

In the Matter of

RUBIN HONEYCUTT dba Mr. Ideal's

Case Nos. 10-03 and 81-03

Final Order of the Commissioner Dan Gardner

Issued November 13, 2003

SYNOPSIS

The forum found that Claimant's daily time sheets, prepared, dated and signed weekly by Claimant, were the best evidence of the hours she worked for Respondent. Claimant's time sheets showed she worked 206 hours during the wage claim period and was paid \$1,600 for those hours. The forum concluded that Respondent did not owe Claimant any wages and dismissed the Agency's Order of Determination. Additionally, the forum dismissed the Agency's Notice of Intent because of the lack of evidence establishing that Respondent failed to maintain and preserve payroll records showing the dates and hours Claimant worked and failed to provide such records to the Agency for inspection. ORS 653.025; ORS 652.140(2); ORS 653.045(1); ORS 653.045(2); OAR 839-020-030; OAR 839-020-0080; OAR 839-020-0083.

The above-entitled case came on regularly for hearing before Linda A. Lohr, 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 July 9, 2003, at the Oregon Department of Human Resources, Adult and Family Services Child Welfare Conference Room, located at 726 NE 7th Street, Grants Pass, Oregon.

Peter McSwain, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Garilynn Pitcock Evans ("Claimant") was present throughout the hearing and was not represented by counsel. Rubin Honeycutt ("Respondent") was present throughout the hearing and was not represented by counsel.

In addition to Claimant, the Agency called as witnesses: Candy Rosenberg (telephonic), computer consultant, and Eric Grosz (telephonic), mechanic.

Respondent testified on his own behalf and called no other witnesses.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-8 (generated before hearing), X-9 through X-14 (generated after hearing);
- b) Agency exhibits A-1 through A-8 (filed with the Agency's case summary);
- c) Respondent exhibits R-1 and R-2 (filed with Respondent's case summary).

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 September 21, 2001, the Bureau of Labor and Industries received a wage claim form from Claimant stating Respondent had employed her from July 12 until October 27, 2000, failed to pay a 25% commission on two cars she sold, failed to pay her \$6.50 per hour for all hours worked, and failed to pay her one and one half times her regular rate for overtime hours worked.

2) The Agency alleged and Respondent did not dispute that Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent at the time she filed her wage claim.

3) On March 14, 2002, the Agency issued Order of Determination No. 01-4211. The Agency alleged Respondent had employed Claimant during the period July 12 through October 27, 2000, failed to pay Claimant at least \$6.50 per hour for each hour worked in that period, and was liable to Claimant for \$2,735.50 in unpaid wages, including \$312 in overtime wages for hours worked in excess of 40 in a given work week. The Agency also alleged Respondent's failure to pay all of Claimant's wages when due was willful and Respondent, therefore, was liable to Claimant for \$1,560 as

penalty wages, plus interest. The Order of Determination gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law. Respondent filed a timely answer wherein he denied any wages were owed and requested a hearing.

4) On April 10, 2003, the Agency requested a hearing. On April 16, 2003, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9 a.m. on July 9, 2003. 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 hearing rules, OAR 839-050-0000 to 839-050-0440.

5) On April 18, 2003, the Agency issued a Notice of Intent to Assess Civil Penalties. The Agency alleged Respondent failed to maintain and preserve payroll records and failed to make required payroll records available to the Commissioner for inspection. The Agency cited aggravating circumstances, including an allegation that Respondent falsified Claimant's payroll records, and proposed to assess civil penalties of \$2,000. Respondent filed a timely answer and request for hearing that stated, in pertinent part:

"I admit I was an employer at all times herein material to this case.

"In response to [the first allegation], I deny this charge since I still have Garilynn Evan's time sheets and records on file.

"In response to [the second allegation], I deny this charge since I did provide these records when requested. They were signed, dated and maintained by Garilynn Evans, herself, while acting in the capacity of Office Manager.

"I deny any and all Aggravating Factors. Due to my history of prior violations, I insisted on signed weekly time sheets to be kept and available for inspection. When requested, I supplied the Agency with available records. I deny manufacturing false records and did not deprive Garilynn Evans of her right to timely and full payment of wages."

