

In the Matter of

DEVON PETERSON, dba Denz Auto Salon

Case No. 68-02

Final Order of Commissioner Dan Gardner

Issued April 1, 2003

SYNOPSIS

Respondent willfully failed to pay two wage claimants their earned wages. The Commissioner ordered Respondent to pay claimants \$1,835.44 in unpaid wages and \$3,482 in penalty wages. ORS 652.140, *former* ORS 652.150, ORS 653.025, *former* OAR 839-001-0470.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 11, 2003, at the Eugene offices of the Bureau of Labor and Industries, located at 1400 Executive Parkway, Suite 200, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Peter McSwain, an employee of the Agency. Seth Courtright and Chris Mercer, wage claimants, were present throughout the hearing and not represented by counsel. Respondent Devon Peterson was present throughout the hearing and was represented by Russell Bevans, attorney at law.

The Agency called the following witnesses: Seth Courtright, wage claimant; Chris Mercer, wage claimant; Roy Harris II (telephonic); Stephen Moe (telephonic); Eric Albanese (telephonic); and Daniel Morris.

Respondent called the following witnesses: Devon Peterson, Respondent; Ryan Brooks (telephonic), Respondent's former employee; Derek Becker (telephonic),

Respondent's former employee; Stephen Benge (telephonic); and Becky Wing, Respondent's girlfriend.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-15 (submitted or generated prior to hearing);
- b) Agency exhibits A-1, A-2 (pp. 1-3 only); A-5, A-6 (pp. 1-3, 5-7) (submitted prior to hearing), and A-11 (submitted at hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On November 2, 2001, Claimant Courtright filed a wage claim with the Agency alleging that Respondent Devon Peterson, dba Denz Auto Salon, had employed him and failed to pay wages earned and due to him.

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

3) On January 4, 2002, Claimant Mercer filed a wage claim with the Agency alleging that Respondent Devon Peterson, dba Denz Auto Salon, had employed him and failed to pay wages earned and due to him.

4) At the time he filed his wage claim, Claimant Mercer assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Mercer, all wages due from Respondent.

5) On February 15, 2002, the Agency issued Order of Determination No. 01-4962 based upon the wage claims filed by Claimants Mercer and Courtright. The Order

of Determination alleged that Respondents “Devon Peterson and Caverear Denz, partners, dba Denz Auto Salon, Employers,” owed a total of \$2,115.75 in unpaid wages¹ and \$3,357.60 in civil penalty wages,² plus interest, and required that, within 20 days, Respondents either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

6) On February 5, 2002, Respondent Devon Peterson filed an answer and request for hearing.

7) On December 6, 2002, the Hearings Unit issued a Notice of Hearing to Respondents, the Agency, and the Claimants stating the time and place of the hearing as January 7, 2003, at 1400 Executive Parkway, Eugene, Oregon.

8) On January 2, 2003, Respondent, through counsel Bevans, filed a motion to postpone the hearing, based on the assertion that Bevans had not been notified of the hearing date until January 2, 2003, and had a scheduling conflict on January 7, 2003. The Agency did not object and the ALJ reset the hearing for February 11, 2003.

9) At the start of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

10) At the conclusion of the ALJ’s advisory statement, the Agency moved to dismiss Caverear Denz as a Respondent from the Order of Determination based on Respondent’s representation that Caverear Denz was not an actual person. The Agency’s motion was granted.

11) On March 11, 2003, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Devon Peterson owned and operated an auto body and paint shop under the assumed business name of Denz Auto Salon and employed one or more individuals in Oregon. Denz Auto Salon occupied a space the size of two or three basketball gymnasiums.

2) Respondent hired Claimant Courtright in August 2001 to do clean up and prep work. Respondent told Claimant Courtright he would be paid \$6.00 per hour.

3) Claimant Courtright worked for Respondent from August 29 through September 18, 2001. He did clean-up, sanded cars, and other prep work to prepare cars for painting, using Respondent's tools to perform his work. He quit Respondent's employment on September 18, 2001.

4) Claimant Courtright worked Monday through Saturday, taking half an hour for lunch each day. He created and maintained a contemporaneous log of the time he arrived at and left work each day.

