

In the Matter of

SCOTT E. MILLER

dba

Miller Accounting and Consulting

Case No. 139-01

Final Order of the Commissioner Jack Roberts

Issued July 29, 2002

SYNOPSIS

Respondent, a certified public accountant, employed Claimant to perform secretarial and bookkeeping tasks and to prepare simple income tax returns at the rate of \$12.69 per hour. Claimant was not a professional employee excluded from coverage of Oregon's overtime laws. Respondent did not pay Claimant at the applicable overtime rate for all hours worked in excess of 40 per week and failed to pay Claimant all wages due upon termination. Respondent's failure to pay the wages was willful, and Respondent was ordered to pay civil penalty wages in addition to the wages owed. ORS 652.140(2), 652.150, 652.332, 653.261(1); OAR 839-020-0030(1).

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 15, 2001, in the Bureau of Labor and Industries hearing room located at 800 NE Oregon Street, Portland, Oregon.

Cynthia Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Edith "Lynn" Shelley ("Claimant") was present throughout the hearing and was not represented by counsel. Scott E. Miller ("Respondent") was present throughout the hearing and was not represented by counsel.

In addition to Claimant, the Agency called Michael Wells, BOLI Wage and Hour Division Compliance Specialist as a witness.

Respondent called himself, Michael Wells, BOLI Wage and Hour Division Compliance Specialist, and Claimant as witnesses.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-27 (generated before hearing); and X-28 through X-30 (generated after hearing).
- b) Agency exhibits A-1 through A-7, A-9, and A-10 (filed with the Agency's case summary);
- c) Respondent exhibits R-1 through R-4, R-6 through R-10, R-13, R-15 through R-17 (filed with Respondent's case summary); and R-18 through R-22 (submitted at hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On August 11, 2000, Claimant filed a wage claim form in which she stated Respondent had employed her from October 6, 1998, through December 17, 1999, and failed to pay her for overtime hours worked between February 1 and April 16, 1999.

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

3) On February 24, 2001, the Agency served Respondent with an Order of Determination, numbered 00-3472. The Agency alleged Respondent had employed Claimant during the period February 1 through April 16, 1999, at the rate of \$12.69 per hour and that Claimant had worked a total of 577.75 hours, 131 of which were hours worked in excess of 40 in a given work week, and that Respondent owed Claimant

\$831.19 in wages, plus interest. The Agency also alleged Respondent's failure to pay was willful and Respondent, therefore, was liable to Claimant for \$3,045.60 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.

4) On March 13, 2001, Respondent filed an answer and request for hearing.

Respondent's answer stated, in pertinent part:

"I received the Order of Determination No. 00-3472, 'the Order,' regarding the claim of Edith Lynn Shelley on February 24, 2001. Pursuant to the Order, I have 20 days to provide you with my request for hearing. Although I requested one in my letters dated January 15, 2001 and December 7, 2000, I reiterate my request for such a hearing.

"In my letter to Mr. Wells dated January 15, 2001, I requested the rules for conducting an appeal. I never received a response from him, but did receive a document title, 'Responding to an Order of Determination or Notice of Intent.' I can only assume these are all of the rules. Pursuant to this document, I must provide you with a written answer, within 20 days from receipt of the Notice [*sic*] of Determination, in which I must admit or deny each fact alleged in the Order and I must state all factual or legal defenses I intend to claim.

"I admit that Ms. Shelley worked for a sole proprietorship named Scott E. Miller, CPA, CVA, that ceased doing business in November 1999. I admit Ms. Shelley earned a salary of \$2,200 per month based upon a 40 hour work week and that equates to \$12.69 per hour. I admit she was employed by the sole proprietorship during the period of October 7, 1998 through November 1999. I admit Ms. Shelley has assigned her wage claim to the BOLI. I deny the employer of Ms. Shelley was Scott E. Miller d/b/a Miller Accounting & Consulting. I deny the employer was required to pay overtime at 1½ times the calculated hourly rate. I deny that Ms. Shelley worked 131 hours of overtime that she would be due compensation under your 'claim.' I deny that the employer 'willfully' failed to pay Ms. Shelley. I further deny the claim by the BOLI that penalty wages, if due, would be \$3,045.60. I deny interest, if due, would be due starting May 1, 1999. I do not believe the BOLI is making any other claims.

"I incorporate by reference all my prior correspondence with the BOLI and verbal communications with Mr. Wells of the BOLI.

"In addition to the facts I denied above, the legal defenses I plan to assert are:

“1. The imposition of a civil penalty is unwarranted because all undisputed wages were paid timely under ORS 652.160 and the imposition of a civil penalty under ORS 652.150 requires a willful failure.

“2. Under ORS 652.12(4) [sic] an employer may enter into a written agreement with an employee regarding the payment of wages at a future date so the imposition of interest beginning May 1, 1999 would be improper.

“3. The hours over 40 per week were calculated by Ms. Shelley and I concur they are 123.75.

“4. Since Ms. Shelley assigned her claim to the BOLI, the BOLI would be required to adhere to the contract she entered into prior to her employment. This would require the BOLI to engage in mediation and then binding arbitration, not the administrative proceedings it has engaged in. Alternative dispute resolution is permitted by ORS 183.470 Sec. 16a. ORS 653.055 prevents an employer from using agreements to circumvent the proper payment of wages, but does not prevent alternative dispute resolution. Under the terms of the employment agreement, any other process would be invalid.

