
In the Matter of
Allen Belcher dba Gutters Etc.

Case No. 63-08

Final Order of Commissioner Brad Avakian
Issued October 28, 2009

SYNOPSIS

Claimant worked 54 hours as an employee of Respondent from May 29 through June 18, 2007. She was entitled to be paid the minimum wage of $7.80 per hour and was only paid $75.00. Respondent was ordered to pay Claimant $346.20 in unpaid, due and owing wages. Respondent's failure to pay the wages was willful, and Respondent was ordered to pay $1,872.00 in penalty wages. Based on Respondent's failure to pay the minimum wage to Claimant, Respondent was also ordered to pay a civil penalty of $1,872.00. ORS 652.140(1), ORS 652.150, ORS 653.025, ORS 653.055.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 29, 2009, at the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, in the State Office Building located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Chet Nakada, a case presenter employed by the Agency. Wage claimant Terra Elias ("Claimant") was present throughout the hearing and was not represented by counsel. Respondent Allen Belcher did not appear at hearing and was held in default.

The Agency called as witnesses: Claimant, Stormie Mathews (telephonic), and Bernadette Yap-Sam (telephonic), Wage and Hour Division compliance specialist.

The forum received into evidence:

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

b) Agency exhibits A-1 through A-11 (submitted prior to hearing) and A-12 (submitted at hearing).

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

FINDINGS OF FACT– PROCEDURAL

1) On July 19, 2007, Claimant filed a wage claim with the Agency alleging that Respondent had employed her from May 29 through June 18, 2007, and failed to pay her $397.85 in earned and due wages. At the time she filed her wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent.

2) Claimant brought her wage claim within the statute of limitations.

3) On November 29, 2007, the Agency issued Order of Determination No. 07-2360 based upon the wage claim filed by Claimant. The Order of Determination alleged that claimant had been employed in Oregon by Respondent from May 29 through June 18, 2007; that Respondent was required to pay claimant at least $7.80 per hour; and that claimant was only paid $75.00, leaving a balance due and owing of $346.20. The Order also alleged that Respondent willfully failed to pay those wages; that more than 30 days had elapsed since the wages became due and owing; that a written notice was sent to Respondent; that Claimant's daily rate of pay was $62.40 per day; and that Respondent owed Claimant $1,872.00 in penalty wages. Finally, the Agency alleged that Respondent paid Claimant less than the wages to which she was entitled under ORS 653.010 to 653.261 and was therefore liable to Claimant for ORS 653.055(1)(b) civil penalties in the amount of $1,872.00. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) On January 18, 2008, Respondent filed a written request for hearing. On January 22, 2008, the Agency sent Respondent a notice stating that his answer was insufficient because it did not include an admission or denial of each fact alleged in the Order of Determination and a statement of each relevant defense to the allegations. On January 30, 2008, Respondent filed an answer in which he stated:

> "I deny that the wage claimant work [sic] for me for that long a period of time. The dates of the first and last checks do not support that claim.
>
> "Although I do admit that the wage claimant is owed money. The sum of $346.20 is incorrect based on the time period she worked & the day's [sic] she was not available to work."

5) On July 14, 2009, the Agency filed a "BOLI Request for Hearing."

6) On July 15, 2009, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimant stating the time and place of the hearing as Sept 29, 2009, at 10 a.m., at the W. W. Gregg Hearing Room of the

Oregon Bureau of Labor and Industries, in the State Office Building located at 800 NE Oregon Street, Portland, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445.

7) On August 6, 2009, the Agency filed a motion for a discovery order seeking answers or documents in five categories, stating that it sought relevant and admissible evidence, that it had previously requested this information on an informal basis, and that Respondent had not responded. On August 18, 2009, the ALJ issued a discovery order that required Respondent to provide the following documents and information:

> "1. Any and all documentation on the method of payment for claimant Terra Elias between May 29, 2007 and June 18, 2007. This sort of documentation would include commission agreements, payroll checks, canceled checks, W-2's. If there is no documentation, please provide a written explanation for what wage you were to pay Terra Elias.
>
> "2. Any and all documentation on the method of timekeeping for Terra Elias between May 29, 2007 and June 18, 2007. This sort of documentation would include time cards or electronic methods of record-keeping or calendars etc. If there is no documentation, please provide a written explanation "on how you kept her track of your Terra Elias' hours worked."
>
> "3. A complete copy of Terra Elias' personnel files.
>
> "4. Identification by name, address and telephone number all employees from the second and third quarter of 2007. State of Oregon Employment Department tax records will suffice for this request.
>
> "5. Identification by name, address and telephone number of all witnesses you intend on calling."

8) At the time set for hearing, Respondent did not appear and had not previously notified the forum that it would not appear. Pursuant to OAR 839-050-0330(2), the ALJ waited 30 minutes before commencing the hearing. When Respondent did not appear or contact the hearings unit by telephone during that time, the ALJ declared Respondent in default and commenced the hearing.

9) At the outset of the hearing, the ALJ explained the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Allen Belcher ("Respondent") conducted business in Oregon under the assumed business name of Gutters Etc. Respondent's business offered the services of gutter cleaning, gutter screening, pest control, and moss control.

2) Respondent obtained work through telemarketing. At the time Claimant was hired, Respondent employed 13 telemarketers and three technicians.

3) In late May 2007, Claimant's friend told her that Respondent had an opening for a telemarketer. Claimant expressed interest, and Respondent contacted her for an interview. Claimant and Respondent met at a Red Robin restaurant and Respondent hired Claimant to work as a telemarketer.

4) Respondent agreed to pay Claimant $25 for each "lead" that resulted in a client requesting "a quote" from Respondent, plus five percent of the income from any work Respondent performed as a result of one of Claimant's "leads." At the conclusion of the interview, Respondent suggested specific language that Claimant should use when calling prospective clients. Respondent also gave Claimant 20 pages that were copied from the "COLE" directory and included names, addresses, and phone numbers of prospective clients in the Portland area.

5) On May 29, 2007, Claimant began working for Respondent. On Respondent's behalf, she telephoned prospective clients from her home, using her cell phone. Claimant maintained a written record of all of her calls and wrote down all the "leads" she developed in a notebook. In the same notebook, she also wrote down the number of hours she worked each day.

6) Claimant was supervised by a woman named Wendy. Wendy called Claimant for status reports each day that Claimant worked. During their conversations, Claimant told Wendy about all new leads.

7) Claimant worked the following dates and hours while employed by Respondent:

May 29: 4 hours

May 30: 4.5 hours

May 31: 4 hours

June 3: 2.5 hours

June 5: 4 hours

June 5: 4 hours

June 7: 4.5 hours

June 10: 2 hours

June 11: 1.5 hours

June 12: 4.5 hours

June 13: 4.5 hours

June 16: 4 hours

June 18: 6 hours

In total, she worked 54 hours.

8) Claimant received two paychecks from Respondent during

her employment. The first, written on June 2, 2007, was in the amount of $75.00. The second, written on June 11, 2007, was in the amount of $197.85. The second check bounced and Claimant never received any of the $197.85.

9) On June 19, 2007, Respondent fired Claimant. The next day, Wendy told Claimant that she would send Claimant's final paycheck to her by mail. When no check arrived, Claimant telephoned Respondent on June 25, 26, and 27. Despite Claimant's calls, Respondent never paid Claimant any more money. In total, Respondent only paid Claimant $75.00 for her work.

10) In 2007, Oregon's minimum wage rate was $7.80 per hour.

11) Calculated at $7.80 per hour, Claimant earned a total of $421.20 in gross wages while employed by Respondent.

12) On August 2, 2007, the Agency mailed a "NOTICE OF WAGE CLAIM" to Respondent that was addressed to: "Gutters Etc., 15516 NE Alton St., Portland, OR 97230." The notice read:

> "NOTICE OF WAGE CLAIM"
>
> "You are hereby notified that TERRA L. ELIAS has filed a wage claim with the Bureau of Labor and Industries alleging:
>
> "Unpaid statutory minimum wages of $385.20 at the rate of $7.80 per hour from May 29, 2007 to June 18, 2007.
>
> "IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send the payments to the Bureau of Labor and Industries at the above address.
>
> "IF YOU DISPUTE THE CLAIM, complete the enclosed "Employer Response" form and return it together with the documentation which supports your position, as well as payment of any amount which you concede are owed the claimant to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.
>
> "If your response to the claim is not received on or before August 16, 2007, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

13) On August 16, 2007, Respondent visited BOLI's Portland office and spoke with Kim Penwell, a BOLI employee. Among other things, he told Penwell that he owed Claimant money, but not as much as she claimed.

14) Yap-Sam, an Agency compliance specialist, was assigned to investigate Claimant's wage claim. On October 9, 2007, she wrote a letter to Respondent in which she stated, among other things:

"Enclosed is a copy of the Notice of Wage Claim mailed on/about August 2, 2007 together with an Employer Response form. * * *

"This letter is to notify you that you are required to respond to me * * * as set out in the Notice of Wage Claim by no later than **October 22, 2007**. Payment of any wages that you do not dispute should be remitted to my attention by check or money order payable solely to Terra Elias together with an itemized statement of all **lawful** deductions, if applicable.