5) Claimant Courtright worked 24.5 hours from August 29-31, 46.25 hours the week of September 3-9, 51.5 hours the week of September 10-16, and 11.75 hours on September 17-18, 2001. In all, he worked 116.25 straight time³ hours and 17.75 overtime hours, for a total of 128 hours. Computed at \$6.50 per hour, he earned \$755.63 for his straight time hours. Computed at \$9.75 per hour, he earned \$173.06 for his overtime hours,⁴ for total earnings of \$928.69 in gross wages.

6) As of the date of hearing, Claimant Courtright had not been paid any wages by Respondent.

7) Penalty wages for Claimant Courtright, computed in accordance with *former* ORS 652.150 and *former* OAR 839-001-0470(1)(d), equal \$1,742 ($\$928.69 \text{ gross earnings} \div 128 \text{ hours worked} = \$7.26 \text{ per hour} \times 8 \text{ hours} = \$58.08 \times 30 \text{ days} = \1742).

8) Claimant Mercer is a car enthusiast and an experienced car mechanic. In November 2001, before Respondent hired him, he installed a timing belt and water pump in Respondent's car in exchange for a custom muffler that Respondent had in stock.

9) On November 21, 2001, Respondent hired Claimant Mercer to do clean up, prep work for cars in the shop to be painted, and mechanical work as needed. Respondent told Mercer he would be paid a salary of \$1200 per month, plus commissions on parts installed.

10) Claimant Mercer worked for Respondent from November 21 through December 18, 2001. He quit Respondent's employment on December 18, 2001. He initially used Respondent's tools, then brought his own hand tools and used Respondent's power tools and his own hand tools for the rest of his employment with Respondent.

11) Claimant Mercer worked Monday through Saturday while employed by Respondent. He worked from 8 a.m. to 6 p.m. on weekdays, with 30 minutes off for lunch. Each Saturday, he worked a total of 7 hours.

12) Some of Claimant Mercer's friends brought their cars to Respondent's shop to be worked on while Mercer worked for Respondent. Mercer's friends paid Respondent for the work that Mercer performed on their cars.

13) Respondent was paid for the mechanical work that Claimant Mercer performed on vehicles in Respondent's shop during Mercer's employment.

14) Claimant Mercer worked 7 hours on November 21, 54.5 hours from November 26-December 1, 54.5 hours from December 10-15, and 9 hours on December 17. In all, he worked 96 straight time hours and 29 overtime hours, for a total of 125 hours. Computed at \$6.50 per hour, he earned \$624 for his straight time hours.

Computed at \$9.75 per hour, he earned \$282.75 for his overtime hours, for total earnings of \$906.75 in gross wages.

15) As of the date of hearing, Claimant Mercer had not been paid any wages by Respondent.

16) Penalty wages for Claimant Mercer, computed in accordance with *former* ORS 652.150 and *former* OAR 839-001-0470(1)(d), equal \$1,742 (\$906.75 gross earnings ÷ 125 hours worked = \$7.25 per hour x 8 hours = \$58 x 30 days = \$1740).

17) Claimants Courtright and Mercer met for the first time during the summer of 2002.

18) In 2001, Respondent paid his other two employees \$1200 per month in salary, with bonuses.

19) In 2001, Respondent did not keep a record of the total hours worked by his employees and kept no record of the hours worked by Claimants Courtright and Mercer.

CREDIBILITY FINDINGS

20) Claimant Courtright was a credible witness. He responded forthrightly to questions on direct and cross-examination. He described with particularity the work he performed on four vehicles while in Respondent's employ, and Respondent did not impeach his testimony on this key point.

21) Claimant Mercer was a credible witness. He testified in a forthright manner, responding directly to questions on direct and cross-examination. He testified in convincing detail about each of the five cars that he worked on during Respondent's employment and the work he performed on each car. His testimony about the salary that Respondent promised to pay him was consistent with the amount of salary Respondent paid to his other employees.

22) Devon Peterson was not a credible witness. His testimony was glib and his self-portrait as an honest businessman being taken advantage of by unscrupulous youths was unconvincing. A prime example of this testimony was the following statement: "I wasn't prepared today because I never thought these lies and allegations would make it this far." He theorized that Claimant Mercer filed a wage claim because he heard about Claimant Courtright's claim and thought he could profit from it, but provided no evidence to back up this speculation. He attempted to paint Claimant Courtright as mentally deficient. He claimed that Claimant Courtright's father came to Respondent's shop and demanded that Courtright be paid or he would have Respondent "fucking killed" and described other threats that Courtright's father made, then testified that he "never thought about it again until this trial." He denied that Claimant Mercer ever worked for him, then acknowledged that Mercer asked him for and was given a place to work in Respondent's shop. He had no explanation for allowing this privilege to Mercer. Based on the above, the forum has disbelieved Respondent's testimony whenever it conflicted with the testimony of Courtright or Mercer and has only credited it where it was corroborated by other credible evidence.

