

In the Matter of
DIRAN BARBER, dba Bob's Bistro, Respondent.

Case Number 63-97
Final Order of the Commissioner
Jack Roberts
Issued September 25, 1997.

SYNOPSIS

Respondent, who operated a bar, employed Claimant as a bartender on a monthly salary for all hours worked. Claimant was not an executive employee excluded from coverage of the minimum wage laws. Since the salary did not compensate Claimant at the minimum wage rate plus the overtime rate for all hours worked, Respondent failed to pay Claimant all wages due upon termination, in violation of ORS 653.025(3) (minimum wages), OAR 839-20-030 (overtime wages), and ORS 652.140(1). Respondent's failure to pay the wages was willful, and the Commissioner ordered Respondent to pay civil penalty wages, pursuant to ORS 652.150. ORS 652.140(1), 652.150, 653.025(3), 653.055(1) and (2), 653.261(1), and OAR 839-20-030 (1).

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on August 14, 1997, in the offices of the Oregon State Employment Department, 2075 Sheridan Avenue, North Bend, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Lewis Wetzell (Claimant) was present

throughout the hearing. Diran Barber (Respondent) was present throughout the hearing.

The Agency called the following witnesses: Sanford Groat, a compliance specialist with the Wage and Hour Division of the Agency; Lewis Wetzell, Claimant; and Sonja Wetzell, Claimant's wife. Respondent called himself as a witness.

Administrative exhibits X-1 to X-14 and Agency exhibits A-1 to A-5 were offered and received into evidence. After the hearing and pursuant to the ALJ's request, the Agency recalculated the wages alleged due. The ALJ received the Agency's recalculation, marked administrative exhibit X-15, and closed the record on August 19, 1997.

Having fully considered the entire record in this matter, I, Jack Roberts, 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 15, 1996, Claimant filed a wage claim with the Agency. He alleged that he had been employed by Respondent and that Respondent had failed to pay wages earned and due to him.

2) At the same time that he filed the wage claim, Claimant assigned to the Commissioner of Labor, in trust for Claimant, all wages due from Respondent.

3) On February 25, 1997, the Agency served on Respondent an Order of Determination based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of \$3,857.15 in wages and \$1,140 in civil penalty wages. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency,

or request an administrative hearing and submit an answer to the charges.

4) On March 17, 1997, the Agency received Respondent's answer and request for a contested case hearing, dated March 5, 1997. In his answer, Respondent denied that he owed Claimant unpaid wages. He contended that Claimant was a bar manager and that he and Claimant had a salary agreement rather than an hourly wage agreement.

5) On June 17, 1997, the Hearings Unit issued a Notice of Hearing to the Respondent, the Agency, and the Claimant indicating the time and place of the hearing. Together with the Notice of Hearing, the forum sent a document entitled "Notice 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 839-050-0000 to 839-050-0440. Upon Respondent's motion and following a conference call among the ALJ, Respondent, and Mr. McCullough for the Agency, the ALJ postponed the hearing date and reset it for August 14, 1997.

6) On June 27, 1997, the Administrative Law Judge issued a discovery order to the participants directing them each to submit a summary of the case, including a list of the witnesses to be called and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-050-0200 and 839-050- 0210. The summaries were due by July 7, 1997. The order advised the participants of the sanctions, pursuant to OAR 839-050-0200(8), for failure to submit the summary. The ALJ gave Respondent an extension of time until August 8, 1997, to submit his case summary. The Agency submitted a timely summary and later supplemented it. Respondent failed to submit one.

7) On July 2, 1997, the Agency moved for a discovery order, with an

attached exhibit showing the Agency's attempt to obtain Respondent's records through an informal exchange of information. On July 3, 1997, the ALJ wrote to Respondent concerning the motion and set a July 8, 1997, deadline for a response to the motion. On July 10, 1997, the ALJ granted the Agency's motion and issued a discovery order directing Respondent to provide by July 15, 1997, various records regarding the employment of Claimant. The ALJ later granted Respondent an extension of time to August 5, 1997, to produce the requested documents to the Agency. Respondent did not provide any records before or at hearing.

8) At the start of the hearing, Respondent said he had reviewed the "Notice of Contested Case Rights and Procedures" and had no questions about it.

