

WAGE COLLECTION, MINIMUM WAGE, OVERTIME, AND WORKING CONDITIONS

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WAGE COLLECTION, MINIMUM WAGE, OVERTIME, AND WORKING CONDITIONS

1.0 COMMISSIONER'S AUTHORITY

1.1 --- Generally; Discretion

The commissioner has jurisdiction over a claim of alleging unpaid wages. ----- *In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 268 (2014).*

Although the commissioner had jurisdiction over the agency's allegations that respondents issued dishonored payroll checks to claimant, those charges were dismissed because the agency was precluded from amending its original OOD to add those allegations. --- *In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 268 (2014).*

1.2 --- To Investigate

1.3 --- To Order Payment of Wages/Penalties

The commissioner has the authority to order respondent to pay claimant her earned, unpaid, due and payable wages and penalty wages, plus interest, on all sums until paid. ---- *In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI 253, 256 (2014).*

The commissioner has the authority to award monetary damages, including penalty wages that exceed those sought in the order of determination when they are awarded as compensation for statutory wage violations alleged in the charging document. ----- *In the Matter of Susan C. Steves, 32 BOLI 43, 54-55 (2012).*

1.4 --- To Fashion Remedy

2.0 EMPLOYMENT RELATIONSHIP

2.1 --- Generally

Testimony of each claimant that he was employed by respondent, corroborated by exhibits and by respondent's failure to dispute the employment, was sufficient to establish employment relationship. ---- *In the Matter of Bruce Crisman, dba Nu West Painting Contractors, 32 BOLI 209, 214 (2013).*

2.2 --- Partnerships

2.3 --- Independent Contractors

2.3.1 --- Generally

In its answer, CSRT denied owing wages to claimant because "CSRT has no employees." The forum stated that assuming, *arguendo*, that this language was sufficient to raise an independent contractor defense, CSRT had the burden of proving that defense by a preponderance of the evidence. ----- *In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 269 (2014).*

This forum applies an "economic reality" test to distinguish an employee from an independent contractor under Oregon's minimum wage and wage collection laws. The degree of economic dependency in any given case is determined by analyzing the facts presented in light of the following five factors, with no one factor being dispositive: (1) The degree of control exercised by the alleged employer; (2) The extent of the relative investments of the worker and alleged employer; (3) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer; (4) The skill and initiative required in performing the job; and (5) The permanency of the relationship. ----- *In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 269 (2014).*

2.3.2 --- Degree of Control Exercised by Alleged Employer

The fact that (1) respondent assigned and directed claimant's work and (2) claimant used a computerized time clock set up by respondent to sign in and out work were indicia of an

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employment relationship. ----- *In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 269 (2014).*

2.3.3 --- Extent of Relative Investments of Worker and Alleged Employer

Claimant invested no money in respondent's business and the software she required to perform her job was provided by respondent's agent. ----- *In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 269 (2014).*

2.3.4 --- Degree to Which Worker's Opportunity for Profit and Loss is Determined by Alleged Employer

Respondent was the only entity for whom claimant performed work during the wage claim period. As well, claimant was paid by the hour and had no opportunity to earn a profit or suffer a loss. Claimant was also provided with a W-2 form for 2012. These facts were found to be indicia of an employment relationship. ----- *In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 269 (2014).*

2.3.5 --- Degree of Skill and Initiative Required to Perform the Work

2.3.6 --- Permanency of the Relationship

2.3.7 --- Independent Contractor Agreement

2.3.8 --- Industry Tradition

2.3.9 --- Other

2.4 --- Termination of Relationship

2.5 --- Volunteers

When respondent was a private attorney operating a for-profit business who met none of the exemptions in ORS 653.010(2), claimant could not work for her as a volunteer as a matter of law. ----- *In the Matter of Susan C. Steves, 32 BOLI 43, 52 (2012).*

3.0 RESPONDENTS/EMPLOYERS

3.1 --- Generally

Although ORS 653.010 does not include an express definition of "employee," by contextual implication and for purposes of chapter 653, a person is an "employee" of another if that other "employs," *i.e.*, "suffer[s] or permit[s]" the person to work. ----- *In the Matter of Susan C. Steves, 32 BOLI 43, 53 (2012).*

When an employer suffers or permits a person to work, the fact that the person is not paid or there is no agreement to pay the worker a fixed rate does not take her out of the definition of "employee" when a minimum wage law requires she be paid the minimum wage. --- *In the Matter of Susan C. Steves, 32 BOLI 43, 53 (2012).*

3.2 --- Corporations/Shareholders

3.2.1 --- Generally

3.2.2 --- Piercing the Corporate Veil

3.3 --- Agents

3.4 --- Joint Employers

In the past, the forum has relied on the federal FLSA, specifically 29 CFR § 791.2, to determine whether respondents were joint employers. ---- *In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 92 (2016).*

In general, a joint employment relationship exists when two associated employers share control of an employee. Joint or co-employers are responsible, both individually and jointly, for compliance with all applicable provisions of Oregon's wage and hour laws. ---- *In the Matter of*

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Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 91 (2016). See also *In the Matter of Portland Flagging, LLC (#28-15), 34 BOLI 244, 264 (2016).*

The forum found that BAS and BMC, two named respondents, were not joint employers on two projects that claimants worked on based on the following facts: (1) Marc Brown, the principal officer in both companies, had an undisputed interest in BAS and BMC; (2) BAS and BMC were both involved in the sheet metal business; (3) BAS, through its employee Brown, and BMC, through Claimants, both performed work at two projects; (4) BAS and BMC had shops located in the same building while BMC was in business and the same P.O. address; (5) Claimants' Daily Reports had either "BROWNS Architectural Sheetmetal, Inc." or "BROWNS Architectural Sheetmetal, Inc." and "Brun Metals Co. LLC" printed on top; (6) Claimants understood they were hired to work for BMC; (7) Claimants were paid by BMC and BMC issued 2009 W-2 forms to them; (8) Claimants' paystubs all came from BMC; and (9) BAS and BMC performed different functions – BAS performed consulting and design through Brown, its employee, and BMC did fabrication and installation. --- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 93-96 (2016).***

When the notice of public works for the subject project: (a) reflected that Portland Flagging was the flagging subcontractor; (b) Portland Flagging previously admitted that it operated under the assumed business name of "AD Traffic"; (c) time sheets, payroll records and retirement plan contribution statements for claimant all used some form of the name "AD Traffic"; (d) the statement for claimant's retirement account was addressed to "AD Traffic Control Services, LLC"; and (e) throughout the contested case process, Portland Flagging and AD Traffic shared the same business address, the forum found that the agency had sustained its burden in establishing that claimant was jointly employed by both Portland Flagging and AD Traffic Control and held that both corporate entities were responsible for the wages owing to her. --- ***In the Matter of Portland Flagging, LLC (#28-15), 34 BOLI 244, 264-65 (2016).***

A joint employment relationship is established under the FLSA when employers have an agreement to share the services of an employee that is mutually beneficial to the employer(s), where one employer acts directly or indirectly in the interest of the other employer with respect to the employee, where the employers share direct or indirect control of the employee, or where one employer controls the other employer. --- ***In the Matter of Portland Flagging, LLC (#28-15), 34 BOLI 244, 264 (2016).***

3.5 --- Partners

3.6 --- Successors in Interest (ORS 652.310)

3.6.1 --- Generally

When the agency failed to establish a prima facie case that claimant was entitled to unpaid wages, respondents Global and Drive could not be held liable under the successor employer theory for any unpaid wages. --- ***In the Matter of Autoteam, LLC, Global Auto Motors, LLC, and Drive Credit, LLC, 34 BOLI 44, 55 (2015).***

To decide if an employer is a successor, the test is whether it conducts essentially the same business that the predecessor did. The forum noted that Respondent Sabo would be a successor if he conducted essentially the same business as respondent CSRT did before it became inactive. The elements to look for include: the name or identity of the business; its location; the lapse of time between the previous operation and the new operation; the same or substantially the same workforce employed; the same product is manufactured or the same service is offered; and, the same machinery, equipment, or methods of production are used. Not every element needs to be present to find an employer to be a successor; the facts must be considered together to reach a decision. --- ***In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 273 (2014).***

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3.6.2 --- Name or Identity of Business

Even though the corporate respondent (CSRT) claimed to have dissolved on November 29, 2013, the individual respondent (Sabo) continued to represent himself as CEO and representative of CSRT. The forum found that the request was also notable in that Sabo both referred to his representative status in the present tense as well as the defense that the company “has” no employees. ---- ***In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 273 (2014).***

3.6.3 --- Location of Business

Even though the corporate respondent (CSRT) claimed to have dissolved on November 29, 2013, the individual respondent (Sabo) requested a hearing with a CSRT letterhead using the same address and phone number as CSRT used prior to its dissolution. ---- ***In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 273 (2014).***

3.6.4 --- Lapse in Time Between Operations

3.6.5 --- Same or Substantially the Same Work Force

3.6.6 --- Manufacture of Same Product or Offer of Same Service

3.6.7 --- Use of Same Machinery, Equipment, or Methods of Production

4.0 HOURS WORKED

4.1 --- Generally

4.2 --- Burden of Proof; Evidence

4.2.1 --- Burden of Proof

In a wage claim case, it is primarily the employer’s responsibility to keep records of the actual hours worked each pay period by each employee. At hearing, it is the employee’s responsibility merely to show the amount and extent of work done as a matter of just and reasonable inference; once that is done, the burden shifts to the employer to show the precise amount of work or to negate the showing of the employee. If the employer fails to produce such evidence, wages may be awarded to the employee, even though the award is approximate. ---- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 61 (2016), appeal pending.***

A claimant’s credible testimony may be sufficient evidence to show the amount of hours worked by the claimant. ---- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 61 (2016), appeal pending.***

Ultimately, a wage claimant always bears the burden of proving he performed work for which he was not properly compensated. ---- ***In the Matter of Autoteam, LLC, Global Auto Motors, LLC, and Drive Credit, LLC, 34 BOLI 44, 54 (2015).***

In a wage case, it is primarily the employer’s responsibility to keep records of the actual hours worked each pay period by each employee. At hearing, it is the employee’s responsibility merely to show the amount and extent of work done as a matter of just and reasonable inference; once that is done, the burden shifts to the employer to show the precise amount of work or to negate the showing of the employee. If the employer fails to produce such evidence, wages may be awarded to the employee, even though the award is approximate. ---- ***In the Matter of Bruce Crisman, dba Nu West Painting Contractors, 32 BOLI 209, 215 (2013).***

4.2.2 --- Evidence

The agency established the amount of unpaid wages due to three claimants from respondent’s agreement in its answer that those wages were due. ---- ***In the Matter of PDX Glass, 35 BOLI 140, 146 (2016).***

When the employer produces no records, the forum may rely on evidence produced by

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the agency from which “a just and reasonable inference may be drawn.” For example, without contrary evidence, the forum may rely on credible testimony as to the amount of hours worked. Notably, the credible testimony to support a wage claim need not come from the wage claimant himself, but can be supported with credible testimony from a co-worker or other person familiar with the hours worked by claimant. Therefore, the fact that claimant failed to appear at the hearing, in and of itself, did not warrant an automatic dismissal of his claims. ---- ***In the Matter of Autoteam, LLC, Global Auto Motors, LLC, and Drive Credit, LLC, 34 BOLI 44, 54 (2015).***

It is the employer’s duty to maintain an accurate record of an employee’s time worked. -- ***In the Matter of Autoteam, LLC, Global Auto Motors, LLC, and Drive Credit, LLC, 34 BOLI 44, 54 (2015).***