“5. A civil penalty can not be assessed without due process. Information was requested on January 15, 2001 and not received. A valid dispute was levied by the employer and repeated numerous times to both the employee and to the BOLI. See ORS 183.090. Since there was a valid dispute and a request for appeal, no penalty should be assessed.

“6. Ms. Shelley was a professional under the criteria set forth by the BOLI and therefore the requirement to pay an overtime premium under OAR 830-020-0020 [sic] is not required.

“7. Please refer to my prior correspondence for other legal defenses.

“If I have left anything out, please let me know and I will promptly provide.

“With best regards,

“Scott E. Miller, CPA, CVA, President”

The Hearings Unit did not receive additional documents with Respondent’s answer.

5) On May 2, 2001, the Agency requested a hearing. On July 11, 2001, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9 a.m. on November 15, 2001. With the Notice of Hearing, the forum included a copy of the Order of Determination, a “SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES,” a warning in eight languages that important documents affecting the

recipient's rights are included, and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

6) By letter dated, August 24, 2001, Respondent amended his answer and stated:

"After reviewing my files, I became aware that I accidentally did not include an issue in my prior correspondence and would like to amend my response to include it.

"In my prior correspondence, I indicated my disagreement with the BOLI complaint because it failed to address the employment contract entered into as a condition of employment of Ms. Shelley with my CPA firm. I had indicated that Ms. Shelley was required to mediate and then arbitrate any issue arising out of the agreement and by the BOLI not doing so; it invalidated her claim as stated in paragraph 26.

"However, I did not specifically discuss paragraph 13 of the agreement which states 'the employee may not assign any of his rights or delegate any of his duties or obligations under this Agreement.'

"I therefore request that my prior responses and correspondence be amended to include my objection to the BOLI being assigned Ms. Shelley's claim as being in violation of the valid contract between Ms. Shelley and my CPA firm.

"Sincerely, Scott E. Miller"

7) On August 31, 2001, Respondent moved for summary judgment "based upon OAR 839-050-0150(4)(a)(A) issue or claim preclusion, (B) no genuine issue as to any material fact exists and the participant is entitled to judgment as a matter of law, & (C) such other reasons as are just." On September 4, 2001, the forum issued an interim order requiring the Agency's written response to the motion by September 10, 2001. On September 6, 2001, the Agency requested an extension of time to respond to Respondent's motion for summary judgment and represented that Respondent had indicated to her that he had no objection to a time extension. On September 7, 2001, the forum granted the Agency's request and extended the response time to October 4, 2001.

8) On October 4, 2001, the Agency, through its counsel, Assistant Attorney General Andrus, filed its response to Respondent's motion for summary judgment. On October 8, 2001, Respondent filed a Response to Response to Motion for Summary Judgment. The forum issued the following ruling on Respondent's motion for summary judgment on October 15, 2001:

"Introduction

"This proceeding involves an assigned wage claim filed by Edith Shelley ("Claimant") against Respondent. In its Order of Determination issued January 18, 2001, the Agency alleges Respondent failed to compensate Claimant for overtime wages earned during the period between February 1 through April 16, 1999, and, thus, owes Claimant \$831.19 in unpaid wages, plus interest, and \$3,045.60, plus interest, as penalty wages for Respondent's willful failure to pay all of Claimant's wages when due.

"On August 31, 2001, Respondent filed a motion for summary judgment, pursuant to OAR 839-050-0150(4), contending that because Claimant had failed to comply with the conditions of a 'valid employment agreement,' Claimant's wage claim is invalid and Respondent is entitled to judgment as a matter of law. In support of his motion, Respondent provided copies of an Employment and Non-Compete Agreement signed by Claimant in October 1998; a letter dated June 8, 2000, from Respondent to Claimant; a memorandum dated December 17, 1999, from Respondent to Claimant; a Supreme Court case decided March 21, 2001; and a letter to Respondent from Claimant dated July 18, 2000. The Agency, through its counsel, Assistant Attorney General Stephanie Andrus, filed a timely responsive pleading in which it opposed Respondent's motion. Respondent, in turn, filed a response to the Agency's response on October 10, 2001.

"Summary Judgment Standard

"A motion for summary judgment may be granted where no genuine issue as to any material fact exists and a participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings. OAR 839-050-0150(4)(a)(B). The standard for determining if a genuine issue of material fact exists is as follows:

' * * * No genuine issue as to a material fact exists if, based upon the record before the [forum] viewed in a manner most favorable to the adverse party, no objectively reasonable [fact finder] could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the

motion as to which the adverse party would have the burden of persuasion at [hearing].’ ORCP 47C.

“Respondent has not stated grounds for summary judgment based on issue or claim preclusion, but has invoked OAR 839-050-0150(4)(a)(C), which says summary judgment may also be based on ‘[s]uch other reasons as are just.’ The forum has considered Respondent’s motion pursuant to OAR 839-050-0150(4)(a)(B) and (C) in the light most favorable to the Agency. ORCP 47C.