9) Pursuant to ORS 183.415(7), the ALJ explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

10) At the end of the hearing, the ALJ asked the Agency to submit a recalculation of the alleged wages due. The ALJ received the recalculation on August 19, 1997, and closed the record.

11) On August 29, 1997, the Administrative Law Judge issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions to the Proposed Order. On September 5, 1997, the Hearings Unit received Respondent's timely exceptions, which the forum has addressed in the Opinion section of this Final Order.

FINDINGS OF FACT -- THE MERITS

1) During all times material herein, the Respondent, a person, did business as Bob's Bistro, a bar located in Coos Bay, Oregon. He invested the money to lease the building and business from their owner, Bob Downer (phonetic), and obtained the

necessary licenses to operate the bar.

2) From August 16, 1995, to April 7, 1996, Respondent employed Claimant as a bartender. Respondent and Claimant had no partnership agreement. Claimant had no ownership interest in the business, invested no money in it, had no right to share profits from the business, and was not liable for any losses from the business. Respondent and Claimant had a goal of becoming partners to buy the building that housed the bar.

3) Initially, Respondent and Claimant had an oral agreement that Claimant would work for \$6.50 per hour. Soon after the bar opened, they renegotiated and Claimant agreed to work for \$800 per month for all hours worked.

4) Respondent kept no time records for Claimant. A log book kept in the bar showed when Claimant worked. Claimant's wife, who also worked at the bar, kept a calendar at home. She wrote Claimant's hours worked on the calendar each day.

5) Claimant's records and testimony reveal the following information, which the forum has accepted as fact: he worked 1,726.5 total hours; of the total hours, 1,324.5 were straight time hours, that is, hours worked up to and including 40 hours in a work week; 402 hours were hours worked in excess of forty hours per week.

6) Pursuant to ORS chapter 653 (Minimum Wages), OAR 839-20-030 (Payment of Overtime Wages), and Agency policy, the Agency calculated Claimant's total earnings to be \$9,157.64. The total reflects the sum of the following: 1,324.5 hours at \$4.75 per hour (the minimum wage) which equals \$6,291.38; plus 402 hours at \$7.13 per hour (the overtime rate: 1.5 times the minimum wage), which equals \$2,866.26.

7) Respondent paid Claimant \$5,600. Respondent paid Claimant this amount knowingly and intentionally. Respondent was a free agent.

8) Respondent discharged Claimant on April 7, 1997.

9) The forum computed civil penalty wages, according to ORS 652.150 and Agency policy, as follows: \$4.75 (Claimant's hourly rate) multiplied by 8 (hours per day) equals \$38.00. This figure of \$38.00 is multiplied by 30 (the maximum number of days for which civil penalty wages continued to accrue) for a total of \$1,140. The Agency set forth this figure in the Order of Determination.

10) The forum carefully observed Claimant's and Sonja Wetzell's demeanor and found their testimony to be credible. Where their memories were weak, they made no attempt to hide this or fabricate what occurred. Except where their memories were weak, the forum determined that Claimant's and Sonja Wetzell's testimony was reliable and credible.

ULTIMATE FINDINGS OF FACT

1) Respondent employed Claimant in Oregon from August 16, 1995, to April 7, 1996.

2) The state minimum wage during 1995 and 1996 was \$4.75 per hour.

3) Respondent discharged Claimant on April 7, 1996.

4) Claimant earned \$9,157.64 in wages. Respondent paid Claimant \$5,600 and owes him \$3,557.64 in earned and unpaid compensation.

5) Respondent willfully failed to pay Claimant all wages immediately when he terminated Claimant's employment and more than 30 days have elapsed from the date Claimant's wages were due and payable.

6) Civil penalty wages, computed pursuant to ORS 652.150 and Agency policy, equal \$1,140.

CONCLUSIONS OF LAW

1) ORS 653.010 provides in part:

"(3) 'Employ' includes to suffer or permit to work; * * *.

"(4) 'Employer' means any person who employs another person * *
* ."

ORS 652.310 provides in part:

"(1) 'Employer' means any person who in this state, directly or through an agent, engages personal services of one or more employees * *
* ."

"(2) 'Employee' means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled."

ORS 68.110(1) provides:

"A partnership is an association of two or more persons to carry on as coowners a business for profit[.]"

Claimant was not a coowner or copartner with Respondent in the business of Bob's Bistro. During all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.414, and 653.010 to 653.261.

