75	40	3.75
6/7/08	55.75	40	15.75
6/14/08	56.75	40	16.75
6/21/08	53	40	13
6/28/08	56.5	40	16.5
7/5/08	43.75	40	3.75
7/12/08	59.75	40	19.75
7/19/08	58	40	18
7/26/08	54.25	40	14.25
8/2/08	58	40	18
8/9/08	54.75	40	14.75
8/16/08	53.25	40	13.25

8/23/08	50.5	40	18.5
8/30/08	59.5	40	19.5
9/6/08	47.75	40	7.75
9/13/08	42.75	40	2.75
9/20/08	43	40	3
9/27/08	53.5	40	13.5
10/4/08	54.25	40	14.25
10/11/08	52.25	40	12.25
10/18/08	43.5	40	3.5
10/25/08	53.75	40	13.75
11/1/08	12	12	0

16) Claimant worked a total of 1,668 hours, including 1,252 straight time hours and 416 overtime hours. He earned \$12,520 for his straight time work (1,252 hours x \$10 per hour) and \$6,240 (416 hours x \$15 per hour) for his overtime work. In total, he earned \$18,760.

17) Respondent paid Claimant the following amounts on the dates listed below. All payments were for wages earned.

<u>Payment Dates</u>	<u>Amt. Paid</u>
March 24	\$300
April 14	\$300
April 20	\$300
May 1	\$400
May 16	\$300
May 29	\$300
June 5	\$300
June 16	\$300
June 27	\$300
July 7	\$400
July 17	\$300
July 28	\$300
August 1	\$400
August 11	\$300
August 20	\$300
September 1--	\$400
September 8	\$300
September 22 -	\$300
September 29	\$320
October 17	\$300
October 28	\$330

In total, Respondent paid Claimant \$6,750. Respondent paid Claimant in cash each time except for the October 28 payment, when Respondent gave Claimant a check.

18) Claimant quit Respondent's employ on the morning of October 28, 2008, because Respondent was not paying him his full wages, despite Claimant's repeated requests for his pay.

19) When Claimant quit, Respondent owed him \$11,710 in unpaid wages. Respondent has not paid any additional wages to Claimant and still owes Claimant \$11,710 in unpaid wages.

20) On December 30, 2008, the Agency mailed a document entitled "Notice of Wage Claim" to Respondent at 2810 Liberty Street NE, Salem, OR 97303 that stated:

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

"Unpaid wages of \$4,700.00<sup>iv</sup> at the rate of \$400.00 per week from March 24, 2008 to October 28, 2008.

"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.

"IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation which supports your position, as well as payment of any amount which you concede is owed the claimant to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.

"If your response to the claim is not received on or before January 14, 2009, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

21) On June 16, 2009, Samuels Autobody & Paint Works, LLC re-registered as a domestic limited liability company with the Oregon Secretary of State Corporation Division, with a renewal date of June 16, 2010. Daniel Davis was listed as registered agent and member, with a member address of 2810 Liberty Street NE, Salem, Oregon.

22) Penalty wages are computed as follows for Claimant, in accordance with ORS 652.150: \$10 per hour x 8 hours x 30 days = \$2,400.

23) ORS 653.055 civil penalties are computed as follows for Claimant: in accordance with ORS 652.150 and ORS 653.055: \$10 per hour x 8 hours x 30 days = \$2,400.

24) Claimant, Davis, and Casey were all credible witnesses.

#### **ULTIMATE FINDINGS OF FACT**

1) In 2008, Respondent Paul Samuels owned and operated a business under the assumed business name of Samuels Auto Body & Paint Works, located at 2810 Liberty Street NE in Salem, Oregon.

2) Respondent solicited and hired Claimant to work for him in March 2008 at the agreed rate of \$400 per week, based on 40 hours per week.

3) During Claimant's employment, Respondent paid for and provided Claimant with a uniform and business card with Respondent's name and address on it. Respondent provided all the tools Claimant used to perform his work. Claimant invested no money in Respondent's business, did no advertising for Respondent's business, and had no opportunity to earn a profit apart from his wages.

4) Respondent set Claimant's work hours, which began at 8 a.m., when he opened Respondent's shop. Claimant ate lunch while he worked. His workday generally ended between 6:45 p.m. and 7 p.m., when he had finished closing up Respondent's shop for the day.

5) Claimant worked a total of 1,668 hours while in Respondent's employ, including 1,252 straight time hours and 416 overtime hours. He earned \$18,760 for his work (1,252 hours x \$10 per hour = \$12,520) and \$6,240 (416 hours x \$15 per hour = \$6,240).

6) Respondent only paid Claimant \$6,750 for his work.

7) Claimant quit Respondent's employ on October 28, 2008, because Respondent was not paying him his full wages.