"If you fail to cooperate as requested above * * * not only will the Division pursue the wages that it determines are due and owing, but also, penalty wages of $1,872 for failure to remit final wages in a timely manner, civil penalties of $1,872 for failure to pay minimum wage, and, reimbursement of costs and attorney fees incurred by the Division during the administrative process."

(emphasis bolded in original)

15) On November 9, 2007, Yap-Sam sent another letter to Respondent in which she stated, among other things, that Claimant was claiming 54 unpaid work hours and that Respondent owed Claimant a total of $346.20 in gross, unpaid wages.

16) Respondent failed to pay Claimant all earned, due, and payable wages not later than the end of the first business day after Claimant's discharge, and more than 30 days have elapsed from the date her wages were due.

17) Penalty wages are computed in accordance with ORS 652.150 by multiplying Claimant's hourly wage x 8 hours x 30 days ($7.80 x 8 x 30 = $1,872.00).

18) Civil penalties are computed in accordance with ORS 653.055 by multiplying Claimant's hourly wage x 8 hours x 30 days ($7.80 x 8 x 30 = $1,872.00).

19) The Agency's witnesses were all credible.

ULTIMATE FINDINGS OF FACT

1) Beginning on August 25, 2005, and continuing throughout Claimant's employment, Respondent Allen Belcher did business under the assumed business name of Gutters Etc. in Oregon and suffered or permitted one or more persons to work for him.

2) Respondent suffered or permitted Claimant to work for him from May 29 through June 18, 2007, and fired Claimant on June 19, 2007.

3) Claimant was entitled to be paid at least $7.80 per hour, Oregon's minimum wage in 2007, for all her work.

4) Claimant worked a total of 54 straight time hours for Respondent, earning $421.20 in gross wages. Respondent only paid Claimant $75.00 for her work, leaving a total of $346.20 in unpaid wages due and owing to her, calculated at the wage rate of $7.80.

5) Respondent was aware that he owed wages to Claimant but failed to pay Claimant those earned, due, and payable wages not later than the end of the first business day after Claimant was discharged and more than 30 days have elapsed since her wages were due. The Agency sent a written notice of Claimant's wage claim to Respondent in August 2007 and made subsequent written demands for Claimant's unpaid wages in October and November 2007.

6) Penalty wages, computed in accordance with ORS 652.150, equal $1,872.00.

7) Respondent failed to pay Claimant the minimum wage for all hours worked. Civil penalties, computed in accordance with ORS 653.055(1)(b), equal $1,872.00.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Allen Belcher was an employer subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and 653.010 to 653.261. Respondent employed Claimant Terra Elias from May 29 through June 18, 2007.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414, ORS 653.040, ORS 653.256.

3) Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid not later than the end of the first business day after Claimant's discharge and owes Claimant $346.20 in unpaid, due and owing wages.

4) Respondent's failure to pay Claimant's wages was willful and Respondent is liable for $1,872.00 in penalty wages to Claimant. ORS 652.150.

5) Respondent did not pay Claimant the minimum wage for all hours worked and Respondent is liable for a $1,872.00 civil penalty to Claimant. ORS 653.055.

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

OPINION

INTRODUCTION

Respondent defaulted when he did not make an appearance at the hearing. When a respondent defaults, the Agency must present a prima facie case on the record to support the allegations of its charging document in order to prevail. *In the Matter of Okechi Village & Health Center,* 27 BOLI 156, 161 (2006). This consists of credible evidence of the following: 1) Respondent employed Claimant; 2) The pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) Claimant performed work for

which she was not properly compensated; and 4) The amount and extent of work Claimant performed for Respondent. *In the Matter of MAM Properties, LLC, 28 BOLI 172, 188 (2007).*

CLAIMANT WAS EMPLOYED BY RESPONDENT

Respondent does not dispute that he employed Claimant.

CLAIMANT WAS ENTITLED TO BE PAID THE MINIMUM WAGE

Claimant credibly testified that Respondent agreed to pay her on commission. Employers are free to pay employees solely by commission so long as the commission does not result in the employee earning less than the minimum wage for all hours worked. *In the Matter of William Presley,* 25 BOLI 56, 70 (2004), *aff'd Presley v. Bureau of Labor and Industries,* 200 Or App 113, 112 P3d 485 (2005). In this case, the Agency sought unpaid wages for Claimant calculated at the minimum wage, and chose to present evidence focusing on the number of hours that Claimant worked instead of trying to prove the amount of commission she earned. Since she was entitled to be paid at least the minimum wage no matter how much commission she earned, the forum not only determines that Claimant was entitled to the minimum wage but also computes all unpaid wages at the minimum wage rate, which was $7.80 per hour in 2007.

CLAIMANT PERFORMED WORK FOR WHICH SHE WAS NOT PROPERLY COMPENSATED

Claimant's credible testimony and contemporaneous time records established that she worked a total of 54 hours during the wage claim period. She was entitled to be paid at least $7.80 per hour for every hour she worked, but was paid only $75.00. This is far less than the amount she earned.

THE AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT.

The final element of the agency's prima facie case requires proof of the amount and extent of work performed by claimant. The agency's burden of proof can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. A claimant's credible testimony may be sufficient evidence. *In the Matter of Ilya Simchuk*, 22 BOLI 186, 196 (2001). When the forum concludes that an employee was employed and improperly compensated, the burden shifts to the employer to produce evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. *In the Matter of David Creager,* 17 BOLI 102, 109 (1998). In this case, Claimant provided a contemporaneous record of her work hours and credibly testified that it accurately reflected the hours that she

worked. In contrast, Respondent provided no records or evidence whatsoever concerning the number of hours worked by Claimant other than the unsworn, generic statements in his answer that he owed Claimant wages, but Claimant did not work the hours that she claimed. The forum concludes that Claimant worked a total of 54 hours.

WAGES OWED TO CLAIMANT

Claimant earned a total of $421.20 in straight time wages and was only paid $75.00, leaving $346.20 in unpaid, due and owing wages.

PENALTY WAGES

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, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *In the Matter of Carl Odoms,* 27 BOLI 232, 240-41 (2006).

Claimant credibly testified that Wendy, her supervisor, telephoned her for status reports every day that Claimant worked. This establishes that Respondent, through his supervisor, was aware of Claimant's work schedule. Despite this awareness, and despite his admission that he owed Claimant wages, Respondent made no effort to pay Claimant the wages he knew she was entitled to.[1] This amounts to a willful failure to pay Claimant the wages she was owed.

ORS 652.150(2) provides that "[i]f the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 100 percent of the employee's unpaid wages * * * unless the employer fails to pay the full amount of the employee's unpaid wages * * * within 12 days after receiving the written notice." On August 2, October 9, and November 9, 2007, the Agency sent written notices of nonpayment to Respondent. By serving the Order of Determination, the Agency also gave written notice to Respondent of Claimant's wage claim. In response, Respondent failed to pay any of the unpaid wages, despite conceding that wages were due. Therefore, penalty wages are not limited to 100% of Claimant's unpaid wages and are calculated pursuant to ORS 652.150(1): $7.80 per hour x 8 hours x 30 days = $1,872.00.

ORS 653.055 CIVIL PENALTIES

ORS 653.055 provides that the forum may award civil penalties to an employee when the employer pays that employee less than the wages to which the employee is entitled under ORS 653.010 to

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[1] *Cf.* ORS 652.160, which provides "In case of dispute over wages, the employer must pay, without condition, and within the time set by ORS 652.140, all wages conceded by the employer to be due * * *."

653.261. Under ORS 653.055(1), an employer who pays an employee less than the minimum wage is liable to the employee for civil penalties that are computed in the same manner as penalty wages under ORS 652.150. *In the Matter of 82nd Street Mall, Inc.,* 30 BOLI 140, 150 (2009). A *per se* violation 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), and no statutory exception applies. *Id.* No statutory exception applies in this case, and Respondent's failure to pay the minimum wage to Claimant entitles Claimant to a civil penalty under ORS 653.055, calculated as follows: $7.80 per hour x 8 hours x 30 days = $1,872.00.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages, penalty wages, and civil penalties Respondent owes as a result of its violations of ORS 652.140(1), the Commissioner of the Bureau of Labor and Industries hereby orders **Allen Belcher** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Terra Elias in the amount of FOUR THOUSAND NINETY DOLLARS AND TWENTY CENTS ($4,090.20), less appropriate lawful deductions, representing $346.20 in gross earned, unpaid, due, and payable wages, $1,872.00 in penalty wages, and $1,872.00 in civil penalties, plus interest at the legal rate on the sum of $346.20 from July 1, 2007, until paid, and interest at the legal rate on the sum of $3,744.00 from August 1, 2007, until paid.

In the Matter of
Ryan Allen Hite

Case No. 58-09

Final Order of Commissioner Brad Avakian
Issued November 18, 2009

SYNOPSIS

The Agency paid out $3,444 in unpaid wages to two wage claimants from the Wage Security Fund and sought reimbursement of that amount from Respondent, plus a 25 percent penalty of $861. The forum ordered Respondent to repay $3,444 to the Wage Security Fund and a 25 percent penalty of $861. ORS 652.140, 652.414.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Indus-

tries for the State of Oregon. The hearing was held on Tuesday, October 13, 2009, at the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Linda A. Lohr, an employee of the Agency. Respondent did not appear at hearing and was held in default.