“Respondent’s Motion

“Respondent argues that, as a condition of employment, Claimant signed an ‘Employment and Non-Compete Agreement’ whereby she agreed to mediate and arbitrate ‘any disputes covered by [the] agreement’ and that, under the agreement, her failure to do so would ‘result in the claim being invalid.’ Respondent further contends that because Claimant agreed to arbitrate any claims covered by the agreement, her assignment to the Agency was invalid and the Agency does not have standing in this action. Additionally, Respondent argues that if the Agency is found to have standing, then it is required to ‘stand in the shoes’ of the Claimant and mediate and then arbitrate the claim as required under the agreement.

“The threshold question in this case is whether the employment agreement at issue is a valid agreement. The dispute that Respondent argues is subject to mediation and arbitration is Claimant’s entitlement to unpaid overtime wages, which is addressed in provision three of the employment agreement as follows:

‘3. Compensation. The Employer shall pay the Employee as compensation for the services rendered by the Employee, a wage of \$12.69 per hour paid twice a month. Salary payments shall be subject to withholding and other applicable taxes. Compensation rates shall be reviewed annually. **Employer shall pay overtime at the same rate as regular time.** Employee shall provide Employer a written time sheet for each pay period within 24 hours of its completion. Employee agrees that it is his responsibility to account for his hours daily and Employer shall not be held liable for any hours not reported on his time sheet. **All overtime shall be “banked” and may be used to increase paid hours, up to 40 hours per week, when there is a lack of work. All unused banked time will be paid each year with the period ending November 30th paycheck.**’ (emphasis in original)

“The forum interprets this provision by looking first to its language, which the forum finds unambiguous, and then in context with the rest of the agreement. See *Pioneer Resources, LLC v. Lemargie*, 175 Or App 202 (2001) (first step in determining contracting parties’ intent is to examine the text of the disputed provision in context with the document as a whole and, in the absence of any ambiguity, the analysis ends, and the

provision's meaning is determined as a matter of law). In so doing, and in the absence of any ambiguity, the forum finds the parties and Respondent in particular, intended this provision to waive Respondent's statutory obligation to pay overtime as a condition of Claimant's employment.

"This forum has consistently held that an employer may not avoid the mandate to pay overtime by entering into an agreement with an employee and an employee may not on his or her own behalf waive the employer's statutory duty to pay overtime. *In the Matter of Danny Jones*, 15 BOLI 25 (1996), *citing In the Matter of John Owen*, 5 BOLI 121 (1986). It is axiomatic that such an agreement is contrary to public policy. As this forum has noted before, '[i]f such an agreement were a defense, an employer could require an employee to 'agree' to waive overtime as a condition of employment, and the purposes of the overtime wage laws would be frustrated.' *In the Matter of John Owen*, 5 BOLI at 126. In this case, Respondent required Claimant to "agree" to waive overtime as a condition of her employment and, by doing so, rendered the compensation provision void as a matter of law. *See In the Matter of Locating, Inc.*, 14 BOLI 97 (1995) (finding written agreement between employee and employer void where employee agreed to accept straight time wages for overtime hours worked). The next question, then, is whether the 'Agreement to Mediate and Arbitrate' provision of the employment agreement is applicable to a void provision, *i.e.*, a nonexistent provision. The answer is that it is not. The dispute raised by Claimant when she assigned her wage claim was the payment of overtime wages. The forum has found the employment agreement's compensation provision, that attempts to regulate payment of Claimant's overtime wages, void and unenforceable. Even if Claimant is required to mediate and arbitrate other disputes covered under the agreement,ⁱ there remains no contract provision related to this action that is subject to mediation and arbitration under the employment agreement.

"Based on the foregoing, Respondent's motion for summary judgment is **DENIED.**"

9) On October 15, 2001, the forum issued a case summary order requiring the Agency and Respondent to submit case summaries that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a 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 November 2, 2001, and advised them of the possible sanctions for failure to comply with the case summary order.

10) On October 17, 2001, Respondent moved for a postponement that would allow him time to appeal the ALJ's ruling on his motion for summary judgment in the "formal court system," allow him time to engage in discovery, and allow time for a pending U. S. Supreme Court case to resolve. On October 22, 2001, the Agency filed objections to Respondent's motion.

11) On October 29, 2001, the forum denied Respondent's motion, finding a lack of good cause shown and no basis for a claim of excusable mistake. (Exhibit X-15)

12) On October 30, 2001, Respondent filed a motion for a discovery order seeking 12 categories of documents.

13) On November 1, 2001, Respondent filed a case summary with attached exhibits.

14) On November 2, 2001, the Agency filed objections to Respondent's motion for discovery order stating that the requests were vague, overbroad, and not likely to lead to relevant information.

15) On November 2, 2001, the Agency filed its case summary with attached exhibits.

16) On November 5, 2001, the forum issued a ruling on Respondent's motion for a discovery order that stated, in pertinent part:

"My ruling on Respondent's motion for a discovery order is made in accordance with OAR 839-050-0200 and is as follows:

"Requests 1 – 7 and 10 - 12

"In each of these requests, Respondent is seeking documents related to the Agency's position regarding the enforceability of arbitration provisions in employment contracts and the ability of a wage claimant who is subject to an arbitration provision to assign wages to the Agency. The requested documents range from policy statements and internal memoranda to legal opinions. The Agency argues the requests are overly broad, seek

privileged information, call for legal research on the part of the Agency, and are not likely to lead to relevant information. The forum concludes that the information sought is not reasonably likely to produce information generally relevant to this case. The forum has already issued a ruling that essentially narrows the issues to whether Claimant is owed overtime wages or is a 'professional' employee exempt from such compensation, and whether any failure to pay overtime compensation was willful. Respondent's requests focus solely on the enforceability of an arbitration provision that is no longer an issue before the forum. Accordingly, Respondent's request for those documents is **DENIED**.