Claimant testified that she worked 20 hours a week for CSRT between November 15, 2012, and May 15, 2013. Her testimony was corroborated by the handwritten calendar of hours worked that she completed for the agency at the time she filed her wage claim and by computer records she provided to the agency that documented specific dates and times she worked. Based on that evidence, the forum concluded that claimant worked a total of 520 hours (20 hours x 26 weeks = 520 hours). ---- ***In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 270 (2014).***

The forum relied on three claimants’ contemporaneous records of the dates and hours worked, and the claimants’ testimony as to the accuracy of their records to determine the amount and extent of work performed. ---- ***In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 202 (2014).***

Although one claimant did not maintain a contemporaneous record of dates and hours worked, the forum relied on claimant’s testimony as to hours worked and photographic evidence of work performed when claimant’s testimony was not impeached or the evidence was not disputed on the record. ---- ***In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 202 (2014).***

Hours spent driving, subtracted by the employer and omitted by the agency in its calculation of hours worked, were not included by the forum in its calculation of total hours worked. ---- ***In the Matter of Dan Thomas Construction, Inc., 32 BOLI 174, 181 (2013).***

When the employer produces no records of the hours that a wage claimant worked, the forum may rely on evidence produced by the agency from which “a just and reasonable inference may be drawn.” ---- ***In the Matter of E. H. Glaab, General Contractor, Inc., 32 BOLI 57, 61 (2012).*** See also *In the Matter of Susan C. Steves, 32 BOLI 43, 53 (2012).*

A claimant’s credible testimony may be sufficient evidence to show the amount of hours worked by the claimant. ---- ***In the Matter of E. H. Glaab, General Contractor, Inc., 32 BOLI 57, 61 (2012).*** See also *In the Matter of Susan C. Steves, 32 BOLI 43, 53 (2012).*

The forum relied on claimant’s credible testimony that the 328 total hours on the handwritten calendar of hours he submitted to the agency was copied from his contemporaneously maintained, accurate record of hours worked when it was corroborated by a co-worker’s credible testimony that he and claimant worked eight hours a day, five days a week, for respondent and respondent did not provide a record of the hours worked by claimant during the agency’s investigation or with its answer. ---- ***In the Matter of E. H. Glaab, General Contractor, Inc., 32 BOLI 57, 61 (2012).***

The forum relied on claimant’s credible testimony and her contemporaneous record of hours worked to determine the number of hours she worked for respondent. ---- ***In the Matter of Susan C. Steves, 32 BOLI 43, 53-54 (2012).***

Lacking any other evidence of the amount respondent paid to claimant, the forum relied

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on claimant's credible testimony to conclude that she was paid \$2,000.00 for her work. ---- ***In the Matter of Susan C. Steves, 32 BOLI 43, 54 (2012).***

4.2.3 --- Amount and Extent of Work

Respondent failed to provide any records to show the amount and extent of work performed by the fourth of four wage claimants and the agency relied on claimant's records and testimony to prove its case. Due to claimant's lack of credibility, the agency failed to produce any evidence from which "a just and reasonable inference may be drawn." Accordingly, despite respondent's failure to produce any credible evidence, claimant's claim failed because the forum had no way of determining the exact or approximate number of hours that claimant worked or amounts he was paid. ---- ***In the Matter of Coast 2 Coast, LLC, 35 BOLI 151, 172 (2017).***

When it was undisputed that the third of four wage claimants was employed at the agreed wage rate of \$720 per week, claimant credibly testified that he maintained a contemporaneous record of his hours worked on a personal calendar that was received into evidence and that the dates and hours he recorded were accurate, and respondent offered no records to show the hours worked by claimant, claiming they had been stolen or, in the alternative, that the records were stored in boxes in a 5,000 square foot warehouse that respondent did not have the time to access because he was homeless, the forum relied on claimant's credible testimony and record to determine the number of hours worked by claimant and amount he was paid. ---- ***In the Matter of Coast 2 Coast, LLC, 35 BOLI 151, 171 (2017).***

When it was undisputed that the second of four wage claimants was employed at the agreed wage rate of \$16.50 per hour, claimant credibly testified that he maintained a contemporaneous record of his hours worked on a personal calendar that was received into evidence and that the dates and hours he recorded were accurate, and respondent offered no records to show the hours worked by claimant, claiming they had been stolen or, in the alternative, that the records were stored in boxes in a 5,000 square foot warehouse that respondent did not have the time to access because he was homeless, the forum relied on claimant's credible testimony and record to determine that he worked 26.5 hours, earning \$437.25 in gross wages, and was paid nothing for his work. ---- ***In the Matter of Coast 2 Coast, LLC, 35 BOLI 151, 171 (2017).***

When it was undisputed that the first of four wage claimants was employed at the agreed wage rate of \$14 per hour, claimant credibly testified that she maintained a contemporaneous record of her hours worked on a personal calendar that was received into evidence and that the dates and hours she recorded were accurate, and respondent offered no records to show the hours worked by claimant, claiming they had been stolen or, in the alternative, that the records were stored in boxes in a 5,000 square foot warehouse that respondent did not have the time to access because he was homeless, the forum relied on claimant's credible testimony and record to determine the number of hours worked by claimant and amount she was paid. ---- ***In the Matter of Coast 2 Coast, LLC, 35 BOLI 151, 171 (2017).***

When respondent kept no records; his testimony as to claimant's work hours was not credible; claimant met his responsibility of showing the amount and extent of work he performed as a matter of just and reasonable inference by credibly testifying as to the approximate hours that he worked; and claimant's approximation was subsequently adjusted downward by the agency's compliance specialist; the forum relied on the calculations by the agency's compliance specialist in awarding unpaid wages to claimant. ---- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 61 (2016), appeal pending.***

A claimant's credible testimony may be sufficient evidence to show the amount of hours worked by the claimant. ---- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 61 (2016), appeal pending.***

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In a wage claim case, it is primarily the employer's responsibility to keep records of the actual hours worked each pay period by each employee. At hearing, it is the employee's responsibility merely to show the amount and extent of work done as a matter of just and reasonable inference; once that is done, the burden shifts to the employer to show the precise amount of work or to negate the showing of the employee. If the employer fails to produce such evidence, wages may be awarded to the employee, even though the award is approximate. ----- ***In the Matter of Coast 2 Coast, LLC, 35 BOLI 151, 171 (2017)***. See also ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 61 (2016)***, appeal pending.

A claimant's credible testimony may be sufficient evidence to show the amount of hours worked by the claimant. ----- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 61 (2016)***, appeal pending.

Although ORS 279C.840 entitled four wage claimants to be paid the prevailing wage rate for any manual labor they performed within a trade classification while employed by respondent on a public works project, the Agency's case for unpaid wages failed for three claimants because the agency failed to meet its burden of proof as to the amount and extent of work they performed that was subject to the prevailing wage rate. Specifically, claimants' testimony established that a significant part of their work was not in a trade classification subject to the prevailing wage and there were no work records offered into evidence that might have allowed the forum to approximate the time the three claimants spent on these non-prevailing wage rate activities. There was also no testimony sufficiently specific regarding dates and times that would have allowed the forum to make reasonably accurate calculations. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 102-03 (2016)***.

When claimants' wage claims were based on the allegation that they worked on a public works project and were not paid the prevailing wage rate and the agency and respondents agreed that claimants were paid agreed rates of pay that were all lower than the prevailing wage rate for all work they performed, the forum was only required to determine the amount and extent of work claimants performed that was subject to the prevailing wage rate. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 98 (2016)***.

The agency established the amount and extent of work performed for four claimants on a prevailing wage rate job by all four claimants' unchallenged daily reports that listed the specific job duties performed each day and amount of time spent performing them, combined with claimants' credible testimony about those reports. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 102-03 (2016)***.

Even though respondents believed that claimant should not be paid for babysitting their son overnight on December 20-21, 2013, claimant was entitled to be paid for all work her employer suffered or permitted her to perform on their behalf. ----- ***In the Matter of Christopher Lee Ruston and Christine M. Stahler, 34 BOLI 56, 63 (2015)***.

It is the employer's duty to maintain an accurate record of an employee's time worked. When the employer produces no records, the forum may rely on evidence produced by the Agency from which "a just and reasonable inference may be drawn." For example, without contrary evidence, the forum may rely on a claimant's credible testimony as to the amount of hours worked. ----- ***In the Matter of Christopher Lee Ruston and Christine M. Stahler, 34 BOLI 56, 63 (2015)***.

Claimant credibly testified that she recorded her hours in her calendar each day that she worked. Respondents offered evidence in an attempt to raise questions as to the accuracy of the number of hours recorded on claimant's calendar, claiming that the evidence claimant submitted was "falsified." Importantly, the accuracy of claimant's calendar entries was

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supported by the fact that the calendar contained notations as to her other activities, such as appointments, house sitting obligations, etc. Those notations supported her assertion that she regularly made daily notes on her calendar of her activities and that this was not created after-the-fact to support her claim. She also credibly testified that she always “clocked out” when one of the respondents returned home and she remained on the premises to use their computer. Unlike claimant, respondents did not maintain contemporaneous records of the hours worked by claimant. Their testimony as to her hours worked was essentially based on their pattern of only having her babysit when they were both not home. However, without their own records of her hours worked, this evidence was not persuasive to overcome the hours claimant recorded at the time she worked. ---- ***In the Matter of Christopher Lee Ruston and Christine M. Stahler, 34 BOLI 56, 63 (2015).***

The agency did not meet its burden of showing the amount and extent of work performed by claimant when there was insufficient evidence to establish the number of hours worked by claimant, making it impossible to determine whether the amounts paid to him were proper compensation for his hours worked. ---- ***In the Matter of Autoteam, LLC, Global Auto Motors, LLC, and Drive Credit, LLC, 34 BOLI 44, 55 (2015).***

When there was no testimony from claimant or any other credible witness to support the number of hours he claimed he worked, the agency failed to establish this element of its prima facie case. ---- ***In the Matter of Autoteam, LLC, Global Auto Motors, LLC, and Drive Credit, LLC, 34 BOLI 44, 55 (2015).***

When claimant was paid nothing for 520 hours of work, the forum concluded that she was owed \$10,400 in gross, unpaid wages (520 hours x \$20 = \$10,400.00). ---- ***In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 270 (2014).***

One claimant earned \$6,030.00 based on a calculation of (1) 652 straight time hours x \$9.00 straight time wage *plus* (2) 12 overtime hours x overtime wage of \$13.50 per hour. ---- ***In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 203 (2014).***

One of the claimants earned \$1,161.00 based on a calculation of 129 straight time hours x \$9.00 straight time hourly wage. ---- ***In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 203 (2014).***

Based on claimant’s credible testimony and respondent’s failure to provide any contrary evidence, the forum concluded that claimant performed 53 hours of work. Claimant earned \$477.00 based on a calculation of 53 straight time hours x \$9.00 straight time hourly wage. ---- ***In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 204 (2014).***

A claimant earned \$2,975.50 based on a calculation of (1) 266 straight time hours x \$11.00 straight time wage *plus* (2) 3 overtime hours x overtime wage of \$16.50 per hour. ---- ***In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 204 (2014).***

4.2.4 --- Failure to Properly Compensate for all Hours Worked

Respondent failed to provide any records to show the amount and extent of work performed by the fourth of four wage claimants and the agency relied on claimant’s records and testimony to prove its case. Due to claimant’s lack of credibility, the agency failed to produce any evidence from which “a just and reasonable inference may be drawn.” Accordingly, despite respondent’s failure to produce any credible evidence, claimant’s claim failed because the forum had no way of determining the exact or approximate number of hours that claimant worked or amounts he was paid. ---- ***In the Matter of Coast 2 Coast, LLC, 35 BOLI 151, 172 (2017).***

The forum relied on claimant’s credible testimony to conclude that he earned \$5,971 in gross wages but was only paid \$1,440 in gross wages, leaving \$4,531.50 in gross, unpaid, due and owing wages that had not been paid to claimant at the time of the hearing. ---- ***In the***

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Matter of Coast 2 Coast, LLC, 35 BOLI 151, 171-72 (2017).

