

**In the Matter of**  
**BARBARA COLEMAN dba FEATHERBED RESORT**

**Case No. 15-00**

**January 28, 2000**

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**SYNOPSIS**

Respondent employed Claimant to manage a resort facility but did not specify what her wages would be. Respondent paid Claimant no wages despite the fact that Claimant worked for her for approximately two months. The commissioner ordered that, under these circumstances, Respondent was required to pay Claimant at least the minimum wage and that her failure to do so was willful. The commissioner ordered Respondent to pay civil penalty wages of \$1440.00 in addition to the \$1354.50 in unpaid wages she owed Claimant. ORS 652.140, ORS 652.150, ORS 653.025, ORS 653.055, OAR 839-001-0470.

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The above-entitled case came on regularly for hearing before Erika L. Hadlock, 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 November 18, 19 and 22, 1999, at the Eugene office of the Bureau of Labor and Industries, located at 165 East Seventh Street, Eugene, Oregon.

Linda Lohr, an employee of the Bureau of Labor and Industries ("BOLI" or "the Agency") represented the Agency. Wage claimant Shannon Esch was present during the hearing and was not represented by counsel. Respondent Barbara Coleman was represented by counsel, Margaret Wilson, who was present throughout the hearing. Respondent herself was also present during most of the hearing.

The Agency called as witnesses: Claimant Shannon Esch; Ted Crane, Les Schmig, and Doug Esch (contractors); Beverly Hadden, Kevin Hadden, Nancy Asman, Judith Kindt, and Joyce Fry (Claimant's friends and neighbors); Laura Miles (formerly employed at Coleman Mortgage); and Agency compliance specialist Tyrone Jones.

Respondent called Raul Lopez, Romeo Lopez, and herself as witnesses. Romeo and Raul Lopez spoke only limited English. A certified and qualified interpreter translated the questions asked of them into Spanish and translated their responses into English.

The forum received:

a) Administrative exhibits X-1 through X-44 (received by the Hearings Unit or generated prior to hearing) and X-45 through X-47 (received by the Hearings Unit or generated after the hearing).

b) Agency exhibits A-1 through A-23 (filed with the Agency's case summary) and A-27 and A-39 (submitted at hearing; A-39 received for impeachment purposes only). The forum did not receive the documents marked as exhibits A-24, A-25, and A-26 that were attached to the Agency's case summary.

c) Respondent exhibits R-2, R-4 to R-10, R-12, R-13, R-15, R-17 (pages 1 through 8 only), and R-18 (all filed with Respondent's case summary). The forum did not receive the other documents that had been attached to Respondent's case summary, identified as exhibits R-1, R-3, R-7, R-11, R-14, R-16, and R-19 to R-21.

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 or about July 30, 1998, Claimant completed a wage claim form in which she alleged that Respondent had employed her from January 1, 1998, until March 19, 1998, and had not paid her any wages. Claimant stated that she and Respondent had not settled upon a rate of pay and put "\$2,500? per month" as her claimed pay rate. Claimant filed that form with the Agency on or about September 11, 1998.

- 2) Claimant filed an assignment of wages along with her wage claim form.
- 3) On about September 18, 1998, the Agency informed Respondent that Claimant had filed a wage claim against her claiming unpaid wages of \$2500.00 per month from January 24, 1998, to March 20, 1998. The Agency requested a response by October 2, 1998.
- 4) Respondent filed a timely response in which she denied that Claimant ever had worked for her. On October 1, 1998, Respondent sent the Agency another letter reiterating her claim that Claimant never had been her employee.
- 5) On November 6, 1998, Agency compliance specialist Tyrone Jones sent a letter to Respondent in which he indicated that the Agency had evidence corroborating Claimant's claim. Jones informed Respondent that the Agency's investigation would continue and instructed Respondent how to contact him if she wished to do so.
- 6) On January 7, 1999, Jones informed Respondent that the Agency's investigation had revealed "an overwhelming corroboration on behalf of the claimant and her allegation that she worked in the capacity of an employee at your business titled Feather Bed Resort." Jones also noted that the Agency had not been able to substantiate the terms of the employment agreement or the hours Claimant claimed. Therefore, he stated, the Agency would seek to collect the minimum wage of \$6.00 per hour for each hour Claimant worked. He also asked Respondent to provide any evidence refuting the hours Claimant had alleged.
- 7) Jones received at least one telephone call from Respondent repeating her denial that she ever had employed Claimant.
- 8) On or about February 4, 1999, the Agency served Respondent with an Order of Determination. The Agency alleged that Respondent had employed Claimant for 226.25 hours during the period January 24, 1998, to March 20, 1998, and was

required to pay her not less than \$6.00 per hour. The Agency further alleged that Respondent had paid Claimant nothing and, therefore, owed her \$1357.50 in earned and unpaid wages, \$1440.00 as penalty wages, and interest on both amounts. The Order of Determination required Respondent, within 20 days, either to 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.

9) On or about February 9, 1999, Respondent filed an Answer and Request for Hearing in which she denied that she ever had employed Claimant.

10) On September 29, 1999, the Agency requested a hearing. On September 30, 1999, the Hearings Unit issued a Notice of Hearing stating that the hearing would commence at 9:00 a.m. on November 2, 1999. With the Notice of Hearing, the forum included a copy of the Order of Determination, a "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES" and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440. The forum mailed these documents to Respondent at two addresses: one on the McKenzie Highway in Vida, Oregon, and one c/o Coleman Mortgage Company, 697 Country Club Road, Eugene, Oregon.

11) On October 5, 1999, the forum issued a case summary order requiring the Agency and Respondent to submit summaries of the case that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any wage, damages, and penalties calculations (for the Agency only). The forum ordered the participants to submit their case summaries by October 20, 1999, and notified them of the possible sanctions for failure

to comply with the case summary order. The forum mailed the case summary order to Respondent at the two addresses identified in the previous Finding.

12) In the first week of October, 1999, the post office returned to the Hearings Unit the Notices of Hearing it had sent to Respondent. The post office informed the Hearings Unit that the Vida, Oregon address no longer was valid and that the address for Barbara Coleman c/o Coleman Mortgage had changed to 969 Willagillespie Road, Eugene, Oregon 97401.

13) On October 7, 1999, the Hearings Unit sent another copy of the Notice of Hearing to Respondent at the Willagillespie Road address. The forum enclosed an addendum to the case summary order, which consisted of a form designed to assist *pro se* respondents in complying with case summary orders.

14) On October 11, 1999, the forum issued an order requiring Respondent to provide her correct address to the Hearings Unit and the Agency case presenter. With that order, the forum enclosed another copy of the original case summary order. The forum sent the order and enclosure to Respondent at all three addresses (Vida, Country Club Road, and Willagillespie Road).

15) On October 13, 1999, Respondent verbally informed the Hearings Unit Coordinator that her correct address was the one on Willagillespie Road. Respondent also gave the Hearings Unit that information in writing. From the time it received this information until Respondent retained counsel, the forum sent mail to Respondent only at the Willagillespie Road address.

16) The Agency timely filed its case summary on October 20, 1999.

17) In a letter to the forum dated October 19, 1999, Respondent stated:

"After receiving notices sent to me the above referenced case including Order of Determination #98-2904, Order for Respondent to Provide Correct Mailing Address, and Addendum to Case Summary Order I find I am unable to complete the Case Summary Form due to an

extreme illness which has forced me from working since early April of this year. At this moment I am unable to recall even the last names of the people I need to call as witnesses.

"Enclosed you will find a letter from one of my seven attending medical doctors. It is my hope that after the next surgeries I have my health pattern will return to a normalcy."

Respondent enclosed a letter from Veronica Alfero, M.D., which stated:

"To Whom It May Concern:

"Barbara Coleman is being treated in this office since 4/5/99. She is facing overwhelming trauma right now since her surgery and will not be able to handle other matters at this time. Her prognosis is positive but I do not expect her to be recovered sufficiently to handle additional stresses for a period of at least 5 to 6 months."

Nothing about Respondent's letter suggested that she had provided a copy of it to the Agency case presenter.

18) The forum disclosed the *ex parte* communication described in the previous Finding in an October 22, 1999, order. In that order, the forum also stated that it was construing Respondent's letter as a motion for postponement of the hearing and of the deadline for submitting case summaries. The forum asked the Agency to file a response to the motions no later than October 26, 1999.

19) On October 25, 1999, the Agency filed a document opposing Respondent's motion for postponement on two grounds. First, the Agency asserted that the motion was untimely because the Notice of Hearing issued on September 30, 1999, and Coleman did not send her letter until October 19, 1999. Second, the Agency argued that the motion did not present good cause for postponement because Respondent's claim of health problems was vague and did not explain what stresses she could or could not handle. In addition, the Agency claimed that Respondent was actively involved in medical malpractice and other litigation in 1999 and had participated in the legislative process during the summer of that year. According to the Agency, "Respondent has offered no evidence to show why participating in complex medical

malpractice litigation is less stressful than a wage claim action involving one wage claimant who Respondent claims she did not employ."