23) Stephen Moe was called as a witness for the Agency. He testified that he observed Claimant Courtright at work on several occasions when he went to Respondent's shop to look at his son-in-law's car. However, in a written statement dated October 31, 2001, he stated that he observed Claimant Courtright at Respondent's business and "subsequently learned that my son-in-law had his car painted at Denz's and that Seth did most of the sanding on the vehicle." These statements are irreconcilable. Because of this major contradiction, the forum has not credited any of Moe's testimony concerning Claimant Courtright.

24) Stephen Bengé was called by Respondent as a witness. He testified that he worked at Respondent's business for "work experience" credit from his high school during November and December 2001 and that Claimant Mercer did not work for Respondent. Bengé signed a written statement on behalf of Mercer on January 2, 2002. That statement read:

"Chris Mercer worked with me and others for Devon Peterson at Denz Auto Salon between the dates of November 21, 2001 and December 18, 2001. I heard Mr. Peterson refer to Chris as his employee. I also heard him tell Chris he would pay him his wages due on several occasions but I never saw him do this."

Bengé testified that the original statement was untrue, and that he only signed it because Claimant Mercer promised to fix his car for free if Bengé signed the statement. Bengé testified that he decided to recant his written statement when Mercer started being rude to him and demonstrated a hostile attitude towards Mercer in his testimony. Based on Bengé's demeanor and bias against Mercer, the forum concludes that Bengé was either lying when he signed the original statement, or he told the truth in the original statement and lied during his testimony. Either way, the forum finds his testimony unreliable and has not credited any of it regarding Claimant Mercer.

25) Eric Albanese was called by the Agency as a rebuttal witness. He testified that Respondent had "ruined" his car and demonstrated an extremely hostile attitude towards Respondent in the manner and contents of his testimony. His testimony against Respondent was exaggerated and slanted towards Claimant Mercer. Based on his demeanor and clear bias against Respondent, the forum has not credited any of his testimony.

26) Becky Wing, Respondent's girlfriend of five years, testified on behalf of Respondent. She characterized Respondent's business as "our business" and clearly had a strong financial interest in the outcome of this case. Despite her testimony that she was at Respondent's business every workday in 2001, she claimed she never saw

Claimant Courtright at Respondent's business in August or September 2001, a claim that contradicted the testimony of Respondent, Brooks, Decker, and Courtright. She also testified inconsistently that Claimant Mercer "came in a lot and did his own thing" and that she only "saw him there a couple times." The forum has discredited all of her testimony regarding Claimants Courtright and Mercer.

27) Daniel Morris, a former customer of Respondent's, testified in person on behalf of the Agency. He exhibited a calm, serious demeanor and gave thoughtful, responsive answers on direct and cross-examination. He readily admitted that he did not recall certain facts and testified with specificity concerning his observations at Respondent's shop. He did not have a bias for or against either Respondent or Claimants Courtright or Mercer. The forum has credited his testimony in its entirety.

28) Ryan Brooks is a former employee of Respondent who was called as a witness for Respondent. Brooks did not appear to have a bias against either Respondent or Claimants Courtright and Mercer. The forum has credited his testimony concerning the employment of Claimant Courtright because it corroborates Courtright's credible testimony. In addition, it was partially corroborated by Becker, who testified that although he did not understand that Courtright was an employee, Courtright was repeatedly on Respondent's premises. The forum has not credited Brooks's testimony concerning the employment of Claimant Mercer because it was contradicted by the more credible testimony of Mercer and Decker.

29) Derek Becker is a former employee of Respondent who was called as a witness for Respondent. He testified that he is a friend of Respondent, but did not demonstrate a bias in favor of Respondent in his demeanor or testimony. The forum has credited his testimony concerning the employment of Claimant Mercer because it is consistent with Mercer's credible testimony. The forum has not credited his testimony

that he did not understand that Claimant Courtright was an employee of Respondent's for the reason that it is inconsistent with the more credible testimony of Brooks and Claimant Courtright and because Respondent's business occupied such a large space and was run so loosely that Courtright could have been Respondent's employee and Becker would not have known it.⁵

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Devon Peterson owned and operated an auto body and paint shop under the assumed business name of Denz Auto Salon and employed one or more individuals in Oregon.