The forum relied on two pay stubs produced by claimant and claimant's credible testimony that those pay stubs accurately reflect the wages she was paid to conclude that respondent only paid claimant \$1,092 in gross wages. In contrast, claimant earned \$1,225 in gross wages, leaving \$133 in gross, unpaid, due and owing wages that had not been paid to claimant at the time of the hearing. ---- ***In the Matter of Coast 2 Coast, LLC, 35 BOLI 151, 171 (2017).***

Since claimants were paid their agreed rate of wage for all work performed and the agreed rate for all four claimants was lower than the prevailing wage rate, they were not properly compensated for any of the work they did that was subject to the prevailing wage rate. The forum found respondent liable for unpaid wages consisting of the difference between claimants' agreed rate of pay and the prevailing wage rate for every hour that claimants performed work in a trade classification. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 98 (2016).***

Claimant was not paid for the 73 hours that she worked and was owed \$365 in gross, unpaid wages (73 hours x \$5.00 = \$365.00). ---- ***In the Matter of Christopher Lee Ruston and Christine M. Stahler, 34 BOLI 56, 64 (2015).***

Based on paystubs, the forum concluded that one of the claimants was only paid \$4,011.95 for work when she had actually earned \$6030.00. \$6,030.00 minus \$4,011.95 is \$2,018.05. Dividing \$2,018.05 by \$9.00 yields a figure of approximately 224 hours of work for which claimant was not paid. ---- ***In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 203 (2014).***

Based on a single paystub, the forum concluded that one of the claimants was only paid \$360.85 for work when she had actually earned \$1,161.00. \$1,161.00 minus \$360.85 is \$800.15. Dividing \$800.15 by \$9.00 yields a figure of approximately 89 hours of work for which claimant was not paid. ---- ***In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 204 (2014).***

Based on claimant's credible testimony and respondent's failure to provide any contrary evidence, the forum concluded that claimant was paid nothing for 53 hours of work. ---- ***In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 204 (2014).***

Based on claimant's acknowledgment that she was paid \$442.13 and respondent's failure to provide any evidence of additional payment, the forum concluded that she was only paid \$442.13 for her work. \$2,975.50 minus \$442.13 is \$2,533.37. Dividing \$2,533.37 by \$11.00 yields a figure of approximately 230 hours of work for which claimant was not paid. ---- ***In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 204 (2014).***

4.3 --- Work Time

The forum responded to respondent's argument that claimant should not be compensated for unauthorized work by noting that the forum has long held that employees are entitled to be paid for all work an employer suffers or permits an employee to perform on their behalf and that respondent's failure to exercise adequate supervision over claimant to prevent him from doing that work is not a defense. The forum also rejected respondent's argument that a more experienced worker could have performed the work in less time. ---- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 61 (2016), appeal pending.***

4.4 --- Waiting Time, Standby Time, Sleep Time, Availability for Recall

4.5 --- Restrictions on Hours for Workers in Certain Industries

5.0 MINIMUM WAGE AND OVERTIME

5.1 --- Minimum Wage

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When the parties stipulated that the claimant was to be paid the greater of commission or minimum wage, there was no evidence to indicate that claimant earned a commission, and minimum wage in Oregon was \$9.10 per hour during claimant's employment, the forum concluded that claimant was entitled to be paid at \$9.10 per hour. ---- ***In the Matter of Autoteam, LLC, Global Auto Motors, LLC, and Drive Credit, LLC, 34 BOLI 44, 54 (2015).***

The forum rejected the argument that claimants were only entitled to minimum wage for "non-client" work, when respondent (1) denied entitlement to any pay for non-client work hours and (2) did not maintain an accurate record of "client" and "non-client" work. ---- ***In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 202 (2014).***

Although ORS 653.010 does not include an express definition of "employee," by contextual implication and for purposes of chapter 653, a person is an "employee" of another if that other "employs," *i.e.*, "suffer[s] or permit[s]" the person to work. ---- ***In the Matter of Susan C. Steves, 32 BOLI 43, 52 (2012).***

When an employer suffers or permits a person to work, the fact that the person is not paid or there is no agreement to pay the worker a fixed rate does not take her out of the definition of "employee" when a minimum wage law requires she be paid the minimum wage. --- ***In the Matter of Susan C. Steves, 32 BOLI 43, 53 (2012).***

When there is no agreed upon rate of pay, an employer is required to pay at least the statutory minimum wage. ---- ***In the Matter of Susan C. Steves, 32 BOLI 43, 53 (2012).***

5.2 --- Overtime

5.2.1 --- Generally

5.2.2 --- Computation

Claimant's overtime rate for hours worked over 40 in a given workweek was calculated by multiplying the agreed hourly rate by 1.5. ---- ***In the Matter of Dan Thomas Construction, Inc., 32 BOLI 174, 181 (2013).***

5.3 --- Posting Requirements

5.4 --- Excluded Employees

In case involving a wage claim made by a babysitter, the agency and respondents stipulated that claimant was to be paid \$5 for each hour worked. ---- ***In the Matter of Christopher Lee Ruston and Christine M. Stahler, 34 BOLI 56, 61 (2015).***

5.4.1 --- Generally

5.4.2 --- Agricultural Workers

5.4.3 --- White-Collar Workers

5.4.4 --- Other Specific Categories of Excluded Workers

6.0 DEDUCTIONS FROM WAGES

6.1 --- Generally

The forum overruled the agency's exception regarding the ALJ's failure to award amounts reflecting "Respondent's unlawful deductions from wage claimant's paychecks" and asks that the forum award "actual damages or \$200, whichever is greater" to four wage claimants pursuant to ORS 652.615 because there are two possible remedies for a violation of ORS 652.610(4) – a civil penalty under ORS 652.900 or "actual damages or \$200" pursuant to a private right of action under ORS 652.615 – and the agency's amended OOD did not ask for a civil penalty under ORS 652.900 and the remedy available under ORS 652.615 can only be obtained through a private right of action in court. ---- ***In the Matter of Coast 2 Coast, LLC, 35 BOLI 151, 175 (2017).***

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The agency sustained its burden of proof establishing that respondents unlawfully deducted amounts for work equipment from the paychecks of five workers in violation of ORS 652.610(3) and OAR 839-020-0020 when there was no admissible evidence to establish that the deductions met one of the exceptions of ORS 652.610(3)(a) or ORS 652.610(3)(b). The forum found five violations of ORS 652.610(3). As there was no evidence presented to show that the deductions caused the workers' pay to fall below the minimum wage and OAR 839-020-0020 applies to payroll deductions for equipment from the minimum wage, the forum concluded that OAR 839-020-0020 was not violated. ---- *In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 35-36 (2016).*

Because there was no evidence of a written agreement allowing respondents to make deductions from claimant's wages, they could not make her "work off" any amounts allegedly owed to them. ---- *In the Matter of Christopher Lee Ruston and Christine M. Stahler, 34 BOLI 56, 63 (2015).*

6.2 --- Authorization of Deductions

6.3 --- Deductions Required to be for Employee's Benefit

6.4 --- Specific Deductions and Setoffs

6.4.1 --- Draws, Advances, Loans

6.4.2 --- Meals, Lodging, Facilities

6.4.3 --- Tools, Equipment, Uniforms

The agency sustained its burden of proof establishing that respondents unlawfully deducted amounts for work equipment from the paychecks of five workers in violation of ORS 652.610(3) and OAR 839-020-0020 when there was no admissible evidence to establish that the deductions met one of the exceptions of ORS 652.610(3)(a) or ORS 652.610(3)(b). The forum found five violations of ORS 652.610(3). As there was no evidence presented to show that the deductions caused the workers' pay to fall below the minimum wage and OAR 839-020-0020 applies to payroll deductions for equipment from the minimum wage, the forum concluded that OAR 839-020-0020 was not violated. ---- *In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 35-36 (2016).*

6.4.4 --- Breakage, Damage

6.4.5 --- Other Deductions, Setoffs, or Counterclaims

Respondent's defense that wages due should be reduced because claimant kept respondent's tools, work truck and car was rejected when no supporting credible evidence was produced. ---- *In the Matter of Dan Thomas Construction, Inc., 32 BOLI 174, 181 (2013).*

7.0 PAYMENT OF WAGES

7.1 --- Agreed Rate

When (1) claimants testified as to their hourly rates of pay for their work with clients, (2) those pay rates were corroborated with handwritten notes and (3) respondent did not contest the accuracy of those pay rates except to dispute whether the rates applied to "non-client" work, the forum concluded that claimants were employed by respondent at the hourly rates claimed by claimants. ---- *In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 201-02 (2014).*

When there was evidence of complainants' agreed pay rates, the forum would not compute some categories of work at the minimum wage rate when (1) the respondent denied complainants' entitlement to pay for non-client work and (2) there was no evidence of an accurate record of the distinction between two types of work. Calculating all earnings at minimum wage would reward respondent for its failure to fulfill its statutory obligation. ---- *In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 202 (2014).*

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Through claimant's credible testimony, the agency proved that claimant's agreed rate of pay was \$20 per hour. --- *In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 270 (2014).*

Testimony of each claimant as to his rate of pay, corroborated by exhibits and respondent's failure to dispute the rate, was sufficient to establish the agreed rate of pay. ---- *In the Matter of Bruce Crisman, dba Nu West Painting Contractors, 32 BOLI 209, 214 (2013).*

The forum relied on claimant's credible testimony to conclude that claimant's correct rate of pay during the wage claim period was \$17 per hour. ----- *In the Matter of E. H. Glaab, General Contractor, Inc., 32 BOLI 57, 61 (2012).*

7.2 --- Reimbursable Expenses

The fact that respondent's testimony regarding payment for expenses was disjointed, confusing, contradictory, and sometimes unbelievable caused the forum to dismiss her claim that some expenses should be credited as wages paid. ----- *In the Matter of Dan Thomas Construction, Inc., 32 BOLI 174, 182 (2013).*

7.3 --- Paydays, Pay Periods

7.4 --- Employers' Duty to Know Law and Amount Due Employee (see also 12.2)

As a general rule, an employer is charged with knowing the hours worked by employees and their rates of pay. Respondents unquestionably knew, at least since they were served with the Order of Determination, that wages were owed to the claimants. ----- *In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI 209, 215 (2014).*

7.5 --- Employers' Duty to Pay

Unless notice of termination is given at least 48 hours ahead of the termination (in which case the wages are due at the time of termination), wages are due at the earlier of five business days after the termination, or at the next regularly scheduled payday. ---- *In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI 253, 261 (2014).*

Claimant's termination occurred on February 15 and there was no regularly scheduled payday. With the intervening Presidents' Day holiday, wages were due on February 23, 2013, and interest on the wages ran from that date. ---- *In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI 253, 261 (2014).*

7.6 --- Dispute About Wages Due

7.7 --- Final Paycheck

7.7.1 --- Generally

Respondents violated ORS 652.140(2) by failing to pay all wages earned and unpaid to claimant not later than five days, excluding Saturdays, Sundays and holidays, after claimant left employment. ----- *In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 268 (2014).*

7.7.2 --- Seasonal Farmworkers

7.7.3 --- Strikes

7.8 --- Method of Payment, Legal Tender

Although the commissioner had jurisdiction over the agency's allegations that respondents issued dishonored payroll checks to claimant, those charges were dismissed because the agency was precluded from amending its original OOD to add those allegations. --- *In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 268 (2014).*