The Agency called Wage and Hour Division compliance specialist Susan Washington as its only witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-5 (submitted or generated prior to hearing); and

b) Agency exhibits A-1 through A-13 (submitted prior to hearing) and A-14 (submitted at hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On May 23, 2008, Claimants Victor Vera ("Vera") and Jose Chavez ("Chavez") filed wage claims with the Agency alleging that Respondent had employed them and failed to pay wages earned and due to them. At the time they filed their wage claims, Vera and Chavez assigned to the Commissioner of the Bureau of Labor and Industries, in trust for themselves, all wages due from Respondent.

2) Claimants filed their wage claims within the statute of limitations.

3) On November 26, 2008, the Agency issued Order of Determination No. 08-2464 based upon the wage claims filed by Claimants Vera and Chavez. The Order of Determination alleged:

(a) Claimant Chavez was employed by Respondent from February 15, 2008, to March 14, 2008; that he was entitled to the agreed pay rate of $15 per hour; that he performed work, labor, and services; that he was paid nothing for 132 hours regular work, and that he is owed $1,980 in unpaid wages, plus interest.

(b) Claimant Vera was employed by Respondent from February 15, 2008, to March 14, 2008; that he was entitled to the agreed pay rate of $12 per hour; that he performed work, labor, and services; that he was paid nothing for 122 hours regular work, and that he is owed $1,464 in unpaid wages, plus interest.

(c) BOLI has paid Vera and Chavez $3,444 from the Wage Security Fund ("WSF") and is entitled to recover from Respondent that amount as

wages paid from the WSF, plus a penalty of 25 percent of the sum paid from the WSF, equaling $861, plus interest.

The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) On December 9, 2008, Respondent filed an answer and request for hearing. He generally denied all the allegations in the Order of Determination. He also alleged that Claimants were subcontractors, that he terminated them on the last project they worked on and paid them in full, that he agreed with them to an hourly wage, that Claimants still had his tile saw, and that Claimant Chavez wanted to be his partner.

5) On July 16, 2009, the Agency filed a "BOLI Request for Hearing" with the forum.

6) On July 24, 2009, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimants stating the time and place of the hearing as October 13, 2009, at the office of the Oregon Bureau of Labor and Industries, W. W. Gregg Hearing Room, 1045 State Office Building, 800 NE Oregon St., Portland, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445.

7) At the time set for hearing, Respondent had not appeared and had not previously announced that he would not appear. Pursuant to OAR 839-050-0330(2), the ALJ waited 30 minutes before commencing the hearing. When Respondent did not appear or contact the hearings unit by telephone during that time, the ALJ declared Respondent in default and commenced the hearing.

8) At the outset of the hearing, the ALJ explained the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing.

9) The ALJ issued a proposed order on October 28, 2009, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Ryan Allen Hite ("Respondent") was an employer in the state of Oregon and a contractor licensed with the Oregon Construction Contractor's Board.

2) Respondent employed Claimants Chavez and Vera to remodel a bathroom in a house in

Oregon owned by Celeste Kirk and Jim Van Osdale. Respondent had previously contracted with Kirk and Van Osdale to perform this remodeling work.

3) Respondent agreed to pay Chavez $15 per hour and Vera $12 per hour for their work.

4) From February 16, 2008, through March 14, 2008, Vera worked the following dates and hours for Respondent at the Kirk/Van Osdale residence:

February 16: 7 hours
February 18: 6½ hours
February 19: 7 hours
February 20: 7 hours
February 21: 7 hours
February 22: 6½ hours
February 25: 7½ hours
February 26: 7 hours
February 27: 4½ hours
February 28: 5½ hours
February 29: 5½ hours
March 4: 7 hours
March 5: 5½ hours
March 6: 2 hours
March 7: 7½ hours
March 10: 6 hours
March 11: 7½ hours
March 12: 7 hours
March 13: 3 hours
March 14: 5½ hours

In all, Vera worked 122 hours from February 16 through March 14, 2008. Respondent discharged Vera and paid him nothing for this work.

5) From February 15, 2008, through March 14, 2008, Chavez worked the following dates and hours for Respondent at the Kirk/Van Osdale residence:

February 15: 10 hours
February 16: 7 hours
February 18: 6½ hours
February 19: 7 hours
February 20: 7 hours
February 21: 7 hours
February 22: 6½ hours
February 25: 7½ hours
February 26: 7 hours
February 27: 4½ hours
February 28: 5½ hours
February 29: 5½ hours
March 4: 7 hours
March 5: 5½ hours
March 6: 2 hours
March 7: 7½ hours
March 10: 6 hours
March 11: 7½ hours
March 12: 7 hours
March 13: 3 hours
March 14: 5½ hours

In all, Chavez worked 132 hours from February 15 through March 14, 2008. Respondent discharged

Chavez and paid him nothing for this work.

6) At one point during the wage claim period, Claimants needed more building supplies but were unable to pick them up from because they were not licensed contractors. Van Osdale had to pay for and pick up the supplies.

7) There was no evidence that Claimants worked for anyone else during the wage claim period.

8) Respondent did not pay Vera or Chavez for any of the hours they worked from February 15, 2008, through March 14, 2008.

9) On March 3, 2008, Respondent submitted a statement to Vera's potential landlord in which he certified that Vera had worked for him as a laborer since "1/17/07," and that Vera's current wage was $12 per hour.

10) On May 28, 2008, the Agency sent a Notice of Wage Claim to Respondent. The letter stated that Claimants had filed wage claims alleging they were each owed $1,725 in unpaid wages.

11) On June 5, 2008, the Agency received a completed "Wage Claimant Investigation/Employer Response" form from Respondent. Among other things, Respondent stated that he closed his business on "April 3rd, 2008" and that Claimants began working for him on "3/10/07."

12) Susan Washington, an Agency compliance specialist, was assigned to investigate Claimants' wage claims. She reviewed the existing file, interviewed Van Osdale, Kirk, both Claimants, and Respondent. Respondent told her that his insurance was cancelled on March 23, 2008, that he had not performed any work after that date, that he was shutting down his business, that he had no assets from which to pay Claimants except for his house, and that he had sold his truck and used the proceeds to pay all of his other workers except for Claimants. Respondent claimed he had proof that Claimants were independent contractors or partners in the form of emails, witness statements, and business cards. Washington asked Respondent to provide that evidence but Respondent never did. Respondent also accused Claimants of taking $2,000 worth of his tools.

13) Based on her interviews with Claimants, the time records they provided, her interviews with Kirk and Van Osdale, Respondent's failure to provide any time records, and Respondent's admission that Claimants performed work on Respondent's project, Washington determined that Chavez was owed $1,980 in unpaid, due and owing wages (132 hours x $15/hour = $1,980) and that Vera was owed $1,464 in unpaid, due and owing wages (122 hours x $12/hour = $1,464).

14) On August 1, 2008, Vera signed and dated a "Wage Security Fund Assignment of Wages." On August 17, 2008,

Chavez signed and dated an identical form.

15) After receiving the WSF Assignment of Wages forms signed by Claimants, Washington completed the Agency's WH-105 form entitled "Wage Security Fund Wage Claim Case Summary" in which she summarized the wage claims and forwarded it to her supervisor for review. On August 21, 2008, Washington's supervisor approved the claims for payment from the WSF. In late August 2008, the Agency caused the WSF to issue checks in the amount of $1,980 to Chavez and in the amount of $1,464 to Vera, less statutory deductions.

16) Twenty-five percent of $3,444 is $861.

17) As of the date of hearing, Respondent had not paid Claimants any of the $3,444 in unpaid wages due and owing to them or repaid the WSF.

18) Washington was a credible witness.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent was an employer and contractor in the state of Oregon and engaged the personal service of one or more employees.

2) Respondent employed Claimants Chavez and Vera in Oregon in February and March 2008 to remodel a residential bathroom. Respondent agreed to pay Chavez $15 per hour and Vera $12 per hour.

3) From February 15 through March 14, 2008, Chavez worked 132 hours for Respondent, earning $1,980 in gross wages. As of the date of hearing, Respondent had not paid Chavez any of these wages.

4) From February 16 through March 14, 2008, Vera worked 122 hours for Respondent, earning $1,464 in gross wages. As of the date of hearing, Respondent had not paid Vera any of these wages.

5) The Agency investigated Chavez's and Vera's wage claims and determined that they were owed $1,980 (Chavez) and $1,464 (Vera) in unpaid, due and owing wages for work performed within 60 days of their last day of work. The Agency further determined that Respondent lacked sufficient assets to pay the wage claims and that the wage claims could not otherwise be fully and promptly paid.

6) In late August 2008, the Agency caused the WSF to issue checks in the amount of $1,980 to Chavez and in the amount of $1,464 to Vera, less statutory deductions.

7) Twenty-five percent of $3,444 is $861.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer subject to the provisions of ORS 652.110 to 652.414, and Vera and Chavez were Respondent's employees.