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

3) ORS 653.025 requires that:

" * * * for each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages computed at a rate lower than:

"* * * * *

"(3) For calendar years after December 31, 1990, \$4.75."

Oregon law required Respondent to pay Claimant at a fixed rate of at least \$4.75 per hour. Respondent failed to pay Claimant the minimum wage rate of \$4.75 for each hour

of work time.

- 4) ORS 653.261(1) provides:

"The commissioner 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."

OAR 839-20-030(1) provides in part:

"[A]ll work performed in excess of 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 benefit of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1)."

Oregon law obligated Respondent to pay Claimant one and one-half times his regular hourly rate, in this case the minimum wage of \$4.75, for all hours worked in excess of 40 hours in a week. Respondent failed to pay Claimant at the overtime rate, in violation of OAR 839-20-030(1).

- 5) ORS 652.140(1) provides:

"Whenever an employer discharges an employee or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge or termination shall become due and payable not later than the end of the first business day after the discharge or termination."

Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid not later than the end of the first business day after discharging him from employment on April 7, 1996.

- 6) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such 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; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140.

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

OPINION

CLAIMANT WORKED AS AN EMPLOYEE

The chief issue in this case is whether Claimant worked for the bar as an employee or as a copartner. Respondent claimed at hearing that Claimant performed work not as an employee, as that term is defined in ORS 652.210(2) and 652.310(2), but as a copartner.¹ The Agency contends that Claimant worked as an employee.

"'Employee' means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate * * *." ORS 652.310(2); *Lamy v. Jack Jarvis & Co., Inc.*, 281 Or 307, 574 P2d 1107, 1111 (1978); *In the Matter of Crystal Heart Books Co.*, 12 BOLI 33, 40-41 (1993).

ORS 68.110(1) defines a partnership as "an association of two or more persons

to carry on as coowners a business for profit[.]” The Oregon Supreme Court has held that “[t]he essential test in determining the existence of a partnership is whether the parties intended to establish such a relation”; that “in the absence of an express agreement * * * the status may be inferred from the conduct of the parties,” and “when faced with intricate transactions that arise, this court looks mainly to the right of a party to share in the profits, his liability to share losses, and the right to exert some control over the business.” *Stone-Fox, Inc. v. Vandehey Development Co.*, 290 Or 779, 626 P2d 1365, 1367 (1981) (quoting from *Hayes v. Killinger*, 235 Or 465, 470, 385 P2d 747 (1963)).

In this case, the preponderance of credible evidence on the whole record establishes that Claimant worked as Respondent's employee rather than as his copartner. The conduct of the parties indicates there was no partnership. Claimant rendered personal services wholly in this state to Respondent, who agreed to pay Claimant at a fixed rate -- \$800 per month. Respondent took no pay from the bar. Respondent and Claimant, who were long-time friends before Respondent invested in the business, had no express agreement to form a partnership. Respondent testified about a partnership in future terms. In other words, he testified that he and his wife, Trina, and Claimant and his wife, Sonja, all worked hard to operate the bar successfully so that in the future they could become partners and buy the building together. Further, Claimant testified credibly that he had no right to share in the profits and no liability to share losses from the business. Respondent did not dispute this testimony.

Respondent alone invested money in the bar and he alone held the licenses necessary to operate it. Respondent had no experience operating a bar, and he consulted Claimant about how to operate it. However, the forum cannot conclude from this that Claimant had the right to exert some control over the business.

A partnership is never presumed, hence the burden of proving a partnership is upon the party alleging it. *Jewell v. Harper*, 199 Or 223, 258 P2d 115, *rehearing denied* 199 Or 223, 260 P2d 784 (1953); *Burke Machinery Co. v. Copenhagen*, 138 Or 314, 6 P2d 886 (1932); *In the Matter of Superior Forest Products*, 4 BOLI 223, 231 (1984); *In the Matter of Crystal Heart Books Co.*, 12 BOLI 33, 40-41 (1993). In this case, Respondent has failed to prove that he and Claimant were partners in Bob's Bistro.

