

In the Matter of

SEAN E. A. REID and The Orion Driftboat and Watercraft Company LLC.

Case No. 44-04

Final Order of Commissioner Dan Gardner

Issued January 12, 2005

SYNOPSIS

Respondent Orion Driftboat and Watercraft Company employed Claimant from May 1-21, 2003, at the agreed wage of \$9 per hour and did not pay him any wages. Claimant worked 90 hours and earned \$810. Respondent Orion was ordered to pay Claimant \$810 in unpaid, due, and owing wages. Respondent Orion's failure to pay the wages was willful and Respondent Orion was ordered to pay \$2160 in penalty wages. Respondent Reid did not employ Claimant. ORS 652.140(1), ORS 652.150, ORS 652.310, OAR 839-010-0470.

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 November 2, 2004, at the office of the Oregon Employment Department, located at 119 N. Oakdale, Medford, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Jeffrey C. Burgess, an employee of the Agency. Wage claimant James R. Shaughnessy ("Claimant") was present throughout the hearing and was not represented by counsel. Respondent Sean E. A. Reid was present throughout the hearing and represented himself and acted as authorized representative for Respondent Orion

1 Driftboat and Watercraft Company LLC (“Orion”). Senior Trooper Don Jeter, from the
2 Oregon State Police, was also present throughout the hearing to provide security.

3 The Agency called the following witnesses: Claimant; Matt Tynan, Claimant’s
4 former co-worker; Margaret Angier, Claimant’s wife; and Katy Bayless, Agency
5 compliance specialist.

6 The forum received into evidence:

7 a) Administrative exhibits X-1 through X-29 (submitted or generated prior to
8 hearing);

9 b) Agency exhibits A-1 through A-13, and A-16 (submitted prior to hearing).

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

14 **FINDINGS OF FACT – PROCEDURAL**

15 1) On July 9, 2003, Claimant filed a wage claim with the Agency alleging that
16 Respondent Sean Reid (“Reid”), doing business as Orion Driftboat & Watercraft Co.,
17 had employed him and failed to pay wages earned and due to him.

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

21 3) On October 13, 2003, the Agency issued Order of Determination No. 03-
22 2317 based upon the wage claim filed by Claimant. The Order of Determination alleged
23 that Respondents “Sean E. A. Reid and The Orion Driftboat and Watercraft Company
24 LLC, Employer” owed a total of \$810 in unpaid wages and \$2,160 in penalty wages,
25 plus interest, and required that, within 20 days, Respondents either pay these sums in

1 trust to the Agency, request an administrative hearing and submit an answer to the
2 charges, or demand a trial in a court of law.

3 4) On December 11, 2003, Respondent Reid filed an answer and request for
4 hearing in which he alleged that Claimant was an independent contractor. Reid did not
5 deny that Claimant was owed \$810 in unpaid wages and \$2160 in penalty wages. Reid
6 further alleged that the only reason Orion had not paid Claimant was that Claimant had
7 not provided his "registered business number" as provided for in a "mutually agreed
8 upon contract." The answer and request for hearing was not accompanied by written
9 authorization giving Reid the authority to act as authorized representative for
10 Respondent Orion.

11 5) On September 27, 2004, the Hearings Unit issued a Notice of Hearing to
12 Respondents, the Agency, and Claimant stating the time and place of the hearing as
13 November 2, 2004, at the Oregon Employment Department, 119 North Oakdale, Room
14 3, Medford, Oregon.

15 6) On September 30, 2004, the ALJ issued an Interim Order stating that
16 Respondent Orion must be represented by an attorney or authorized representative and
17 that, "except for a letter authorizing a person to appear on behalf of Respondent Orion
18 as an authorized representative, the forum will disregard any motions, filings, or other
19 communications from Respondent Orion unless they are through an attorney or
20 authorized representative." This Interim Order was mailed to the Agency case
21 presenter and to the following addresses:

22 "Sean E.A. Reid, 131 Oak Meadows Place, Ashland, OR 97520"

23 "The Orion Driftboat and Watercraft Company LLC, PMB 222, 1454
24 Ashland Street, Ashland, OR 97520"

25 7) All subsequent Interim Orders issued by the ALJ were mailed to
Respondents at both addresses.