2) The Commissioner of the Bureau of Labor and Industries

has jurisdiction over the subject matter and Respondent herein. ORS 652.310 to 652.414.

3) Respondent violated ORS 652.140(1) by failing to pay Vera and Chavez all wages earned and unpaid not later than the end of the first business day after their discharge.

4) The Agency paid out a total of $3,444 from the WSF to Vera and Chavez and is entitled to recoup $3,444, plus a 25 percent penalty of $861, from Respondent. ORS 652.414(1), ORS 652.414(3).

5) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to reimburse the WSF and to pay a 25 percent penalty on the amount paid out by the WSF, plus interest on all sums until paid. ORS 652.332, ORS 652.414(3).

OPINION

RESPONDENT'S INDEPENDENT CONTRACTOR DEFENSE

Although Respondent did not appear at hearing and was held in default, Respondent raised an independent contractor defense in its answer that the forum must consider. In a default case, unsworn and unsubstantiated assertions contained in a respondent's answer may be considered, but are overcome whenever they are contradicted by other credible evidence in the record. *In the Matter of MAM Properties, LLC,* 28 BOLI 172, 187 (2007).

This forum uses an "economic reality" test to determine whether a wage claimant is an employee or independent contractor under Oregon's wage and hour laws. The focal point of the test is "whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which [she] renders [her] services." The forum uses five factors to gauge the degree of the worker's economic dependency, with no single factor being determinative: (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 Adesina Adeniji,* 25 BOLI 162, 169-70 (2004). Respondent has the burden of proving its affirmative defense that claimants were independent contractors and not Respondent's employees. *In the Matter of Gary Lee Lucas,* 26 BOLI 198, 210 (2005).

The record is devoid of evidence as to the degree of control exercised by the Respondent or the skill and initiative required of Claimants to perform the job. Based on Respondent's claim to Washington that $2,000 of his tools were missing from the job,

the forum infers that Respondent provided the tools necessary to perform the work. There is no evidence that Claimants had any investment in the job, other than their time and labor. Because Claimants were paid an hourly wage for their work, they had no opportunity to make a profit or suffer a loss. Finally, Respondent's written statements that Claimants began working for him on "1/17/07" and "3/10/07" shows that Claimants had worked for him for at least a year and there was no evidence that they worked for anyone else in that time period. Based on this evidence, the forum agrees with the Agency's conclusion that Claimants were Respondent's employees and not independent contractors.

WAGE SECURITY FUND RECOVERY

In cases involving payouts from the WSF, when (1) there is credible evidence that a determination on the validity of the claim was made; (2) there is credible evidence as to the means by which that determination was made; and (3) the Agency has paid out money from the Fund and seeks to recover that money, there is a rebuttable presumption that the Agency's determination is valid for the sums actually paid out. *In the Matter of Catalogfinder, Inc.,* 18 BOLI 242, 260 (1999).

In this case, the Agency established that rebuttable presumption through credible documentary evidence and witness testimony showing:

(1) It determined that the Claimants' wage claims were valid for $3,444 in wages earned within 60 days before the last day Claimants were employed, that Respondent had ceased doing business on March 23, 2008, and that Claimants' wage claims could not otherwise be fully and promptly paid;

(2) It based its determination on an investigation that included interviews of all material witnesses and an inspection of available, relevant documents; and

(3) It paid out $3,444 from the WSF, an amount equal to Claimants' unpaid, due, and owing wages, and seeks to recover that money.

Respondent's unsworn assertions in its answer that Claimants were subcontractors who were paid in full are insufficient to rebut this presumption, and the forum concludes that Respondent is liable to repay the WSF the $3,444 paid out to Claimants.

WAGE SECURITY FUND PENALTY

Pursuant to ORS 652.414(3), the Commissioner is entitled to recover a 25 percent penalty on $3,444, the amount of wages paid out, or $200, whichever is greater. In this case, a 25 percent penalty of $861 is greater and Respondent is liable to the Commissioner for that amount.

ORDER

NOW, THEREFORE, as authorized by ORS 652.414 and as payment of the amounts paid from the Wage Security Fund as a result of Respondent's violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Ryan Allen Hite** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in the amount of FOUR THOUSAND THREE HUNDRED AND FIVE DOLLARS ($4,305), representing $1,980 paid to Jose Chavez from the Wage Security Fund, $1,464 paid to Victor Vera from the Wage Security Fund, and a 25 percent penalty of $861 on the sum of $3,444, plus interest at the legal rate on the sum of $3,444 from April 1, 2008, until paid, and interest at the legal rate on the sum of $861 from August 25, 2008, until paid.

In the Matter of

Income Property Management

Case No. 54-08

Final Order of Commissioner Brad Avakian

Issued January 6, 2010

SYNOPSIS

Respondent denied Complainant Oregon Family Medical Leave ("OFLA") by terminating her while she was absent from work due to an OFLA qualified health condition. The forum determined that Respondent should pay Complainant $15,000 for mental suffering she experienced as a result of the denial. ORS 659A.183; OAR 839-009-0230.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 19, 2009, in the W. W. Gregg Hearing Room, located in the State Office Building, Suite 1045, 800 NE Oregon Street, Portland, Oregon.

Case presenter Chet Nakada, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "Agency"). Jenny Davis ("Complainant") was present throughout the hearing and was not represented by counsel. Attorney David J. Riewald represented Income Property Management Co. ("Respondent"). Nancy Henderson was present throughout the hearing as Respondent's corporate representative.

The Agency called as witnesses: Donna Meredith, Senior Investigator, BOLI Civil Rights Division (telephonic); Candace

Cobb, Complainant's daughter; and Complainant.

Respondent called as witnesses: Mary Daggett, Respondent's Human Resources Market Specialist and Nancy Henderson, Payroll and Human Resources Supervisor.

The forum received as evidence:

a) Administrative exhibits X-1 through X-27;

b) Agency exhibits A-1 through A-12 (filed with the Agency's case summary), A-25, A-26 (submitted during the hearing); and

c) Respondent exhibits R-1 through R-32, R-34 through R-36, R-41 through R-53, and R-55, R-56 (filed with Respondent's case summary), and R-62 (submitted during the hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On January 25, 2007, Complainant filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging Respondent violated provisions of ORS 659A.183.

2) On February 4, 2009, the Agency filed formal charges against Respondent alleging Respondent denied or constructively denied Complainant use of OFLA leave for a serious health condition and terminated or, in the alternative, retaliated against her because she inquired about OFLA, submitted a request for OFLA leave, or invoked the provisions of ORS 659A.150 to 659A.186. Along with the formal charges, the Agency filed a request for hearing.

4) On February 5, 2009, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:00 a.m. on April 14, 2009. With the Notice of Hearing, the forum included the formal charges, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

5) On or about February 6, 2009, Respondent was served with the formal charges and notice of hearing.

6) On February 24, 2009, Respondent's counsel timely filed a notice of appearance.

7) On February 24, 2009, after receiving permission from the ALJ, Respondent, through counsel, fax-filed a letter requesting an extension of time to file an answer to the formal charges. The request for additional time was granted on February 26, 2009 and

Respondent was given until March 2, 2009, to file an answer.

8) On February 27, 2009, Respondent timely filed an answer to the formal charges, admitting some of the allegations and denying the remainder. Additionally, Respondent alleged several affirmative defenses.

9) On March 9, 2009, the ALJ ordered the Agency and Respondent each to submit a case summary that included: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; for the Agency only, a brief statement of the elements of the claim and any damage calculations; and, for Respondent only, a brief statement of its defenses to the charges. The ALJ ordered the participants to submit their case summaries by April 3, 2009, and notified them of the possible sanctions for failure to comply with the case summary order. On the same date, the ALJ issued an order reiterating the rules pertaining to fax filings, timelines for filing motions, and service of documents.

10) On March 25, 2009, Respondent filed a motion for discovery order compelling Complainant and the Agency to produce all medical information and documents Respondent requested through an informal discovery request. On April 1, 2009, the Agency filed an objection to Respondent's motion based on relevance. The ALJ granted Respondent's motion and issued a discovery order on April 7, 2009, compelling the Agency to produce Complainant's medical and psychological records and provide them to Respondent. On the same date, the ALJ issued a protective order governing the classification, acquisition, and use of Complainant's medical and psychological records.

11) On April 3, 2009, the Agency timely submitted a case summary. On the same date, Respondent filed a motion to extend the case summary due date to April 7, 2009.

12) On April 6, 2009, Respondent notified the ALJ that the Agency case presenter did not oppose Respondent's motion to extend the case summary due date.

13) On April 7, 2009, at the Agency's request, the ALJ conducted a prehearing conference to discuss the Agency's oral motion to postpone the hearing. Respondent did not oppose the Agency's request for postponement and the Agency's motion was granted. After the participants submitted their available dates for hearing, the ALJ issued an order resetting the hearing for May 19, 2009, and extending the case summary due date to May 8, 2009.

14) On April 9, 2009, the Agency filed a motion to extend the time for complying with the April 7, 2009, discovery order and represented that Respondent's counsel did not oppose extending time to the date requested. On

April 14, 2009, the ALJ issued an order granting the Agency's motion.