8) When Claimant quit, Respondent owed him \$11,710 in unpaid wages. Respondent has not paid any additional wages to Claimant and still owes Claimant \$11,710 in unpaid wages.

9) On December 30, 2008, the Agency mailed a notice to Respondent's correct business address that notified Respondent of Claimant's wage claim and demanded that Respondent pay the unpaid, due, and owing wages if the claim was correct.

10) Penalty wages are computed as follows for Claimant, in accordance with ORS 652.150:  $\$10 \text{ per hour} \times 8 \text{ hours} \times 30 \text{ days} = \$2,400$ .

11) ORS 653.055 civil penalties are computed as follows for Claimant: in accordance with ORS 652.150 and ORS 653.055:  $\$10 \text{ per hour} \times 8 \text{ hours} \times 30 \text{ days} = \$2,400$ .

#### **CONCLUSIONS OF LAW**

1) At all times material herein, Respondent Samuels was an employer who directly engaged the personal services of Claimant in Oregon and suffered or permitted Claimant to work and Claimant was Respondent's employee, subject to the provisions of ORS 652.110 to 652.200 and ORS 652.310 to 652.405.

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

3) Respondent violated ORS 652.140(2) by failing to pay to Claimant all wages earned and unpaid not later than five days, excluding Saturdays, Sundays and holidays, after Claimant quit Respondent's employment. Respondent owes Claimant \$11,710 in unpaid, due, and owing wages.

4) Respondent willfully failed to pay Claimant all wages due and owing and Respondent owes \$2,400 in penalty wages to Claimant. ORS 652.150.

5) Respondent paid Claimant less than the wages to which he was entitled under ORS 653.010 to 653.261 by failing to pay him overtime wages for all hours worked over 40 in a given workweek and is liable to pay civil penalties to Claimant in the amount of \$2,400. ORS 653.055(1)(b).

## **OPINION**

### **CLAIMANT'S WAGE CLAIM**

To establish Claimant's wage claim, the Agency must prove the following elements by a preponderance of the evidence: 1) Respondent employed Claimant; 2) The pay rate upon which Respondent and Claimant agreed; 3) Claimant performed work for which he was not properly compensated; and 4) The amount and extent of work Claimant performed for Respondent. *In the Matter of Creative Carpenters Corporation, 29 BOLI 271, 277 (2007)*. In a default case, the forum may consider any unsworn and unsubstantiated assertions contained in a respondent's answer, but those assertions are overcome whenever they are contradicted by other credible evidence in the record. *In the Matter of Sehat Entertainment, Inc., 30 BOLI 170, 181 (2009)*.

### **CLAIMANT WAS EMPLOYED BY RESPONDENT**

Under ORS 652.310(1), an "employer" is someone who "engages personal services of one or more employees \* \* \*." ORS 653.010 defines "employ" as "to suffer or permit to work \* \* \*." Both definitions are relevant in this case because the Agency is seeking unpaid agreed straight time and unpaid overtime wages.

The forum begins by evaluating Respondent's affirmative defense that no wages are owed because Claimant was an independent contractor, not an employee. Respondent did not appear at hearing to back up his claim, and the only evidence supporting of this defense are the unsworn summary assertions in Respondent's answer. The forum notes that Respondent must prove this defense by a

preponderance of the evidence in order to prevail. *In the Matter of Gary Lee Lucas*, 26 BOLI 198, 210 (2005).

This forum applies an “economic reality” test to distinguish an employee from an independent contractor under Oregon’s minimum wage and wage collection laws. *Id.* The degree of economic dependency in any given case is determined by analyzing the facts presented in light of the following five factors, with no one factor being dispositive:

- (1) The degree of control exercised by the alleged employer;
- (2) The extent of the relative investments of the worker and alleged employer;
- (3) The degree to which the worker’s opportunity for profit and loss is determined by the alleged employer;
- (4) The skill and initiative required in performing the job; and
- (5) The permanency of the relationship.

*Id.* See also *In the Matter of Orion Driftboat and Watercraft Company*, 26 BOLI 137, 146 (2005); *In the Matter of Kilmore Enterprises*, 26 BOLI 111,120-21 (2004).

The Agency established the following relevant facts through Claimant’s credible testimony:

1. Respondent solicited and hired Claimant at the agreed rate of \$400 per week for 40 hours of work;
2. Respondent set Claimant’s work hours;
3. Claimant made no financial investment in Respondent’s business;
4. Respondent provided all the tools used by Claimant in his work;
5. Claimant had no opportunity for profit or loss apart from his wages; and
6. Claimant performed the same kind of work for his previous employer that he performed for Respondent.