6) On May 22, 2003, the Agency requested a hearing, and on June 11, 2003, filed a motion to consolidate the matters alleged in the Agency's Notice of Intent with the

matters alleged in its Order of Determination. On June 12, 2003, the forum issued an order granting the Agency's motion and consolidating the cases for hearing on July 9, 2003.

7) On June 23, 2003, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; 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 brief statement of any agreed or stipulated facts; and any wage and penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by July 1, 2003, and advised them of the possible sanctions for failure to comply with the case summary order. Both participants timely filed case summaries.

8) At the start of 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.

9) On July 11, 2003, on her own motion, and in order to fully and fairly adjudicate the matter before the forum, the ALJ reopened the evidentiary portion of the record to take additional evidence and ordered the Agency and Respondent to provide the following information by July 23, 2003:

"1. The month and year Respondent provided Claimant Evans with a computer for use in her home;

"2. The month and year Respondent filed a court action against Claimant Evans seeking the return of his computer;

"3. The month and year Claimant Evans returned the computer to Respondent;

"4. The birth date of the child Claimant Evans was expecting during her employment with Respondent;

“5. A copy of the certificate of service showing the date a certified demand letter from Claimant Evans, Exhibit A-1 (pages 4 and 8), was delivered to Respondent;

“6. An affidavit from the Agency compliance specialist reciting the date(s) he or she requested payroll information pertaining to Claimant Evans from Respondent and the date and nature of Respondent’s response, if any.”

On July 14, 2003, the ALJ issued an addendum to the July 11 order that stated, in pertinent part:

“Additionally, the Agency and Respondent are hereby ordered to submit a document that includes * * * [t]he month and year Claimant applied for unemployment benefits *after* she terminated her employment with Respondent.”

10) On July 21, 2003, the Hearings Unit received a letter from Respondent that stated, in pertinent part:

“As so ordered * * * the following information is being supplied with copies sent to the other participating parties:

“1. Month & Year Respondent provided Evans with computer: Approx. 3/01.

“2. Month & Year Respondent filed court action against Evans. 8/01.

“3. Month & Year Evans returned computer to Respondent: 3/02.

“4. I do not know the birth date of Evans child.

“5. I do not have a copy of certificate of service from demand letter.

“6. I received request for payroll information on 10/25/01 and responded with Time sheets and 1099 on 10/29/01.

“Enclosed is a document showing date unemployment was filed.

“Rubin Honeycutt”

A State of Oregon Employment Department Notice of Claim Determination (Potential Charges) (“Notice of Claim”) accompanied Respondent’s letter. The Notice of Claim states that Claimant filed for unemployment benefits on February 12, 2001, and her “last work day” was May 29, 2001. The ALJ received both documents as substantive evidence.

11) On July 23, 2003, Agency case presenter, Jeffrey Burgess, moved for an order extending the time to file a response to the interim orders issued on July 11 and 14, 2003. As grounds for the extension, Burgess stated that:

“1. Agency Case Presenter Peter McSwain is in need of additional time to gather the information sought by the Forum.

“2. The undersigned was unable to reach Respondent to determine whether he had any objection to the extension requested herein.

“3. An extension of two weeks, through and including August 6, 2003 should be sufficient to enable Mr. McSwain to complete and file the Response.

“4. The requested extension should not significantly prejudice any party and is reasonable and appropriate under the circumstances. The interests of justice require that the extension be granted.”

12) On July 24, 2003, the ALJ advised Respondent that he had until July 30, 2003, to file a written response to the Agency’s motion. The Hearings Unit did not receive a response from Respondent.

13) On July 31, 2003, the Agency notified the Hearings Unit of Claimant’s current mailing address and filed its Response to ALJ. The Agency’s response stated in pertinent part:

“To the extent the agency objects to or wishes to elaborate upon the reply by Respondent, the agency’s RESPONSES are set forth in italics below.