"Requests 8 and 9

"In request number eight, Respondent seeks 'all statistics that are already being calculated and maintained by the BOLI regarding the number of cases submitted to the BOLI and the ultimate disposition of those cases.' Respondent believes the information will help support his defense that the Agency denies employers, in general, due process. His request, however, is vague, overbroad, and imposes an undue burden on the Agency to produce information that Respondent has not established, even remotely, as relevant or likely to lead to relevant information. Accordingly, Respondent's request number eight is **DENIED**.

"In request number nine, Respondent seeks 'the information [the Agency] has regarding actual or potential bias by any of [the Agency's] employees.' This request, also, is vague and overly broad. Moreover, it is the Commissioner who makes the ultimate determinations of law and fact in a contested case. Speculation about bias on the part of Agency employees is not probative of any issues in this case. Respondent's request number nine is **DENIED**."

17) By letter dated November 7, 2001, the Agency advised the forum that Respondent had filed certain documents in U. S. District Court. Copies of the documents were appended to the Agency's letter.

18) On November 7, 2001, Respondent filed a second motion for postponement based on a pending lawsuit against BOLI in federal court that Respondent filed on October 31, 2001. On November 9, 2001, the Agency filed its objections to Respondent's request by facsimile transmission, asserting the request was untimely and not for good cause shown.

19) On November 9, 2001, the forum issued its ruling on Respondent's second motion for postponement that stated in pertinent part:

“As with Respondent’s first request, I have considered the requirements of OAR 839-050-0150(5) that says, in part, “the administrative law judge may grant the request for good cause shown.” OAR 839-050-0020(10) provides, in pertinent part:

“‘Good cause’ means, unless otherwise specifically stated, that a participant failed to perform a required act due to an excusable mistake or circumstance over which the participant had no control. ‘Good cause’ does not include a lack of knowledge of the law including these rules.’

“I have also considered OAR 839-050-0000 which states that one of the purposes of the hearings rules is to provide for timely hearings. I find Respondent’s reason given in support of his second request does not satisfy the requirements of these rules.

“The request is untimely and based on a reason that does not constitute circumstances beyond Respondent’s control. The forum is unaware of any reason, at present, why Respondent’s recent action in federal court necessitates a postponement of the scheduled hearing. Respondent’s request is **DENIED.**”

20) At the start of hearing, Respondent stated he had no questions about the Notice of Contested Case Rights and Procedures, but stated for the record that he had a continuing objection to the ALJ’s rulings on all of his prehearing motions.

21) At the start of hearing, the ALJ verbally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

22) At the start of hearing, the participants stipulated to the admission of exhibits A-9, A-10, R-1, R-4, R-8, R-9, and R-10.

23) During the hearing, Respondent objected to the admission of Claimant’s time records into evidence on the basis they contained the names of Respondent’s clients and were confidential business records. The Agency objected to the timeliness of the objection and argued that the records were central to the issues in the case. The participants agreed that Respondent released the documents to the Agency prior to the hearing and did not claim a privilege at that time. The ALJ found that the time records were central to the issues before the forum and that Respondent had not timely

objected to them based on a privilege. After finding that the names of Respondent's clients were not particularly pertinent to the case, the ALJ ordered the names be redacted from any records submitted as evidence in the record and ordered the participants to refrain from referring to Respondent's clients by name during witness testimony. The Agency was also ordered to return any and all copies of the time records that were not submitted as evidence to Respondent after the hearing and retain only those documents necessary to maintain its record of the proceeding.

24) Respondent advised the forum by letter dated December 5, 2001, that the Agency had not returned Claimant's time records to Respondent in accordance with the ALJ's oral ruling at hearing. Additionally, Respondent asserted the Agency had not complied with the ruling by failing to make the required redaction on the time records.

25) On December 19, 2001, the forum received a letter, with enclosures, from Agency case presenter Domas stating in pertinent part:

"Enclosed are the redacted exhibits per your oral order during the hearing in the above case. A copy has been provided to the Respondent. The Compliance Specialist is sending me Ms. Shelley's time sheets and I am sending him a redacted copy. His copy of the time sheets will be destroyed."

26) On December 21, 2001, the forum issued an interim order that stated in pertinent part:

"The Agency is hereby ordered to either (1) return all copies of all Respondent timesheets, retaining only a redacted copy of that which is necessary to preserve the Agency's file, or (2) with Respondent's permission, destroy all copies of all Respondent time sheets, retaining only a redacted copy of that which is necessary to preserve the Agency's file. If the Agency destroys its copies of the timesheets, the Agency must provide to the forum, with a copy to Respondent, a statement certifying that all copies of all Respondent time sheets in the Agency's possession were destroyed. Said documents must be turned over to Respondent or destroyed, with a certificate filed with the Hearings Unit, by Friday, January 4, 2001 [sic]."