20) Immediately after receiving the Agency's opposition to the postponement motion, the ALJ contacted case presenter Lohr and Respondent and scheduled a conference regarding the motion. During that conference, which took place on the afternoon of October 25, 1999, Respondent asserted that she would not be able to participate effectively in the hearing because of side-effects of an antidepressant drug she takes -- Wellbutrin. Respondent claimed that the medication prevented her from thinking clearly. Upon questioning by the ALJ, Respondent specifically stated that her use of Wellbutrin was the only reason she felt unable to participate in the contested case hearing. The ALJ rejected Respondent's motion for reasons she explained in an October 27, 1999, order:

"For several reasons, the forum concludes that Respondent will be able to receive a full and fair hearing despite her use of Wellbutrin. First, Respondent appears able to participate in other matters requiring concentration, memory, and mental exertion. Respondent stated during the teleconference that she recently has resumed working several hours each day at the mortgage business she owns and operates. Moreover, in its written response to the postponement motion, the Agency asserted that Respondent is actively pursuing two malpractice suits. During the teleconference, Respondent did not deny that assertion. In addition, Respondent asserted that if the ALJ and case presenter wanted to learn about the basis of her malpractice claims, they should watch the television program 20/20 on November 3, 1999. If Respondent is mentally able to run her business and participate actively in full-blown litigation, she certainly is able to participate in a hearing regarding a single disputed wage claim.

"Second, the forum notes that Respondent did not make any claim that her mental state would preclude her from participating in the hearing until October 19, 1999. The previous day, Respondent spoke with the Agency case presenter and stated only that she might have a doctor's appointment that conflicted with the scheduled hearing date. Respondent did not indicate that her medical condition would prevent her from appearing at hearing. The forum finds Respondent's belated assertion regarding the effects of her medication to be suspect.

"Finally, Respondent discussed her medical problems in great detail during the October 25 teleconference, identifying specific dates on which specific events allegedly occurred. Throughout the teleconference, Respondent was lucid, was able to understand the instructions of the ALJ, and responded logically to questions put to her by the ALJ and the case presenter.

"In sum, the forum finds that, despite Respondent's assertions regarding the effects of Wellbutrin on her mental state, she will be able to effectively participate in the contested case hearing process and will receive a full and fair hearing regarding the disputed wage claim. In short, Respondent has not shown good cause for an extended delay of the hearing. For that reason, **the motion for an indefinite postponement of the hearing date is denied.**"

21) Although the forum rejected Respondent's request for an indefinite postponement, it did allow a short extension because of Respondent's ongoing health issues and the relatively short notice she received regarding the hearing date. During the October 25, 1999, teleconference, the ALJ identified three dates in November on which she would be available to commence the hearing, and asked Respondent and the case presenter to identify which of those dates they would prefer. The case presenter stated that any of the dates would work for her. The ALJ gave Respondent until 4:00 p.m. on Tuesday, October 26, to send the ALJ a facsimile transmission identifying her preferred hearing date. Respondent timely transmitted a single-page handwritten letter to the forum stating that, of the dates indicated, she preferred November 18 and 19. Accordingly, the forum rescheduled the hearing to begin at 9:00 a.m. on November 18, 1999, and to continue, if necessary, on November 19, 1999, and any additional days that might be needed. The forum also:

- a) Extended the deadline for case summaries to November 5, 1999;
- b) Ordered that any further motions regarding the time, place, and/or manner of hearing had to be filed and received by the hearings unit no later than 12:00 noon on Monday, November 1, 1999, unless they were based on events that occurred after that time and could not reasonably have been anticipated; and

- c) Ordered that Respondent should notify the hearings unit by 12:00 noon on Monday, November 8, 1999, if she required any accommodation during the hearing process.

The forum sent this order to Respondent by both facsimile transmission and first-class mail on October 27, 1999.

22) On November 4, 1999, attorney Margaret J. Wilson entered an appearance on behalf of Respondent.

23) The same day, Respondent moved to postpone the contested case hearing and the deadline for filing case summaries, claiming four grounds for postponement: 1) that her newly retained attorney did not have sufficient time to prepare for hearing and had prior commitments on the dates set for hearing; 2) that Respondent was considering filing a summary judgment motion and would need more time to do so; 3) that Respondent suffered "from severe depression and diminished concentration levels," which "ma[de] it difficult for her to gather the necessary information to submit to her attorney" and anticipated that she would "be mentally able to fully defend this matter by March, 2000"; and 4) that Claimant would not be prejudiced by a postponement. With the motion, Respondent filed a second letter from Dr. Alfero, which stated that Respondent was being treated for severe depression, discussed her symptoms, and asserted that Respondent was:

"a woman who is extremely depressed and anxious, irritable, can't get out of bed and function at all, cannot take care of her business, cannot concentrate or stay focused on a task, is overwhelmed by everything, is no longer attending to her personal grooming as she so meticulously did in the past."

Alfero concluded:

"Given her lack of prior psychiatric history and her previous high level of functioning, I feel her long-term prognosis is good. However, given the severity and duration of her depression, the comorbid anxiety, and her

poor response to treatment thus far, I feel she may require 5 to 6 months to achieve stable remission."

Respondent filed the motion and accompanying documents by facsimile transmission and first-class mail.

24) The forum initiated another telephone conference on November 5, 1999, in which Lohr and Wilson participated. During that teleconference, Lohr submitted an affidavit making factual assertions regarding Respondent's ability to engage in various activities. The ALJ read the affidavit into the record during the November 5 teleconference.

25) At the end of the teleconference, the ALJ verbally denied the motion for postponement. The forum issued an order on November 8, 1999, confirming that ruling, which stated:

"Respondent's motion to postpone the hearing is DENIED. **The hearing shall commence at 9:00 a.m. on November 18, 1999, at the place set forth in the Notice of Hearing.** Respondent's motion to extend the deadline for filing case summaries is GRANTED IN PART. **Case summaries shall be filed by November 12, 1999.** Any summary judgment motions also must be filed by that date.

"\* \* \* \* \*

"By order dated October 27, 1999, the forum postponed the hearing in this matter for approximately two weeks at Respondent's request. In that same order, the forum stated: "Any further motions regarding the time, place, and/or manner of hearing must be filed and received by the hearings unit no later than 12:00 noon on Monday, November 1, 1999, unless they are based on events that occur after that time and could not reasonably have been anticipated." The forum received no motions by that deadline.

"On November 4, 1999, attorney Margaret J. Wilson filed an entry of appearance on behalf of Respondent, a motion to postpone the hearing date and the deadline for filing case summaries, and a supporting affidavit. The motion was based on counsel's assertion of a need for additional time to prepare for the hearing, a conflict between the hearing date and a contract that counsel has to provide legal services to the University of Oregon, the possibility that Respondent might file a summary judgment motion, and counsel's assertion that Respondent's medical condition

'makes it difficult for her to gather the necessary information to submit to her attorney.'

"The next day, Agency case presenter Lohr filed an affidavit in opposition to the motion to postpone. The forum initiated a teleconference at 4:00 p.m. on Friday, November 5, at which Respondent's counsel and the Agency case presenter presented oral argument on the motion. After hearing argument from both sides, the forum denied the motion to postpone the hearing date. The forum did extend the deadline for filing case summaries until Friday, November 12, 1999, and ordered any summary judgment motions to be filed by that same date. This interim order serves to confirm those oral rulings.

"This forum grants opposed motions for postponements 'for good cause shown.' OAR 839-050-0150(5). The forum denies Respondent's second motion for a postponement because it is not based on good cause. This forum has sometimes granted first requests for postponements based on scheduling conflicts of Respondents' lawyers. In this case, however, Respondent unreasonably delayed retaining counsel. Respondent has been aware that this matter would go to hearing since February 1999, when she filed an Answer and Request for Hearing. In the October 25, 1999, teleconference regarding Respondent's first motion for postponement, Respondent identified her use of the anti-depressant drug Wellbutrin as the only reason she felt unable to go to hearing on the originally scheduled date of November 2, 1999. She did not, at that time, indicate that she needed additional time to obtain counsel. The motion also is untimely because Respondent filed it after the November 1, 1999, deadline set in this forum's October 27, 1999, order, which was sent to Respondent both by facsimile transmission and first-class mail. Moreover, it appears that the scheduling conflict will not prevent counsel from assisting Respondent in preparing for hearing, and may not actually preclude counsel's presence during the hearing. In sum, the forum does not find that the scheduling conflict of Respondent's newly retained counsel presents good cause for a postponement in this case.

"The forum also is not persuaded by Respondent's assertion of a need for additional time to prepare for hearing. The Order of Determination sets forth a simple wage claim involving a single claimant. As mentioned above, Respondent herself has had months to prepare her defense to this charge. By the time this matter goes to hearing on November 18, 1999, Respondent's counsel will have had approximately two weeks to prepare, which the forum finds to be adequate. For similar reasons, the forum finds that Respondent's potential interest in filing a summary judgment motion does not constitute good cause for a postponement.