There was no evidence presented that Claimant engaged in any other gainful employment while he worked for Respondent, that Claimant worked on any vehicles during his work time with Respondent that gave him the opportunity to earn any money other than his agreed wage, or as to the expected duration of Claimant’s employment.<sup>v</sup>

There is one additional piece of evidence offered into evidence by the Agency that the forum must consider, a document entitled “Independent Contractor’s and Confidential Information Agreement.” That document, which was sent to the Agency by

Respondent, is dated February 29, 2008, and bears a printed name and signature purporting to be Claimant's. Even if such an agreement provided a legitimate defense,<sup>vi</sup> the forum would disregard it for two reasons: (1) Claimant credibly testified that he has never seen and did not sign the document; and (2) Claimant's purported signature and hand printed name on the Agreement are substantially dissimilar from Claimant's acknowledged signature and hand printed name on the wage claim form and assignment of wages he submitted to the Agency when Claimant presumably had no idea that the authenticity of his handwriting would be subject to scrutiny by the forum.

Based on this evidence, the forum concludes that Respondent did not meet its burden of proof and that Claimant was not an independent contractor. In contrast, the same evidence establishes that Respondent engaged Claimant's personal services and suffered or permitted him to work, leading to the conclusion that Respondent was an employer who employed Claimant.

### **THE PAY RATE TO WHICH RESPONDENT AND CLAIMANT AGREED**

Claimant credibly testified that Respondent agreed to pay him \$400 a week to work from 8 a.m. to 5:30 p.m., five days a week. Factoring in the 30 minutes a day that Claimant was legally entitled to take for a lunch break,<sup>vii</sup> this constitutes an agreement to work 40 hours for \$400, or an agreed wage rate of \$10 per hour. Claimant's overtime rate for hours worked over 40 in a given workweek is calculated by multiplying \$10/hour x 1.5 = \$15/hr. OAR 839-020-0030(1).

### **CLAIMANT PERFORMED WORK FOR WHICH HE WAS NOT PROPERLY COMPENSATED**

By any method of calculation, Claimant performed work for which he was not properly compensated. Respondent paid Claimant \$6,750 for his work, which was only enough to compensate him for 675 hours of straight time work, based on a wage rate of \$10/hr. Even calculated at Oregon's statutory 2008 minimum wage of \$7.95/hr.,

Respondent still only paid Claimant for 849 hours of work (\$6,750 divided by \$7.95 = 849). In comparison, Claimant worked 1,668 hours.

### **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 Claimant. When the forum concludes that an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. In this case, Respondent produced no records, instead submitting a written statement to the Agency saying that he had no time records for Claimant. When the employer produces no records, the forum may rely on evidence produced by the agency from which "a just and reasonable inference may be drawn." *In the Matter of Kilmore Enterprises*, 26 BOLI 111, 122 (2004). A claimant's credible testimony may be sufficient evidence to show the amount of hours worked by the claimant and amount owed. *Id.* at 123.

At hearing, Claimant credibly testified that he maintained a contemporaneous daily record of the hours and schedule that he worked. Although Claimant did not produce that record at hearing, he credibly testified that the calendar of hours worked that he gave the Agency during its investigation and that was received into evidence contained the same information as his contemporaneous record. The forum relies on that latter calendar to determine the number of straight time and overtime hours at Claimant worked. In total, Claimant worked 1,252 straight time hours and 416 overtime hours, for which Claimant earned \$12,520 for his straight time work (1,252 hours x \$10 per hour) and \$6,240 (416 hours x \$15 per hour) for his overtime work, for a total of \$18,760. Respondent only paid Claimant \$6,750 for his work, leaving unpaid, due, and owing wages of \$11,710.

## **RESPONDENT'S AFFIRMATIVE DEFENSES OF LACK OF JURISDICTION**

Respondent's affirmative defenses of lack of jurisdiction<sup>viii</sup> are all predicated on Respondent's allegations that Claimant was an independent contractor, that Claimant owned the business, or that Claimant received a commission for work performed and was paid at least the minimum wage for all hours worked. These affirmative defenses fail because Respondent has not met his burden of proof regarding the alleged facts that would support these defenses.

## **CLAIMANT IS OWED PENALTY WAGES**

The forum may award penalty wages when 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).

The Agency established by a preponderance of the evidence that: (1) Claimant and Respondent agreed upon a wage rate of \$10 per hr.; (2) Respondent set Claimant's work hours and was aware of them; and (3) Claimant repeatedly requested that Respondent pay him his due and owing wages and finally quit after Respondent continually failed to pay those wages. It is an employer's duty to keep an accurate record of the hours worked by its employees. ORS 653.045; *In the Matter of Tina Davidson*, 16 BOLI 141, 148 (1997). The fact that Respondent kept no record of Claimant's hours worked does not allow him to evade his responsibility for penalty wages, nor does his failed defense that Claimant was an independent contractor.<sup>ix</sup> There is no evidence that Respondent acted other than voluntarily and as a free agent in underpaying Claimant and the forum concludes that Respondent acted willfully in failing to pay Claimant his wages and is liable for penalty wages under ORS 652.150.