15) On April 20, 2009, the Agency provided the ALJ with documentation supporting the Agency's motion to postpone hearing.

16) On May 8, 2009, the Agency timely filed an addendum to the case summary filed on April 3, 2009.

17) On May 9, 2009, Respondent timely submitted a case summary.

18) The Agency filed a second addendum to its case summary on May 11, 2009.

19) On May 15, 2009, the Agency filed a list of exhibits covered by the protective order, and on May 18, 2009, filed a third addendum to its case summary.

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

21) During the hearing, Respondent, citing specific case law, moved to dismiss the formal charges based on ERISA preemption. After a brief recess to review the cited cases, the ALJ denied Respondent's motion. At the close of hearing, Respondent renewed the motion to dismiss and moved to amend its answer to affirmatively allege that Complainant's testimony during the hearing implicated ERISA and that the issue was removable to federal court. The participants were given until June 15, 2009, to submit briefs addressing the issues raised in Respondent's motions.

22) On May 27, 2009, the ALJ issued an order withdrawing the request for briefs stating, in pertinent part:

> "During the contested case hearing held on May 18-19, 2009, Respondent's counsel moved to dismiss the above-entitled case on the ground that the Employee Retirement Income Security Act ("ERISA") preempts Complainant's state claims under the Oregon Family Leave Act ("OFLA"). Respondent argued Complainant's testimony that she believed she was terminated partly because Respondent did not want its insurance carrier to pay for her back surgery raised a federal issue under ERISA. The motion initially was denied because the Agency's formal charges do not contain an allegation related to Complainant's health care benefits. At the close of hearing, Respondent renewed the motion to dismiss and moved to amend its answer to affirmatively allege that Complainant's testimony during the hearing implicated ERISA and that the issue belonged in federal court. The participants were given until June 15, 2009, to submit briefs addressing the issues raised in Respondent's motions.

"After reviewing the record, I find briefing unnecessary to enter a ruling in this matter. Therefore, my order requiring briefs is withdrawn and the following ruling will be incorporated in the proposed order.

"**Ruling on Motions**

"Respondent acknowledged that its affirmative defense was waivable, but argued that the defense was not viable until Complainant gave specific testimony that implicated ERISA. However, the Agency did not move to amend its pleading "to conform to the evidence and to reflect issues presented" as required under OAR 839-050-0140. Consequently, the only issues properly before this forum are the ones raised in the Agency's formal charges and none of those issues relate to or are in any way connected with ERISA.[1] Without an amended charging document, Complainant's brief testimony does not constitute a proper claim for relief. Respondent has no viable basis for amending its answer and raising an additional affirmative defense.

"Accordingly, Respondent's motions to amend the answer and to dismiss the formal charges are **DENIED**.

"**IT IS SO ORDERED.**"

23) The ALJ issued a proposed order on November 4, 2009, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither Respondent nor the Agency filed exceptions to the proposed order.

FINDINGS OF FACT – THE MERITS

1) At times material, Respondent was a domestic corporation providing property management services in Oregon and was an employer utilizing the personal services of 25 or more persons.

2) At times material, Nancy Henderson was Respondent's payroll and human resources supervisor. Mary Daggett was a human resources specialist and her duties included assisting Henderson with interviewing, disciplining and terminating employees.

3) On July 8, 2005, Respondent hired Complainant to work as a desk clerk and janitor for the Patton Home, a residential care facility in Portland, Oregon, that provides low income housing for persons with drug and alcohol problems, mental health issues, and income challenges.

[1] By moving to amend its answer, Respondent concedes that none of the allegations in the formal charges implicate ERISA. Even if the Agency's allegations had included an ERISA related issue, Respondent waived that defense when it filed its answer to the charges. *See* OAR 839-050-0130(2)("The failure of a party to raise an affirmative defense in the answer is a waiver of such defense.")

4) Complainant worked the graveyard shift from 10 p.m. to 6:30 a.m., five days per week. Initially, she earned $9 per hour but after 30 days her pay was raised to $10 per hour. On September 1, 2005, Complainant became eligible for and received medical and dental insurance coverage as part of her employment benefits. Chris Tracy was Complainant's immediate supervisor.

5) Complainant signed an employment agreement with Respondent on July 8, 2005, that included a provision addressing Respondent's "no call, no show" policy, stating that "[e]mployees who do not call in for three consecutive work days may be considered to have voluntarily terminated their employment." On the same date, Complainant received a copy of Respondent's Policy Manual that reiterates the "no call, no show" policy, stating that "[a]n employee absent for three (3) consecutive scheduled working days without notification to the Company will be considered to have voluntarily quit by job abandonment." Complainant acknowledged by her signature that she received the Policy Manual and that she understood it was her responsibility to read the manual and contact her supervisor if she had questions or needed help understanding the information in the manual.

6) When she was hired, Complainant informed Julie Hovorak during a routine drug screening that she was taking medication for a preexisting back condition. Later, in or around August or September 2005, Complainant told Tracy that she was scheduled for an epidural test related to her back condition. During that time, "on a few occasions," she saw a doctor about her back.

7) On August 11, 2005, Respondent sent Complainant a Notice of COBRA Rights informing Complainant that if her employment should end, she would be entitled to continue her health care benefits with no break in coverage. Federal law requires employers who provide employees with medical coverage to notify newly hired employees of their right to continuing health care coverage and Respondent sends all employees the COBRA notice when they are hired.

8) Sometime before or in early December 2005, Complainant told Tracy she may need back surgery and asked "about paperwork for going on sick leave." On December 2, 2005, Tracy gave Complainant a handwritten note stating, in pertinent part:

> "I spoke w/downtown today about your being off for surgery. You need to call Nancy Henderson at 503-223-6327 when you have the specific time. They have special paperwork for you to fill out. (?) I'm not quite sure what it entails. I also need the dates for scheduling."
>
> " * * * * *
>
> "Thank you very much!
>
> "Chris Tracy"

The term "downtown" refers to Respondent's headquarters. A copy of the note was placed in Complainant's personnel file.

9) On December 12, 2005, Daggett informed Henderson that Complainant had called and would be in that afternoon to pick up the medical leave paperwork. Henderson planned to be out in the afternoon and prepared a packet of information that included Respondent's FMLA/OFLA policy, FMLA/OFLA Employer Notice to Employee, and forms for Complainant and her physician to complete and return. She gave the packet to Daggett with instructions about how to explain each document to Complainant. Complainant came in earlier than expected and Henderson met with Complainant, gave her the packet, and "walked her through each document." Complainant asked Henderson if there was "any money involved in it" and Henderson explained that the leave was unpaid but Complainant would be allowed to use her vacation or sick leave in lieu of the unpaid leave. On the same day, per her practice, Henderson mailed another packet of identical documents to Complainant, along with a cover letter stating, in pertinent part:

"Dear Jenny:

"Today you requested information that you may need a leave of absence, which may qualify as family medical leave under the law. On behalf of the company, I wish to extend to you our support and at the same time I want to stress how important it is for you and the company to communicate throughout this process. Today, on December 12, 2005, you advised the company that you were considering a leave of absence. Under our policy/practice, leaves of absence that qualify for family medical leave under state or federal law run concurrently with other types of leave. Leave such as workers compensation leave, leave for a non-industrial injury or illness (including paid leave such as sick leave or short-term disability leave). Leave as a reasonable accommodation for a qualified individual with a disability, and paid vacation used for a family-leave qualifying reason. Leave that qualifies as family medical leave will be counted against an employee's annual family leave entitlement or, if applicable, OFLA pregnancy disability leave.

"At this time, we understand the purpose of your requested leave qualifies as family medical leave under state and/or federal law. This means, such leave will [provisionally] be counted against your annual family medical leave entitlement. Attached are two forms: **IPM/HOF FMLA/OFLA Company Policy** and **Employer Family and Medical Leave Notice to Employee**, which contains other information for you regarding your family medical leave rights. Also attached is a **Medical Certification Form** which you

must have your health care provider complete. These are the same forms given to you today during our meeting. *It is your responsibility to return the completed form to me within 15 days; otherwise your protected leave may be revoked*. If your absence is not protected, it may be counted as an incident of absenteeism and discipline may follow for excessive absenteeism.

"Sincerely,

"Nancy K. Henderson, Payroll/Human Resources

"Enclosures: IPM/HOF FMLA/OFLA Policy, Employer Family and Medical Leave Notice to Employee, Medical Certification Form." (Emphasis added)

Complainant never returned the medical certification forms.

10) After requesting and receiving a workers compensation packet from Respondent, Complainant turned in a Report of Job Injury or Illness ("801 form") on January 6, 2006, to Respondent claiming she had suffered an upper and lower back injury due to the "nature of the work." In response to the first question on the 801 form about the date of injury, Complainant wrote "over the period of the job." She described the job as consisting of "heavy lifting (extensive), extensive walking, extensive bending and stooping, extensive heavy pushing, highly stressful environment, heavy workload sometimes very stressful, [and] lots of [illegible], push/pulling, stooping, bending, crouching."

11) When Complainant turned in the 801 form on January 6, 2006, she also submitted the Employee's Report of Incident in which she stated, in pertinent part:

"Over a period of several months on the job extensive heavy work load. (at times doing other job as well as my own.) Heavy lifting, pushing, pulling, walking, bending, stooping. 9-10 hours at times of work condensed into 8. At times very stressful."