7.9 --- Vacation Pay

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7.10 --- Interest

In general, a joint employment relationship exists when two associated employers share control of an employee. Joint or co-employers are responsible, both individually and jointly, for compliance with all applicable provisions of Oregon's wage and hour laws. ---- *In the Matter of Portland Flagging, LLC (#28-15), 34 BOLI 244, 265 (2016).*

Interest was found to be due starting five days after an employee's termination of employment. ---- *In the Matter of Bruce Crisman, dba Nu West Painting Contractors, 32 BOLI 209, 215-16 (2013)*

8.0 WORKING CONDITIONS

8.1 --- Meal Periods and Rest Periods

An employee's two time cards showing work for 6.5 hours and "no lunch", together with WH-38s showing payment to that employee for 6.5 hours on each occasion was a tacit admission the employee worked without the meal period required by OAR 839-020-0050, and the forum found two violations. ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 203 (2013).*

8.2 --- Rest Periods to Express Milk

8.2.1 --- Intentional Failure to Provide Rest Periods to Express Milk

8.2.2 --- Undue Hardship

8.2.3 --- Reasonable Efforts to Provide Private Location to Express Milk

8.2.4 --- Private Location

8.2.5 --- Close Proximity

8.2.6 --- Public Restrooms & Toilet Stalls

9.0 RECORDS

9.1 --- Personnel

9.2 --- Payroll Records, Time Records & Itemized Statements

It is primarily the employer's responsibility to keep records of the actual hours worked each pay period by each employee. At hearing, it is the employee's responsibility merely to show the amount and extent of work done as a matter of just and reasonable inference; once that is done, the burden shifts to the employer to show the precise amount of work or to negate the showing of the employee. If the employer fails to produce such evidence, wages may be awarded to the employee, even though the award is approximate. ---- *In the Matter of Bruce Crisman, dba Nu West Painting Contractors, 32 BOLI 209, 215 (2013).*

The forum found no violation of requirements to keep or provide records under OAR 839-020-0080 or 839-020-0083, when the agency's notice of intent failed to identify any records that respondents were required to keep and failed to keep, and no evidence was presented at the hearing to assist the forum in identifying how respondents were deficient. ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., et al, 32 BOLI 185, 198-99 (2013).*

10.0 WAGE CLAIMS

10.1 --- Generally

In a wage case, although the agency is not allowed to amend the order of determination to change the amount due, actual wages due can be still awarded if they exceed the amount sought in the order. ---- *In the Matter of Bruce Crisman dba Nu West Painting Contractors, 32 BOLI 209, 215-16 (2013)*

10.2 --- Assignment of Wage Claim

Penalty wages are recoverable by the commissioner when liability is established and the

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commissioner has an assignment of wages from the wage claimant. ---- ***In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI 209, 214 (2014).***

10.3 --- Agency's Prima Facie Case

To establish claimant's wage claim, the agency must prove the following elements by a preponderance of the evidence: 1) respondent employed claimant; 2) The pay rate upon which respondent and claimant agreed, if other than the minimum wage; 3) The amount and extent of work claimant performed for respondent; and 4) claimant performed work for which she was not properly compensated. ---- ***In the Matter of Coast 2 Coast, LLC, 35 BOLI 151, 170 (2017).*** See also *PDX Glass, 35 BOLI 140, 145 (2016); In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 60 (2016), appeal pending; In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 91 (2016); In the Matter of Christopher Lee Ruston and Christine M. Stahler, 34 BOLI 56, 61 (2015); In the Matter of Autoteam, LLC, Global Auto Motors, LLC, and Drive Credit, LLC, 34 BOLI 44, 53 (2015). In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 268 (2014); In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI Orders 253, 260 (2014); In the Matter of Giants, Inc., George T. Comalli, Hollywood Fitness, LLC, and Hollywood Fitness Center, LLC, 33 BOLI 53, 56 (2014); In the Matter of Aaron Alexander dba Currinsville Deli, 33 BOLI 60, 63 (2014); In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI 209, 214 (2014); In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 201 (2014); In the Matter of Bruce Crisman, dba Nu West Painting Contractors, 32 BOLI 209, 214 (2013); In the Matter of Dan Thomas Construction, Inc., 32 BOLI 174, 180 (2013); In the Matter of E. H. Glaab, General Contractor, Inc., 32 BOLI 57, 61 (2012); In the Matter of Susan C. Steves, 32 BOLI 43, 51-52 (2012).*

In a wage claim case in which the agency alleged that claimants were underpaid because they were not paid the prevailing wage they were entitled to, the elements of the agency's prima facie case included two additional elements. First, that two respondents jointly employed claimants. Second, that claimants were entitled to be paid the prevailing wage rate for all their work because the EG and ACMA projects were "public works." ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 91 (2016).***

After the ALJ's opening statements and after the ALJ declared CSRT to be in default, the agency's administrative prosecutor asked the ALJ to apply the provisions of OAR 839-005-0330(1) & (2) by accepting the pleadings and the agency's case summary as the record of the case and issuing a Final Order on Default. This was the first case in which the agency asked the forum to apply this rule. After the ALJ explained the problems he saw in interpreting the rule, the agency elected to withdraw its request and proceeded to call witnesses listed in its case summary and offer the agency exhibits filed with its case summary. ---- ***In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 265-66 (2014).***

When respondents admitted that the wages claimed in the Order of Determination were due and the amounts owing were correct, respondents' admissions established that the wages were unpaid and that they were due. ---- ***In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI 209, 214 (2014).***

When respondent did not appear at the hearing and did not contest the allegations that he employed the wage claimants and or the amount of the unpaid wages, it is the agency's responsibility merely to establish a prima facie case. ---- ***In the Matter of Bruce Crisman dba Nu West Painting Contractors, 32 BOLI 209, 214 (2013).***

In a wage claim default case, the Agency needs only to establish a prima facie case supporting the allegations of its order of determination in order to prevail. ---- ***In the Matter of***

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E. H. Glaab, General Contractor, Inc., 32 BOLI 57, 61 (2012).

11.0 AFFIRMATIVE DEFENSES

11.1 --- Claim and Issue Preclusion

11.2 --- Laches

Respondents' defense of laches was rejected because respondents did not satisfy their burden of proof. ---- *In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 103 (2016).*

11.3 --- Financial Inability to Pay Wages

The forum granted the agency's motion for summary judgment on the issue of penalty wages when respondent raised the affirmative defense of financial inability to pay in its answer but provided no records containing the detailed information required to support this affirmative defense in its response to the agency's motion. ---- *In the Matter of PDX Glass, LLC, 35 BOLI 140, 146 (2016).*

The inability to pay wages at the time the wages accrued is an affirmative defense under ORS 652.150(5) that, if proven, relieves an employer of all liability for ORS 652.150 penalty wages. Respondent has the burden of proving this affirmative defense. To meet its burden of proof, an employer must provide specific information as to the financial resources and expenses of both the business and the employer personally during the wage claim period, including submission of records from which that information came. ---- *In the Matter of PDX Glass, LLC, 35 BOLI 140, 146 (2016).*

11.4 --- Other

Respondents asserted the defense that "to the extent that any activities were undertaken at the direction of third parties or third parties knowingly participated in said activities or indemnified those activities, those third parties, including the prime contractor, are indispensable parties." The forum rejected this defense, stating that the agency had no obligation to join any other parties to the action. ---- *In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 104 (2016).*

Respondents assert the defense that "the agency has failed to apply its policies even-handedly and fairly by subjecting respondents to an OOD while acquiescing, approving, or condoning similar actions of other contractors at the same project locations without requiring those other contractors to pay prevailing wages." The forum rejected this defense because there was no evidence in the record as to whether the "other contractors" referred to by respondents paid the prevailing wage rate to their employees. ---- *In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 104 (2016).*

Respondents asserted the defense that "other contractors worked on the subject properties prior to and following respondents but were not required by the agency to pay prevailing wages for similar activities. As a consequence, the rationale governing those of the contractor should apply to respondents." The forum rejected this defense because there was no evidence in the record as to whether the "other contractors" referred to by respondents paid the prevailing wage rate to their employees. ---- *In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 103-04 (2016).*

The forum held that respondents' affirmative defense of "good faith/legitimate business motives" was not a defense to claimants' wage claims. ---- *In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 103 (2016).*

When respondents asserted that "some or all of the agency's and claimants' claims are barred by the applicable statute of limitations," the forum rejected respondents' defense, holding that the statute of limitations for wage claims for regular wages is six years and the agency's

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OOD was issued within the six-year period for all four claimants. ---- *In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 103 (2016).*

12.0 OTHER MATTERS CLAIMED AS DEFENSES

12.1 --- Contract Exempting Employer from Wage and Hour Laws/Agreed Rate Less than Minimum Wage

The forum rejected respondent's defense that claimants agreed to not be paid for "non-client" work hours. Under Oregon law, employees are entitled to be paid for all work that an employer suffers or permits them to perform on the employer's behalf, regardless of terms in an employment contract. ----- *In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 202-03 (2014).*

12.2 --- Ignorance or Misunderstanding of the Law

Employers have a duty to know the laws that regulate employment in this state. ORS 653.045 is one of those laws and respondents, as employers, had a duty to know and abide by its provisions. ----- *In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 47 (2016), appeal pending.*

The fact that respondents were ignorant of the law does not excuse them from compliance. Respondents were aware of Claimant's claim for wages, acted willfully in failing to pay her for 73 hours worked, and were liable for ORS 652.150 penalty wages. ----- *In the Matter of Christopher Lee Ruston and Christine M. Stahler, 34 BOLI 56, 64 (2015).*

Respondent's failure to apprehend the correct application of the law and her actions based on this incorrect application did not exempt her from a determination that she willfully failed to pay wages earned and due to claimant. ----- *In the Matter of Susan C. Steves, 32 BOLI 43, 55 (2012).*

12.3 --- Unconstitutionality

12.3 --- Arbitration Agreements

12.5 --- Other

The forum responded to respondent's argument that claimant should not be compensated for unauthorized work by noting that the forum has long held that employees are entitled to be paid for all work an employer suffers or permits an employee to perform on their behalf and that respondent's failure to exercise adequate supervision over claimant to prevent him from doing that work is not a defense. The forum also rejected respondent's argument that a more experienced worker could have performed the work in less time. ----- *In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 61 (2016), appeal pending.*

13.0 PENALTY WAGES (ORS 652.150)

13.1 --- Generally

Penalty wages can accrue for up to 30 days after wages are due if notice is given and the wages are not paid for that full 30 days. ---- *In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI 253, 261 (2014).*

Claimant was entitled to penalty wages from respondent on account of the failure to receive all wages due at termination. ---- *In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI 253, 256 (2014).*

The forum may award penalty wages when a respondent's failure to pay wages was willful. ----- *In the Matter of Christopher Lee Ruston and Christine M. Stahler, 34 BOLI 56, 64 (2015).* See also *In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 270 (2014); In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189 (2014); In the Matter of Dan Thomas Construction, Inc., 32 BOLI 174, 183 (2013); In the Matter of E. H. Glaab, General*

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Contractor, Inc., 32 BOLI 57, 62 (2012).