2) Respondent hired Claimant Courtright in August 2001 to do clean up and prep work. Claimant Courtright worked for Respondent from August 29 through September 18, 2001, doing clean up, sanding, and other prep work to prepare cars for painting. He quit Respondent's employment on September 18, 2001.

3) Claimant Courtright worked 116.25 straight time hours and 17.75 overtime hours while employed by Respondent. Computed at \$6.50 per hour, he earned \$755.63 for his straight time hours. Computed at \$9.75 per hour, he earned \$173.06 for his overtime hours, for total earnings of \$928.69 in gross wages.

4) As of the date of hearing, Claimant Courtright had not been paid any wages by Respondent. (Testimony of Courtright)

5) Respondent willfully failed to pay Claimant Courtright and Claimant Courtright is entitled to penalty wages in the amount of \$1,742.

6) On November 21, 2001, Respondent hired Claimant Mercer to do clean up, prep work for cars in the shop to be painted, and mechanical work as needed. Respondent told Mercer he would be paid a salary of \$1200 per month, plus commission on parts installed.

7) Claimant Mercer worked for Respondent from November 21 through December 18, 2001. He quit Respondent's employment on December 18, 2001.

8) Claimant Mercer worked 96 straight time hours and 29 overtime hours, for a total of 125 hours while employed by Respondent. Computed at \$6.50 per hour, he earned \$624 for his straight time hours. Computed at \$9.75 per hour, he earned \$282.75 for his overtime hours, for total earnings of \$906.75 in gross wages.

9) As of the date of hearing, Claimant Mercer had not been paid any wages by Respondent.

10) Respondent willfully failed to pay Claimant Mercer and Claimant Mercer is entitled to penalty wages in the amount of \$1,740.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an Oregon employer who suffered or permitted Claimants Courtright and Mercer to work. ORS 653.010(3) & (4).

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent. ORS 652.310 to ORS 652.332, ORS 653.040, ORS 653.261.

3) Respondent violated ORS 652.140(2) by failing to pay Claimant Courtright all wages earned and unpaid by September 25, 2001, five days after he voluntarily quit Respondent's employment, excluding Saturdays, Sundays and holidays. Respondent owes Claimant Courtright \$928.69 in unpaid, due and owing wages.

4) Respondent is liable for \$1,742 in penalty wages to Claimant Courtright. *Former* ORS 652.150; *former* OAR 839-001-0470(1).

5) Respondent violated ORS 652.140(2) by failing to pay Claimant Mercer all wages earned and unpaid by December 26, 2001, five days after he voluntarily quit Respondent's employment, excluding Saturdays, Sundays and holidays. Respondent owes Claimant Mercer \$906.75 in unpaid, due and owing wages.

6) Respondent is liable for \$1,740 in penalty wages to Claimant Mercer. *Former* ORS 652.150; *former* OAR 839-001-0470(1).

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

OPINION

INTRODUCTION

This case involves wage claims by Claimants Seth Courtright and Chris Mercer, two persons whom the Agency alleges worked at Respondent's auto body and paint shop. Respondent denies that it employed either claimant. In order to prevail in this matter, the Agency is required to prove, by a preponderance of the evidence, the following four elements: 1) Respondent employed Claimants; 2) The pay rate upon which Respondent and Claimants agreed, if it exceeded the minimum wage; 3) Claimants performed work for which they were not properly compensated; and 4) The amount and extent of work Claimants performed for Respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230, 262-63 (2000).

CLAIMANT COURTRIGHT

A. Respondent employed Claimant Courtright.

Claimant Courtright testified that Respondent hired him and promised to pay him \$6.00 per hour. He testified as to particular cars that he worked on and the work that he performed on those cars, and that he worked for about three weeks. Ryan Brooks, one of Respondent's regular employees, testified that Courtright worked for about a month and that Courtright scrubbed and sanded on cars to prepare them for painting. The

forum has found the testimony of Courtright and Brooks credible with regard to the circumstances of Courtright's employment. In contrast, the forum found the testimony of all of Respondent's other witnesses on this issue to be unreliable. This is sufficient evidence to prove the first element of the Agency's case with respect to Claimant Courtright.