1 8) On September 30, 2004, the forum ordered the Agency and Respondents
2 each to submit a case summary including: lists of all persons to be called as witnesses;
3 identification and copies of all documents to be offered into evidence; a brief statement
4 of the elements of the claim (for the Agency only); and a statement of any agreed or
5 stipulated facts; and any wage and penalty calculations (for the Agency only.) The
6 forum ordered the participants to submit case summaries no later than Friday, October
7 22, 2004, and notified the Agency and Respondents of the possible sanctions for failure
8 to comply with the case summary order. The forum also enclosed a form designed to
9 assist *pro se* respondents in filing a case summary.

10 9) On October 12, 2004, the Agency filed a motion for a discovery order
11 seeking documents and responses to questions. The Agency represented that these
12 documents and responses had been previously requested and not provided.

13 10) On October 12, 2004, the ALJ issued an initial ruling on the Agency's
14 motion directing the Agency to issue interrogatories if it wished to obtain responses to
15 the non-documentary information sought in its motion for discovery order.

16 11) Respondents did not respond to the Agency's motion. The ALJ found that
17 the relevancy of the requested discovery was apparent and issued a discovery order
18 requiring Respondents to provide the documents sought by the Agency.

19 12) On October 21, 2004, Respondent Reid telephoned the ALJ and stated
20 that he needed a postponement for at least 90 days and a corresponding extension of
21 time to file a case summary due to Respondents' need to be represented by an attorney
22 and his current inability to afford an attorney. Reid stated that he had consulted several
23 attorneys and each had asked for a retainer ranging from \$12,000 to \$15,000. The ALJ
24 then initiated a conference call with Reid and Burgess and held a pre-hearing
25 conference. The conference was not tape recorded.

1 13) During the pre-hearing conference, the Agency objected to a
2 postponement on the basis that the Agency had lined up its witnesses and was
3 prepared to proceed, and because Respondent Reid had agreed in August to a
4 November hearing date. The Agency did not object to an extension of time to submit
5 case summaries, so long as the Agency received Respondents' case summary no later
6 than October 26, 2004. Reid stated that he never agreed to a hearing in November and
7 that he had asked for information from Burgess in May that had not been provided. The
8 ALJ advised Reid that the means of obtaining information that had been informally
9 requested and not provided was by filing a motion for a discovery order, as the Agency
10 had done. The ALJ also advised Reid that the Hearings Unit had not yet received
11 authorization for Reid to act as authorized representative for Orion, and that the forum
12 would not consider any of Reid's motions on behalf of Orion until he filed such written
13 authorization. The ALJ told Reid he could file his motions by fax as long as he also
14 faxed copies directly to Burgess and called the ALJ and Burgess to confirm they had
15 received Respondents' faxes and filed hard copies with the Hearings Unit. In response
16 to Reid's question, the ALJ informed him that he could still get an attorney.

17 14) On October 21, 2004, after the prehearing conference, Reid faxed the
18 following documents directly to the ALJ: 1) a written statement authorizing Reid to act
19 as authorized representative for Orion; 2) a motion to postpone the hearing; and 3) a
20 "motion to dismiss interim order case summaries."

21 15) Reid cited the following reasons in support of Respondents' motion to
22 postpone:

23 "1. Respondents need an attorney. Mr. Reid has been told by several
24 attorneys that they required a retainer of \$12,000 to \$15,000 and Respondents cannot currently afford that amount, but expect to be able to
25 afford a retainer within 90 days.

 "2. Mr. Reid never agreed with Mr. Burgess to the scheduling of a
hearing in November.

1 “3. Respondents have made repeated offers to settle the matter that
2 the Agency has refused to accept.

3 “4. The former Agency case presenter made unreasonable demands
4 and threats towards Respondents prior to the transfer of the case to Mr.
5 Burgess in or around May 2004.

6 “5. Mr. Burgess has refused to provide requested information related to
7 this case to Mr. Reid and Mr. Reid believed until recently that the case
8 was still in the negotiating phase. Mr. Reid needs more time to file
9 motions for a discovery order.”ⁱ

10 16) Reid based his motion to dismiss the case summary interim order on the
11 grounds that his name was misspelled in the caption as “Sean A. Reid” instead of “Sean
12 E.A.Reid.”