“1. * * * *The agency disagrees with Respondent’s recollection on this subject. By 03/01, Respondent may have provided access to a computer in his home or office since Claimant was doing his taxes about that time. However, the purpose for which Claimant was allowed to take home the computer in question was so that Claimant could set about trying to sell Respondent’s inventory on e-Bay. The computer was provided near the commencement of employment on or about July 12,200 [sic]. This plan never was abandoned during Claimant’s employ, though it never got under way. The reason Claimant continued to retain the computer after she left the employ of Respondent was that, believing earnestly that Respondent owed her considerable back pay, she felt that her chance of ever recovering was more secure if she held the computer as collateral. She checked with two computer stores during the period of controversy and learned that the fair market value of the computer and peripherals was \$350. In Claimant’s understanding, the small claims court ordered her to give back the computer and that Respondent await further*

resolution in this forum because the Claimant told the judge she did not claim to own the computer but was holding it for collateral. Claimant's best recollection is that, upon learning Claimant had a prior claim for the same wages she was asking as a counterclaim, the judge in small claims dismissed the case in favor of its being resolved before the agency.

*"2. * * * The Agency agrees with Respondent. The [small claims action] was filed in Josephine County. It was number 0113101SC. Claimant was served with the complaint on 8-16-01. The Court date was 3-19-02. The matter was dismissed on 4-01-02.*

*"3. * * * The Agency agrees with Respondent [as to the month and year Claimant returned the computer to Respondent].*

*"4. * * * [Claimant's child] was born on 12/30/00.*

*"5. * * * It appears from the file that Respondent signed for receipt of a letter from Claimant on November 13, 200 [sic], though the letter was apparently mailed on November 02, 2000 at a cost of \$5.85. See attachment A hereto (2 pages).*

*"6. * * * The Agency relies on Agency Exhibits 3 and 4. Exhibit 3 is a (second) Notice of Claim sent to Respondent's 1800 Rogue River Highway address on October 25, 2001. It tells Respondent: 'IF YOU DISPUTE THE CLAIM, complete the enclosed Employer Response form and return it together with the documentation which supports your position' (Emphasis supplied). In its line twelve, at page 3A, the Response form calls for copies of time cards and other records to substantiate Respondent's dispute of the amount of the hourly claim. Both these documents, then, included requests for payroll information pertaining to Claimant Evans. The enclosed form was completed and submitted. Again, the Employer Documentation Check List calls for Time Cards and other Time records. It was introduced in evidence as Agency Exhibit 4. The Response Form and Check List were accompanied by pages 6 through 24 of Agency Exhibit 4, pages also included in Respondent's own exhibits. These purport to be the time cards and records for which the agency made demand through Agency Exhibit 3. All of the above documents came into evidence with no objection to their authenticity and all were presented with the Agency Case Summary well before hearing.*

"As to these issues, the Agency's position rests solely on these documents having constituted a demand for pay records and Respondent's response having been insufficient under the law because, in the Agency view, the documents were known to be false, not reflective of actual hours worked.

"The Case Presenter understands that Compliance specialist Leslie Laing is out of the office until August 3, having left for Vacation July 21. Interviewed, Office Specialist Jana Gunn confirms that, though she has no independent recollection in particular, the Notice of Claim (WH-3), Wage

Claim Investigation/Employer Response (WH-R), and its accompanying Employer Documentation Checklist (WH-3D) were all routinely used to give Notice of Claim and demand records of any Respondent disputing the amount of wage. If the above recitals are insufficient for the Administrative Law Judge to complete the record, the Agency requests opportunity to either submit an affidavit accordingly from the Compliance specialist or call her as a telephone witness.