B. Claimant Courtright was entitled to Oregon's minimum wage.

Claimant Courtright testified that Respondent agreed to pay him \$6.00 per hour. The minimum wage in Oregon in 2001 was \$6.50 per hour, and employers are prohibited from paying their employees a lesser wage. ORS 653.025. See *In the Matter of Leslie Elmer DeHart*, 18 BOLI 199, 208 (1999). Respondent was required by law to pay Courtright \$6.50 per hour for straight time hours and \$9.75 per hour for all overtime hours worked.

C. Claimant Courtright performed work for which he was not properly compensated.

The forum has already concluded that Claimant Courtright was Respondent's employee and performed some work for Respondent. It is undisputed that Courtright has been paid nothing by Respondent. This satisfies the third element of the Agency's case.

D. Respondent owes Claimant Courtright \$928.69 in unpaid wages.

ORS 653.045 requires an employer to keep and maintain proper records of wages, hours and other conditions and practices of employment. Where the forum concludes an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. *In the Matter of Diran Barber*, 16 BOLI 190 (1997), quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946).

Where the employer produces no records, the Commissioner may rely on 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 then may award damages to the employee, even though the result be only approximate. *In the Matter of Usra A. Vargas*, 22 BOLI 212, 221 (2001). This forum will accept testimony of a claimant as sufficient evidence to prove work was performed and from which to draw an inference of the extent of that work -- where that testimony is credible. *In the Matter of Graciela Vargas*, 16 BOLI 246, 254 (1998). In this case, Respondent produced no records and rested its defense on the claim that he never employed Claimant Courtright. In contrast, Courtright credibly testified as to the dates and hours that he worked and produced a contemporaneous record of his work hours. The forum bases its award of unpaid wages and penalty wage calculations on that record. The forum arrived at its total of hours worked by Courtright⁶ by subtracting his 30-minute lunch break from Courtright's record showing his arrival and departure time at work each day. For example, Courtright's calendar shows that he arrived at work at 8:15 a.m. and left work at 8:45 p.m. on August 29. Courtright was credited with 12 hours work time on that day (12/5 hours - .5 hours). The forum did not subtract 30 minutes from August 31 for the reason that Courtright was only at work three hours, from 9 a.m. until noon, on that day. In total, Courtright is entitled to \$928.69 in unpaid, due and owing wages.⁷

CLAIMANT MERCER

A. Respondent employed Claimant Mercer.

Claimant Mercer credibly testified that Respondent hired him and promised to pay him \$1200 per month, plus commissions in convincing detail about the cars he worked on while in Respondent's employ. Derek Becker, one of Respondent's regular employees, also credibly testified that Mercer worked for Respondent and described the

work Mercer performed. Respondent claimed that all work performed by Mercer was as an independent contractor, but provided no reliable evidence to back up this claim. This is sufficient evidence to prove the first element of the Agency's case with respect to Claimant Courtright.

B. Claimant Mercer was entitled to Oregon's minimum wage.

In its Order of Determination, the Agency sought unpaid wages for Claimant Mercer at the rate of \$6.50 per hour. At hearing, Mercer credibly testified that Respondent agreed to pay him \$1200 per month, plus commissions. However, no evidence was presented as to the number of hours of work per week this salary was intended to cover, which makes it impossible to calculate Mercer's regular hourly rate of pay based on a salary of \$1200.⁸ Respondent was required to pay Mercer at least the minimum wage of \$6.50 per hour, and the forum has calculated Mercer's unpaid wages at that rate. Unpaid wages for hours worked in excess of 40 each workweek have been calculated at \$9.75 per hour.

C. Claimant Mercer performed work for which he was not properly compensated.

The forum has already concluded that Claimant Mercer was Respondent's employee and performed some work for Respondent. It is undisputed that Respondent has paid Mercer nothing. This satisfies the third element of the Agency's case.

D. Respondent owes Claimant Mercer \$906.75 in unpaid wages.

ORS 653.045 requires an employer to keep and maintain proper records of wages, hours and other conditions and practices of employment. Where the forum concludes an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. *Barber*, 16 BOLI at 190.