13 17) On October 22, 2004, the Agency filed its case summary.

14 18) On October 25, 2004, the ALJ issued an Interim Order denying
15 Respondents’ motion for postponement on the basis that Respondents had not stated
16 good cause. The ALJ issued a second Interim Order denying Respondents’ motion to
17 dismiss the Interim Order for Case Summaries. The ALJ faxed this ruling to Burgess.
18 The ALJ telephoned Reid to obtain a fax number so that the Interim Orders could be
19 faxed to Reid. Reid stated he did not have a fax machine and that he could not afford to
20 use someone else’s fax machine. The ALJ told Reid that he had denied Respondents’
21 motions for postponement and to dismiss the Interim Order for Case Summaries.

22 19) After talking with Reid, the ALJ contacted BOLI’s Medford office and made
23 arrangements to fax his two October 25 Interim Orders to that office. The ALJ then
24 faxed those Interim Orders to BOLI’s Medford office and confirmed that they were
25 received. The ALJ telephoned Reid, who lives in Ashland, and informed him that he
 could pick up copies of the Interim Orders at BOLI’s Medford office. Reid responded
 that it was too much of a burden for him to drive to Medford.

 20) On October 25, 2004, the ALJ received Respondents’ motion to “dismiss
 notice of hearing.” Respondents filed this motion on October 21, 2004, by mailing it to

1 the Hearings Unit but did not fax it to the ALJ. Respondents asked that the notice of
2 hearing be dismissed because the “Order attached to the Notice of Hearing” names
3 “SEAN A. REID” and there is no one named “Sean A. Reid” associated with Orion. The
4 ALJ denied Respondents’ motion on the basis that the Agency’s Order of Determination
5 named “Sean E. A. Reid” as a Respondent and Reid had stated that “Sean E. A. Reid”
6 was his correct name.

7 21) On October 27, 2004, Respondents filed a motion to recuse the ALJ
8 based on his “unethical, illegal and prejudicial actions.”

9 22) On October 27, 2004, the ALJ received two phone calls from Reid
10 demanding that ALJ recuse himself from the hearing. Because of Reid’s threatening
11 tone of voice and invective language,ⁱⁱ the ALJ perceived the phone calls as threats and
12 arranged for the presence of an Oregon State trooper at the hearing. After making this
13 arrangement, the ALJ telephoned Burgess to inform him that a state trooper would be at
14 the hearing and the reason why. Burgess informed the ALJ that he had received similar
15 phone calls from Reid.

16 23) On October 28, 2004, the ALJ issued an Interim Order denying
17 Respondents’ motion to recuse. The ALJ denied Respondents’ motion based on
18 Respondents’ failure to support their motion with an affidavit establishing the prejudice
19 of the ALJ.

20 24) On October 29, 2004, Respondents filed a “motion and demand to recuse
21 addendum” in which Respondents disputed the ALJ’s Interim Orders denying
22 Respondents’ motions and requested that BOLI “formally report [the ALJ’s] unethical
23 and perhaps criminal actions to the Oregon State Bar.”

24 25) On October 31, Reid again telephoned the ALJ and left a message that
25 the ALJ perceived as threatening because of Reid’s tone of voice.

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

4 27) Prior to opening statements, the ALJ stated that Reid had made *ex parte*
5 phone calls to him on October 21, 27, and 31, that the phone messages had been
6 recorded and made an administrative exhibit, and that the transcribed phone messages
7 had also been made an administrative exhibit. Burgess and Reid were both given
8 copies of the transcribed phone messages. The ALJ also stated that state trooper Jeter
9 had been asked to be present throughout the hearing based on Reid's phone calls.

10 28) Prior to opening statements, Reid objected to the presence of Jeter,
11 renewed his motions to dismiss the captioned orders and rulings naming Sean A. Reid
12 and Orion as joined Respondents and to recuse the ALJ, and objected to the testimony
13 of any telephone witnesses. The ALJ denied Respondents' motions and declined to ask
14 Jeter to leave.

15 29) After the Agency's opening statement, Reid stated that he wanted to call
16 Burgess as a witness. The ALJ denied Reid's motion on the basis that Respondents
17 had not submitted a case summary.