An employer is liable for penalty wages when it willfully fails to pay any wages or compensation of any employee whose employment ceases. Willfulness does not imply or require blame, malice, 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. ----- ***In the Matter of Coast 2 Coast, LLC, 35 BOLI 151, 172 (2017).*** See also *In the Matter of PDX Glass, 35 BOLI 140, 146 (2016)*; *In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 62 (2016), appeal pending*; *In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 99 (2016)*; *In the Matter of Giants, Inc., George T. Comalli, Hollywood Fitness, LLC, and Hollywood Fitness Center, LLC, 33 BOLI 53, 56 (2014)*; *In the Matter of Aaron Alexander dba Currinsville Deli, 33 BOLI 60, 64 (2014)*; *In the Matter of Susan C. Steves, 32 BOLI 43, 55 (2012).*

Penalty wages are due when an employer willfully fails to pay wages to an employee whose employment has ceased. ----- ***In the Matter of Farwest Hatchery LLC, 33 BOLI 176, 185 (2014).*** See also *In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI 209, 214 (2014).*

13.2 --- Willful Failure to Pay Wages

When there was no credible evidence in the record to suggest that respondent's agent, the person responsible for paying claimants, was unaware of the hours they worked or that he was not acting as a free agent in deciding not to pay claimants and the agency provided documentary and testimonial evidence to prove that its investigative staff made the written demand contemplated by ORS 652.150(2) for claimants' wages and the agency's OOD that repeated this demand, the forum computed penalty wages at the maximum rate set out in ORS 652.150(1) because respondent failed to pay claimants their unpaid wages after receiving the notices. ----- ***In the Matter of Coast 2 Coast, LLC, 35 BOLI 151, 172 (2017).***

From respondent's admissions, the forum inferred that respondent was aware that these wages were owed prior to the issuance of the OOD and that respondent's failure to pay the wage claimants all wages owed at the time of their termination corresponded to respondent's awareness that those wages were in fact owed. When there was no evidence in the record that respondent was not a free agent in its decision not to pay the wage claimants those wages, the forum concluded that respondent's failure was willful. ----- ***In the Matter of PDX Glass, 35 BOLI 140, 147 (2016).***

Respondent's arguments that he should not have to pay claimant for all hours worked because some of it was not authorized and because a more experienced worker could have performed the work in less time are no defense to a claim for penalty wages. Further, it is an employer's duty to keep an accurate record of the hours worked by its employees, and there is no evidence to suggest that respondent's omission of this required act, which potentially contributed to claimant's underpayment, was an unintentional act. ----- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 62 (2016), appeal pending.***

When the principal member of a respondent LLC testified that he had worked on public works projects in the past in which he had paid the prevailing wage rate to his employees, the project that respondent's employees worked on was obviously a public building being newly constructed, the principal's only inquiry as to respondents' responsibility to pay the prevailing wage rate was to ask the prime contractor, who told him respondent did not have to pay the prevailing wage rate because he would be working as a "consultant," respondent's workers credibly testified that they performed physical and manual labor on the project, testimony reflected in the unchallenged Daily Reports they submitted to respondents' office, and the principal himself was at the project on a regular basis to observe worker's activities, the forum

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concluded that, based on his prior experience on public works projects, the principal could not have avoided seeing that the project was a new public works under construction and his reliance on the prime contractor's assurance that respondents did not have to pay the prevailing wage rate was ill-founded and established respondent's willful failure to pay the prevailing wage rate on the subject project. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 99 (2016).***

The agency proved that claimant was not paid for work performed from December 11-21, 2013. Respondents were under the impression that they did not have to pay claimant for watching their son overnight as they did not believe they had hired her to babysit, but that she essentially voluntarily agreed to do so. Respondents also believed that they could require claimant to "work off" the cost of a car rental. These are not permissible reasons for failing to pay wages to an employee. Moreover, the fact that respondents were ignorant of the law does not excuse them from compliance. Respondents were aware of Claimant's claim for wages, acted willfully in failing to pay her for 73 hours worked, and were liable for ORS 652.150 penalty wages. ---- ***In the Matter of Christopher Lee Ruston and Christine M. Stahler, 34 BOLI 56, 64 (2015).***

Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission "willfully" if he or she acts (or fails to act) intentionally, as a free agent, and with knowledge of what is being done or not done. ---- ***In the Matter of Christopher Lee Ruston and Christine M. Stahler, 34 BOLI 56, 64 (2015).*** See also *In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 270 (2014); In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI 253, 260 (2014); In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189 (2014); In the Matter of Dan Thomas Construction, Inc., 32 BOLI 174, 183 (2013); In the Matter of E. H. Glaab, General Contractor, Inc., 32 BOLI 57, 62 (2012).*

Claimant was entitled to penalty wages when respondent and claimant agreed on an hourly wage, respondent was aware that claimant work 20 hours a week and respondent was aware that claimant had not been paid for any of her work performed after November 15, 2012. There was no evidence that respondent acted other than voluntarily and as a free agency in not paying claimant for six months' work. Therefore, the forum concluded that respondent acted willfully in failing to pay claimant her wages. ---- ***In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 270 (2014).***

The Agency established by a preponderance of the evidence that respondent's president and claimants' supervisor was in charge of respondent's payroll and aware of the work that claimants performed. The stated excuse of respondent's president for not paying claimants for all hours worked was that claimants signed employment contracts in which they agreed they would only be paid for work associated with clients. This excuse is not a defense to the agency's claim for penalty wages. There is no evidence that respondent, through its agent, acted other than voluntarily and as a free agent in not paying claimants for all hours worked. The forum therefore concluded that respondent acted willfully in failing to pay claimants their wages and is liable for penalty wages. ---- ***In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 204-05 (2014).***

Willfulness does not imply or require blame, malice, 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. ---- ***In the Matter of Farwest Hatchery LLC, 33 BOLI 176, 180, 185 (2014).*** See also *In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI 209, 215 (2014).*

Respondents' continued failure to pay wages known and acknowledged to be due was a willful failure to pay those wages. ---- ***In the Matter of Grant and Leslie Hamilton dba***

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MacGregors, 33 BOLI 209, 216 (2014).

In its answer, respondent denied it owed claimants penalty wages, stating that the company intended to pay the wages. Respondent's stated intent to pay claimant's wages at a future time is no defense to the agency's allegation that respondent willfully failed to pay those wages. ---- ***In the Matter of Farwest Hatchery LLC, 33 BOLI 176, 181, 185 (2014).***

When respondent had admitted that he owed the alleged unpaid wages, his argument that he should not be liable to pay penalty wages because he agreed to pay claimant's unpaid wages in monthly installments was not a defense. The agency issued three separate written demand letters. Despite this notification, respondent failed to pay any wages due to claimant. Respondent's continuing failure to pay wages that respondent acknowledged were due was a willful failure to pay those wages when there was no evidence that respondent was not a free agent in his decision not to pay the wages. The forum, therefore, concluded that respondent's failure to pay all wages due at the time of claimant's termination was willful. ---- ***In the Matter of Aaron Alexander dba Currinsville Deli, 33 BOLI 60, 64 (2014).***

Respondents admitted in their answers that they owed claimant the wages alleged in the Order of Determination. When coupled with the statement that respondent was not able to start payments, the forum inferred that respondents were aware that the wages were owed prior to the issuance of the Order of Determination and found that respondents' failure to pay claimant all wages owed at the time of his termination corresponded to respondents' awareness that those wages were in fact owed. When there was no evidence that respondents were not free agents in their decision not to pay Claimant those wages, the forum concluded that respondents' failure to pay claimant all wages due to him at the time of his termination was willful. ---- ***In the Matter of Giants, Inc., George T. Comalli, Hollywood Fitness, LLC, and Hollywood Fitness Center, LLC, 33 BOLI 53, 57 (2014).***

Penalty wages are awarded when a respondent's failure to pay wages at termination of employment was willful. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission "willfully" if he or she acts (or fails to act) intentionally, as a free agent, and with knowledge of what is being done or not done. ---- ***In the Matter of Bruce Crisman dba Nu West Painting Contractors, 32 BOLI 209, 217 (2013)***

The forum concluded that the respondent's failure to pay wages was willful when the corporate secretary and bookkeeper, who wrote pay checks, was aware of the hours worked by claimant and the amount he was paid, and there was no evidence that she acted other than voluntarily and as a free agent in underpaying claimant. ---- ***In the Matter of Dan Thomas Construction, Inc., 32 BOLI 174, 183 (2013).***

Respondent's failure to pay wages to claimant was willful when the agency established that claimant was entitled to be paid \$17 per hour for his work; that respondent set claimant's work hours and was aware of them; that respondent laid off claimant and did not pay him for all hours worked; and there was no evidence that respondent acted other than voluntarily and as a free agent in underpaying claimant. ---- ***In the Matter of E. H. Glaab, General Contractor, Inc., 32 BOLI 57, 62 (2012).***

An employer acts "willfully" when it knows what it is doing, intends to do what it is doing, and is a free agent. ---- ***In the Matter of Susan C. Steves, 32 BOLI 46, 58 (2012).***

Respondent's failure to pay wages to claimant was willful when the agency proved that respondent knew that claimant was performing work on respondent's behalf and chose not to pay her all wages due and owing on the basis of her belief that claimant was a volunteer and not entitled to any wages, and there was no evidence that respondent intended to pay claimant an amount other than the amount claimant was actually paid or that respondent was not acting

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as a free agent in choosing not to pay claimant the rest of her wages. ---- *In the Matter of Susan C. Steves, 32 BOLI 43, 55 (2012).*

Respondent's failure to apprehend the correct application of the law and her actions based on this incorrect application did not exempt her from a determination that she willfully failed to pay wages earned and due to claimant. ---- *In the Matter of Susan C. Steves, 32 BOLI 43, 55 (2012).*

13.3 --- Liability of Certain Respondents

13.4 --- Computation

The agency provided documentary and testimonial evidence that its investigative staff made the written demand contemplated by ORS 652.150(2) for claimant's wages and the agency's OOD repeated this demand. Because respondent failed to pay claimant his unpaid wages after receiving the notices, the forum computed penalty wages at the maximum rate set out in ORS 652.150(1): \$12 per hour x 8 hours = \$96 x 30 = \$2,880. ---- *In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 62 (2016), appeal pending.*

Penalty wages can accrue for up to 30 days after wages are due if notice is given and the wages are not paid for that full 30 days. ---- *In the Matter of Coast 2 Coast, LLC, 35 BOLI 151, 172 (2017).* See also *In the Matter of PDX Glass, 35 BOLI 140, 146 (2016); In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 62 (2016), appeal pending.*

The record did not clearly establish the specific dates that claimants' employment ceased, a prerequisite for an award of penalty wages. However, as claimants were employees of BMC, a business that was administratively dissolved on June 7, 2013, the forum concluded that their employment could have ceased no later than that date. ---- *In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 100 (2016).*

The calculation of penalty wages presents a question that the forum had not addressed before, namely, what does the phrase "at the same hourly rate for eight hours" mean when claimants were entitled to be paid the prevailing wage rate for some of their hours worked and their agreed rate for other hours in the time period encompassed by the wage claim? The agency's OOD was of no assistance because it merely showed that the penalty wages sought by the agency were calculated by means of a "weighted average." Additionally, the agency's administrative prosecutor elicited no testimony at hearing from the agency's compliance specialist who calculated the penalty wages alleged in the OOD, as to how he performed his calculations. Under these circumstances, the forum adopted a "weighted average" approach based on the prevailing wage base rate for each trade classification claimants worked for which they were entitled to be paid the prevailing wage rate and computed claimants' hourly base wage rates by dividing each claimant's total earned base rate prevailing wages by the number of hours each claimant worked for which they were entitled to be paid the prevailing wage rate. ---- *In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 100-01 (2016).*