Where the employer produces no records, the Commissioner may rely on 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 then may award damages to the employee, even though the result be only approximate. *Usra Vargas*, 22 BOLI at 212. This forum will accept testimony of a claimant as sufficient evidence to prove work was performed and from which to draw an inference of the extent of that work -- where that testimony is credible. *Graciela Vargas*, 16 BOLI at 254. Respondent produced no records and rested its defense on the claim that he never employed Claimant Mercer. In contrast, Mercer credibly testified as to the dates and hours that he worked. The forum bases its award of unpaid wages and penalty wage calculations on Mercer's credible testimony. The forum arrived at its total of hours worked by Mercer⁹ by subtracting his 30-minute lunch break from the ten hours (8 a.m. to 6 p.m.) that Mercer was at work each day and crediting him with seven hours on both Saturdays that he worked. In total, Mercer is entitled to \$906.75 in unpaid, due and owing wages.

PENALTY WAGES

An award of penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

Respondent, as an employer, had a duty to know the amount of wages due to his employees. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238 (1983). Because Respondent hired Claimants and was usually present at Denz Auto Salon during business hours, the forum concludes that he knew Courtright and Mercer's hours of work. There was no evidence that Respondent acted

other than voluntarily or as a free agent in not paying Courtright and Mercer for the work they performed during the wage claim periods. The evidence shows that he simply chose not to pay them. Therefore, both wage claimants are entitled to penalty wages.

Claimants both voluntarily quit, and their wages became due five days after the dates they quit, not counting weekends and holidays. More than 30 days have elapsed since that date. Penalty wages are therefore assessed and calculated pursuant to *former* ORS 652.150 and *former* OAR 839-001-0470(1). Claimant Courtright is entitled to \$1,742 in penalty wages, and Claimant Mercer is entitled to \$1,740 in penalty wages.¹⁰

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages and penalty wages he owes as a result of his violations of ORS 652.140(2), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Devon Peterson** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Seth Courtright in the amount of TWO THOUSAND SIX HUNDRED SEVENTY NINE DOLLARS AND SIXTY NINE CENTS (\$2,679.69), less appropriate lawful deductions, representing \$928.69 in gross earned, unpaid, due, and payable wages and \$1,742 in penalty wages, plus interest at the legal rate on the sum of \$928.69 from October 1, 2001, until paid, and interest at the legal rate on the sum of \$1,742 from November 1, 2001, until paid.

(2) A certified check payable to the Bureau of Labor and Industries in trust for Chris Mercer in the amount of TWO THOUSAND SIX HUNDRED FORTY SIX DOLLARS AND SEVENTY FIVE CENTS (\$2,646.75), less appropriate lawful deductions, representing \$906.75 in gross earned, unpaid, due, and payable wages and \$1,740 in penalty wages, plus interest at the legal rate on the sum of \$906.75 from January 1, 2002, until paid, and interest at the legal rate on the sum of \$1,740 from February 1, 2002, until paid.

¹ The Agency alleged that Courtright was entitled to \$867.75 and Mercer was entitled to \$1,248 in unpaid wages.

² The Agency alleged that Courtright was entitled to \$1,636.80 and Mercer was entitled to \$1,720.80 in penalty wages.

³ Straight time hours are all hours worked that do not exceed 40 in a given workweek.

⁴ Overtime hours are all hours worked in excess of 40 in a given workweek. OAR 839-020-0030(1).

⁵ For example, Albanese and Morris both testified that they worked on their own cars in Respondent's shop to try and save some money. Also, it was clear to the forum that Bengé worked for Respondent for at least a few weeks during Becker's employment gaining "work experience," yet Decker also testified that he did not recall Bengé.

⁶ See Finding of Fact 5 – The Merits, *supra*.

⁷ Although the Agency only sought \$867.75 in unpaid wages in its Order of Determination, the Commissioner has the authority to award unpaid wages and penalty wages exceeding those sought in an Order of Determination where the wages are awarded as compensation for statutory violations alleged in the Agency's Order of Determination. *In the Matter of Contractor's Plumbing Service, Inc.*, 20 BOLI 257, 273 (2000).

⁸ Where a wage claimant is paid a salary, the claimant's regular hourly rate of pay can only be computed where there is evidence of the agreed number of hours the salary is intended to cover per week or, where hours per week fluctuate, where there is evidence of a "clear mutual understanding of the parties that the fixed salary is compensation for the hours worked each work week, whatever their number[.]" OAR 839-020-0030(3)(e), (f), and (g).

⁹ See Finding of Fact 14 – The Merits, *supra*.

¹⁰ In these circumstances, the Commissioner has the authority to award both wage claimants more than was sought in the Agency's Order of Determination. See fn. 7, *supra*.