"Finally, Respondent asserts that her depression makes it difficult for her to gather the necessary information to submit to her attorney. Nothing filed with this forum (including the October 26, 1999, letter from psychiatrist Alfero, resubmitted with the November 4 motion to postpone)

comes close to establishing that Respondent is legally incompetent, and Respondent has made no such claim. As the forum stated in its October 27 interim order, Respondent spoke lucidly and logically during the October 25 teleconference, stated that she was able to work at her business several hours each day, and was able to recall details of events that occurred many months ago. The forum continues to find that Respondent will be able to effectively participate in the contested case hearing, with or without counsel, and will receive a full and fair hearing regarding the disputed wage claim. Respondent's depression does not constitute good cause for further delay of the hearing.

"The forum has extended the deadline for case summaries, however, to give Respondent's counsel an opportunity to assist Respondent in presenting her case. **Case summaries must be filed no later than Friday, November 12, 1999.** Respondent's counsel stated that she might wish to file a summary judgment motion. Any such motion also shall be filed no later than November 12, 1999. **The contested case hearing remains set to commence at 9:00 a.m. on Thursday, November 18, 1999, at the place set forth in the Notice of Hearing.**"

The forum also ruled that, given the short time lines involved, it would consider any exhibits attached to the Agency's case summary in deciding whether Respondent was entitled to summary judgment if Respondent filed a summary judgment motion.

26) On November 9, 1999, Respondent requested that the Agency provide a Spanish interpreter for one of Respondent's witnesses. The forum granted that request the next day.

27) Respondent filed a case summary and an amended case summary on November 12, 1999, and the Agency filed a supplementary case summary the same day.

28) On November 12, 1999, Respondent filed a motion for summary judgment on the following grounds:

"1. Claimant was not an employee of Respondent's pursuant to ORS 654.310(2) and therefore this forum lacks jurisdiction over this matter.

"2. Claimant was not employed by Respondent pursuant to ORS 653.010(3) and therefore Respondent is not subject to the minimum wage laws with regard to Claimant.

"3. Claimant cannot establish with certainty any hours of work time for Respondent (since she was never employed) and Claimant is therefore not entitled to any wages pursuant to ORS 653.025."

Respondent submitted her own affidavit and other documentation in support of the summary judgment motion.

29) The Agency filed an opposition to Respondent's summary judgment motion on November 15, 1999, arguing that material issues of fact remained in dispute.

30) On November 15, 1999, the forum denied Respondent's summary judgment motion:

"The Agency alleges, in its Order of Determination, that Respondent employed Claimant from January 24, 1998, through March 20, 1998, and paid her no wages. Respondent denies that she employed Claimant.

"During a pre-hearing conference, counsel for Respondent indicated that she might follow a summary judgment motion, and the forum gave her until Friday, November 12, to do so. The Agency waived its right to have seven days to respond to the motion, though not its underlying right to respond, and the forum indicated that it would attempt to issue a ruling on any summary judgment motion before the date the hearing was scheduled to commence.

"Respondent has now filed a timely motion for summary judgment and the Agency has filed a response. Although Respondent cites three grounds for her motion, they all reduce to a claim that she did not employ Claimant. In her supporting memorandum, Respondent lists what she claims to be undisputed facts, including that 'Respondent never hired Claimant' and 'Respondent did not suffer or permit Claimant to perform work at the motel.'

"A participant in a BOLI contested case hearing is entitled to summary judgment only if '[n]o genuine issue as to any material fact exists and the participant is entitled to a judgment as a matter of law \* \* \*.' OAR 839-050-0150(4)(B). In reviewing a motion for summary judgment, this forum 'draw[s] all inferences of fact from the record against the participant filing the motion for summary judgment \* \* \* and in favor of the participant opposing the motion \* \* \*.' *In the Matter of Efrain Corona*, 11 BOLI 44, 54 (1992), *aff'd without opinion, Corona v. Bureau of Labor and Industries*, 124 Or App 211, 861 P2d 1046 (1993); *see Jones v. General Motors Corp.*, 325 Or 404, 408, 939 P2d 608 (1997). In considering summary judgment motions, this forum gives some evidentiary weight to unsworn assertions contained in the participants' pleadings and other filings. *Cf. In the Matter of Tina Davidson*, 16 BOLI 141, 148 (1997) (considering

contents of the Respondent's answer in making factual findings in a default hearing).

"An 'employer' is 'any person who in this state \* \* \* engages personal services of one or more employees \* \* \*.' ORS 652.310(1). An 'employee' is defined as:

"any individual who otherwise than as 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 652.310(2). The question, then, is whether there is anything in the record from which this forum could infer that Claimant rendered services to Respondent for which Respondent paid or agreed to pay her.

"There are documents in the record, including Respondent's affidavit, from which the forum could conclude that Respondent did not employ Claimant. However, the documents attached to the Agency's case summary and supplemental case summary create a genuine issue of material fact sufficient to defeat Respondent's summary judgment motion. Those documents include the wage claim form that Claimant filed with the Wage and Hour Division, in which she claimed that she had worked for Respondent from January 24, 1998, to March 20, 1998. With that form, Claimant submitted a calendar on which she wrote the number of hours she claims to have worked each day. In addition, a letter from plumber Ted Crane states that Claimant hired him to work for Respondent and that he was introduced to Respondent as Claimant's boss. A letter from Beverly Hadden states that Claimant 'was hired as a manager & carekeeper for [Respondent's] resort' and that she saw Claimant 'at this business daily for long periods of time doing various management duties.' A letter from Kevin Hadden implies that Claimant performed work at Respondent's place of business. A letter marked as Agency Exhibit A-9 states that Respondent told the letter's author on January 25, 1998, 'that she had hired [Claimant] as manager of her motel/cabin complex' and that the author 'saw [Claimant] working daily at [Respondent's] property.' A letter from Nancy Asman states that Asman 'know[s] that [Claimant] was employed by [Respondent] from January through March 1998.'

"Pertinent documentation attached to the Agency's supplemental case summary includes March 1998 letters that the Agency identifies as having been authored by Respondent. Those letters could be construed as acknowledging that Claimant performed work for Respondent. In another March 1998 letter, Claimant appears to assert that Respondent employed her from January 24<sup>th</sup> to March 19<sup>th</sup>. In that letter, Claimant states 'I know you remember what you said about my salary the day you hired me.' That statement constitutes some evidence from which the forum could infer that

Respondent agreed to pay Claimant a salary. Thus, documents in the record, construed in the light most favorable to Claimant, establish that there is a genuine dispute regarding both whether Claimant rendered personal services to Respondent and whether Respondent agreed to compensate Claimant for those services. Consequently, Respondent is not entitled to summary judgment.

"Respondent appears to argue that she cannot be held to be Claimant's employer because there is no evidence that she and Claimant reached an agreement regarding the wage Claimant would receive. Indeed, certain entries on Claimant's wage claim form could be construed as an admission that she and Respondent never reached an agreement regarding Claimant's pay rate. That, however, is not necessarily fatal to a claim that Respondent was Claimant's employer. Where there is no agreement regarding wages, an individual is an 'employee' entitled to the statutory minimum wage as long as he or she renders personal services to another (unless the individual is an independent contractor or copartner or is a participant in a certain type of work training program). *In the Matter of Laverne Springer*, 15 BOLI 47, 67 (1996). The evidence discussed above creates a genuine dispute regarding whether Claimant was Respondent's employee.

"Respondent's motion for summary judgment is DENIED."

That ruling, which the forum faxed to Respondent's counsel on the day it issued, is hereby affirmed.

31) On November 16, 1999, Respondent filed exceptions to case presenter Lohr's response to the summary judgment motion, claiming that Lohr improperly had made legal argument regarding the agency's jurisdiction to hear the contested case. At the start of the hearing, the ALJ explained that she would have denied the summary judgment motion whether or not Lohr opposed the jurisdictional argument.

32) On November 17, 1999, Respondent herself (not Respondent's counsel) filed a statement taking exception to various factual assertions made by Lohr in her affidavit opposing Respondent's second postponement motion. Respondent asked the forum to replace Lohr with "someone with rational reasoning \* \* \* as Case Presenter for Case 15-00." At the beginning of the hearing, the ALJ noted that she lacked authority to

change the case presenter and further stated that, even if she did have that authority, she would not exercise it in this case.

33) On November 10, 1999, Alfero wrote a letter stating that she believed Respondent was "not able to participate effectively in court proceedings at this time because of cognitive impairment (i.e. impaired concentration and memory)." This letter was filed with Respondent's case summary and the forum received it as an exhibit at hearing. Respondent's counsel, Wilson, did not renew the postponement motion based on the content of the letter.<sup>1</sup> Rather, she explained, the letter provided further explanation for Respondent's previous motions. Wilson also asserted that the letter was relevant to explain Respondent's mental state during the hearing and during the pendency of the hearing. Upon questioning by the case presenter, Wilson clarified that she was not arguing that Respondent's testimony at hearing should be considered unreliable. Wilson also clarified that she was not arguing that Respondent was incapable of testifying. See *also* Finding of Fact -- Procedural 43, *infra*.

34) At the beginning of the contested case hearing, Respondent stated that she had received the documents accompanying the Notice of Hearing, including the summary of contested case procedures. Respondent's counsel said she had no questions regarding those documents or the procedures to be followed at hearing.