The agency provided documentary and testimonial evidence that its investigative staff made the written demand contemplated by ORS 652.150(2) for claimant's wages and the agency's OOD repeated this demand. Because respondents failed to pay claimant her unpaid wages after receiving the notices, the forum computed penalty wages at the maximum rate set out in ORS 652.150(1). ---- *In the Matter of Christopher Lee Ruston and Christine M. Stahler, 34 BOLI 56, 65 (2015).*

The forum computed penalty wages at the maximum rate set out in ORS 652.150(1) (\$20 hourly rate x eight hours per day x 30 days = \$4800 penalty wages). ---- *In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 271 (2014).*

The forum has previously held that the commissioner has the authority to award penalty

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wages exceeding those sought in the OOD when penalty wages are awarded as compensation for statutory wage violations alleged in the charging document. ---- ***In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 271 (2014).***

Claimant was entitled to penalty wages in the amount of her hourly rate (\$10) multiplied by 240, plus interest at the legal rate on that amount from March 22, 2013, which is 35 days after the last day of employment. ---- ***In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI 253, 256 (2014).***

The daily penalty, which is the wages or compensation of the employee at the same hourly rate of eight hours per day, accrues until the earlier of payment or 30 days from termination. If a written notice of nonpayment, including the amount estimated to be owed, is not given to the employer on behalf of the employee, or if the employer does pay the wages due within 12 days after receiving the notice, the penalty can be no more than 100% of the unpaid wages ---- ***In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI 209, 214-15 (2014).***

When respondent failed to pay the full amount of claimants' unpaid wages within 12 days of receiving the agency's written notice, the forum assessed penalty wages at the maximum rate set out in ORS 652.150(1) (hourly rate x eight hours per day x 30 days = penalty wages). Penalty wages for three claimants equaled \$2,160.00 (\$9.00 per hour x eight hours x 30 days). Penalty wages for an additional claimant equaled \$2,640.00 (\$11.00 per hour x eight hours x 30 days). ---- ***In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 205 (2014).***

The agency correctly computed claimant's penalty wages as \$12,000.00 (\$50.00/hr. x 8 hours = \$400.00 x 30 days = \$12,000.00). ---- ***In the Matter of Farwest Hatchery LLC, 33 BOLI 176, 181 (2014).***

When the employee or a person on behalf of the employee submits a written notice of nonpayment and payment is not made, penalty wages continue for 30 days. ---- ***In the Matter of Farwest Hatchery LLC, 33 BOLI 176, 185 (2014).***

The agency correctly computed claimant's penalty wages as \$3,360.00 (\$14.00/hr. x 8 hours = \$112.00 x 30 days = \$3,360.00). ---- ***In the Matter of Farwest Hatchery LLC, 33 BOLI 176, 185 (2014).***

When a written notice of nonpayment has been submitted on behalf of a wage claimant and the proposed civil penalty does not exceed 100 percent of a claimant's unpaid wages, penalty wages are computed by multiplying a claimant's hourly wage x eight hours per day x 30 days. Claimant's penalty wages equaled \$2,400 (\$10 x 8 hours x 30 days). ---- ***In the Matter of Aaron Alexander dba Currinsville Deli, 33 BOLI 60, 64 (2014).***

When a written notice of nonpayment submitted on behalf of a wage claimant and the proposed civil penalty did not exceed 100 percent of a claimant's unpaid wages, penalty wages were computed by multiplying a claimant's hourly wage x eight hours per day x 30 days. ORS 652.150(1) & (2); OAR 839-001-0470. Claimant's penalty wages equaled \$2,160 (\$9 x 8 hours x 30 days). ---- ***In the Matter of Giants, Inc., George T. Comalli, Hollywood Fitness, LLC, and Hollywood Fitness Center, LLC, 33 BOLI 53, 57 (2014).***

Penalty wages, when the hourly rate is \$10, are \$2,400. When the rate is \$9 per hour, penalty wages are \$2,160. ---- ***In the Matter of Bruce Crisman dba Nu West Painting Contractors, 32 BOLI 209, 217 (2013).***

When respondent failed to pay the full amount of claimant's unpaid wages within 12 days after receiving written notice, the forum assessed penalty wages at the maximum rate set out in ORS 652.150(1) (hourly rate x eight hours per day x 30 days = penalty wages), or \$4,080

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(\$17 per hour x eight hours x 30 days). ----- *In the Matter of E. H. Glaab, General Contractor, Inc., 32 BOLI 57, 63 (2012).*

When respondent failed to pay the full amount of claimant's unpaid wages within 12 days after receiving written notice, the forum assessed penalty wages at the maximum rate set out in ORS 652.150(1) (hourly rate x eight hours per day x 30 days = penalty wages), or \$4,080 (\$8.40 per hour x eight hours x 30 days). ----- *In the Matter of Susan C. Steves, 32 BOLI 43, 56 (2012).*

13.5 --- Amount Claimed in Order of Determination

If the agency does not reference the appropriate rule in the Order of Determination and the requested relief depends entirely on that rule, the agency may not rely upon the rule to calculate a higher penalty. ---- *In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI 209, 217 (2014).*

When the Order of Determination did not state the date from which interest should accrue, the forum declined to allow interest to accrue prior to the entry of the final order. ----- *In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI 209, 217 (2014).*

There is no need to plead any entitlement to post-judgment interest in an Order of Determination. Post-judgment interest is recoverable on all judgments. ----- *In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI 209, 212 (2014).*

The forum was unable to award pre-judgment when, among other reasons, it was not requested in the Order of Determination. ----- *In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI 209, 212 (2014).*

Where the last day worked is earlier than that alleged in the Order of Determination, interest runs from the date established by the evidence. ---- *In the Matter of Bruce Crisman dba Nu West Painting Contractors, 32 BOLI 209, 217 (2013).*

13.6 --- Financial Inability to Pay Wages

The forum granted the agency's motion for summary judgment on the issue of penalty wages when respondent raised the affirmative defense of financial inability to pay in its answer but provided no records containing the detailed information required to support this affirmative defense in its response to the agency's motion. ---- *In the Matter of PDX Glass, LLC, 35 BOLI 140, 146 (2016).*

The inability to pay wages at the time the wages accrued is an affirmative defense under ORS 652.150(5) that, if proven, relieves an employer of all liability for ORS 652.150 penalty wages. Respondent has the burden of proving this affirmative defense. To meet its burden of proof, an employer must provide specific information as to the financial resources and expenses of both the business and the employer personally during the wage claim period, including submission of records from which that information came. ---- *In the Matter of PDX Glass, LLC, 35 BOLI 140, 146 (2016).*

Inability to pay wages at the time the wages accrued is an affirmative defense that, if proven, relieves an employer of all liability for ORS 652.150 penalty wages. However, affirmative defenses are waived if not plead in a respondent's answer and respondent waived this defense by not pleading it. ----- *In the Matter of Farwest Hatchery LLC, 33 BOLI 176, 187 (2014).*

To prove the affirmative defense of financial inability to pay, a respondent must provide specific information as to the financial resources and expenses of both the business and the employer personally during the wage claim period, including submission of records from which that information came. ----- *In the Matter of Farwest Hatchery LLC, 33 BOLI 176, 187 n.3 (2014).*

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In their answers, respondents alleged they were not able to start payments due to limitations placed upon the business by the Internal Revenue Department. Reading the answers in a light most favorable to respondents, the forum found that respondents' statement raised the affirmative defense of financial inability to pay. The employer may avoid liability for ORS 652.150 penalty wages by showing financial inability to pay the wages or compensation at the time the wages or compensation accrued. Respondents have the burden of proving this affirmative defense. Respondents' answer alleged no facts from which the forum could infer that respondents were financially unable to pay claimant's wages at the time the wages accrued. Accordingly, the affirmative defense failed. ---- ***In the Matter of Giants, Inc., George T. Comalli, Hollywood Fitness, LLC, and Hollywood Fitness Center, LLC, 33 BOLI 53, 57 (2014).***

13.7 --- Notice of Nonpayment of Wages (ORS 652.150(2))

The forum found that the agency's form demand" letters notifying respondents of claimants' wage claims satisfied the "written notice of nonpayment" provision of ORS 652.150(2), that respondents had not paid any of the unpaid wages in response to those letters, and that claimants were entitled to penalty wages computed under ORS 652.150(1)(a). ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 100-01 (2016).***

The agency provided documentary and testimonial evidence that its investigative staff made the written demand contemplated by ORS 652.150(2) for claimant's wages and the agency's OOD repeated this demand. Because respondents failed to pay claimant her unpaid wages after receiving the notices, the forum computed penalty wages at the maximum rate set out in ORS 652.150(1). ---- ***In the Matter of Christopher Lee Ruston and Christine M. Stahler, 34 BOLI 56, 65 (2015).***

The forum awarded penalty wages when the agency provided documentary and testimonial evidence that investigative staff issued two written demands to respondents, and respondents failed to pay claimant after receiving the notices. ---- ***In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 271 (2014).***

Penalties for unpaid wages may not accrue unless notice is given to the employer that the wages are due. If notice is given and the employer does not pay after receiving the notice, the penalty equals the product of the amount of the hourly wage, eight hours per day, and the number of days that pass until payment, with a cap of 30 days. ---- ***In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI 253, 261 (2014).***

Penalty wages were awarded when notice of nonpayment of the wages was given to respondent on at least three occasions. The forum concluded that respondent undoubtedly received the notice prior to the date when she filed her answer. ---- ***In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI 253, 261 (2014).***

If a written notice of nonpayment which includes the amount estimated to be owed is not given to the employer on behalf of the employee, the penalty can be no more than 100% of the unpaid wages. ---- ***In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI 209, 214-15 (2014).***

When there is proof of service of an Order of Determination which contains reference to the amounts claimed to be due, the fact of written notice is established, as is the amount of the penalty. ---- ***In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI 209, 215 (2014).***

Penalty wages were awarded when the evidence showed that notice of nonpayment was sent to the Respondent, as required by ORS 652.150(2) and that payment was still not made, within 12 days as required by the statute, or at any other time. ---- ***In the Matter of Hey***

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Beautiful Enterprises, Ltd., 33 BOLI 189, 205 (2014). See also *In the Matter of Bruce Crisman dba Nu West Painting Contractors, 32 BOLI 209, 217 (2013).*

Documentary and testimonial evidence that the agency's investigative staff made the written demand contemplated by ORS 652.150(2) for claimant's wages and the agency's order of determination satisfied the notice requirement of ORS 652.150(2). ---- ***In the Matter of Dan Thomas Construction, Inc., 32 BOLI 183 (2013).*** See also *In the Matter of E. H. Glaab, General Contractor, Inc., 32 BOLI 57, 62-63 (2012); In the Matter of Susan C. Steves, 32 BOLI 43, 55-56 (2012).*

13.8 --- Interest

Wages were due on February 23, 2013, when notice of nonpayment was given and the wages were not paid. Therefore, interest runs from the imposition of the penalty of the 30th date, which was March 25, 2013. ---- ***In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI 253, 262 (2014).***

Prejudgment interest accrues on obligations from the date they become due, at the rate of 9% per annum. The same rate, on open accounts, accrues from the last item on the account. ---- ***In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI 253, 261 (2014).***

Post-judgment interest is recoverable on all judgments, regardless of whether it was requested in an Order of Determination. ---- ***In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI 209, 212 (2014).***

Pre-judgment interest is only recoverable in certain circumstances. The forum was unable to award pre-judgment interest without a specific claim for pre-judgment interest referencing the statutory basis for awarding pre-judgment interest, and without a specific date from which pre-judgment interest can be calculated. ---- ***In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI 209, 212 (2014).***

When the last day worked was earlier than that alleged in the Order of Determination, interest on penalty wages runs from the date established by the evidence. ---- ***In the Matter of Bruce Crisman dba Nu West Painting Contractors, 32 BOLI 209, 217 (2013).***