27) On May 29, 2002, the ALJ issued a proposed order and notified the participants they were entitled to file exceptions to the proposed order. After receiving an extension of time to file his exceptions, Respondent filed timely exceptions, which are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Scott E. Miller was a certified public accountant who engaged in business as an accountant and tax consultant and employed one or more individuals in Oregon.

2) Respondent employed Claimant from October 7, 1998 until December 17, 1999.

3) When Respondent hired Claimant, he asked her to sign an employment agreement that stated in pertinent part:

“1. Employment. The Employer agrees to employ the Employee in the capacity of Paraprofessional, upon the terms and conditions set out herein.

“ * * * * *

“3. Compensation. The Employer shall pay the Employee as compensation for the services rendered by the Employee, a wage of \$12.69 per hour paid twice a month. Salary payments shall be subject to withholding and other applicable taxes. Compensation rates shall be reviewed annually. Employer shall pay overtime at the same rate as regular time. Employee shall provide Employer a written time sheet for each pay period within 24 hours of its completion. Employee agrees that it is [her] responsibility to account for [her] hours daily and Employer shall not be held liable for any hours not reported on [her] time sheet. All overtime shall be ‘banked’ and may be used to increase paid hours, up to 40 hours per week, when there is a lack of work. All unused banked time will be paid each year with the period ending November 30th paycheck.”

Respondent wrote the employment agreement in 1997 and then hired an attorney to review the completed document.

4) In accordance with the employment agreement, Claimant maintained a weekly time sheet that recorded her billable and non-billable hours worked. On a

written time sheet provided by Respondent, she recorded the tasks she performed each day, the name of the client each task pertained to, and the amount of time spent on each task. Claimant turned in her time sheets to Respondent each week and he reviewed and checked off each entry with a pencil or pen. After his review, Respondent entered the approved hours worked into a time and billing program on the computer. Claimant was paid \$12.69 per hour for each hour she worked throughout her employment.

5) Respondent shared an office suite with two other certified public accountants. Claimant was Respondent's only full time employee. Her duties included typing, filing, billing, and working with a computer tax program to prepare simple tax returns. She also "stuffed" envelopes, answered telephones, and greeted clients for Respondent. There was no front desk person. Clients who were scheduled for appointments walked in and rang a bell for service. Claimant responded to the bell for Respondent and the other two accountants in the office.

6) During tax season, Respondent hired a part time employee to assist with tax preparation. Claimant and the part time employee both assisted Respondent by preparing simple tax returns. Respondent supervised Claimant and the part time employee.

7) Respondent set Claimant's hours and she normally worked from 8 a.m. until 5 p.m., five days per week. During tax season and at Respondent's request, Claimant worked hours that exceeded her 40-hour workweek. As provided in the employment agreement Claimant signed, Respondent "banked" Claimant's overtime hours with the understanding that the hours would be credited to Claimant, at her straight time rate, during the slow season to bring a slow week up to 40 hours when necessary. By the time Claimant's employment with Respondent ended in December

1999, she had accrued 123.75 overtime hours that Respondent had paid at Claimant's straight time rate of \$12.69 per hour. In May 2000, Claimant wrote Respondent a letter that stated in pertinent part:

"I am writing this letter to give you the opportunity to voluntarily pay me the overtime pay I was denied. I calculate that at 123.75 hours at \$6.345 per hour or [sic] a total of \$785.19."

8) Claimant has taken some college level accounting and computer courses, but she does not have a college degree. She holds an Oregon tax consultant's license and passed an exam to become an "enrolled agent" for the IRS. She did not appear before the IRS as an enrolled agent or use her tax consultant license while working for Respondent. Respondent assigned Claimant uncomplicated tax returns to prepare during tax season, but Claimant's primary duty year round involved bookkeeping and clerical tasks.

9) Claimant prepared tax returns by using a computer program that required only that she transfer the client's tax information to a standard prepared form. Respondent did not permit Claimant to interview or advise clients on tax matters. Respondent reviewed and signed every tax return Claimant prepared. Because he signed all of the returns, Respondent believed it was his duty to ensure that the work done by others was done correctly.

10) Between February 1 and April 16, 1999, Claimant worked 577.75 hours, 123.75 of which were hours exceeding 40 per week. For those hours, Claimant earned \$8,117.46 (577.75 multiplied by \$12.69 and 123.75 multiplied by \$6.35). Respondent paid Claimant only \$7,331.65. Respondent still owes Claimant \$785.81 in unpaid wages.

11) Claimant's last day of work was December 17, 1999.

12) Claimant's due and owing wages of \$785.81 remain unpaid.

13) The forum computed civil penalty wages pursuant to ORS 652.150, as follows: \$12.69 (Claimant's hourly rate) multiplied by 8 (hours per day), which equals \$101.52, multiplied by 30 days, which equals \$3,045.60.

14) All of the witnesses gave credible testimony.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent conducted a business in the state of Oregon and engaged the personal services of one or more employees in the operation of that business.

2) Respondent employed Claimant between October 7, 1998, and December 17, 1999.

3) At all times material herein, Claimant was not a bona fide professional employee exempt from overtime.

4) Respondent and Claimant had a written agreement that Claimant would be paid \$12.69 per hour.