35) At the beginning of the hearing, Respondent moved for leave to "testify in writing" by submitting certain documents she had authored instead of appearing as a witness. The Agency objected to the proposal on the ground that it would not give the Agency an adequate opportunity for cross-examination. The Agency also formally requested an opportunity to cross-examine Respondent as the author of the documents she proposed to submit in lieu of her testimony.

36) The ALJ first noted that, although Respondent was present in the hearing room, she had the right to leave the hearing and appear only through counsel, and such a decision would not place her in default. The ALJ then ruled that the question to be decided was not whether Respondent could "testify in writing" but, rather, whether each of the documents Respondent proposed to offer would be accepted into evidence if Respondent were not available for cross-examination.

37) The ALJ then ruled on each of the documents Respondent wished to have received as substantive evidence without making herself available for cross-examination, as follows:

a) Respondent's affidavit, labeled as exhibit R-13. The Agency objected to admission of this document and the forum ruled that it would be received only if Agency were given an opportunity to cross-examine Respondent. Because the Agency did eventually have that opportunity, the document was later received into evidence.

b) A listing of hours allegedly worked by some of Respondent's employees, marked as exhibit R-7. The Agency objected to admission of this document and the forum ruled that it would be received only if a foundation for it were laid during the hearing. No such foundation ever was laid and the document was not received into evidence.

c) October 26, 1999, letter from Respondent to the ALJ, labeled as part of exhibit X-19b. The Agency did not object to this document, which the forum received as substantive evidence.

d) A statement authored by Respondent not labeled as an exhibit discussing her psychiatric state and attaching an information sheet on the drug Wellbutrin. The Agency objected to admission of this document and the forum ruled that it would be received only if the Agency were given an opportunity to cross-examine Respondent.

Although Respondent eventually testified, she did not again offer the document and it was not received into evidence.

e) Respondent's answer, labeled as exhibit X-1b. The forum received Respondent's answer as substantive evidence.

f) Respondent's October 19, 1999, letter to the ALJ, labeled exhibit X-12. The Agency did not object to admission of this letter and the forum received it as substantive evidence.

g) Agency exhibit A-19, page 2. The Agency did not object to admission of this document, which the forum received into evidence.

h) October 1, 1998, letter from Respondent to Kay Nichols, labeled exhibit R-18. The Agency did not object to admission of this document and the forum received it into evidence.

i) Letter from Respondent to the forum labeled exhibit X-44. The Agency objected to admission of this document and the forum ruled that it would be received as substantive evidence only if the Agency were given an opportunity to cross-examine Respondent. Because the Agency did eventually have that opportunity, the document was later received into evidence.

Respondent's counsel, Wilson, stated that Respondent would decide at a later point whether she wished to testify in light of these rulings. Wilson also asked whether Respondent's psychiatrist could be present during Respondent's testimony. The ALJ stated that the psychiatrist had a right to be present like any other member of the public, but would not be permitted to take an active role in the hearing.

38) At the start of the hearing, Wilson stated that two of Respondent's witnesses, Raul and Romeo Lopez, "were going to appear tomorrow but they're now afraid to come here because apparently the Claimant has either notified governmental

agencies that they would be appearing or has told them that she was going to do so, and they're afraid that if they show up, they're going to be arrested." Wilson said she had only been notified of this difficulty the previous evening. She also stated that she had been told that both the witnesses had "taken it upon themselves \* \* \* to make statements and have them notarized." Respondent asked to have those notarized statements admitted into evidence. The Agency objected to the request. The forum ruled that it would not accept the statements of Raul and Romeo Lopez as evidence but would allow them to testify by telephone.

39) When it came time for Raul Lopez to testify, the forum learned that he was testifying from the office of Coleman Mortgage, located only a short distance from the BOLI office in Eugene, and that Respondent had left the hearing to let him into her office. Accordingly, the ALJ cautioned Raul Lopez at the beginning of his testimony that he should provide his own answers to the questions asked and not look to Respondent for guidance. Lopez testified credibly that Respondent was not in the same room as him but was waiting in the office lobby. A similar situation occurred when Romeo Lopez testified and the ALJ gave him a similar caution. Both Romeo and Raul Lopez testified through a certified and qualified Spanish interpreter.

40) During discussion of these pre-hearing matters, the Agency served Respondent with a subpoena and witness fees. On Respondent's motion, the forum quashed the subpoena on the ground that the Agency had not identified Respondent as a witness in its case summary.

41) The hearing room was uncomfortably warm, though not intolerable, during the hearing on November 18 and 19, 1999. It was somewhat cooler on the last day of the hearing, November 22.

42) At the close of the Agency's case, Respondent moved to dismiss on three grounds: 1) the forum lacked jurisdiction because Respondent never agreed to pay Claimant at a fixed rate and Claimant, therefore, was not an "employee" for purposes of ORS 652.310(2); 2) Claimant was not employed pursuant to ORS 653.010(3), so the forum lacked jurisdiction over the minimum wage claim; and 3) Claimant had not met her burden of proving the hours and days she worked for Respondent. The ALJ denied the motion for reasons discussed in the opinion section of this order.

43) On the last day of hearing, Respondent decided to testify. She stated that she was taking Wellbutrin, nitroglycerin, Centroid (phonetic), a blood pressure medication, aspirin, and cough medicine. Respondent delivered some of her testimony from a standing position, which gave her some relief from the pain she allegedly suffered after a "big lump fell out of [her] side" the previous evening. The ALJ observed that Respondent testified coherently and logically despite her medical and psychiatric condition, and was able to confer with her attorney throughout the hearing. Indeed, Respondent's counsel specifically stated that she was *not* arguing that Respondent's psychiatric condition rendered her testimony unreliable and that she was *not* arguing that Respondent was incapable of testifying. Respondent herself stated: "I can testify." The forum finds that neither Respondent's medical condition nor any medication she was taking prevented her from participating effectively in the contested case hearing process.

44) The evidentiary record closed on November 22, 1999.

45) On Tuesday, November 23, 1999, the ALJ received a voicemail message from Respondent on her work telephone, which she disclosed in an order dated December 2, 1999:

"On Tuesday, November 23, 1999, the ALJ received a voicemail message from Respondent on her work telephone. The ALJ disclosed the gist of

the message to both case presenter Lohr and Respondent's counsel by leaving messages on their telephone answering machines. Pursuant to OAR 839-050-0310, the forum now places the substance of the ex parte contact on the record by quoting it verbatim:

"Erika Hadlock, please. This is Barbara Coleman. I just wanted her to know that when I left there, I went into the hospital, and because of the conditions in that room, and the rain, and my medical condition, I now have double pneumonia and am very, very sick. And if I live through this, I want to talk to her and tell her don't ever, ever hold another meeting in that room because the doctor told me that's what caused this pneumonia. I was in a weakened condition in the first place and very susceptible and going out in the rain and then coming back into that humid, humid terrible room, this is the result. I've been in the hospital all last night and I just got out but I want you to know this has happened. Goodbye.'

"The forum does not believe the matters Respondent discussed are relevant to any fact in issue in the case, but is disclosing the contact in case either participant feels otherwise."

This message has played no part in the forum's decision regarding this matter.

46) The ALJ issued a proposed order on January 7, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed timely exceptions.

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

1) In early 1997, Respondent Barbara Coleman purchased a distressed resort property that consisted of a four-unit motel and four cabins in Vida, Oregon. In March 1998, Respondent applied for an employer identification number for the resort business. Respondent filed the assumed business name of Feather Bed Resort with the Corporation Division on April 21, 1998. At all material times, Respondent owned another business called Coleman Mortgage, located in Eugene, Oregon.

2) The Feather Bed Resort is located about 35 miles east of Eugene, near the McKenzie River. Claimant lives about 1/2 mile away from the resort.

3) Joyce Fry, a long-term friend of Claimant, lives on property near the Feather Bed Resort and operates a small motel on that property. Fry's daughter and son-in-law, Beverly and Kevin Hadden, also live on the Fry property.

4) After Respondent bought the Feather Bed, she asked Beverly Hadden whether she or a family member might be interested in running the resort. Beverly Hadden declined the job.

5) Sometime after that, Fry mentioned to Claimant that Respondent was looking for a motel manager. Claimant was looking for employment and was excited by the prospect of a job so close to her home.

6) On the morning of January 24, 1998, Fry told Claimant that Respondent was at the resort and suggested Claimant go talk to her. Claimant went to the resort and asked Respondent if she could make an appointment to interview for the position of manager. Respondent said they could talk about it right away. Respondent and Claimant then discussed Respondent's plan for renovating and opening the resort. Claimant told Respondent that she had no motel management experience but explained why she believed she was suited to running the resort. After one or two hours, Claimant asked when Respondent would finish interviewing candidates for the managerial position and Respondent said Claimant had the job. Respondent explained that she wanted somebody who lived close to the resort, who would not need to live on the property, and who did not have a husband who also needed regular work at the resort. Respondent told Claimant she could begin work immediately. Respondent said she also planned to purchase a store and the Eagle Rock Lodge, facilities located near the Feather Bed Resort, and wanted Claimant to manage all three businesses.