*"7. * * * It appears from the attachment to Respondent's Response that Claimant applied for unemployment benefits on 02-12-01."*

The Agency's response did not include an affidavit from Claimant attesting to any of the facts set forth by Agency Case Presenter McSwain. The response included a two page document, marked "Attachment A." The first page is a copy of a certified mail "Domestic Return Receipt" showing an "article" was addressed to: "Rubin Honeycutt, 1800 Rogue River Hwy, Grants Pass, Or 97524." The section that reads, "Complete this Section on Delivery" is blank. There is no "Date of Delivery" or "Signature" establishing receipt of the article. The second page is a copy of what apparently is the outside of a "Priority Mail" envelope addressed to "Rubin Honeycutt" with a "Certified Mail" sticker attached. The envelope was postmarked from Grants Pass, Oregon, on November 2, 2000. In the upper left hand corner, covering the sender's address is what appears to be a sticker dated "11/24/00" that says, "Notify Sender of New Address" and shows the following: "Pitcock' Garilynn, 734 Tami Rd., Grants Pass, OR 97526-5897." Each of the pages has a Bureau of Labor and Industries Medford Office date stamp showing a receipt date of October 5, 2001.

14) The evidentiary record closed on August 1, 2003.

15) The ALJ issued a proposed order on October 22, 2003 that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

RULING ON AGENCY'S MOTION FOR EXTENSION OF TIME

On July 23, 2003, the Agency moved for additional time, until August 6, 2003, to file its response to the ALJ's Interim Order issued on July 11, 2003. OAR 839-050-0050(3) provides that an extension of time may be granted "where no other participant opposes the request." Respondent had the opportunity to object to the Agency's motion and did not do so within the time allowed. Therefore, the Agency's motion is granted and the forum includes the Agency's Response to ALJ, dated July 31, 2003, in the evidentiary record.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Rubin Honeycutt operated a used car lot under the assumed business name of Mr. Ideal's in Grants Pass, Oregon.

2) Respondent hired Claimant sometime in June 2000 as an "office manager." Claimant's first work day was on or about June 26, 2000. The car lot opened at 9 a.m. and closed at 5 p.m. each day.

3) Claimant's duties included answering telephones, helping customers, and performing general clerical work.

4) Respondent told Claimant he would pay her \$100 per week for approximately 15 hours per week, computed at the minimum wage rate of \$6.50 per hour. Respondent did not care which or how many hours she worked each day as long as they totaled around 15 at the end of the work week.

5) Respondent required Claimant to keep a daily record of the hours she worked. He told Claimant he had not previously maintained necessary records showing his employees' work hours and had experienced some wage claims as a result. At Respondent's request, Claimant filled out, by hand, daily time sheets entitled "MR. IDEALS Daily Time Sheet" on which she was required to record the number of hours she worked each day and the total number of hours for each week ending on Friday.

She filled out her time sheets every Friday, which was also payday. After she was paid and before she turned in her time sheet, she hand wrote "paid," along with her initials on the time sheet. Claimant recorded 35 hours between June 26 and July 12, 2000, on Respondent's daily time sheets and was paid in full for those hours.

6) Claimant worked for Respondent in 2001 after her child's birth in December 2000 and hand wrote her hours on the same or similar daily time sheets she used from June to October 2000. Respondent maintained copies of all of Claimant's time sheets, which show she worked for Respondent 11 hours in March, 32 hours in April, and 10.5 hours in May 2001. Respondent paid Claimant the minimum wage for those hours and she makes no claim for wages for the hours she worked March-May 2001.

7) The daily time sheets show 15 hours total per week for most weeks during the wage claim period between July and October 1999. The daily entries on the last 9 out of 10 weeks of time sheets add up to less than the 15 total per week listed at the bottom. For instance, on the time sheet dated "8/23 [to] 8/30," the entries for Monday through Thursday show the "time in" and "time out" as "9:00 [to] 11:00" and the entry for Friday shows "9:00 [to] 1:00," which totals 12 hours for the week. The daily entries for the nine weeks preceding Claimant's last week of work total from 10 to 13 hours per week, while the weekly totals show 15 hours. Claimant's daily entries for the final week ending October 27, 2000, add up to six hours, the same number that appears at the bottom of the time sheet for the "total per week."

8) Between July 12 and October 27, 2000, Respondent paid Claimant \$100 per week, "sometimes more," regardless of the daily entry total, for 16 weeks. On at least one occasion, Respondent paid Claimant an additional \$50.00 for repossessing a

car for Respondent. With Respondent's permission, Claimant used his credit card to purchase baby clothes and to pay her cable bill while she was in his employ.