5) Between February 1 and April 16, 1999, Claimant worked 577.75 hours, 123.75 of which were in excess of 40 hours per week. For all of these hours, Claimant earned a total of \$8,117.46. Respondent paid Claimant \$7,331.65 and therefore owed Claimant \$785.81 in earned and unpaid wages at the time Claimant left Respondent's employment.

6) Claimant quit her employment on December 17, 1999.

7) Respondent owes Claimant \$785.81.

8) Respondent willfully failed to pay Claimant \$785.81 in earned, due and payable overtime wages. Respondent has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.

9) Civil penalty wages, computed pursuant to ORS 652.150, equal \$3,045.60.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimant was Respondent's employee subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.414, and 653.010 to 653.261.

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

3) ORS 653.261(1) provides:

"The Commissioner of the Bureau of Labor and Industries may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to, minimum meal periods and rest periods, and maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of such employees when computed without benefit of commissions, overrides, spiffs, and similar benefits."

OAR 839-020-0030(1) provides that except in circumstances not relevant here:

" * * * all work performed in excess of forty (40) hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed without benefits of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.281(1)."

Claimant was not exempt from overtime. Oregon law required Respondent to pay Claimant one and one-half times her regular hourly rate of \$12.69 per hour or \$19.04 per hour for all hours worked in excess of 40 per week. Respondent failed to pay Claimant at the overtime rate, in violation of OAR 839-020-0030(1).

4) ORS 652.140(2) provides:

"When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the

next regularly scheduled payday after the employee has quit, whichever event first occurs.”

Claimant’s last day of work was December 17, 1999, but the record does not establish whether Claimant gave 48 hours or more notice to Respondent of her intention to quit her employment. Even assuming Claimant did not give the requisite notice, her wages would have been due no later than December 24, 1999. Respondent violated ORS 652.140(2) by failing to pay Claimant \$785.81 by that date.

5) ORS 652.150 provides:

“If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date, and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued.”

Respondent is liable for \$3,045.60 in civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(2).

6) 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 order Respondent to pay Claimant her earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

In order to prevail in this matter, the Agency was required to prove: 1) that Respondent employed Claimant; 2) Respondent agreed to pay Claimant \$12.69 per hour; 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, 263, 264 (2000). Undisputed evidence

shows that Respondent employed Claimant and that he agreed to pay her \$12.69 per hour. The participants agree that Respondent paid Claimant for all of the hours she worked in excess of 40 hours per week at the straight time wage rate of \$12.69 per hour. In his answer, however, Respondent contends that Claimant “was a professional under the criteria set forth by BOLI and therefore the requirement to pay an overtime premium under OAR 839-050-0030 is not required.” Respondent has the burden of presenting evidence to support his affirmative defense. *In the Matter of Lane-Douglas Construction*, 21 BOLI 36 (2000). Respondent failed to meet that burden. Evidence establishes that Claimant was, at best, Respondent’s assistant and an hourly employee who worked 123.75 hours in excess of 40 hours per week for which she was not properly compensated.

PROFESSIONAL EMPLOYEE

If certain conditions are met, professional employees may be excluded from overtime requirements. ORS 653.020(3) provides an exclusion for an individual:

“[e]ngaged in * * * professional work who:

“(a) Performs predominantly intellectual * * * tasks;

“(b) Exercises discretion and independent judgment; and

“(c) Earns a salary and is paid on a salary basis.”

OAR 839-020-0005 further states that:

“(3) ‘Professional Employee’ means any employee:

“(a) Whose primary duty consists of the performance of:

“(A) Work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine menial, manual, or physical processes;

“ * * * * *

“(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

“(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

“(d) Who earns a salary and is paid on a salary basis pursuant to ORS 653.025 exclusive of board, lodging, or other facilities.

“ * * * * *

“(5) ‘Independent Judgment and Discretion’ means the selection of a course of action from a number of possible alternatives after consideration of each, made freely without direction or supervision with respect to matters of significance. It does not include skill exercised in the application of prescribed procedures.”

This forum has not previously discussed this particular exemption or the type of intellectual tasks contemplated as typical of employees performing “professional work.” The forum can, however, take guidance from the federal regulations interpreting the federal exemption statute, which is nearly identical to ORS 653.020(3).ⁱⁱ Those regulations, which include a definition of “professional employee” very similar to the one in OAR 839-020-0005,ⁱⁱⁱ include a specific discussion of the exemption as it pertains to accountants. The regulations note that accountants who are not certified public accountants may also be exempt as professional employees if the accountants actually perform work requiring the consistent exercise of discretion and independent judgment and “otherwise meet the tests prescribed in the definition of ‘professional’ employee. Accounting clerks, junior accountants, and other accountants, on the other hand, normally perform a great deal of routine work which is not an essential part of and necessarily incident to any professional work which they may do. Where these facts are found such accountants are not exempt.” 29 CFR § 541.301(f).