7) After Respondent told Claimant she was hired, Claimant raised the issue of compensation. Respondent initially said that Claimant could name her own salary,

then stated that the current director of the Eagle Rock Lodge was making \$4000.00 per month plus room and benefits. Claimant said something about "needing to see how many zeroes" she would need, and drew several zeroes on a piece of paper to indicate to Respondent that she expected to be compensated well for her work. From the way the conversation progressed, Claimant assumed that Respondent was going to pay her about \$4000.00 per month. In fact, Respondent had agreed to pay Claimant for her services, but never directly stated that Claimant would earn \$4000.00 per month or any other specific amount. As Claimant readily admitted at hearing, she and Respondent never reached an agreement regarding Claimant's rate of pay.

8) Claimant understood that many of her job responsibilities, including supervising workers and taking care of guests once the resort opened, would involve working on evenings and weekends and that she essentially would be on call at all times. Claimant believed Respondent had hired her to work on a full-time, salaried basis without fixed hours. For that reason, Claimant did not record the hours she worked each day.

9) Respondent and Claimant agreed that Claimant could do a lot of her managerial work, except for supervising other workers, at her home because the motel did not yet have electric service and was not heated. Respondent showed Claimant where keys to the motel units were hidden so Claimant could unlock the units to let in workers. After Claimant's first week of work, Respondent had a separate set of keys made for Claimant's use.

10) A pay telephone was located outside the resort and Respondent planned to have a sign instructing guests who arrived in the evening to call Claimant at home so she could come let them in.

11) Respondent told Claimant that she could hire an assistant manager to work on those days when Claimant was unavailable. Respondent said that Claimant could decide when she needed to take time off and the assistant manager would get the money Claimant otherwise would have earned during that time.

12) Claimant's meeting with Respondent continued for five or six hours after Respondent agreed to employ Claimant as manager of the Feather Bed Resort. Respondent and Claimant discussed what Claimant's duties would be. For at least the next few weeks, Claimant would focus on readying the units for rental and overseeing other people doing work at the resort. Once the resort opened, Claimant would be responsible for supervising other workers, renting rooms, and generally managing the property. Respondent and Claimant reviewed what work needed to be done in each unit and decided which of them would be responsible for ensuring that particular tasks were completed. Respondent and Claimant agreed that Claimant would order supplies, including shampoo, conditioner, bar soaps, luggage racks, and Gideon Bibles. Claimant took notes during this meeting that reflect portions of her discussion with Respondent.

13) Respondent also said that plumbing, electrical, and light carpentry work needed to be done. Claimant asked whether Respondent was going to hire contractors herself or wanted Claimant to hire them. Respondent said Claimant should do it. Claimant agreed to ask people she knew, including her husband, to do this work for Respondent.

14) The evening of January 24, Claimant told Beverly Hadden that Respondent had hired her to manage the resort. Claimant was elated about getting the job.

15) The same evening, Claimant told her husband, Doug Esch, that Respondent had said that the Eagle Rock director was making \$4000.00 per month and said she thought she would make a similar amount.

16) Because Respondent was eager to open the resort as quickly as possible, Claimant asked her husband whether he would be willing to do the light carpentry work that needed to be done in the motel units. He agreed. The next day, January 25, Doug Esch met with Respondent at the resort and they agreed on the work he would do.

17) That same day, Respondent called Fry and told her that she had hired Claimant as manager of the Feather Bed and had hired her husband to do some work on the premises.

18) Sometime within a few days of January 24, Claimant rewrote her rough notes from her meeting with Respondent and added more information. In the rewritten note, Claimant stated that Respondent had said Claimant could name her own salary.

19) At the time she hired Claimant, Respondent also employed two brothers, Raul Lopez and Romeo Lopez, to perform maintenance and landscaping work on the property. One of Claimant's job duties was supervising the Lopez's work, although she did not keep track of their time and was not responsible for paying them.

20) Raul Lopez speaks only limited English. At some point, Respondent told him that Claimant "was going to be manager" of the Feather Bed Resort. The forum inferred from the totality of Lopez's testimony that, in his mind, a motel can have a manager only after it is open and renting rooms. Consequently, his testimony that Claimant "was going to be manager" is consistent with Respondent having already hired Claimant to prepare the resort for opening.

21) During the remainder of January 1998, Claimant performed various tasks for Respondent, including supervising the Lopez brothers, checking for plumbing leaks,

noting work that contractors needed to do, and identifying other items that needed attention. Claimant did research regarding what other motels paid their staff, how much they budgeted for supplies, the types of supplies they used, their office hours, their expected vacancy rates, and various motel policies. Claimant also researched the price of toiletries to be placed in the motel and cabin bathrooms. Respondent instructed Claimant to deal with personnel from Lane Electric regarding the electricity at the motel. Respondent also instructed Claimant to "get a plumber." Claimant performed these tasks in her role as manager of the Feather Bed Resort.

22) Respondent and Claimant had hoped the resort could open within one or two weeks of the date on which Claimant started work. Various problems arose, such as the water being undrinkable, and the opening was postponed. Each week, Respondent hoped to open, and each weekend, Claimant tried to prepare for that event.

23) Because Respondent hoped to open the resort quickly, Claimant arranged for several people she knew personally to do work at the facility. One of those contractors was Claimant's husband, Doug Esch, as stated in Finding of Fact -- the Merits 16, *supra*. Although Doug Esch worked as an operator at the Cougar Dam, he had done general contracting work in the past. Esch did light carpentry jobs for Respondent, including replacing counters and cabinets in the motel kitchenettes and fixing door jambs. Respondent paid Esch promptly for that work. Claimant also arranged for Les Schmig, who worked with Esch at the Cougar Dam, to perform electrical work and for Ted Crane, a licensed plumber, to do plumbing. When Claimant introduced each of these contractors to Respondent, she called Respondent her boss. Respondent did not contradict that characterization of her business relationship with Claimant. Claimant kept track of the work the contractors performed at the Feather Bed Resort and checked its quality.

24) Although Schmig submitted his bill to Respondent on February 9, Respondent did not pay either him or Crane for their work until March 16, 1998.

25) On January 29, 1998, someone from Jerry's Home Improvement Center told Claimant that plastic needed to be placed under the motel units to prevent moisture from collecting. Respondent authorized Claimant to take care of this problem.

26) On February 1, 1998, somebody purchased supplies for the resort from Wal-Mart, including four "knife sets."

27) Claimant's duties at the Feather Bed Resort in February 1998 were similar to what they had been in January. She generally went to the resort several times each day to check on the work of the contractors and Raul and Romeo Lopez. Claimant obtained copies of the laws governing facilities like the Feather Bed Resort and familiarized herself with them. During the time she worked for Respondent, Claimant frequently called Joyce Fry for information on renting motel units. She also obtained guest registration slips from Fry to use at the resort.

28) Throughout the time that Claimant worked for Respondent, several people who lived in the neighborhood saw her working at the resort.

29) Respondent arranged for contractors to do work related to the septic system and propane gas at the resort. Claimant followed Respondent's instructions to be present at the resort property or at her home at specific times so she could let these contractors into the buildings. She also spoke to the propane gas worker about the heaters in the cabins.

30) Claimant usually saw Respondent at the resort on weekends and spoke with her several times each week by telephone about such things as what the workers were doing and what supplies were needed.

31) By mid-February, Respondent had not paid Claimant any money for the work she had performed at Feather Bed. Claimant asked Respondent what she had decided about Claimant's pay as a polite way of stating that she wanted her wages. Respondent said she had discovered that other motels did not pay their managers much. Claimant asked again what Respondent intended to pay her and Respondent suggested she would pay Claimant something but did not mention a specific amount.

32) Claimant continued working for Respondent because, in her words, she is "not a quitter." Claimant had arranged for Schmig and Crane to work on Respondent's property and felt obliged to ensure they were paid. In addition, Claimant still was enthusiastic about running the resort. She believed that Respondent eventually would pay her and that things "would work out."

33) Sometime in late February or early March, Doug Esch installed and stained some wood moulding in two of the motel units at Respondent's request. Esch submitted his bill for that work on March 6, 1998.

34) On February 27, Respondent told Claimant that she planned to open the resort on Friday, March 6. Around this time, an inspector informed Claimant that the resort's water was still bad.

35) In early March, Claimant arranged for one of her friends, Judith Kindt, to work as assistant manager on weekends and arranged for another of her friends, Cherie Teuscher, to stay in her house and be available to work at the resort when Claimant was out of town. Claimant told Kindt that Respondent would call her to arrange a meeting, but that never happened.

36) On March 2, 1998, at Respondent's instruction, Claimant waited for a sewer contractor to come to the motel. Claimant and the contractor waited several hours for Respondent to show up so the contractor could explain what needed to be

done. Claimant did not understand why Respondent felt it was necessary for both of them to be there to talk to the contractor.

37) On March 6, 1998, Claimant received no calls from Respondent. She called and left a message for Respondent, which she did not return. The phones near Claimant's home and the resort later "went down" and Claimant drove to Eugene to try to talk to Respondent about the water situation.

38) On Saturday, March 7, Claimant was supposed to meet Respondent at the resort. When Respondent did not appear, Claimant asked Raul to have Respondent call Claimant at home when she arrived. Respondent did not call. Claimant went to the resort in the late afternoon to check the workers' work and found Respondent there. Respondent said she was going to open the resort that night, which puzzled Claimant because the water still had not been approved, the motel did not yet have a credit card machine, and there was no "open" sign. In Claimant's view, the motel could not open under those circumstances. Claimant told Respondent that she planned to go to town that evening and Respondent became angry with her.