9) Claimant recorded 206 hours of work on her daily time sheets between July 12 and October 27, 2000. At the minimum wage rate of \$6.50 per hour, Claimant earned \$1,339 for the hours she recorded during that time period (206 hours x \$6.50 per hour).

10) Between July 12 and October 27, 2000, Respondent paid Claimant gross wages totaling \$1,600.

11) On a computer in her home, Claimant prepared time tables entitled "WEEKLY TIME SHEET [of] GARILYNN PITCOCK" that included "Time In" and "Time Out" each day and the total number of hours worked, daily and weekly. The computer printout indicates Claimant worked 8 hour work days, including four Saturdays, from 9 a.m. until 5 p.m. Claimant signed and wrote a date on each time table. Two of the time tables are identical except each has different dates handwritten on them and Claimant's signature is written slightly different on each. Both are for the period beginning August 2 through August 8, 2000 and show a 48 hour work week. Claimant signed both and wrote "August 9, 2000" on one and wrote what appears to be "August 10, 2000" on the other. Claimant also signed and wrote what appears to be "August 10, 2000" on the time table for the period beginning August 9 through August 15, 2000. The time tables show a total of 651 hours worked, from July 12 through October 27, 2000, including 32 overtime hours.

12) In or around March 2001, Respondent provided Claimant with a computer for home use which enabled her to remain home with her newborn while performing work for Respondent, including doing "e-bay" sales, helping him with "his income tax stuff and to get the 1099's out to his employees," and DMV registrations. Claimant did

not have a computer in her home until Respondent provided her with one to use for his business. Some of the income tax work she performed for Respondent in 2001 was performed in his home.

13) After she left her employment in May 2001, Claimant refused to return the computer to Respondent. In August 2001, Respondent filed a court action against Claimant seeking the return of his computer.

14) Claimant filed a wage claim in September 2001 and claimed Respondent owed her wages from July 12 through October 27, 2000. On her wage claim form she stated her first and last day of work was July 12 and October 27, 2000. She also stated that she worked 664 hours, was paid \$1,600, and was still owed wages of \$2,700. Additionally, she stated Respondent owed her \$2,625 as a 25 percent commission on two cars she sold for him.

15) On October 25, 2001, the Agency notified Respondent of Claimant's wage claim and advised him to either pay the wages claimed or complete an "Employer Response" form stating his position and including any documentation in support of his position within 10 days of the "Notice of Wage Claim."

16) On October 29, 2001, Respondent sent the Agency: a completed employer response form; a Department of Treasury Form 1099 (2000) for "GARILYNN PITCOCK" showing "nonemployee compensation" totaling \$1,908; and Claimant's handwritten daily time records. In his response, Respondent stated Claimant still had some of his property which included a "computer, printer, monitor, keyboard, [and] mouse." As a reason why he believed "the claimant wages are not owed," he stated: "She was paid each week. This is probably a result of our small claims suit against her." Claimant returned Respondent's computer by court order sometime in March

2002. The Agency also issued an Order of Determination against Respondent in March 2002.

17) Eric Grosz's testimony regarding his "impression" of Claimant's work schedule and his knowledge of the pay she received for the hours she worked was not reliable. Grosz acknowledged he performed minor repair work for Respondent on an "as needed" basis, sometimes working as few as two hours on a car and always outside the car lot office. The forum finds Grosz's opportunity to observe Claimant's actual work hours was limited. Additionally, his testimony about several discussions he had with Claimant *during her employment* regarding the "partial" wages Respondent paid her was inconsistent with an earlier statement he made to the Agency compliance specialist that, "[Grosz] didn't know about [Claimant's] wages until he saw her at the bank one day after her employment ended."