She indicated on the form that the date of incident was "over period of the job" and that the resulting injury was that she "need[ed] surgery."

12) On January 6, 2006, Dan Webber submitted a Supervisor's Accident Investigation Report to Respondent that described an incident that occurred on December 28, 2005, when Complainant called in sick. Webber was acting as Complainant's supervisor in place of Tracy, who was not working that day. His report stated, in pertinent part:

"Jenny told me that she went to the doctor and they did some tests on her back. She said that after she got out of the hospital she was having back pains. She did not mention an on-site injury."

13) On January 9, 2006, Daggett and Angie Henry exchanged email communications discussing Complainant's time off

from work due to her alleged on-the-job injury. Henry asked Daggett whether Respondent should request a doctor's note stating Complainant "is to be off work" and whether Tracy could hire a temporary employee to fill in for Complainant while she was off work. Daggett's response confirmed that Respondent needed "a doctor's note with a description of her need for limited duties or time off" and that if a temporary worker was hired to fill in for Complainant, Respondent "must let [the worker] know this is a temporary position."

14) On January 9, 2006, Tracy gave Complainant a note stating:

> "You need to fill out a time-off sheet. It needs to state how long you are planning to be out. We also need a doctor's note with a description of your need for limited duties or the time off you have requested.
>
> "Thank you,
>
> "Chris Tracy"

Subsequently, Complainant gave Respondent a Return to Work Information form that her doctor had filled out and signed on January 9, 2006. Her doctor indicated that she was not medically stationary, that she was to perform "no work until reevaluation on 2/9/06" and that she "will be eval'd for back surgery Jan 24th, 2006." The doctor also noted that she was taking "narcotics" that could interfere with her duties while on the job.

15) Complainant left work on January 9, 2006, and did not perform work for Respondent after that date. On January 15, 2006, Complainant signed and turned in a time card that shows she worked eight hours per day from Monday, January 2, through Friday, January 6, 2006, and on Monday, January 9, 2006. The time card also shows Complainant was on sick leave from Tuesday, January 10 through Friday, January 15, 2006.

16) After Complainant filed her workers' compensation claim, Daggett interviewed Tracy, Webber and Complainant in separate interviews about when and how the injury occurred. Daggett documented each interview. Her notes from the Tracy interview show that Tracy was on vacation when Complainant notified Respondent of her injury. Tracy told Daggett that Complainant had mentioned a preexisting condition when she was hired, but had said it would not affect her job. Tracy also told her that Complainant had mentioned the possibility of back surgery in September 2005 but did not say that it was work related. Daggett's notes from the Webber interview show that Webber was acting as supervisor at the time Complainant reported the injury. Webber told Daggett that on December 27 or 28, 2005, Complainant told him that she could not move around and that "she had hurt since her tests because they shot dye into her." Webber also told Daggett that Complainant had never stated she was hurt on-site. The interviews with Tracy and Webber occurred before Complainant's interview.

17) Complainant's interview took place at Respondent's corporate office on January 20, 2006. Henderson was present for the interview. Daggett's notes from the interview are prefaced with the parenthetical statement:

> "(The interview with Jenny Davis happened on January 20, 2006 at 11 a.m. due to the employee being off work for the injury. She came in to the corporate office and is off work until an unknown date. Nancy Henderson sat in on the interview as well)."

Primarily, the notes document a lengthy discussion about Complainant's workers' compensation claim, her work load, and her recommendations about "how to improve the situation." Daggett's notes further state, in pertinent part:

> "Nancy Henderson asked Jenny when she notified her supervisor of her injury and Jenny couldn't remember. Nancy asked her if she was aware of the instructions regarding On the Job Injuries that were explained in both her employment agreement and her employee handbook she received stating she needs to notify her supervisor immediately of an injury and the proper documentation must be filled out and turned in within 24 hours after the injury. Jenny stated she didn't know.
>
> "I asked her about her time off stating that I understood her surgery was scheduled for January 24th and she was scheduled to return to work on February 4th [sic]. Jenny corrected me stating that she was being evaluated on the 24th not having her surgery. She didn't know when she was going to return to work.
>
> "As we were wrapping up the interview, I told Jenny that I had heard congratulations were in order. She looked at me curiously and smiled as I told her I had heard she was getting married this weekend. She said she was getting married next Saturday (1/28) not this Saturday but thanked me. I told her I didn't even know she was engaged and she said it was happening quickly. I congratulated her again."

After the meeting, Henderson gave Complainant a second FMLA/OFLA packet containing the same information that she was given on December 12, 2005.

18) The only doctor's note Respondent received from Complainant was the one she brought in on January 9, 2006, stating that Complainant was not to work until she was reevaluated on February 9, 2006. Respondent expected Complainant either to return to work on that date or provide another doctor's note updating her status. Complainant did not return to her employment on or after February 9, 2006. She did not call Respondent or provide a new doctor's note releasing her from work for an additional period.

19) On February 2, 2006, SAIF Corporation denied Complainant's claim for workers compensation benefits based on her back condition.

20) Daggett called Complainant on February 10 and February 13, 2006, but Complainant did not answer her telephone. Daggett did not leave a message because she was worried about privacy issues as a result of the new HIPA regulations. Henderson also made attempts to reach Complainant and on one occasion spoke with "a male" who answered the telephone. Henderson left her name and telephone number, but Complainant did not return the call.

21) On February 16, 2006, Daggett, Henderson, Tracy, and Henry met to discuss Complainant's job status. Based on Complainant's failure to return to work or to communicate with Respondent about her medical status, Daggett and Henderson determined that Complainant had abandoned her job which was grounds for termination under Respondent's existing employment policies. For that reason and after considering Complainant's prior reprimands in October and November 2005 for chronic tardiness, they made a joint decision to terminate Complainant's employment.

22) Daggett drafted a letter for Henderson's signature that was mailed to Complainant on February 16, 2006, and stated, in pertinent part:

"Dear Jenny,

"Following your recent back injury, you completed the necessary paperwork and turned in a doctor's report stating that you would be off work until February 9th, at which time you would be reviewed for possible back surgery. We have not received any additional paperwork from your physician outlining time loss or limited work status, nor have we received any communication from you to clarify your work status.

"According to your employment agreement:

"'13. Injury on the Job. Employee shall immediately report in writing all on-the-job injuries as soon as practicable after the injury to the supervisor named on Exhibit A, but in no event later than 24 hours after the injury. An incident report should be filled out on every incident, whether the employee was injured or not. Employee must also complete a post accident drug screen within 24 hours of the incident. This reporting requirement shall not alter any of the Employee's rights under the Workers Compensation law of the State of Oregon. **All post accident paperwork should be turned into the HR Department in a timely manner following each Doctor's appointment.**' and

"'4. Attendance and Punctuality. Employee should be at job

assignment ready for work at time scheduled; return from breaks and lunch on time; and not leave work before scheduled time off. Absence or tardiness should be reported to supervisor or person on duty as soon as possible and preferably before the start of the workday. To report tardiness or absent shift:

a. Call supervisor or the Human Resources Manager as soon as possible.

b. Give name and the reason for absence or tardiness and the approximate day or time of return.

c. Upon return to work, report to your supervisor before starting work.

"'Unreported absence or tardiness, reported absence or tardiness for unacceptable reasons, or a pattern of absences or tardiness may result in disciplinary action up to and including termination from the company. Employees who do not call in for three consecutive working days may be considered to have voluntarily terminated their employment. Being absent for three or more days due to an illness, injury, or family emergency may require a signed release or document from the attending physician to return to work.'

"We have no other choice but to believe you have abandoned your position as we have not received any word from you for a week. Enclosed is a copy of your separation notice. Please turn in any items that were given to you by Patton Home including keys.

"Sincerely,

"Nancy Henderson"

Henderson sent Complainant a final paycheck dated February 17, 2006.

23) On or about February 17, 2006, Complainant called Respondent inquiring about her medical insurance. Henderson returned the call and told Complainant that her insurance benefits were paid through February 28, 2006, but she could elect to continue her coverage by enrolling in COBRA. During the telephone conversation, Complainant asked what she could do to "remedy the situation" and Henderson told her there was nothing she could do at that point. Complainant told Henderson that she thought it was her doctor's responsibility to notify Respondent about her continuing medical condition. Henderson told her that it was Complainant's responsibility to keep Respondent informed.

24) On February 20, 2006, Henderson sent Complainant a COBRA Enrollment Form and Rate Sheet, a Change of Address form, Exit Interview, and a stamped, self-addressed envelope. The cost to Complainant to continue her health insurance without a break in coverage was $460.34 per month. The coverage can be continued up to 18 months without interruption or cancelled at any time without

penalty. The insurance carrier, Ceridian, sent a separate COBRA notification to Complainant and subsequently notified Respondent that it had not received a completed enrollment form from Complainant. Complainant has not returned any documents to Respondent since it sent the February 20, 2006, letter.

25) Several of Respondent's employees have "voluntarily" terminated their employment by "abandoning" their positions. At least two employees abandoned their jobs before Complainant's employment ended and at least six have done so since.