Interest on penalty wages runs from 30 days after the wages were due. ---- ***In the Matter of Bruce Crisman dba Nu West Painting Contractors, 32 BOLI 209, 217 (2013).***

14.0 CIVIL PENALTIES (ORS 653.256, ORS 653.055 & ORS 653.077)

14.1 --- Under ORS 653.256

14.1.1 --- Generally

The agency amended its original OOD to allege that based on CSRT's issuance of dishonored checks to claimant, claimant was entitled to a civil penalty. However, under OAR 839-050-0440(4), the agency was foreclosed from amending the OOD except to correct names of respondents or to add respondents. The agency exceeded its authority in amending the OOD to seek civil penalties. Since the agency had no authority to amend the OOD to seek civil penalties, the forum had no authority to impose such penalties and dismissed the agency's claim for civil penalties. ---- ***In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 273-74 (2014).***

The words "the employer has the burden to show" in OAR 839-020-0050(3) make it clear that respondent has the burden to prove the applicability of any exceptions to the requirement to provide a meal period. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 203 (2013).***

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14.1.2 --- Willful Failure to Make and Keep Records or Make Them Available (ORS 653.045(1)&(2))

The agency's NOI alleged that respondent willfully failed to make available to the commissioner or commissioner's designee the records required to be maintained by ORS 653.045(1)-(2) and OAR 839-020-0083(3). Before evaluating whether respondent's responses violated the law, the forum first examined the statute and rule to determine the records that respondent was required to maintain. ----- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 239 (2017).***

In its NOI, the agency alleged violations of ORS 653.045 and ORS 279C.850(1)-(2), a parallel statute in Oregon's PWR law that requires contractors and subcontractors to make payroll and other records available that BOLI's commissioner deems necessary to determine if the prevailing wage rate has been paid as required by ORS 279C.840. The forum found that the existence of these separate statutes pertaining to the production of prevailing wage rate and non-prevailing wage rate records, respectively, indicated that the forum's analysis of the alleged ORS 653.045 violation should focus on respondent's production of records related to non-prevailing wage rate wages. ----- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 240-41 (2017).***

The provision in OAR 839-020-0083(3) requiring records to "be made available" includes that requirement that those records be provided to BOLI upon request. The agency's compliance specialist made several requests for time and payroll records for respondent's workers who worked on the prevailing wage rate and non-prevailing wage rate jobs in the same weeks so she could accurately determine the amount of unpaid wages, if any, owed to those workers. Respondent eventually provided her with most of the records, but she never received all the requested time cards, and many of the records were only provided in response to a subpoena she issued more than seven months after her initial request. Under these circumstances, the forum found that respondent violated ORS 653.045(1)-(2) and OAR 839-020-0083(3). ----- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 230, 243-44 (2017).***

Respondent's violation of ORS 653.045(1)-(2) and OAR 839-020-0083(3) was "willful" when the agency's compliance specialist made several requests for time and payroll records for respondent's workers who worked on the prevailing wage rate and non-prevailing wage rate jobs in the same weeks so she could accurately determine the amount of unpaid wages, if any, owed to those workers; respondent eventually provided her with most of the records, but she never received all the requested time cards; and many of the records were only provided in response to a subpoena she issued more than seven months after her initial request. The forum assessed a civil penalty of \$1,000. ----- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 230, 244 (2017).***

Respondent's violation of ORS 653.045(1)-(2) and OAR 839-020-0083(3) was aggravated by its failure to provide those records in a timely manner that kept the agency's compliance specialist from accurately calculating the workers' unpaid wages for an extended period of time, which in turn kept them from receiving the wages coming to them until more than a year after they were earned. Given the time it took respondent to comply, respondent's understaffing and the magnitude of BOLI's request were not mitigating circumstances. ----- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 230, 244 (2017).***

The agency's compliance specialist testified to her difficulty in determining the wages due to claimant because of respondent's failure to make and keep records and his lengthy delay in providing records that minimally assisted her in making a determination. As an employer, respondent is held to have known or that he should have known of an employer's record keeping requirements. The forum found that respondent could have easily created and

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maintained the required records by (1) simply asking claimant for the identification information required by the statute and rule and writing it down; (2) asking claimant, at the end of each day, about the hours he worked and writing them down; and (3) making a written record of all payments to claimant. Had he done this, it would have been easy for him to provide that information to the agency when it was first requested. Respondent presented no mitigating circumstances. Under these circumstances, the forum assessed a civil penalty of \$1,000 for respondent's violation of ORS 653.045(1) and OAR 839-020-0083. ----- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 64 (2016), appeal pending.***

The agency's compliance specialist testified to her difficulty in determining the wages due to claimant because of respondent's failure to make and keep records and his lengthy delay in providing records that minimally assisted her in making a determination. As an employer, respondent is held to have known or that he should have known of an employer's record keeping requirements. The forum found that respondent could have easily created and maintained the required records by (1) simply asking claimant for the identification information required by the statute and rule and writing it down; (2) asking claimant, at the end of each day, about the hours he worked and writing them down; and (3) making a written record of all payments to claimant. Had he done this, it would have been easy for him to provide that information to the agency when it was first requested. Respondent presented no mitigating circumstances. The forum assessed a civil penalty of \$500 for respondent's violation of ORS 653.045(2) and OAR 839-020-0080, finding that respondent had already been penalized in part for his violation because of the duplicative language in OAR 839-020-0080 and OAR 839-020-0083. ----- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 64 (2016), appeal pending.***

The forum's ruling on the agency's motion for summary judgment resolved the agency's allegations that respondent had violated ORS 653.045(2) and OAR 839-020-0083 and that issue requires no further discussion. The same ruling denied the agency's summary judgment motion for civil penalties because of a defect in the agency's pleading and gave the agency the option to amend its NOI if it chose to pursue civil penalties. When the agency declined to amend its NOI, electing to accept the summary judgment ruling rather than pursue the civil penalties issue further, no civil penalties were assessed. ---- ***In the Matter of X Wall Incorporated, 35 BOLI 133, 139 (2016).***

The agency's compliance specialist requested records from respondent related to three employees that fell squarely within the provisions of ORS 653.045(1) and her interview with one of respondent's employees constituted credible, un rebutted evidence that two of those employees, Daniel and Ulysses Diaz, were employed by respondent in Oregon in 2015. Under ORS 653.045(2), the agency was authorized to request that records of their employment be made available, and respondent's failure to provide those records violated ORS 653.045(2) and OAR 839-020-0083(3). However, a cryptic note related to the third employee was insufficient evidence to establish that respondent actually employed that person in Oregon. The forum held that respondent could not be held accountable for failing to provide records associated with the third employee when the Agency did not meet its burden of proof of showing that respondent actually employed that person. ---- ***In the Matter of X Wall Incorporated, 35 BOLI 133, 139 (2016).***

Respondent's 16-month delay in providing records requested by BOLI that respondents were required to maintain by ORS 653.045(1) and OAR 839-020-0083 violated the statute and rule and the agency was granted summary judgment on that issue. The forum denied the agency's motion for summary judgment regarding respondent's failure to create and provide a list instead of providing actual records, holding that the statute and rule does not require employers to create any additional records. ----- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 45-47 (2016), appeal pending.***

The forum granted the agency's motion for summary judgment as to the agency's

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allegation in its NOI that respondents failed to keep, maintain and make required records available under ORS 653.045(1) when, viewed in the manner most favorable to respondents, the records provided by respondents met some, but not all the requirements of the statute. ----- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 43-44 (2016), appeal pending.***

Employers have a duty to know the laws that regulate employment in this state. ORS 653.045 is one of those laws and respondents, as employers, had a duty to know and abide by its provisions. Under OAR 839-020-0004(32), Respondents' failure to make and keep the records required by ORS 653.045 and to provide the records it made and kept in response to BOLI's request constituted a willful violation. ----- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 47 (2016), appeal pending.***

14.1.3 --- Willful Failure to Supply Itemized Statement of Deductions (ORS 653.045(3) & OAR 839-020-0012)

14.1.4 --- Willful Failure to Post Summary of Wage and Hour Laws (ORS 653.050)

14.1.5 --- Willful Failure to Provide Meal and Rest Periods (OAR 839-020-0050)

An employee's two time cards showing work for 6.5 hours and "no lunch," together with WH-38s showing payment to that employee for 6.5 hours on each occasion, was a tacit admission the employee worked without the meal period required by OAR 839-020-0050. ----- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 203 (2013).***

The maximum civil penalty for a violation of OAR 839-020-0050 is \$1000, the amount sought by the agency. The forum assessed that amount for each of two violations when the NOI alleged no aggravating circumstances and no evidence of mitigating circumstances was presented. ----- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 203 (2013).***

14.1.6 --- Willful Discrimination Based on Wage Claim (ORS 653.060)

14.1.7 --- Willful Failure to Pay the Minimum Wage Rate (ORS 653.025)

14.1.8 --- Willful Failure to Comply with Rest and Meal Period and Overtime Rules (ORS 653.261)

14.2 --- Under ORS 653.055

14.2.1 --- Generally

An employer who does not pay an employee the minimum wage or overtime wages is liable to a civil penalty computed in the same manner as ORS 652.150 penalty wages. ----- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 63 (2016), appeal pending.***

Civil penalties may be awarded to an employee when the employee is paid less than the wages to which he or she is entitled under ORS 653.010 to 653.261, including overtime wages. Willfulness is not an element of such a claim. ----- ***In the Matter of Dan Thomas Construction, Inc., 32 BOLI 174, 184 (2013).***

14.2.2 --- Failure to Pay Minimum Wage

Based on the 2013 minimum wage of \$8.95 per hour, respondent was required to pay claimant \$2,407.55 for 266 straight, non-overtime hours worked. By paying claimant only \$442.13, respondent paid her less than the minimum wage for those hours worked. ----- ***In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 207 (2014).***

Based on the 2013 minimum wage of \$8.95 per hour, respondent was required to pay claimant \$474.35 for 53 straight, non-overtime hours worked. By paying claimant nothing, respondent paid her less than the minimum wage for those hours worked. ----- ***In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 207 (2014).***

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Based on the 2012 minimum wage of \$8.80 per hour, respondent was required to pay claimant \$5,843.20 for 652 straight, non-overtime time hours worked. By paying claimant only \$4,011.95, respondent paid her less than the minimum wage for those hours worked. ---- ***In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 206-207 (2014).***

ORS 653.025 prohibits two specific practices. First, employers are prohibited from paying employees less than the minimum wage, regardless of any agreed wage rate. Second, employers are prohibited from making an agreement with employees to pay them at a rate less than the minimum wage. ---- ***In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 205 (2014).***

A *per se* violation of ORS 653.055(1)(b) occurs when an employee's wage rate is the minimum wage, the employee is not paid all wages earned, due, and owing under ORS 652.140(1) or 652.140(2), and no statutory exception applies. ---- ***In the Matter of Susan C. Steves, 32 BOLI 43, 56 (2012).***

When claimant's wage rate was the minimum wage, she was not paid all wages earned, due, and owing after she quit, and there was no applicable statutory exception, claimant was entitled to an ORS 653.055 civil penalty in the amount of \$2,016. ---- ***In the Matter of Susan C. Steves, 32 BOLI 43, 56 (2012).***

14.2.3 --- Failure to Pay Overtime Wages

Employers have a duty to know the laws that regulate employment in this state. ORS 653.261 is one of those laws and respondents, as employers, had a duty to know and abide by its provisions, including knowing the hours worked by four employees. Under OAR 839-020-0004(33), respondents were presumed to know the requirements of ORS 653.261 and OAR 839-020-0030, the law and rule that require payment of overtime and describe the method by which overtime is to be calculated. Part or all of respondents' failure to pay overtime was due to its failure to properly calculate weighted average overtime. In respondents' defense, respondents' president testified that he did not have a proper understanding of how to calculate weighted overtime but made an effort to pay overtime when he thought it was due. The forum found that the president's lack of understanding of weighted average was not a defense and that respondents' eight violations were "willful." ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 224 (2017).***

In the context of respondents' failure to pay overtime wages and the assessment of civil penalties, the forum found that "willfully" is defined in OAR 839-020-0004(33) as follows: "Willfully means knowingly. An action is done knowingly when it is undertaken with actual knowledge of a thing to be done or omitted or action undertaken by a person who should have known the thing to be done or omitted. A person 'should have known the thing to be done or omitted' if the person has knowledge of facts or circumstances which, with reasonably diligent inquiry, would place the person on notice of the thing to be done or omitted to be done. A person acts willfully if the person has the means to inform himself or herself but elects not to do so. For purposes of these rules, the employer is presumed to know the requirements of ORS 653.010 to 653.261 and these rules." ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 224 (2017).***

When the agency and respondents stipulated that respondents failed to pay non-prevailing wage rate overtime wages to four workers, it was necessary for the forum to determine that respondents' violations were "willful" before considering how to compute an appropriate civil penalty. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 223 (2017).***

When the agency and respondents stipulated that respondents failed to pay non-prevailing wage rate overtime wages to four workers, the forum found that respondents violated ORS 653.261(1) and OAR 839-020-0030. ---- ***In the Matter of Green Thumb Landscape and***

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Maintenance, Inc., 35 BOLI 178, 223 (2017).