HOURS WORKED

Sonja Wetzell, Claimant's wife, recorded on her home calendar the number of hours Claimant worked each day. Ms. Wetzell also worked in the bar and occasionally filled in for Claimant on Sundays when he and Respondent played pool in a league. At hearing, she modified the hours claimed by Claimant to account for those times when the hours on the calendar were hers rather than Claimant's. From these calendars and Claimant's and Ms. Wetzell's credible testimony, the forum has concluded that Respondent employed Claimant and improperly compensated him. When the forum concludes that an employee was employed and was improperly compensated, it becomes the burden of the employer to produce all appropriate records to prove the precise amounts involved. *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946); *In the Matter of Dan's Ukiah Service*, 8 BOLI 96, 106 (1989).

Thus, it became Respondent's burden to produce all appropriate records to prove the precise amounts involved. ORS 653.045 requires an employer to maintain payroll records. Respondent did not produce any record of hours or dates worked by Claimant. Respondent did not dispute the hours claimed, except as describe above, when occasionally Ms. Wetzell filled in for Claimant.

Where an employer produces no records, the Commissioner may rely on the evidence produced by the Agency "to show the amount and extent of the employee's

work as a matter of just and reasonable inference," and "may then award damages to the employee, even though the result be only approximate." *Anderson v. Mt. Clemens Pottery Co.*, 328 US at 687-88. From these rulings, the forum may rely on the evidence produced by the Agency regarding the number of hours worked by Claimant.

MINIMUM WAGE AND OVERTIME

At hearing, Respondent did not assert any exemption or exclusion from the coverage of Oregon's Minimum Wage Law (ORS 653.010 to 653.261) or Oregon's Wage and Hour Laws (ORS chapter 652) for himself or Claimant. In his answer, however, Respondent alleged that Claimant was employed as the bar manager and paid a salary. If certain conditions are met, salaried managers may be excluded from the requirements of the minimum wage law.²

ORS 653.020(3) provides an exclusion for certain individuals engaged in executive work, including those who perform predominantly managerial tasks. OAR 839-20-005(1) further defines an "Executive Employee" for purposes of the minimum wage law.

An executive employee means an employee (a) whose primary duty (which generally means over 50 percent of the employee's time) consists of management of the enterprise, (b) who customarily and regularly directs the work of two or more other employees, (c) who has the authority to hire or fire other employees (or whose recommendations on such issues are given particular weight), (d) who customarily and regularly exercises discretionary powers, and (e) who earns a salary and is paid on a salary basis pursuant to ORS 653.025.

A salary is defined as "no less than the [minimum] wage set pursuant to ORS 653.025, multiplied by 2,080 hours per year, then divided by 12 months." ORS 653.010(10). Under this formula, a salary must be no less than \$823.33 per month

(\$4.75 times 2,080 hours equals \$9,880, divided by 12 months equals \$823.33 per month). Respondent and Claimant had an agreement whereby Claimant earned a salary of \$800 per month for all hours worked.³ Since Claimant was paid a salary of less than \$823 per month, he did not satisfy this requirement of the "executive employee" exclusion.

Further, Respondent did not argue or offer evidence to prove that Claimant met the other requirements for this exclusion.⁴ Evidence showed that Bob's Bistro was operated by four individuals: Respondent and his wife and Claimant and his wife. Claimant's primary duty was to tend bar. No evidence suggested that Claimant's primary duty consisted of management of the bar, or that Claimant customarily and regularly directed the work of two or more other employees, or that he had the authority to hire or fire other employees. Respondent failed to prove that Claimant was an executive employee. Thus, the forum concludes that Claimant was not an executive employee exempt from the requirements of the minimum wage law.

ORS 653.025 prohibits employers from paying their employees at a rate less than \$4.75 for each hour of work time. ORS 653.055(1) provides that "[a]ny employer who pays an employee less than the [minimum wage and overtime] is liable to the employee affected: (a) For the full amount of the wages, less any amount actually paid to the employee by the employer; * * * and (c) For civil penalties provided in ORS 652.150." ORS 653.055(2) states that "[a]ny agreement between an employee and an employer to work at less than the [minimum wage and overtime] is no defense to an action under subsection (1) of this section." Thus, the salary agreement between Respondent and Claimant is no defense to Respondent's failure to pay the minimum wage and overtime.

OAR 839-20-030 provides that all work performed in excess of 40 hours per

week must be paid for at the rate of not less than one and one-half the regular rate of pay. Respondent is obligated by law to pay Claimant one and one-half times his regular hourly rate, in this case the minimum wage, for all hours worked in excess of 40 hours in a week.