18 30) At the end of the Agency's case in chief, the Agency asked to have Reid
19 testify as a witness. Reid objected and the ALJ sustained Reid's objection on the basis
20 that the Agency had not listed Reid as a witness on its case summary.

21 31) Reid did not testify or offer any exhibits on Respondents' behalf.

22 32) The Agency offered Exhibit A-2, consisting of a Corporations Division
23 printout reflecting Respondents' business status that was obtained by Burgess through
24 the internet on September 24, 2004. Respondents objected and the ALJ stated he
25 would rule on its admissibility in the proposed order. The Agency asked for a

1 continuance to present substitute evidence if the ALJ did not receive Exhibit A-2 and the
2 ALJ denied the Agency's motion. Exhibit A-2 is admitted for reasons stated in the
3 Opinion.

4 33) During his closing statement, Reid moved to have the case referred to
5 arbitration. The ALJ denied Reid's motion and informed Reid that there was no
6 statutory provision for arbitration in wage claim cases.

7 34) At the conclusion of the hearing, Reid stated that all correspondence from
8 the ALJ and Hearings Unit should be mailed to him at the following address: "Sean E.
9 A. Reid, 131 Oak Meadows Place, Ashland, OR 97520." Reid stated it was
10 unnecessary to send mail to the "PMB 222, 1454 Ashland Street, Ashland, OR 97520"
11 address.

12 35) The ALJ issued a proposed order on November 22, 2004, that notified the
13 participants they were entitled to file exceptions to the proposed order within ten days of
14 its issuance. No exceptions were filed. (Entire Record)

15 **FINDINGS OF FACT – THE MERITS**

16 1) Respondent Orion registered as a limited liability company ("LLC") with the
17 Oregon Secretary of State on May 22, 2002, and was administratively dissolved on July
18 18, 2003. Respondent Reid was Respondent Orion's registered agent. While doing
19 business as an LLC, Orion was engaged in the manufacture of wooden driftboats.

20 2) In or around February 2003, Claimant saw an advertisement in the
21 employment section of the newspaper. In response to the ad, Claimant phoned and
22 spoke with Reid, then went to an interview with Reid. After the interview, Reid called
23 Claimant, told him he "was the lucky candidate," and told Claimant to "come down and
24 talk about [his] employment."

25 3) Reid and Claimant agreed to the initial wage of \$8.50 per hour, with a
raise after two months to \$9 per hour, then another raise to \$10 per hour. They had "a

1 loose agreement” that Claimant would show up to work by 10 a.m., keep his lunch
2 break to 30 minutes, and work until [Reid] said the day was over at 5.” Reid told
3 Claimant that Claimant would work weekdays and sometimes on weekends.

4 4) Claimant was hired to work for Orion for an indefinite period of time. The
5 job he was hired to do was building wooden driftboats.

6 5) Claimant began working for Orion on February 10, 2003. Reid was his
7 supervisor.

8 6) Claimant had one other co-worker, Matt Tynan, who was hired after
9 Claimant and continued working after Claimant left Respondent’s employment.

10 7) When Reid first hired Claimant, he asked Claimant to provide him with a
11 business registry number. Reid periodically asked Claimant for a business registry
12 number throughout Claimant’s employment with Orion. Claimant never gave Reid a
13 business registry number.

14 8) Claimant had a fly fishing guide business at the time he started work at
15 Orion. At the time Reid hired Claimant, Claimant told Reid that he had a two week
16 fishing trip scheduled in Mexico for that business and would need time off for that trip.
17 Claimant took two weeks off to go to Mexico for that business trip during his
18 employment at Orion.

19 9) Claimant worked at Orion from February 10 through May 21, 2003. At
20 Reid’s request, he maintained a written record of the dates, times, and total hours per
21 day that he worked and posted them above Reid’s desk. Claimant did this throughout
22 his employment.

23 10) There was no evidence that Reid maintained an independent record of the
24 hours worked by Claimant.

1 11) Claimant had no experience building wooden driftboats prior to working for
2 Orion.

3 12) While working for Orion, Claimant performed all his work at Orion's facility.

4 13) Reid provided all the tools and materials that Claimant used in his work for
5 Orion. Reid did not ask Claimant to provide any tools.