In this case, the evidence does not support that Claimant was exempt from overtime as an accountant or an accounting clerk who regularly exercised discretion and independent judgment. Although Claimant had taken some accounting courses and was certified to prepare income tax returns, she did not have the advanced

specialized instruction or education contemplated by this exemption. There is no evidence in the record that Claimant prepared anything other than basic, uncomplicated tax returns and even those were subject to Respondent's review and signature. Moreover, the majority of Claimant's actual job duties were routine mental and physical tasks that did not require advanced instruction. Even when Claimant was actually preparing income tax returns, she was primarily filling out forms rather than analyzing or making independent judgments concerning individual clients. As the federal regulations further note, "some employers erroneously believe that anyone employed in the field of accountancy, engineering, or other professional fields, will qualify for exemption as a professional employee by virtue of such employment. While there are many exempt employees in these fields, *the exemption of an individual depends upon his [or her] duties and other qualifications.*" (Emphasis added) The regulation emphasizes that the exemption does not apply to all employees of professional employers or all employees in industries having large numbers of professional members, or all employees in a particular occupation. Nor does the exemption apply to "persons with professional training, who are working in professional fields, but performing subprofessional or routine work." 29 CFR § 541.308. Even if evidence showed Claimant had professional training, she was performing routine work and is not exempt as a professional employee.

The final criteria requires that a professional employee "[e]arn[] a salary and [be] paid on a salary basis." ORS 653.020(3)(c). Evidence shows Respondent and Claimant agreed that Claimant would be paid \$12.69 per hour for every hour worked and, in fact, was paid that hourly rate for every hour she worked. The forum finds that when Claimant's job duties and form of compensation are measured against the

applicable criteria, Claimant is not a professional employee and is not exempt from Oregon's overtime provisions.

OVERTIME HOURS WORKED

Respondent does not dispute that Claimant worked at least 123.75 hours of overtime and that he paid the overtime at Claimant's straight time rate of \$12.69 per hour. Claimant contends and her time sheets represent that she worked 131 hours. However, missing from one of Claimant's time sheets are Respondent's check marks which, evidence established, serve to indicate he has reviewed and accepted the time sheet. That particular time sheet represents that Claimant worked 7.75 hours on March 15, 1999. Since the check marks are present on every other time sheet submitted, the forum infers that either Respondent had no knowledge of the time sheet or for some reason did not accept the time noted by Claimant. In either case, the forum has only credited those time sheets that Respondent reviewed and approved. As a result, the forum finds that Claimant worked a total of 123.75 hours in excess of 40 hours per week. For her total hours worked (577.75), Claimant earned \$8,117.46, including overtime, based on the agreed upon rate of \$12.69 per hour. The participants stipulated that Respondent paid Claimant a total of \$7,331.65. Respondent owes Claimant \$785.81 for overtime wages earned and unpaid.

CIVIL PENALTIES

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 employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238 (1983).

Respondent does not dispute that Claimant worked 123.75 overtime hours, but believed Claimant was a professional employee and therefore exempt from overtime. Respondent's failure to apprehend the correct application of the law pertaining to overtime exemptions and Respondent's actions based on this incorrect application does not exempt Respondent from a determination that he willfully failed to pay wages earned and due. *In the Matter of Locating, Inc.*, 14 BOLI 97 (1994), *aff'd without opinion, Locating, Inc. v. Deforest*, 139 Or App 600, 911 P2d 1289 (1996); *In the Matter of Mario Pedroza*, 13 BOLI 220 (1994). Respondent admits he did not pay Claimant one and one half times her regular rate of pay for her overtime hours worked and the evidence shows his failure to pay the additional half time wages was intentional. From these facts, the forum infers Respondent voluntarily and as a free agent failed to pay Claimant all of the wages she earned between February 1 and April 16, 1999. Respondent acted willfully and is liable for penalty wages under ORS 652.150.

Penalty wages, therefore, are assessed and calculated in accordance with ORS 652.150 in the amount of \$3,045.60. This figure is computed by multiplying \$12.69 per hour by 8 hours per day multiplied by 30 days. See ORS 652.150 and OAR 839-001-0470.

RESPONDENT'S EXCEPTIONS

Respondent filed four general categories of exceptions to the proposed order. The forum has changed portions of the proposed order in response to some of the exceptions and overruled the remainder of the exceptions as discussed below.

A. Exception 1 - “Claimant intentionally gave inaccurate testimony designed to mislead the BOLI.”

Respondent excepts to the forum’s reliance on Claimant’s testimony in the proposed order and contends that Claimant’s statements regarding the nature of her work, the amount of time she spent on her work, her use of her technical licenses, and her exercise of independent judgment are “completely false.” Respondent submitted, for the first time, unsworn statements of previous employees “[t]o support Respondent’s claim that Claimant intentionally gave false testimony.” This forum has previously held and continues to hold that credibility findings are accorded substantial deference and absent convincing reasons for rejecting such findings, they are not disturbed. *In the Matter of Staff, Inc.*, 16 BOLI 97, 117 (1997). In this case, Claimant’s testimony regarding the substantive issues was bolstered by and consistent with Respondent’s testimony. At this juncture, Respondent offers two unsworn statements of former employees describing their job duties while employed by Respondent in an effort to discredit Claimant’s testimony. Notwithstanding their lack of relevance,^{iv} the witness statements constitute new facts that are not part of the record. The forum is required to make its decisions exclusively on the record made at hearing. OAR 839-050-0380(1) states, in pertinent part, that “[a]ny new facts presented or issues raised in * * * exceptions shall not be considered by the commissioner in preparation of the Final Order.” See also *In the Matter of Diran Barber*, 16 BOLI 190 (1997). The forum, therefore, has not considered the statements and, after considering Respondent’s arguments and the evidence, finds no convincing reason to disturb the ALJ’s finding that all of the witnesses, including Claimant and Respondent, testified credibly. Respondent’s exception is denied.