Credible evidence based on the whole record establishes that Claimant worked 1726.5 hours, including 402 overtime hours. At minimum wage with overtime, Claimant earned \$9,157.64 in wages. Respondent paid him \$5,600. Therefore, Respondent owes Claimant \$3,557.64 in earned and unpaid wages.

PENALTY WAGES

Awarding penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent, as an employer, had a duty to know the amount of wages due to his employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). Here, evidence established that Respondent knew he was paying Claimant the agreed upon salary for his work and intentionally paid those wages. Evidence showed that Respondent acted voluntarily and was a free agent. Respondent must be deemed to have acted willfully under this test, and thus is liable for penalty wages under ORS 652.150.

RESPONDENT'S EXCEPTIONS

Respondent objected to the ALJ's findings regarding (1) the number of hours Claimant worked, (2) whether Claimant was an employee or a partner, and (3) the reason for Claimant's termination. Respondent stated that witnesses would offer testimony that is contrary to the findings.

This forum is required to make its decisions based exclusively on the record made at hearing. Any new facts presented or issues raised in exceptions shall not be considered by the Commissioner in preparing the final order. OAR 839-050-0380(1). Respondent failed to file a case summary before hearing, as ordered by the ALJ. He offered no documents at hearing. The evidence he offered was limited to his testimony. The record of that hearing is now closed. In his exceptions, Respondent gave no reason why, before the hearing, he could not have gathered the evidence he now wants considered. The forum therefore declines to reopen the record for new evidence.

Accordingly, the forum has considered Respondent's exceptions based on the record made at hearing. The preponderance of the credible evidence in that record supports the findings made by the ALJ. Respondent's exceptions are not supported by the evidence.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders **DIRAN BARBER** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR LEWIS G. WETZELL in the amount of FOUR THOUSAND SIX HUNDRED NINETY SEVEN DOLLARS AND SIXTY FOUR CENTS (\$4,697.64), less appropriate lawful deductions, representing \$3,557.64 in gross earned, unpaid, due, and payable wages; and \$1,140 in penalty wages; plus interest at the rate of nine percent per year on the sum of \$3,557.64 from May 1, 1996, until paid and nine percent interest per year on the sum of \$1,140 from June 1, 1996, until paid.

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¹Respondent did not raise this issue until hearing. In his answer to the Order of Determination, Respondent's defense was only that Claimant was paid a salary, not by the hour. Respondent wrote, "He [Claimant] was a salary employee as bar manager."

²Putting an employee on salary does not, by itself, cause the employee to be excluded from the coverage of Oregon's minimum wage law. See ORS 653.020 (listing excluded employees). A salary is merely one method of compensating an employee; other methods include, for example, hourly wage rates, piece rates, commissions, overrides, spiffs, bonuses, tips, and similar benefits. Likewise, giving an employee the title of manager does not automatically exclude the employee from coverage of the minimum wage law. *In the Matter of John Mathioudakis*, 12 BOLI 11, 20 (1993); *In the Matter of Burrito Boy, Inc.*, 16 BOLI 1, 19 (1997) ("Simply putting a head cook on salary and giving him the title of manager is not enough to make him exempt from the requirements of the minimum wage law.").

³Respondent alleged at hearing that Claimant was paid \$800 per month plus beer and food. The law permits an employer to deduct from the minimum wage the fair market value of meals furnished by the employer for the private benefit of the employee. ORS 653.035(1); *former* OAR 839-20-025 (BL 3-1992). However, this only applies when an employer continuously meets certain conditions. For example, the employee must have authorized the deduction in writing, the deduction must meet the other requirements for a lawful deduction under ORS 652.610, and the employer must make a full settlement on each regular payday of sums owed to the employer by the employee because of the

meals furnished. Respondent presented no evidence to establish the fair market value of any meals or drinks provided to Claimant. Nor did he present evidence that he met the other conditions necessary to make this deduction from Claimant's minimum wage.

⁴It is an affirmative defense that an employee is excluded from coverage of Oregon's minimum wage law. *In the Matter of Sunnyside Enterprises of Oregon, Inc.*, 14 BOLI 170, 183 (1995). Thus, Respondent had the duty to raise this defense and present evidence to support it. ORS 183.450(2); OAR 839-050-0130(2).