26) On June 20, 2006, a hearing was held on Complainant's back claim. On July 5, 2006, an ALJ found Complainant's back claim was not work related. Following Complainant's appeal, the Workers Compensation Board upheld the ALJ's order on February 27, 2007, concluding that Respondent did not cause Complainant's back condition.

27) On July 26, 2006, Complainant's doctor released her for light duty.

28) On November 28, 2006, Complainant filed an EEOC complaint against Respondent claiming she was discriminated against based on her religion. EEOC later dismissed the complaint finding no evidence of religious discrimination.

29) After Complainant filed an OFLA complaint with BOLI in January 2007, civil rights investigator Meredith initially determined that "Complainant was terminated only after she had failed to contact Respondent or provide any additional notice that she was continuing her protected leave. OFLA requires an employee to provide notice to the employer of taking or continuing protected leave; Complainant failed to meet the requirements of OFLA and was terminated pursuant to Respondent's policy. Therefore, this case should be dismissed." In the dismissal memorandum, Meredith found that "Complainant admits she did not communicate with Respondent about continuing her OFLA leave and did not provide any additional documentation from her doctor." Meredith also noted that Complainant stated she worked another week for Respondent after she was off work starting on January 9, 2006. Meredith changed her mind about the case after she received additional information pertaining to Respondent's January 20, 2006, meeting with Complainant. In her interview notes, Meredith noted that Complainant told her that Respondent terminated her because of her religious beliefs.

30) In or around August 2008, Complainant filed for Social Security disability benefits. She represented to the Social Security Administration that she became disabled on December 30, 2007. She also stated that she worked "pretty consistently from 2005 through 12/2007 in a combination of employment and self employment" and that she "stopped working in 12/2007 due to [her] condition and [has] not worked

since that time." In or around January 2009, the Social Security Administration notified Complainant that she did not qualify for benefits and her claim was denied.

31) When Complainant's employment ended, she was angry, frustrated and mad, and had no back-up plan. She was upset about having no income and that she had to rely on her children to help her with the rent. She had "very bad" back problems and needed surgery. Her newly wed husband "flaked out" and added to the difficulty. Complainant was "very unhappy and stressed."

32) Complainant earned "some dollars" after she left her employment by looking for housekeeping jobs on Craig's List. She was self employed for a period and provided cleaning services for various homeowners.

33) In 2005, Complainant reported earnings of $7,849 to the Internal Revenue Service ("IRS"). Her W2 shows earnings totaling $7,848.89 while in Respondent's employ in 2005. In 2006, she reported earnings of $3,944 to the IRS, approximately two thirds of which was classified as "business income."

34) In 2007, Complainant earned approximately $10,450 by doing housecleaning and providing childcare for her grandchildren. She did not file income tax returns in 2007 or 2008.

35) Complainant has not had surgery on her back since her employment ended and her back continues to get worse over time. In April 2009, she was in an automobile accident and it will be another six months before her doctor allows her to work anywhere. Her "present accident" has added additional stress.

36) Complainant had other stressors in her life during 2006, including worries about her children and a separation from her new husband that ended in divorce. In 2006, one of her daughters went to boot camp and was ultimately deployed. All in that same year, Complainant separated from her husband, he filed for divorce, and the divorce became final. Complainant complained about many stressors related to her children and other events to her doctors before her employment ended, but did not complain to her doctors about her work. Before she worked for Respondent, Complainant reportedly was suffering from severe depression. After her employment ended, Complainant saw her doctor three times and though she reportedly complained about all the other stressors in her life, she never mentioned that she lost her job.

37) As of May 15, 2009, Complainant owed medical bills totaling $4,691.94 for medical services received in 2004 and before and during her employment in 2005 and 2006. None of the services occurred after her insurance coverage terminated.

38) Complainant testified that she had taken morphine for back pain before coming to hear-

ing. Throughout her entire testimony she exhibited a very poor memory. Also, she was evasive, defensive and sometimes argumentative during cross-examination and was not responsive to many of counsel's questions. As a result, most of her testimony was unreliable.

For instance, she testified on cross-examination that she worked a few extra days after the doctor took her off work on January 9, 2006. She stated she continued to work because she wanted to make sure Respondent found someone to replace her. Seconds later, she testified that it could have been no more than one or two days that she worked after January 9. After consulting a calendar provided by counsel, she changed her testimony and stated she worked less than a full shift on January 10, "maybe a couple of hours." Her internally inconsistent testimony conflicts with her sworn statement in her BOLI complaint that "[d]espite this release I continued to work for at least another week. I then went off of work because of my back injury." She told BOLI investigator Meredith that she stopped working on January 15 or 16. Under oath in an unemployment hearing on July 13, 2006, she testified that she continued to work until late January. None of her conflicting statements, under oath or otherwise, are consistent with the time card she signed on January 15 that shows her last work day was January 9 and that she was on sick leave every day thereafter.[2] Her explanation that the events occurred a long time ago and the "technicalities" of "exact days or whatever may have been off" was not credible given that she signed her time card on January 15, 2006, that showed January 9 as her last day worked and six months later in her unemployment hearing she swore that she worked for Respondent until late January.

Her testimony that she was not offered any COBRA insurance contradicted her earlier statement to her doctor that she was eligible for COBRA and wanted the surgery. Her testimony that she continued to mitigate her damages by looking for work throughout 2008 contradicted her statement to the Social Security Administration that she was totally disabled and unable to work after December 18, 2007. Her testimony that Henderson did not give her a packet containing OFLA information in December 2005 was not consistent with her statement to civil rights investigator Meredith that Henderson did give her a packet of information related to OFLA leave. Overall, Complainant's testimony was not helpful and was credited only when it constituted a statement against interest or an admission, or was corroborated by other credible evidence.

39) Candace Cobb was a credible witness. Although she

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[2] *See* Finding of Fact – The Merits 15.

was Complainant's daughter, she did not demonstrate undue bias toward her mother. Her testimony generally was straightforward and confined to her own observations and perceptions of Complainant's emotional and physical distress following Complainant's termination. She was not impeached and the forum credits her testimony in its entirety.

40) For the most part, Nancy Henderson's testimony was forthright and believable. On cross-examination she exhibited some confusion about how many OFLA packets she gave Complainant and when she gave them to her, but the forum concludes that her confusion likely resulted from questions by the Agency case presenter that were themselves confusing and the case presenter's misquotes about dates already in the record. Henderson's testimony otherwise was not impeached and is credited in its entirety.

41) Mary Daggett generally was a credible witness. Except for her testimony that she told Complainant to keep Respondent informed about her work status at the January 20, 2006, meeting, which was not corroborated by her contemporaneous notes, the forum credited Daggett's testimony in its entirety.

42) Donna Meredith's testimony was credible. Although at first she was reluctant to acknowledge that she initially recommended dismissing Complainant's case, she was straightforward about why she changed her mind. Her relevant testimony was not impeached and the forum credits that testimony.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent employed 25 or more persons in Oregon and was subject to the Oregon Family Leave Act.

2) At all material times, Complainant was Respondent's employee and was eligible to take OFLA leave.

3) At all material times, Complainant had a back condition that qualified her for OFLA leave.

4) Respondent maintains a uniformly applied absentee policy providing that any employee absent for more than three consecutive scheduled working days without notifying Respondent will be considered to have voluntarily quit by job abandonment. Complainant knew or should have known of the policy which was contained in both the employment agreement Complainant signed and the policy manual for which she acknowledged receipt by her signature.

5) Respondent's notice requirement for employees using OFLA leave states that an employee must give Respondent 30 days notice of the need for leave if it is foreseeable and if unforeseeable, the employee must give oral notice within 24 hours after the leave begins and provide written notice within three days of the employee's return to work.

6) Respondent's employees are required to provide medical certification of a serious health condition within 15 days after Respondent sends the eligibility letter with the enclosed certification form. While on leave, employees are required to furnish Respondent with periodic status reports every three days, including the employee's intent to return to work. When the leave ends, employees are required to present a fitness for duty certificate prior to being restored to employment.

7) On or about December 12, 2005, Complainant told her supervisor that she was anticipating back surgery and asked for "sick leave" paperwork. She was directed to Human Resources and was subsequently given an OFLA packet that included Respondent's OFLA leave policy, medical certification forms for Complainant and her doctor to fill out, and a letter to Complainant dated December 12, 2005, stating she had notified Respondent of her need for medical leave and informing her that she must complete and return the enclosed medical certification within 15 days of the date of the letter. She also was informed that she must furnish a status report every three days while on leave and that she would be required to present a fitness for duty certificate prior to being restored to employment. An identical OFLA packet also was mailed to Complainant on the same date.

8) Complainant never returned the medical certification forms to Respondent.

9) On or about December 28, 2005, Complainant told the acting supervisor that she was having back pain and could not come to work that day. She did not tell the supervisor that she had an on-the-job injury.

10) On January 6, 2005, Complainant filed a workers compensation claim alleging she injured her back over a period of time during her employment.

11) On January 9, 2006, Respondent asked Complainant to fill out a time off sheet indicating how long she planned to be off work and furnish a doctor's note with a description of her need for limited duties or the requested time off.