39) At about six o'clock that evening, Respondent pulled her car into the Haddens' driveway, threw up her hands, and told Beverly Hadden that she was in total shock that her manager had the nerve to take off on a Saturday night when she should have been renting the motel units.

40) Sometime that weekend, Respondent told Claimant that she was dissatisfied with the moulding Esch had installed and stained because it was lighter than other moulding in the motel units.

41) Claimant worked on Sunday, March 8. She tried calling Respondent, who said they could talk later. Claimant brought Teuscher to the resort to interview for the

assistant manager position, but Respondent was not there. Claimant left Respondent a message regarding what still needed to be done to ready the resort to open on Monday.

42) Claimant worked on Monday, March 9, and tried calling Respondent several times, but received no answer.

43) Sometime after Respondent complained about Doug Esch's moulding work, but before the Esches received Respondent's March 16, 1999, letters (see Findings of Fact -- The Merits 47 and 48, *infra*), Claimant and Doug Esch took photographs inside some of the motel units to show the quality of the work he had done. One of those photographs shows a knife set sitting next to the sink.

44) From March 10 through 13, Claimant was out of town. Claimant had planned that Teuscher would work at the motel while she was gone.

45) On March 16, Claimant felt that the units were ready to rent. She called Respondent several times but Respondent would not speak to her.

46) Sometime during March, a credit card machine arrived at the resort. Claimant and Respondent previously had agreed that Claimant would operate the machine, so Claimant opened the package and set up the device. To do that, she briefly had to turn on the electric breakers in one of the motel units.

47) On or about March 16, 1998, Respondent sent Claimant a letter stating, in pertinent part:

"It is my understanding from Crane Plumbing, that did the work on the motel, you are to return from your vacation on March 16th. \* \* \*

"\* \* \* \* \*

"On the very day I was able to open the motel you told me you were going to town and the next day you took off on a vacation. I did not feel you were honest or above board with me.

"Your employment is not needed or wanted in my McKenzie project. \* \* \*"

In the letter, Respondent also complained about the moulding work Claimant's husband had done at the Feather Bed and indicated she was not going to pay the bill he had submitted. Claimant received this letter on March 19, 1998.

48) Respondent sent Claimant a second letter dated March 16 stating, in pertinent part:

"You have more gall than anyone I've ever met. To think you could name your own time you work and take two one week vacations, etc. in three weeks time. Especially when I was opening is beyond belief.

"It is obvious that you have no concept of work ethics. You do not tell the owner of the company your plans to work for 'when you'll be able to work' and tell her how to run her own business. Unbelievable!!

"You are to give my key to Roul and STAY out of my houses and motel. How dare you open my sealed money credit machine and ordering Raul to turn on the breakers in #3 cabin when I especially told him to keep them OFF!

"Your [*sic*] the most negative person I have ever met. You only know the down side of all circumstances you definitely have an Attitude Problem. I want no part of."

Claimant also received this letter on March 19. She interpreted the two letters as meaning she was fired. March 19, 1998, was the last day Claimant performed work for Respondent.

49) On March 20, 1998, Doug Esch wrote to Respondent explaining his bill for the latter part of his work and reiterating that Respondent owed him \$160.48 for the work he had performed.

50) The next day, Claimant wrote Respondent a letter stating, in pertinent part:

"Barbara, I was hired by you on Jan. 24th and you fired me Mar. 19th. That is 2 days short of 8 weeks. You mentioned remembering business dealings from over 44 years ago, so I know you remember what you said about my salary the day you hired me. As you mentioned, I too want to be dealt with honestly, and not be taken advantage of. Since you haven't paid me anything for nearly eight weeks work, I would appreciate payment this week, thank you.

"In reading your letter, I noticed several dates that need adjusting, i.e. 'On the very day I was able to open,' was *Thursday, 3/5 not Saturday 3/7*, 'and the next day you took off on vacation.' On Sunday, the day I supposedly left on vacation, you put up the neon Open sign, and I brought up a woman I wanted you to meet, but you weren't there. I called you twice Sunday and left a message Sunday evening, for you to call me. On Monday I was at the Motel, in fact, while I was at work, I asked to use Joyce Fry's dryer, because mine had broken that morning. I also called you, both from the motel and my home, and left messages for you to return my calls both at your home and office, but you refused to answer the phone messages. There are other errors in your letter. Maybe this is where some of the misunderstandings arose. I would like to discuss this with you, so we can become friends again.

"I see you took my suggestion last Tuesday of getting an open sign set out. They look very nice."

51) A week or two later, Claimant and Doug Esch saw that Respondent was at the resort and went there to ask her for Claimant's pay and for the money they felt Respondent owed Doug Esch for the moulding work he had done. Respondent said she was not going to pay Claimant and refused to acknowledge that Claimant had done any work for her. She also refused to pay Doug Esch's second bill.

52) Respondent never has paid Claimant any money for the work Claimant performed for her.

53) All the motel-related work Claimant did between January 24 and March 19, 1998, was as Respondent's employee. Claimant did not do the work out of friendship or merely to educate herself regarding the hotel management business.

54) After she first spoke with a BOLI investigator about her claim, Claimant completed a calendar indicating the number of hours she estimated she had worked for Respondent on each day from January 24, 1998, through March 19, 1998. Claimant based the estimate on her notes regarding particular tasks she had performed on certain days, her knowledge regarding how long those tasks took, and her recollection of events.

55) Claimant estimated that she worked a total of 227.75 hours for Respondent. She acknowledged that, on January 24, one or two hours of the seven hours she recorded for that day were for an interview. Claimant was not yet an employee during that interview and the forum has deducted two hours from Claimant's estimate of the total hours she worked. The forum finds that Claimant worked a total of 225.75 hours for Respondent.

56) Claimant did spend some of the time she recorded on the calendar in transit between her home and the motel. Given that Claimant lived only 1/2 mile from the motel, the forum finds that amount of time to be negligible. Moreover, that travel occurred during the work day. Respondent had authorized Claimant to work from her home and understood that Claimant sometimes would have to travel from her home to the motel to deal with matters there.

57) Claimant and her husband home-schooled their teen-aged son during early 1998 and he occasionally brought Claimant her lunch when she was at the motel or delivered other messages. Claimant did not spend time teaching her son or visiting with him during the hours she was performing work for Respondent.

58) Claimant believed Respondent was going to pay her about \$4000.00 per month to manage the Feather Bed Resort as well as the Eagle Rock Lodge and a store once Respondent purchased those other businesses. Claimant wrote "\$2500?" as her monthly salary on BOLI's wage claim form because she had managed only the Feather Bed Resort from January through March 1998 and thought she was not entitled to the entire amount Respondent had mentioned for managing all three facilities.

59) On April 16, 1998, somebody purchased various supplies from Wal-Mart for use at the resort, including four nine-piece cutlery sets.

60) On October 9, 1999, Laura Miles started working full-time for Respondent's other business -- Coleman Mortgage -- as a receptionist and typist. Miles observed that Respondent was present at the Coleman Mortgage office every weekday from then until November 8, 1999, when Miles quit her job. Respondent worked full-time at the office except on a couple of occasions when she either came in late or left early because she had doctor's appointments. During the month that Miles worked for her, Respondent closed two mortgage deals and had additional clients come in to submit mortgage applications.

61) Respondent dictated her October 19, 1999, letter to the ALJ to Miles, who typed it. Miles was surprised by Respondent's assertion in that letter that her illness had "forced [her] from working since early April" because Respondent was working at the office every day. Miles did not ask Respondent about the statement, but Respondent said something like, "how can I work -- I have to do all this stuff." Miles assumed that Respondent meant she could not do her mortgage work because she was busy with litigation.

62) On November 8, 1999, Miles received a telephone call from a woman who told her that she was going to be served with a subpoena to testify in this case. Miles went into Respondent's office and told her about the call. Miles suggested that maybe she could submit a statement in writing instead of testifying in person. Respondent told Miles to call the case presenter and tell her that she and Respondent could not be out of the office at the same time and to also tell the case presenter that Miles did not know anything about the case. Miles started heading back to the reception area to call the case presenter, but Respondent told her to make the call from Respondent's office, in Respondent's presence. Miles called the case presenter and left a message. Later that day, Miles quit her job.

63) About a week before the hearing started on November 18, 1999, Respondent told Fry that Claimant had "turned in Raul."

64) Raul Lopez testified credibly that he was not sure why he was testifying by telephone. Earlier, Respondent had told him that he would have to make a written statement. When asked if he had told Respondent that Claimant had threatened him, he said, "Threatened to do what?" in a puzzled tone of voice. He then stated that nobody had threatened to turn him into the Immigration and Naturalization Service. Romeo Lopez also testified that nobody had threatened to turn him in to any government agency if he testified at the hearing.

65) Raul and Romeo Lopez both testified credibly that they never had spoken with Wilson, Respondent's counsel, before she questioned them at the hearing.