B. Exception 2 - “Factual inaccuracies in the proposed order.”

Respondent cites three inaccuracies in the proposed order. First, Respondent correctly points out that the proposed order erroneously states that Claimant’s earned and unpaid wages were due on February 7, 1999. The correct date is December 24, 1999, and the appropriate changes were made in the Conclusions of Law and Order sections of this Final Order.

Second, Respondent notes that the proposed order did not mention a letter signed by Claimant stating she had been fully compensated for all of her time while employed by Respondent. There is no such letter in the record; however, Claimant acknowledged during her testimony that she had signed a statement agreeing she had been compensated for all hours worked, but that she did not sign a statement agreeing she had been paid at the proper rate. Respondent posits that Claimant has “waived her right to any additional compensation (if it were due her)” by acknowledging she was paid for all hours worked. Such a position is contrary to the law. Respondent is required to pay Claimant at the proper rate and Claimant’s acceptance of straight time pay for her overtime hours worked is not a defense to an administrative action to collect earned, due, and payable wages. *In the Matter of Locating, Inc.*, 14 BOLI 97, 108 (1995). Respondent’s exception on this point is denied.

Finally, Respondent states that during the hearing “Respondent made certain objections regarding the Forum’s previous rulings [that] were not noted in the Proposed Order and may therefore provide an incomplete record of the hearing.” The forum has modified Finding of Fact – Procedural 20 to reflect Respondent’s continuing objection to the ALJ’s rulings on Respondent’s prehearing motions.

C. Exception 3 - “The investigator failed to do his job correctly which resulted in Respondent being inappropriately assessed penalty wages.”

Respondent’s lengthy exception regarding the competency of the Agency’s investigation, if not completely irrelevant, is without merit. There is no evidence in the record made at hearing that (1) shows the Agency investigator failed to perform his job correctly or (2) that Respondent was inappropriately assessed civil penalty wages. Respondent’s exception is denied.

D. Exception 4 - “Not all of the evidence was considered or given appropriate weight.”

Respondent cites three examples of evidence Respondent believes the ALJ did not consider. First, Respondent contends the proposed order omitted evidence (an employment agreement that was reviewed by an attorney in 1997) that shows Respondent did not have the “intent or knowledge required for an award of penalty wages.” To the contrary, the employment agreement was considered by the ALJ to the extent that it established that Respondent intended to pay Claimant straight time wages for overtime hours worked. Moreover, the agreement also established that Respondent voluntarily and as a free agent failed to pay Claimant all of her overtime wages, earned and due. Those facts, established in the employment agreement, are enough to find Respondent liable for civil penalty wages. Respondent’s exception is denied. The forum, however, made a minor revision to Finding of Fact – The Merits 3 to clarify the finding.

Second, Respondent excepts to the lack of discussion in the proposed order regarding Respondent’s claim that the Agency investigator “tried to use heavy handed and illegal tactics to force Respondent not to exercise his legal rights to appeal.” There is no evidence in the record that warrants such a discussion and Respondent’s exception is therefore denied.

Finally, Respondent asserts that despite the ALJ's finding that all of the witnesses were credible, the ALJ did not give Respondent's evidence equal weight. There is no evidence in the record that "there was a presumption that Respondent would not act truthfully." To the contrary, Respondent's testimony regarding the substantive issues was given considerable weight and was found to be consistent with Claimant's testimony. Respondent attached a different significance to the facts than the ALJ, but that difference does not render Respondent's testimony less than credible. The forum is not required to explain why it chooses which evidence to believe; likewise, if from a basic finding of fact the forum could rationally infer a further fact, the forum need not explain the rationale by which the inferred fact is reached. *In the Matter of Scott Nelson*, 15 BOLI 168, 189 (1996). Respondent's misapprehension of the facts and law in this case, does not portend a lack of credibility on Respondent's part, but rather an earnest, albeit mistaken, belief that his interpretation of the facts and law and inferences drawn therefrom is correct. Respondent's exception is denied.

ORDER

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

A certified check payable to the Bureau of Labor and Industries in trust for Edith "Lynn" Shelley in the amount of THREE THOUSAND EIGHT HUNDRED THIRTY ONE DOLLARS AND FORTY ONE CENTS (\$3,831.41), less appropriate lawful deductions, representing \$785.81 in gross earned, unpaid, due and payable wages and \$3,045.60 in penalty wages, plus interest at the legal rate on the sum of \$785.81 from December 24, 1999, until paid and interest at the legal rate on the sum of \$3,045.60 from January 24, 2000, until paid.

ⁱ “The forum makes no determination in this ruling regarding the enforceability of the mediation and arbitration provision. However, as the Agency points out, the provision’s efficacy is dubious because it contains language that if deemed unconscionable would render the provision void and unenforceable.”

ⁱⁱ See 29 USC § 13(a)(1), which makes exempt: “any employee employed in a bona fide executive, administrative, or professional capacity * * * (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedures Act * * *)”

ⁱⁱⁱ See 29 CFR § 541.3.

^{iv} The authors of the statements do not reveal any personal knowledge of Claimant’s job duties during her period of employment with Respondent.