6 14) Reid directed Claimant's work and told Claimant what to build and how to
7 build it. Claimant was not involved in the design of Respondent's boats.

8 15) In February, March, and April 2003, Reid paid Claimant in cash for the
9 work Claimant performed for Orion. Reid paid Claimant for all hours that Claimant
10 wrote on his time sheet for those three months.

11 16) On May 20, 2003, Reid presented Claimant with a document entitled
12 "INDEPENDENT CONTRACTOR AGREEMENT" and asked Claimant to sign it. The
13 document contained the following language:

14 "INDEPENDENT CONTRACTOR AGREEMENT"

15 "I, _____ agree to work for The Orion
16 Driftboat & Watercraft Company LLC as an independent Boatwright sub-
contractor.

17 "I am responsible for all, and any aspects of liability, insurance,
18 workman's compensation, state and federal taxes, health costs, etc.

19 "It is my responsibility to make The Orion Driftboat & Watercraft
20 Company LLC aware of my Business Registry # _____, within
thirty (30) days of the signing (sic) of this agreement.

21 "Dated this 1 day of March, 2003

22 "

23 "Sub-contractor:

24 "

25 "Sean Reid, The Orion Driftboat & Watercraft Company LLC"

17) Claimant signed the agreement, but Reid did not. After Claimant signed it,
he scratched out "1 day of March, 2003" and wrote in "5/20/03" and initialed it.

1 18) On May 21, 2003, Reid fired Claimant. Earlier, Claimant had borrowed
2 \$100 from Reid. Reid told Claimant that if Claimant paid him back the \$100 and tied 15
3 flies, Reid would give Claimant the money owed to Claimant. Claimant gave Reid \$100
4 and 15 flies in the next two days.

5 19) Reid then told Claimant he would put Claimant's check in the mail and that
6 Claimant would receive it the following Monday. The check did not come in the mail
7 and Claimant called Reid to ask about the check. Reid told Claimant to stop calling him
8 or he would sue Claimant for harassment.

9 20) Claimant worked 90 hours for Respondent Orion between May 1 and May
10 21, 2003, at the agreed rate of \$9 per hour, earning a total of \$810. As of the date of
11 hearing, Claimant had not been paid any of those wages.

12 21) Angier and Bayless were credible witnesses.

13 22) Tynan's testimony was credible except for his statement that he generally
14 started work about 8 a.m. This testimony was not credible because he also testified
15 that he worked similar hours as the Claimant, and Claimant's written time sheets show
16 that Claimant showed up for work between 9 and 11 a.m.

17 23) With one exception, Claimant testified in a forthright manner, responding
18 directly to questions on direct and cross examination with a clear recollection of events.
19 The exception occurred when Reid questioned Claimant about Claimant's use of
20 Respondent's business phone for his personal business purposes, at which time
21 Claimant's memory inexplicably failed him. Claimant's testimony regarding his rate of
22 pay and hours worked was unimpeached and supported by Tynan's credible testimony,
23 the uncontroverted fact that Claimant was paid in full for all the February-April hours he
24 wrote down on his timecard, and Respondents' failure to deny the alleged hours and
25 amount owed.

1 **ULTIMATE FINDINGS OF FACT**

2 1) At all times material herein, Respondent The Orion Driftboat and
3 Watercraft Company LLC was a limited liability company that owned and operated a
4 wooden driftboat manufacturing shop and employed one or more individuals in Oregon.

5 2) Respondent Orion, through Respondent Reid, hired Claimant in February
6 21, 2003, to build wooden driftboats. Claimant built driftboats for Orion at Orion's shop
7 until May 21, 2003, when he was fired.

8 3) Claimant had no prior driftboat building experience before he started work
9 for Orion. He was hired for an indefinite period of time and performed all his work in
10 Orion's shop, using Orion's tools and materials and working under Reid's direction. .

11 4) Claimant worked 90 hours for Respondent Orion between May 1 and May
12 21, 2003, at the agreed rate of \$9 per hour, earning a total of \$810. As of the date of
13 hearing, Claimant had not been paid any of those wages.

14 5) Respondent Orion willfully failed to pay Claimant and Claimant is entitled
15 to penalty wages in the amount of \$2,160.