66) Every aspect of Claimant's testimony was completely credible. Claimant gave straightforward, non-evasive answers to all questions asked. She did not exaggerate any facts to enhance her claim, despite many opportunities to do so. Nor did Claimant exhibit undue anger or frustration with Respondent. Rather, Claimant appeared to be a highly honest, ethical woman who simply wanted to be paid for the work she had performed. The forum finds Claimant's testimony to be truthful in all respects.

67) The testimony of each of the Agency's other witnesses also was credible. The witnesses who were friends of Claimant readily acknowledged that fact. Those who testified that they "knew" Claimant was Respondent's manager did not hesitate to admit that their knowledge arose largely from what Claimant had told them. Those who saw Claimant working at the resort did not exaggerate the scope of the tasks they observed her performing. The forum does find that the memory of Joyce Fry has faded somewhat over time, and has not given her testimony at hearing as much weight as it

has the testimony of the other witnesses. The forum has credited Fry's written statement, which she wrote much closer in time to the events at issue.

68) Several witnesses testified extensively regarding whether Esch, Schmig and Crane needed licenses to perform the work they did and whether Respondent or the contractors were required to get permits for that work. The forum finds those issues irrelevant to the question of whether Claimant was Respondent's employee, and therefore has not made findings concerning them, with one exception. Respondent testified, in an apparent attempt to impeach Claimant, that Claimant had told her that all three of the contractors were licensed, which they were not. The forum accepts as fact Claimant's contrary testimony that she never told Respondent the contractors were licensed and that the subject had never come up.

69) The testimony of Raul Lopez generally was credible, although his memory appeared to have faded significantly and somewhat conveniently regarding the pertinent events. Raul Lopez still is employed by Respondent but also considers Claimant to be his friend and the statements he was willing to make were not biased in favor of either person. Rather, he seemed most comfortable in not giving specific answers to the questions asked, but stated repeatedly that he could not remember exactly what had happened. For that reason, the forum has not given great weight to Raul Lopez's testimony except in those instances where he did not claim memory loss. One of those instances is his recollection that Respondent told him that Claimant was going to be manager of the Feather Bed Resort -- he testified to that fact several times without hesitation or equivocation.

70) Romeo Lopez either had no knowledge of pertinent facts or was unwilling to testify to them. Accordingly, the forum has given his testimony on the merits little weight. The forum had no reason to disbelieve his testimony that nobody threatened to

turn him in to a government agency if he appeared at the hearing and his testimony that he had not spoken to Wilson, Respondent's counsel, before she questioned him during the hearing. Consequently, the forum has credited Romeo Lopez's statements regarding those matters.

71) The forum believed very little of Respondent's testimony. Respondent either lied or seriously misled the forum on several occasions, as described in the following four paragraphs. Her testimony on the merits consisted mainly of stories designed to explain away inconvenient facts. It also conflicted significantly with that of Claimant, whose testimony was far more credible. The forum has given almost no weight to any aspect of Respondent's testimony.

72) Respondent's first significant misrepresentation to the forum occurred when she wrote on October 19, 1999, that she was "unable to complete the Case Summary Form due to an extreme illness which ha[d] forced [her] from working since early April of this year." On October 19, 1999, as Miles testified credibly, Respondent was working full-time at her mortgage business and had been since at least October 9, 1999, the day Miles started working for her.

73) Respondent attempted to mislead the forum a second time during the October 25, 1999, teleconference when she stated that she just recently had been able to return to work for a "few hours a day" and later suggested that her health problems prevented her from working more than "four or three hours" each day. That was not true. As Miles testified, Respondent was working full-time at the time of the teleconference. Respondent misrepresented her ability to work in an unsuccessful attempt to persuade the forum to postpone the hearing for a significant period.

74) Dr. Alfero's October 26, 1999, letter, filed with Respondent's second postponement motion, also contains a misstatement of fact -- that Respondent "can't

get out of bed and function at all." That assertion conflicts with Miles' credible testimony that Respondent was working full-time during October 1999. The forum has no reason to believe that Dr. Alfero intentionally misled the forum. Rather, it appears likely that Respondent may not have been completely honest with her doctor.

75) Respondent's third misrepresentation to the forum concerned her two witnesses, Raul and Romeo Lopez. Respondent asked that the Lopezes be permitted to submit statements in writing, rather than testify, because Claimant had either reported the Lopezes to governmental authorities or had threatened to do so.<sup>2</sup> That was not true. Raul and Romeo Lopez both testified that they had not been threatened. The forum infers that Respondent concocted the story about threats both to portray Claimant in a bad light and to prevent the Agency from cross-examining the Lopezes effectively.

76) Respondent testified that Claimant spent a great deal of time at the resort not as an employee, but merely as an unwanted "pest" who bossed around Respondent's other employees without authorization. Respondent also suggested that Claimant gathered information about the way in which other motels were managed, and passed that information on to Respondent, only to educate herself about the motel industry. The forum was unimpressed by these theories, which it finds Respondent created to explain away the inconvenient fact that Claimant spent a great deal of time engaged in managerial tasks at the resort.

77) Finally, the forum rejects Respondent's attempt to portray Claimant and her husband as trespassers. Respondent testified that Claimant and Doug Esch entered the motel units without permission sometime after April 16, 1998, to take photographs of the moulding Esch had installed, not before March 19, 1998, as the Esches testified. As proof of this offense, Respondent explained that one of the

photographs showed a cutlery set that had not been purchased until April 16. Respondent offered an April 16, 1998, receipt from Wal-Mart for four "9PC CUTLERY" sets to support this claim. The forum finds this evidence unpersuasive. First, Respondent's testimony generally is unreliable and the forum gives no weight to her assertion that the photograph displays items she did not purchase until April 1998. Second, the photograph displays a *knife* set and the record also includes a receipt showing that somebody purchased four "KNIFE SET[S]" for the resort on February 1, 1998, well before Claimant and Doug Esch testified they took the photographs at issue.

### **ULTIMATE FINDINGS OF FACT**

- 1) At all material times, Respondent owned and operated the Feather Bed Resort east of Eugene, Oregon.
- 2) On January 24, 1998, Respondent hired Claimant to work as the manager of the Feather Bed Resort and agreed to compensate her for her work, although she and Claimant did not agree on a specific rate of pay.
- 3) From January 24, 1998, until March 19, 1998, Claimant rendered personal services to Respondent as manager of the Feather Bed Resort. Claimant worked a total of 225.75 hours for Respondent.
- 4) Respondent never paid Claimant any wages for the work she performed.
- 5) Respondent's failure to pay Claimant's wages was willful and more than 30 days have passed since Claimant's wages became due.
- 6) Civil penalty wages, computed in accordance with ORS 652.150 and OAR 839-001-0470, equal \$1440.00.

### **CONCLUSIONS OF LAW**

- 1) ORS 653.010 provides, in pertinent part:
  - "(3) 'Employ' includes to suffer or permit to work \* \* \*.
  - "(4) 'Employer' means any person who employs another person \* \* \*."

Respondent employed Claimant by suffering or permitting her to work as the manager of the Feather Bed Resort.

2) ORS 653.025 provides, in pertinent part:

"Except as provided by ORS 652.020 and the rules of the Commissioner of the Bureau of Labor and Industries issued under ORS 653.030 and 653.261, 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:

\*\* \* \* \* \*

"(2) For calendar year 1998, \$6.00."

Respondent was required to pay Claimant at least \$6.00 for each hour she rendered personal services to Respondent as manager of the Feather Bed Resort.

3) ORS 653.055(1) provides:

"(1) Any employer who pays an employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261 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

"(b) For civil penalties provided in ORS 652.150."

Respondent is liable to Claimant for the unpaid wages Claimant earned plus civil penalties as provided by ORS 652.150.

4) ORS 652.140 provides, in pertinent part:

"(1) 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 was required to pay Claimant the wages due her under the minimum wage law no later than the first business day after March 19, 1998, and violated ORS 652.140 by failing to do so.

5) 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."

OAR 839-001-0470 provides:

"(1) When an employer willfully fails to pay all or part of the wages due and payable to the employee upon termination of employment within the time specified in OAR 839-001-0420, 839-001-0430 and 839-001-0440, the employer shall be subject to the following penalty:

"(a) The wages of the employee shall continue from the date the wages were due and payable until the date the wages are paid or until a legal action is commenced, whichever occurs first;

"(b) The rate at which the employee's wages shall continue shall be the employee's hourly rate of pay times eight (8) hours for each day the wages are unpaid;

"(c) Even if the wages are unpaid for more than 30 days, the maximum penalty shall be no greater than the employee's hourly rate of pay times 8 hours per day times 30 days.

"(2) The wages of an employee that are computed at a rate other than an hourly rate shall be reduced to an hourly rate for penalty computation purposes by dividing the total wages earned while employed or the total wages earned in the last 30 days of employment, whichever is less, by the total number of hours worked during the corresponding time period."

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

6) ORS 653.055(3) provides, in pertinent part:

"The Commissioner of the Bureau of Labor and Industries has the same powers and duties in connection with a wage claim based on ORS 653.010 to 653.261 as the commissioner has under ORS 652.310 to 652.445 \* \* \*."