18) Candy Rosenberg's testimony pertaining to Claimant's work schedule and pay was not reliable. She was present at Respondent's car lot "off and on, as needed" as a contract "computer consultant" and had limited opportunity to observe Claimant's actual work hours. Her testimony that she sometimes saw Claimant at the car lot in the morning and sometimes in the afternoon was a diluted version of her prior statement to the Agency compliance specialist who recorded that Rosenberg stated Claimant was "usually there 8-5 M-F and some Saturdays." The compliance specialist reported that Rosenberg also stated "[Claimant] frequently opened [the] lot, or *went back to lock up [when] Rubin called her,*" which is not congruent with the first reported statement that Claimant was at the car lot from "8-5 M-F." Additionally, Rosenberg testified that Claimant, while in Respondent's employ, complained to her several times about not being paid for all hours worked and Rosenberg then advised her to keep a record of the hours she worked. However, in a prior statement to the Agency compliance specialist,

summarized in a "Contact Report," Rosenberg said she talked with Claimant "vaguely about her *wage claim*." The report does not mention Claimant's complaints to Rosenberg or Rosenberg's purported advice to Claimant about keeping a record of her work hours. The forum infers from the reported statement that Rosenberg recalled a single discussion with Claimant, though "vague," about Claimant's wage claim. Notably, the wage claim was filed almost one year after Claimant first left her employment in October 2000. Rosenberg's apparently enhanced recall at hearing of discussions during Claimant's employment about Claimant's complaints pertaining to her pay is unconvincing and the forum gave little weight, if any, to her testimony.

19) Claimant's testimony was not credible. It was internally inconsistent, self serving, and contradicted earlier statements she made to the Agency. Moreover, her demeanor toward Respondent during the hearing, which ranged from inert hostility to mocking his statements under the auspices of jest, further negated her testimony's trustworthiness. When she filed her wage claim, she represented that she was employed by Respondent between July 12 and October 27, 2000.ⁱ She presented the Agency with a computer printout of her time records (17 pages) and claimed she was owed for all of the hours shown, less \$1,600 Respondent paid to her during that period. She claimed she was owed not only \$2,700 in wages, but also \$2,635 in commission sales, a claim she later abandoned. At hearing, she testified that she filed a wage claim in November 2000, whereas documentary evidence presented at hearing showed that Claimant filed her wage claim and supporting documents with the Agency by facsimile transmission on September 17, 2001. There is no evidence that she faxed any time sheets other than the computer time tables to the Agency.

During the subsequent wage claim investigation and at hearing, Respondent produced handwritten time sheets Claimant prepared each week during her

employment showing that her first day of work was June 26, 2000, and that she performed work for Respondent during March, April, and May 2001, facts Claimant does not dispute. Contrary to her adamant assertion at hearing that she was “forced” to carefully manipulate her recorded “time in” and “time out” to end up with a 15 hour total at the end of the workweek, the records show that the specific hours she recorded each week more often than not add up to 13 hours or less, yet she always recorded and was paid for 15 hours at the end of each week. Claimant’s inflation of her work hours undermined her ability to convince this forum that the computer version of her time records is the more accurate representation of the hours she actually worked. Overall, her testimony and demeanor were at odds with the facts in evidence and the forum has credited her testimony only where it is corroborated by credible evidence or is a statement against interest.

20) Respondent’s brief testimony was more believable than Claimant’s. Despite his obvious bias, Respondent’s adamant claim that he paid Claimant for all of the hours she worked during her employment not only had the ring of truth, but was bolstered by Claimant’s testimony. She agreed that he required her to keep time records because of previous wage claims he experienced. She acknowledged that she prepared the records written in her own hand and agreed that she had been paid in full for work she performed two weeks prior to the date she alleged was her “first workday” and for the three month period she worked for him in 2001. Respondent’s testimony was not impeached in any way and the forum has credited it in its entirety.

ULTIMATE FINDINGS OF FACT

1) Respondent at all times material herein conducted a business in Oregon and employed one or more persons in the operation of that business.

2) Respondent employed Claimant between June 26, 2000, and May 27, 2001.