16 6) Claimant, through BOLI's Order of Determination, made written demand
17 for payment of his wages on October 13, 2003.

18 **CONCLUSIONS OF LAW**

19 1) At all times material herein, Respondent Orion was an Oregon employer
20 that engaged the personal services of Claimant. Respondent Reid did not employ
21 Claimant. ORS 652.310.

22 2) The Commissioner of the Bureau of Labor and Industries has jurisdiction
23 over the subject matter and Respondents. ORS 652.310 to ORS 652.332.

24 3) Respondent Orion violated ORS 652.140(1) by failing to pay Claimant all
25 wages earned and unpaid by the end of the business day on May 22, 2003.
Respondent Orion owes Claimant \$810 in unpaid, due and owing wages.

1 “whether the alleged employee, as a matter of economic reality, is economically
2 dependent upon the business to which [she] renders [her] services.” *Id.* The forum
3 considers five factors to gauge the degree of the worker’s economic dependency, with
4 no single factor being determinative: (1) the degree of control exercised by the alleged
5 employer; (2) the extent of the relative investments of the worker and alleged employer;
6 (3) the degree to which the worker’s opportunity for profit and loss is determined by the
7 alleged employer; (4) the skill and initiative required in performing the job; and (5) the
8 permanency of the relationship. *Id.* A signed, written contract, if it exists, does not
9 control the outcome of this case, as the forum looks at the totality of the circumstances
10 in determining whether a wage claimant was an employee or an independent
11 contractor. *In the Matter of Triple A Construction, LLC*, 23 BOLI 79, 93 (2002).

12 In this case, the relevant facts show that Reid directed Claimant’s work; Orion
13 supplied all the materials and tools necessary to perform his work; Claimant had no
14 investment in Orion; Claimant had no opportunity to earn a profit or suffer a loss, as he
15 was paid a set wage of \$8.50, then \$9.00 per hour; Claimant learned how to build
16 driftboats while working for Orion; Claimant was hired for an indefinite period of time;
17 and Orion was Claimant’s primary employer between February 10 and May 21, 2003.
18 All these factors point the forum to the conclusion that Claimant was an employee, not
19 an independent contractor, throughout his tenure at Orion. Finally, credible evidence
20 established that Orion’s purported “INDEPENDENT CONTRACTOR AGREEMENT”
21 was not signed by Claimant until his next to last day of work, and that it was not
22 executed by Orion, as Reid failed to sign it. Consequently, the forum gives this
23 agreement no weight in determining whether or not Claimant was an employee or
24 independent contractor. Based on this evidence, the forum concludes that Claimant
25 was an employee, not an independent contractor.

1 The Agency also named Sean E. A. Reid as a Respondent in its Order of
2 Determination. The Agency established that Orion was an active LLC during the entire
3 period of Complainant's employment. The Agency did not allege, and there is no
4 evidence to support a conclusion that Reid was a successor to the business of the LLC
5 or a lessee or purchaser of the LLC's business for the continuance of the LLC's
6 business, such that Reid would meet the definition of an "employer" under ORS
7 652.310. There is no other evidence to support a finding that Reid is personally liable
8 as an "employer" in this matter. The forum concludes that Reid was not Claimant's
9 "employer" and has no personal liability in this matter.

10 **CLAIMANT'S PAY RATE**

11 The Order of Determination alleged that Claimant's agreed wage rate was \$9.00
12 per hour during the wage claim period, and Claimant testified that Reid, on Orion's
13 behalf, agreed to pay him \$9.00 per hour. Respondents did not deny this allegation in
14 their answer, and factual matters alleged in a charging document and not denied in the
15 answer are considered to be admissions. OAR 839-050-0130(2). The forum concludes
16 that Claimant's agreed wage rate during the wage claim period was \$9.00 per hour.

17 **CLAIMANT PERFORMED WORK FOR WHICH HE WAS NOT PROPERLY** 18 **COMPENSATED**

19 The Order of Determination alleged that Claimant was not paid for 90 hours of
20 work. Respondents did not deny this allegation in their answer, and factual matters
21 alleged in a charging document and not denied in the answer are considered to be
22 admissions. OAR 839-050-0130(2). Claimant provided written documentation of the
23 hours he worked, and Orion paid Claimant for working similar hours in the previous
24 three months, bolstering Claimant's claim. Finally, Respondents provided no contrary
25 evidence to dispute Claimant's allegation. The forum concludes that Claimant's agreed
wage rate during the wage claim period was \$9.00 per hour.