ORS 652.332 provides, in pertinent part:

"(1) In any case when the Commissioner of the Bureau of Labor and Industries has received a wage claim complaint which the commissioner could seek to collect through court action, the commissioner may instead elect to seek collection of such claim

through administrative proceedings in the manner provided in this section, subject to the employer's right to request a trial in a court of law. \* \* \*

The commissioner has the same authority to initiate administrative proceedings regarding claims for failure to pay the minimum wage under ORS Chapter 653 as he has to initiate administrative proceedings regarding ORS Chapter 652 claims for failure to pay wages upon which the employer and employee agreed. The commissioner has jurisdiction over this proceeding and the authority to issue an order requiring Respondent to pay unpaid wages and penalty wages to Claimant.

### **OPINION**

#### **RESPONDENT EMPLOYED CLAIMANT AND OWES HER \$1354.50 IN UNPAID WAGES**

To establish a prima facie case supporting a wage claim, the Agency must prove: 1) that Respondent employed Claimant; 2) any pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) that Claimant performed work for Respondent for which she was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. *See In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 260 (1999). The dispute in this case centers on the first element -- whether an employment relationship existed between Claimant and Respondent.

#### **A. Respondent Employed Claimant**

The forum finds that Respondent did employ Claimant to manage the Feather Bed Resort and prepare it for opening. Claimant testified with absolute credibility that Respondent hired her for that job. This forum would conclude from Claimant's testimony alone that Respondent had hired her. There is, in addition, ample corroborating evidence in the record, such as Fry's statement that Respondent told her in January 1998 that she had hired Claimant. Further confirmation came from Beverly Hadden, who testified that Respondent came to her the night of March 7, 1998, and

said she was in total shock that "her manager" had left on a Saturday night when she should have been renting the motel units. Respondent never claimed that she had employed someone other than Claimant as manager at that time, and it was Claimant who went to town that evening despite Respondent's unrealistic plans to open the motel. In addition, several people who lived near the resort testified credibly that they frequently saw Claimant working at the property.

Further evidence that Respondent had hired Claimant comes from Respondent's own letters to Claimant. In one March 16, 1998, letter, Respondent expressed her displeasure that the day she planned to open the motel, Claimant said she was going out of town and then left on a vacation. If Claimant was not working for Respondent, Respondent should have been indifferent to her vacation plans. In the other March 16 letter, Respondent again stated her displeasure that Claimant had taken vacation at the time Respondent was trying to open the resort. These letters simply are inconsistent with Respondent's testimony that she never employed Claimant and that any time Claimant spent at the resort property was unwelcome.

In sum, the forum finds that Respondent "suffered or permitted" Claimant to work as the manager of the Feather Bed Resort. Consequently, an employment relationship existed between them. See ORS 653.010.

**B. Respondent and Claimant Did Not Agree on a Pay Rate that Exceeded the Minimum Wage**

As Claimant readily admits, she and Respondent did not agree on the specific wage that Claimant would receive. Consequently, Respondent was required to pay Claimant at least the minimum wage, which was \$6.00 per hour in 1998.

Respondent argues that because she did not agree to pay Claimant at a "fixed rate," Claimant was not her "employee" as that term is defined in ORS 652.310(2).<sup>3</sup> She concludes that the Commissioner of the Bureau of Labor and Industries lacks

jurisdiction over this case because he has jurisdiction only over wage claims of such "employees." See ORS 652.330, ORS 652.332.

Respondent's argument fails because it attempts to limit the scope of the commissioner's jurisdiction under chapter 653 by importing definitions applicable only to ORS chapter 652. As the Oregon Court of Appeals has explained, ORS chapter 652 "governs claims for unpaid **agreed** wages." *State ex rel. Stevenson v. Youth Adventures*, 42 Or App 263, 600 P2d 880, 881 (1979) (emphasis added). Consequently, it makes sense that the definition of employee applicable to that chapter provides that the employer must have agreed to pay the employee at a fixed rate. ORS chapter 653, on the other hand, "governs claims for unpaid minimum and overtime wages." *Id.* For purposes of chapter 653, a person is an "employee" of another if that other "suffer[s] or permit[s]" the person to work. ORS 653.010; see *State ex rel Roberts v. Bomareto Ent., Inc.*, 153 Or App 183, 188, 956 P2d 254 (1997), *rev den* 327 Or 192 (1998).<sup>4</sup> No agreement regarding a pay rate is needed. Because Respondent suffered or permitted Claimant to work for her, Claimant was Respondent's employee for purposes of ORS chapter 653.

The commissioner's authority to enforce chapter 653 minimum wage claims is set forth in ORS 653.055(3), which states that the commissioner "has the same powers and duties in connection with a wage claim based on ORS 653.010 to 653.261 as the commissioner has under ORS 652.310 to 652.445 \* \* \*." The latter statutes authorize the commissioner to take assignments of wage claims and to seek collection through administrative proceedings. Accordingly, the commissioner has jurisdiction over this contested case proceeding, in which the Agency seeks to collect the wages Respondent owes Claimant under the minimum wage law. *Cf. In the Matter of Laverne Springer*, 15 BOLI 47, 67 (1996) (the absence of an agreement to pay wages "cannot

take [a person] out of the definition of 'employee' where a minimum wage law required that [the person] be paid a minimum wage").

**C. Claimant Performed 225.75 Hours of Work for Respondent for Which Respondent Owes Her \$1354.50**

It is the employer's duty to maintain accurate records of the hours that employees work. Where the forum concludes that a respondent employed a claimant without proper compensation, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. Where the 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." *In the Matter of Norma Amezola*, 18 BOLI 209, 218 (1999) (internal quotation marks and brackets omitted).

Here, Respondent kept no record of the days or hours that Claimant worked. The forum has accepted Claimant's credible testimony that she determined the hours she worked from her recollection of what had happened on certain days and by reviewing notes of tasks she had performed for Respondent and calculating the amount of time spent completing those tasks. The forum concludes that Claimant's good-faith estimate that she worked 227.75 hours for Respondent is unexaggerated, reasonable, and forms a proper basis for an award of damages in this case. The forum has deducted two hours from Claimant's estimate to account for the time she spent interviewing with Respondent before she was hired on January 24, 1998.

The forum finds that Claimant performed 225.75 hours of work for Respondent. She was entitled to receive at least the statutory minimum wage rate of \$6.00 per hour, for a total of \$1354.50. Respondent has paid Claimant no portion of that amount and, therefore, owes Claimant \$1354.50 in unpaid wages.

## **RESPONDENT OWES CLAIMANT \$1440.00 IN PENALTY WAGES**

The forum may award penalty wages where the respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission "willfully" if he or she acts (or fails to act) intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent, as an employer, had a duty to know the amount of wages due her employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jake Coke*, 3 BOLI 238, 242 (1983).

Here, Respondent hired Claimant, was aware that Claimant was performing services on her behalf, and intentionally refused to pay her any wages. From these facts, the forum infers that Respondent voluntarily and as a free agent failed to pay Claimant any of the wages she earned from January 24 through March 19, 1998. Respondent acted willfully and is liable for penalty wages.

As this forum previously has explained, penalty wages are calculated in accordance with the relevant laws and Agency policy as follows:

"Total earned during the wage claim period divided by the total number of hours worked during the wage claim period, multiplied by eight hours, multiplied by 30 days.' \* \* \* Statement of Agency Policy, July 23, 1996."

*In the Matter of Mark Johnson*, 15 BOLI 139, 143 (1996); see ORS 652.150; OAR 839-001-0470. Respondent owes Claimant \$1440.00 in civil penalty wages (\$1354.50 divided by 225.75 hours = \$6.00 per hour, times 8 hours = \$48.00, times 30 days = \$1440.00).

### **ORDER**

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages and civil penalty wages she owes as a result of her violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders

**Barbara Coleman, dba Feather Bed Resort**, 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 Shannon Esch in the amount of TWO THOUSAND SEVEN HUNDRED NINETY-FOUR DOLLARS AND FIFTY CENTS (\$2794.50), less appropriate lawful deductions, representing \$1354.50 in gross earned, unpaid, due, and payable wages and \$1440.00 in penalty wages, plus interest at the legal rate on the sum of \$1354.50 from April 1, 1998, until paid and interest at the legal rate on the sum of \$1440.00 from May 1, 1998, until paid.

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<sup>1</sup> The forum notes that it would not have granted such a request even if it had been made. As explained in Finding of Fact -- the Merits 43, *infra*, neither Respondent's medical condition nor any medications she was taking prevented her from participating effectively in the contested case hearing process.

<sup>2</sup> It actually was Respondent's counsel, Wilson, who told the forum that these alleged threats had been made. Wilson stated, however, that she had only learned of the threats the previous evening. The forum infers that Respondent was the person who told Wilson that Claimant had threatened the Lopezes because the Lopezes testified credibly that they never had spoken to Wilson before she questioned them during the hearing.

<sup>3</sup> ORS 652.310 defines an employees as an individual whose employer "pays or agrees to pay such individual at a fixed rate \* \* \*."

<sup>4</sup> There are some exceptions to this definition of employee, such as persons who are independent contractors, but none of those exceptions applies here.