An employer who does not pay an employee the minimum wage or overtime wages is liable to a civil penalty computed in the same manner as ORS 652.150 penalty wages. When the agency plead that a claimant was entitled to a civil penalty based on Respondent's failure to pay him overtime wages, claimant earned \$715.50 in overtime wages for his work between October 26 and December 12, 2015, and the only pay he received for that work was \$1,100 net wages he received in cash, which was only enough to cover the wages he earned between October 26 and November 6, and claimant worked overtime during four subsequent weeks and was paid nothing at all for that work, the forum concluded that claimant was not paid for the overtime he worked after November 6 and was entitled to an ORS 653.055 civil penalty in the amount of \$4,320. ---- ***In the Matter of Coast 2 Coast, LLC, 35 BOLI 151, 173 (2017).***

Claimant earned \$621 in overtime wages and was only paid \$434 in total for all hours worked. The forum found it was unnecessary to calculate how the \$434 paid to claimant should be apportioned between straight time and overtime wages because the simple fact that claimant was paid less than the overtime wages he earned proves that claimant was not paid for all the overtime he worked. The forum awarded an ORS 653.055 civil penalty in the amount of \$2,880. ---- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 63 (2016), appeal pending.***

The forum's authority to award penalties in excess of those plead in the OOD does not extend to ORS 653.055(1)(b) civil penalties. ---- ***In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 206-207 (2014).***

Respondent did not dispute that claimant was not paid for 77.75 overtime hours, but argued he should not have to pay civil penalties because of his yet unfulfilled promise to pay back all of claimant's unpaid wages. That promise was no defense to a claim for ORS 653.055(1)(b) civil penalties. ---- ***In the Matter of Aaron Alexander dba Currinsville Deli, 33 BOLI 60, 65 (2014).***

ORS 653.055 provides that an employer is responsible to pay a civil penalty to an employee if the employer pays that employee less than the wages to which he or she is entitled under ORS 653.010 to 653.261. ORS 653.055(1)(b). This includes overtime wages. "Willfulness" is not an element. --- ***In the Matter of Bruce Crisman dba Nu West Painting Contractors, 32 BOLI 209, 217 (2013).***

Civil penalties may be awarded to an employee when the employee is paid less than the wages to which he or she is entitled under ORS 653.010 to 653.261, including overtime wages. Willfulness is not an element of such a claim. ---- ***In the Matter of Dan Thomas Construction, Inc., 32 BOLI 174, 184 (2012).***

14.2.4 --- Computation

The forum found that respondents' failure to pay overtime was respondents' first violation of ORS 653.261 and OAR 839-020-0030; respondents knew or should have known the four workers were working overtime and likely would have known, had respondents not kept separate records for prevailing wage rate and non-prevailing wage rate work; four workers were underpaid a total of \$260.98 as a result of respondents' failure to pay non-prevailing wage rate overtime. The forum found that respondents' president's lack of understanding of how weighted average overtime is computed was not a mitigating circumstance, but that respondents' improvements in its payroll system to avoid this problem in the future and respondents' prompt payment of the unpaid wages upon BOLI's demand for those wages were mitigating circumstances. Considering the aggravating and mitigating circumstances, the forum concluded that a civil penalty of \$500 per violation was an appropriate civil penalty. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 225 (2017).***

Claimant earned \$621 in overtime wages and was only paid \$434 in total for all hours

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worked. The forum found it was unnecessary to calculate how the \$434 paid to claimant should be apportioned between straight time and overtime wages because the simple fact that claimant was paid less than the overtime wages he earned proves that claimant was not paid for all the overtime he worked. The forum awarded an ORS 653.055 civil penalty in the amount of \$2,880. ----- ***In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 63 (2016), appeal pending.***

After concluding that claimant was not paid for overtime hours earned, the forum assessed a total of \$2,016.00 in civil penalties. (\$9 per hour x 8 hours x 30 days). ----- ***In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 207 (2014).***

After finding that claimants were not paid for overtime hours earned, the forum assessed a total of \$2,148.00 in civil penalties for each claimant. (\$8.95 per hour x 8 hours x 30 days). ---- ***- In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 207 (2014).***

Civil penalties awarded pursuant to ORS 653.055(1)(b) are computed as provided in ORS 652.150 (hourly rate x 8 hours per day x 30 days). ----- ***In the Matter of Aaron Alexander dba Currinsville Deli, 33 BOLI 60, 65 (2014).***

The overtime penalty is calculated by the same method as the penalty for failure to pay wages at termination. ---- ***In the Matter of Bruce Crisman dba Nu West Painting Contractors, 32 BOLI 209, 217 (2013).***

The forum assessed ORS 653.055(1)(b) civil penalties based on the formula set out in ORS 652.150(1) for a total of \$2,016.00. (\$8.40 per hour x 8 hours x 30 days). ----- ***In the Matter of Susan C. Steves, 32 BOLI 43, 56 (2012).***

After deducting wages paid solely from overtime wages earned, and finding that overtime wages were still owing, a civil penalty was assessed, pursuant to ORS 653.055(1)(b), by multiplying the straight time wage rate by 8 hours by 30 days. ---- ***In the Matter of Dan Thomas Construction, Inc., 32 BOLI 174, 184 (2013).***

14.3 --- Under ORS 653.077

14.3.1 --- Generally

14.3.2 --- Intentional Failure to Provide Rest Period to Express Milk

15.0 WAGE SECURITY FUND

15.1 --- Generally

The commissioner is authorized and directed to pay wages to an employee from the Wage Security Fund. The commissioner may then commence a proceeding to recover the amounts paid from the Wage Security Fund from the persons liable for the unpaid wages. ----- ***In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI 209, 216 (2014).***

The commissioner may commence an appropriate action, suit or proceeding to recover from the employer, or other persons or property liable for the unpaid wages, amounts paid by the Wage Security Fund under ORS 652.414(1). The commissioner is entitled to recover costs and disbursements, reasonable attorney fees at trial and on appeal, together with a penalty of 25 percent of the amount of wages paid from the Wage Security Fund or \$200, whichever amount is the greater. ---- ***In the Matter of KC Systems, Inc. fdba The Machine Shop, 32 BOLI 205, 207 (2013).***

15.2 --- Prima Facie Case

15.3 --- Presumptions

15.4 --- Liability

15.5 --- Repayment

If wages are paid from the Wage Security Fund, the commissioner is authorized to

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collect them from the employer who failed to pay them. ----- ***In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI 209, 216 (2014).***

Respondent's failure to deny the allegations in the Order of Determination or to contest the exhibits submitted in support of the agency's motion for summary judgment constituted an admission of the allegations in the Order of Determination. Accordingly, respondent owed claimant \$2,780.75 in unpaid, due and owing wages, and that the agency had already paid \$2,058.00 of that sum to claimant from the Wage Security Fund. Therefore, respondent was liable to reimburse the Wage Security Fund in the amount of \$2,058 and was liable to claimant for unpaid wages in the amount of \$722.75. ----- ***In the Matter of Farwest Hatchery LLC, 33 BOLI 176, 184 (2014).***

15.6 --- Penalty

If the agency does not reference the appropriate rule in the Order of Determination and the requested penalty depends entirely on that rule, the agency may not rely upon the to calculate a higher penalty. ----- ***In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI 209, 217 (2014).***

If wages are paid from the Wage Security Fund, the commissioner is authorized to assess penalties from the employer who failed to pay the wages. ----- ***In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI 209, 216 (2014).***

The commissioner may recover a penalty of 25 percent of the amount of wages paid from the Wage Security Fund, or \$200, whichever amount is the greater. ----- ***In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI 209, 216 (2014).***

Until the 2012 amendment to OAR 839-001-0560, ORS 652.414(3) had been found to prohibit the use of the minimum \$200 penalty on a per/worker basis when the total amount paid from the Wage Security Fund on account of a single employer exceeded \$800, even if one of two or more employees earned less than \$800. ----- ***In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI 209, 216 (2014).***

The commissioner is automatically entitled to recover a penalty amounting to 25 percent of the amount of the wages paid out from the Wage Security Fund or \$200, whichever is greater. 25 percent of \$1,250.00 is \$312.50, which is a greater amount than \$200, entitling the commissioner to recoup \$312.50 from respondent to reimburse the Wage Security Fund. ----- ***In the Matter of Farwest Hatchery LLC, 33 BOLI 176, 180 (2014).***

The commissioner is automatically entitled to recover a penalty amounting to 25 percent of the amount of the wages paid out from the Wage Security Fund or \$200, whichever is greater. 25 percent of \$2,058.00 is \$514.50, which is a greater amount than \$200, entitling the commissioner to recoup \$514.50 from respondent to reimburse the Wage Security Fund. ----- ***In the Matter of Farwest Hatchery LLC, 33 BOLI 176, 184 (2014).***

When the Order of Determination cited ORS 652.414, which allows imposition of a penalty of 25% of the total paid by the Wage Security Fund in satisfaction of an employer's obligation to pay wages, the forum awarded a penalty in the amount of \$923.83 (25% of the total wages paid from the Wage Security Fund). ----- ***In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI 209, 217 (2014).***

To be entitled to collect the 25 percent penalty under ORS 652.414(3), the agency is not required to prove respondent intended not to pay wages the agency paid from the Wage Security Fund. It is automatically entitled to recover the penalty. ---- ***In the Matter of KC Systems, Inc. fdba The Machine Shop, 32 BOLI 205, 207 (2013).***

The forum awarded to the agency the penalty under ORS 652.414 when respondent

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admitted its liability for the wages, and its answer and response to the agency's motion for summary judgment denied a penalty was owed because the business' owner took his own life and the personal representative did not have access to funds to make payroll. --- ***In the Matter of KC Systems, Inc. fdba The Machine Shop, 32 BOLI 205, 207 (2013).***

16.0 FEDERAL LAW

16.1 --- Fair Labor Standards Act

16.2 --- Other

17.0 STATUTORY INTERPRETATION

18.0 AGENCY RULE INTERPRETATION

19.0 BANKRUPTCY

20.0 CONSTITUTIONALITY