1 **THE AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT**

2 The forum has already concluded that Claimant worked 90 hours for which he
3 was not compensated, at the wage rate of \$9.00 per hour. In all, Claimant earned \$810
4 (90 hours x \$9.00) for which he has not been paid.

5 **PENALTY WAGES**

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

11 Respondent, as an employer, had a duty to know the amount of wages due to his
12 employees. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack*
13 *Coke*, 3 BOLI 238 (1983). Although Orion did not maintain a record of Claimant's
14 hours, Reid, as Orion's agent, asked Claimant to write down his hours and post them by
15 Reid's desk. Claimant did this throughout his employment with Orion, including the
16 wage claim period from May 1 through May 21, 2003. Based on this evidence, the
17 forum concludes that Reid knew Claimant's hours of work. There was no evidence that
18 Reid acted other than voluntarily or as a free agent in not paying Claimant for the work
19 Claimant performed during the wage claim period. Therefore, Claimant is entitled to
20 penalty wages.

21 Claimant was fired and his wages became due at the end of the business day of
22 May 22, 2003. The Agency made a written demand for Claimant's wages on Claimant's
23 behalf when it issued the Order of Determination. More than 12 days have elapsed
24 since Respondents received that written notice of Claimant's wage claim was sent to
25 and received by Respondents, and more than 30 days have elapsed since Claimant's

1 last workday. Penalty wages are therefore assessed and calculated pursuant to ORS
2 652.150 (8 hours x \$9 per hour x 30 days = \$2,160).

3 **ADMISSIBILITY OF EXHIBIT A-2**

4 Exhibit A-2 consists of a two page printout of a “business name search” from the
5 Oregon Secretary of State’s website. The Agency offered A-2 to show that Orion was
6 administratively dissolved on July 18, 2003. The Agency did not lay a foundation for its
7 introduction through a witness and A-2 is not a self-authenticating document. At the
8 time it was offered, the case presenter represented that he had personally obtained the
9 information and printed it from the Oregon Secretary of State’s internet website.
10 Although the print at the bottom of Exhibit A-1 is not completely reproduced, an overall
11 comparison of A-1 and A-2 makes it apparent that both documents came from the same
12 website, that being the website of the Oregon Secretary of State. While not every
13 document printed out from the internet can be considered reliable as to its ultimate
14 source and the accuracy of its information, the forum considers that information
15 obtained from the State of Oregon’s official website is “evidence of the type commonly
16 relied upon by reasonably prudent persons in the conduct of their serious affairs.” OAR
17 839-050-0260. Respondent’s objection to the admission of Exhibit A-2 is overruled and
18 Exhibit A-2 is admitted into evidence.

19 **ORDER**

20 NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the
21 unpaid wages as a result of its violations of ORS 652.140, the Commissioner of the
22 Bureau of Labor and Industries hereby orders **The Orion Driftboat and Watercraft**
23 **Company LLC** to deliver to the Fiscal Services Office of the Bureau of Labor and
24 Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-
25 2180, the following:

1 A certified check payable to the Bureau of Labor and Industries in trust for
2 Complainant James R. Shaughnessy in the amount of TWO THOUSAND
3 NINE HUNDRED SEVENTY DOLLARS (\$2,970), less appropriate lawful
4 deductions, representing \$810 in gross earned, unpaid, due and payable
5 wages and \$2,160 in penalty wages, plus interest at the legal rate on the
6 sum of \$810 from June 1, 2003, until paid, and interest at the legal rate on
7 the sum of \$2,160 from July 1, 2003, until paid.

8 ⁱ This quote is taken from the ALJ's subsequent Interim Order denying Respondents' motion for
9 postponement in which the ALJ summarizes Respondents' grounds for seeking a postponement.

10 ⁱⁱ Examples include: "Your office has just been faxed and therefore you are served because I have
11 telephone records of it, a demand to recuse your ass from this case, you prejudicial supposed attorney!"
12 "I just wanted you to know this, Mr. McCullough, you ass!"