ORS 652.150(1) and (2) provide, in pertinent part:

“(1) Except as provided in subsections (2) and (3) of this section, if an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 \* \* \*, then, as a penalty for the nonpayment, the wages or compensation of the employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced.

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

The Agency provided documentary and testimonial evidence that its investigative staff made the written demand contemplated by ORS 652.150(2) for Claimant’s wages on December 30, 2008. The Agency’s Order of Determination, issued on May 22, 2009, repeated this demand, adding overtime wages.<sup>x</sup> Respondent failed to pay the full amount of Claimant’s unpaid wages within 12 days after receiving the written notices and has still not paid them. Consequently, the forum assesses penalty wages at the maximum rate set out in ORS 652.150(1) (hourly rate x eight hours per day x 30 days = penalty wages). Penalty wages for Claimant equal \$2,400 (\$10 per hour x eight hours x 30 days).

### **ORS 653.055 CIVIL PENALTIES**

In its Order of Determination, the Agency alleged that Claimant is entitled to a civil penalty of \$2,400 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 the employer pays less than the wages to which the employee is entitled under ORS 653.010 to 653.261, computed in the same fashion as ORS 652.150 penalty wages. This includes unpaid

overtime wages. "Willfulness" is not an element. *In the Matter of Captain Hooks, LLP*, 27 BOLI 21, 225 (2006).

Claimant, who worked for the agreed wage rate of \$10 per hour, was entitled to be paid overtime wages for any work he performed in excess of 40 hours in a work week. OAR 839-020-0030. He earned \$12,520 for his straight time work (1,252 hours x \$10 per hour) and \$6,240 (416 hours x \$15 per hour) for his overtime work, for a total of \$18,760. In contrast, Respondent only paid Claimant \$6,750 for his work, a sum that did not even come close to paying Complainant in full for his straight time hours, much less his overtime hours. Respondent's failure to pay overtime wages to Claimant entitles Claimant to a civil penalty of \$2,400 (\$10 per hour x eight hours x 30 days) in addition to the penalty wages awarded under ORS 652.150.

#### **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 **PAUL SAMUELS** 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:

- (1) A certified check payable to the Bureau of Labor and Industries in trust for Claimant in the amount of SIXTEEN THOUSAND FIVE HUNDRED AND TEN DOLLARS (\$16,510), less appropriate lawful deductions, representing \$11,710 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from December 1, 2008, until paid; \$2,400 in penalty wages, plus interest at the legal rate on that sum from January 1, 2009, until paid; and civil penalties of \$2,400, plus interest at the legal rate on that sum from January 1, 2009, until paid.

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<sup>i</sup> The originals for exhibit A-1, pp. 4-8 were received into evidence in substitution for the copies submitted with the Agency's case summary because the copies were partially illegible.

<sup>ii</sup> ST = straight time hours

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<sup>iii</sup> OT = overtime hours

<sup>iv</sup> Casey testified that the Notice only sought \$4,700 because it did not include computation for overtime wages.

<sup>v</sup> The forum has previously recognized that “[i]ndependent contractors are generally engaged to perform a specific project for a limited period.” *In the Matter of Triple A Construction, LLC*, 23 BOLI 79, 93 (2002).

<sup>vi</sup> See *In the Matter of Forestry Action Committee*, 30 BOLI 63, 75 (2008) (an “independent contractor agreement,” even if signed by a claimant, is not controlling in determining whether the claimant was an independent contractor.)

<sup>vii</sup> See OAR 839-020-0050(2) & (3), which provides:

“(2)(a) Except as otherwise provided in this rule, every employer shall provide to each employee, for each work period of not less than six or more than eight hours, a meal period of not less than 30 continuous minutes during which the employee is relieved of all duties.

“(b) Except as otherwise provided in this rule, if an employee is not relieved of all duties for 30 continuous minutes during the meal period, the employer must pay the employee for the entire 30-minute meal period.”

<sup>viii</sup> See Proposed Finding of Fact 4 – Procedural.

<sup>ix</sup> See, e.g., *In the Matter of Bukovina Express, Inc.*, 27 BOLI 184, 203 (2006) (a respondent's ignorance or misunderstanding of the law does not exempt that respondent from a determination that it willfully failed to pay wages earned and owed.)

<sup>x</sup> See *In the Matter of MAM Properties, LLC*, 28 BOLI 172, 190 fn. 7 (2007) (the Agency's Order of Determination constitutes a written notice of nonpayment of wages).