- 3) Respondent and Claimant agreed Claimant would be paid \$6.50 per hour for approximately 15 hours per week.
- 4) At all times material herein, the state minimum wage was \$6.50 per hour.
- 5) Respondent paid Claimant \$1,600 for hours Claimant worked between July 12 and October 27, 2000.
- 6) Claimant worked 206 hours between July 12 and October 27, 2000.
- 7) Respondent paid Claimant all wages earned.
- 8) Respondent kept and maintained payroll records showing the number of hours Claimant worked for Respondent.
- 9) Respondent provided those records to the Agency upon its request in October 2001.

CONCLUSIONS OF LAW

- 1) During all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 653.010(3)&(4) and 652.310 to 652.405.
- 2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414.
- 3) Claimant was paid wages totaling \$1,600 during her employment with Respondent, computed at the applicable minimum wage rate in accordance with ORS 653.025(3). There were no wages due Claimant at the time she ceased employment with Respondent. ORS 652.140(2).
- 4) Respondent maintained and preserved required payroll records pertaining to Claimant's actual hours worked and made them available to the Agency upon its request in compliance with ORS 653.045(2).
- 4) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the

authority to dismiss the Claimant's wage claim, the Agency's Order of Determination, and the Agency's Notice of Intent to Assess Civil Penalties filed against Respondent.

OPINION

CLAIMANT'S WAGE CLAIM

The Agency was required to 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 which she was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230 (2000).

There is no dispute that Respondent employed Claimant during the wage claim period or that Claimant was entitled to no more than minimum wage for the hours she worked. The only issues are whether Claimant worked hours for which she was not properly compensated and, if so, the amount and extent of those hours. Claimant bears the burden of proving she performed work for which she was not properly compensated. *In the Matter of Ann L. Swanger*, 19 BOLI 42, 56 (1999).

ORS 653.045 requires an employer to maintain payroll records. Here, there is no dispute that Respondent required Claimant to record her daily hours and weekly totals on time sheets he provided for that purpose. Moreover, Respondent and Claimant agree that he required the time sheets because he failed to keep time records for previous employees and incurred wage claims as a result. Respondent produced those records during the wage claim investigation at the Agency's request and it is Claimant's threshold burden to establish that the records are "inaccurate or inadequate." See *In the Matter of Graciela Vargas*, 16 BOLI 246 (1999), citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

Claimant maintains she was forced to sign and submit "falsified" time sheets each week for almost four months in order to receive the \$100 per week Respondent

promised her. She further maintains she kept a separate contemporaneous record of her actual hours on a computer in her home that shows her work hours exceeded by two thirds those she recorded on the daily time sheets Respondent required her to fill out and sign each week. The forum finds her assertions unbelievable.

First, there is no credible independent corroboration for the hours she claims on the computer time records, which appear to have been generated en masse. Witnesses who testified on Claimant's behalf lacked actual knowledge of her work hours and gave inconsistent and unreliable testimony. Curiously, Claimant did not maintain computer records or claim Respondent owed wages for the two-week period she worked prior to her purported "first workday" in July 2000 or for the three-month period she worked in 2001 for Respondent. However, Claimant's hand written time sheets for those periods show similar work hours to those recorded on the ones dated July 12 to October 27, 2000, including several randomly recorded "days off." In contrast, the computer generated time records show a steady pattern of eight-hour workdays, including a few Saturdays, with no recorded days off.

Second, Claimant's contention that she falsified the handwritten time sheets because she needed the job and was afraid no one else would hire her because of her pregnancy flies in the face of her claim that she quit her job on October 27, 2000, because Respondent was not paying her properly. Moreover, evidence shows that after she gave birth in December 2000, she returned to Respondent's employ in March 2001 and worked three additional months, despite his alleged failure to pay a purported two thirds of her earnings for four months the previous year. Ultimately, she waited until September 2001, to file her wage claim, which was after Respondent filed suit for the return of his computer. None of those facts are consistent with someone who is

desperate for money and must falsify time sheets to receive a mere \$100 per week for purported 40 hour work weeks.

Finally, her claim that she prepared the computer generated time records weekly between July and October 2000 is contradicted by her testimony that she did not have a computer of her own in her home during her employment with Respondent, and that he provided her with a computer “when she had the baby” so she could perform work for him at home. Claimant gave birth in December 2000 and undisputed evidence shows Claimant performed work for Respondent in March, April, and May 2001. Respondent’s contention that he gave her a computer to use in her home in about March 2001 is consistent with those facts and is more believable than Claimant’s self-serving attempt to place the computer in her home during the time she claims she prepared a separate set of time records. Evidence shows Claimant still had Respondent’s computer on September 17, 2001, when she filed her wage claim and submitted the computer time records to the Agency. Consequently, the forum finds that Claimant generated the computer time records well after she quit her employment with Respondent in May 2001.

CONCLUSION

Evidence shows Respondent agreed to pay Claimant minimum wage for no more than 15 hours per week; that he required her to record her hours and affirm each week that she was paid in full; and that during Claimant’s employment which began in June 2000 and ended in May 2001, she consistently prepared weekly time sheets that showed she was paid minimum wage or more for 15 hours or less per week. Claimant filed her wage claim in September 2001, almost a year after she claims she was not properly compensated by Respondent, and only after Respondent filed a legal action against her. At that time she provided the Agency with time records that could not have

been prepared between July and October 2000. Respondent, on the other hand, produced time sheets that Claimant admits were maintained contemporaneously at Respondent's direction. The preponderance of evidence supports Respondent's theory that Claimant filed her wage claim in response to the legal proceeding he initiated to recover his computer. Claimant failed to prove Respondent's records were inaccurate or inadequate and the forum concludes that Claimant was properly compensated for all of the hours she performed work for Respondent.

RESPONDENT'S RECORD KEEPING

A. Failure to Maintain and Preserve Payroll or Other Records

Other than its general allegation that Respondent violated ORS 653.045(1) and OAR 839-020-0080, the Agency presented no evidence and made no argument from which the forum can conclude that Respondent generally failed to make, maintain, and preserve required payroll or other records containing information and data with respect to Claimant.

B. Failure to Make Records Required to be Preserved and Maintained Available for Inspection by the Commissioner

The Agency specifically alleged that on October 29, 2001, it requested "production of such records or other items to support Respondent's resistance to [Claimant's] wage claim" and that "Respondent made documents available but they were falsified records." There is no dispute that the Agency requested specific documents from Respondent on the date alleged and that Respondent produced the requested records. The only issue is whether Respondent knowingly produced falsified records. As previously discussed, there is no reliable evidence that Claimant worked more hours than she recorded on the handwritten time sheets she submitted each week to Respondent. Instead, evidence shows Respondent had a particular incentive to maintain and preserve accurate time records and that he did so by requiring Claimant to

fill out and sign weekly time sheets showing her time in and out each day and her total hours for the week. Despite the length of time that passed before Claimant filed her wage claim, Respondent produced Claimant's records in response to the Agency's request. Claimant, who may have presumed the records were long gone by that time, was forced to explain the extraordinary discrepancy between the hours she recorded on her handwritten time sheets and those she provided to the Agency via computer printouts. The forum finds her explanation of the discrepancy both disingenuous and peculiar, in that by believing her explanation the forum must also believe she intentionally created false time records. It is axiomatic that her admission to falsifying time records makes her explanation of the discrepancy unbelievable. The forum declines to give credence to Claimant's characterization of her handwritten time records and finds that Respondent kept proper records in conformity with his statutory duty and made them available to the Agency as required.

ORDER

NOW, THEREFORE, as Respondent has been found not to owe Claimant wages, the Commissioner of the Bureau of Labor and Industries hereby orders that Order of Determination 01-4311 against Rubin Honeycutt be and is hereby dismissed.

FURTHERMORE, as Respondent has been found not to have violated ORS chapter 653 provisions governing the making and preserving of required payroll records, the Commissioner of the Bureau of Labor and Industries hereby orders that the Notice of Intent issued on April 18, 2003, against Rubin Honeycutt be and is hereby dismissed.

ⁱ On the wage claim form, she claimed that her "first workday" was "7/12/00" and her "last workday" was "10/27/00."