12) On January 9, 2006, Complainant provided Respondent with a doctor's note stating that she was not to work until February 9, 2006, and would be "eval'd for surgery January 24, 2006."

13) As of January 20, 2006, Respondent knew Complainant was going to be evaluated for surgery on January 24 and that she did not know when her surgery would take place or when she would return to work. Other than providing Complainant with a packet of OFLA information, Respondent did not inquire further about Complainant's anticipated need for additional leave.

14) On February 2, 2006, SAIF Corporation denied Complainant's workers compensation claim. Complainant appealed the

denial, but the denial was ultimately upheld.

15) Complainant's leave expired on February 9, 2006, and she did not return to work or give Respondent an updated medical release. Complainant did not call her supervisor or anyone from Respondent to report her medical status or her intent to return to work.

16) After unsuccessful attempts to reach Complainant by telephone, Respondent, through its human resources representatives, decided to terminate her employment. Because Complainant had not contacted Respondent or provided any medical documentation showing a need for additional leave, Respondent considered Complainant as having abandoned her employment

17) On February 16, 2006, Respondent sent Complainant a letter notifying her that her employment was terminated and giving the reasons for the termination.

18) Complainant's medical insurance expired on February 28, 2006. Complainant did not elect to continue her coverage through COBRA.

19) Complainant had many stressors in her life that existed before and during her employment with Respondent. After her employment ended, she experienced anger, frustration and sadness due to the unanticipated loss of her job.

20) Complainant was released for light duty on July 26, 2006 - seventeen weeks after her OFLA leave would have expired on March 31, 2006.

CONCLUSIONS OF LAW

1) At times material herein, Respondent was a covered employer as defined in ORS 659A.150(1) and 659A.153.

2) At times material herein, Complainant was an eligible employee as defined in ORS 659A.156.

3) The actions, inaction, and motivations of Mary Daggett and Nancy Henderson properly are imputed to Respondent.

4) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practices found. ORS 659A.800.

5) Complainant's back condition constituted a "serious health condition" as defined in ORS 659A.159(1)(c) and OAR 839-009-0210(14).

6) By terminating Complainant for violating Respondent's absentee policy, Respondent denied Complainant OFLA leave in the manner required by ORS 659A.150 to 659A.186 and committed an unlawful employment practice in violation of ORS 659A.183.

7) Respondent did not apply its absentee policy against Complainant because Complainant

inquired about family leave, submitted a request for family leave, or invoked any OFLA provisions and did not therefore commit an unlawful employment practice in violation of ORS 659A.183.

8) Respondent did not terminate Complainant because she inquired about family leave, submitted a request for family leave, or invoked any OFLA provisions and therefore did not commit an unlawful employment practice in violation of ORS 659A.183 or OAR 839-009-0230(2).

OPINION

OFLA regulates two distinct areas of employer behavior with regard to employee leaves of absence. First, OFLA establishes an entitlement providing that eligible employees working for covered employers are entitled to OFLA leave for the purposes set out in the statute, and job protection during that leave. Second, OFLA prohibits retaliation or discrimination against any employee based on inquiry about or use of OFLA. This distinction is important because the analysis of whether or not unlawful practices occurred is different in each area. *In the Matter of Roseburg Forest Products*, 20 BOLI 8, 27 (2000).

The Agency alleges Respondent denied Complainant OFLA leave to which she was entitled by terminating her before she had used her full entitlement. The Agency also alleges Respondent retaliated or discriminated against Complainant in the terms and conditions of her employment or retaliated or discriminated against her by terminating her for invoking or using OFLA leave. For these two types of alleged unlawful practices, the Agency seeks lost wages "in excess of $56,000" and mental suffering damages "estimated to be at least $50,000."

Respondent denies it denied Complainant OFLA leave, or retaliated or discriminated against her or terminated her based on her inquiring about, invoking or using OFLA leave. Respondent contends Complainant was terminated because she had abandoned her job by failing to return to work when her authorized leave expired and by failing to provide additional medical documentation extending her leave.

A. Unlawful Denial of OFLA Leave – ORS 659A.183(1)

Under the OFLA, it is an unlawful employment practice for an employer to deny an eligible employee leave to recover from or seek treatment for a serious health condition "in the manner required by ORS 659A.150 to 659A.186." To prevail, the Agency must prove by a preponderance of credible evidence that: 1) Respondent was a covered employer as defined in ORS 659A.153(1); 2) Complainant was an eligible employee, i.e., she was employed by a covered employer at least 180 calendar days immediately preceding the date her medical leave began; 3) Complainant had a "serious health condition" as defined in OAR 839-009-0210(14)(e); 4) Complainant

used or would have used OFLA leave to recover from or seek treatment for her serious health condition; and 5) Respondent did not allow Complainant to use OFLA leave to which she was entitled in the manner required by ORS 659A.150 to 659A.186. *In the Matter of Gordy's Truck Stop LLC*, 26 BOLI 234, 247 2005); *In the Matter of Magno-Humphries, Inc.*, 25 BOLI 175, 192 (2004), *citing In the Matter of Centennial School District*, 18 BOLI 176, 192-93 (1999).

Respondent does not dispute that it was a covered employer, that Complainant was an eligible employee, or that Complainant had a serious health condition. The issue is whether Respondent denied Complainant use of OFLA leave to which she was entitled by enforcing its absentee policy after Complainant failed to return to work or call her supervisor for more than three days after her OFLA leave expired, or, in the alternative, provide Respondent with updated medical information that would extend her OFLA leave. There is no dispute that Complainant failed to return to work on February 9, 2006, and that she failed to call her supervisor or provide Respondent with updated medical information at that time or anytime thereafter. Additionally, Complainant did not deny that the employment agreement she signed and the policy manual, the receipt of which she acknowledged, specifically put her on notice of Respondent's policy stating that an employee who is absent for three consecutive days without notifying Respondent will be considered to have voluntarily quit by job abandonment.[3] The question is whether Respondent enforced its policy unlawfully thereby denying Complainant leave to which she was entitled.

OAR 839-009-0250(1)(d) speaks directly to the facts in this case and provides:

> "An employee on OFLA leave who needs to take more leave than originally authorized should give the employer reasonable notice prior to the end of the authorized leave, following the employer's known, reasonable and customary procedures for requesting any kind of leave. However, when an authorized period of OFLA leave has ended and an employee does not return to work, an employer having reason to believe the continuing absence may qualify as OFLA leave must request additional information, and may not treat a continuing absence as unauthorized unless requested information is not provided or does not support OFLA qualification."

There is no dispute that Complainant was on authorized OFLA leave between January 9 and February 9, 2006. There is no dispute that Respondent knew on January 20, 2006, that Complainant was "off work until an unknown date." Respondent also knew that on January 24 Com-

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[3] *See* Finding of Fact – The Merits 5.

plainant was going to be evaluated for possible back surgery that could entail a longer leave period. Respondent knew all of this because on January 20, Complainant gave Respondent verbal notice that she did not know when she was going to return to work, i.e., that she may need more leave than originally authorized. There is nothing in Respondent's policy manual or OFLA leave policies that suggests Complainant was not following Respondent's "known, reasonable and customary procedures" when she verbally indicated she may need additional leave.

Even if her statement did not constitute sufficient notice, and the forum finds that it did, Respondent had more than enough reason to believe that Complainant's continuing absence after February 9 qualified as OFLA leave and at that point had a duty to request additional information and treat the continuing absence as authorized unless Complainant failed to provide the requested information. Instead of requesting additional information, Respondent waited for a few days after Complainant's release expired and applied it's "no call, no show" policy to end Complainant's employment. Respondent's argument that Complainant had notice she was required to submit medical verification when her release expired is inconsistent with the law. Merely handing Complainant a packet of OFLA papers in December 2005, without any follow-up, and expecting her to determine what her obligations are under OFLA does not satisfy Respondent's obligation to provide her with *written notice each time* Respondent requires her to provide medical verification and of the *consequences* if she fails to do so. OAR 839-009-0260(3).

Notably, even if Complainant had told Respondent that she had no intention of returning to work after her leave expired, she was still entitled to complete her OFLA leave. OAR 839-009-0270(8)(a) provides, in pertinent part:

> "If an employee gives unequivocal notice of intent not to return to work from OFLA leave:
>
> "(a) The employee is entitled to complete the approved OFLA leave, providing that the original need for OFLA leave still exists. The employee remains entitled to all the rights and protections under OFLA, including but not limited to, the use of vacation, sick leave and health benefits pursuant to OAR 839-009-0270 and 839-009-0280; except
>
> "(b) The employer's obligations under OFLA to restore the employee's position and to restore benefits upon the completion of leave cease, except as required by COBRA; and
>
> "(c) The employer is not required to hold a position vacant or available for the employee giving unequivocal notice of intent not to return."

In this case, Complainant did not show any intent to abandon

her employment; instead she conveyed to Respondent that she may need additional leave due to her anticipated back surgery. Respondent violated OAR 839-009-0250(1)(d) by failing to request additional information when it had reason to believe her continuing absence qualified as OFLA leave. Respondent ended Complainant's employment by applying its absentee policy in a manner that was not consistent with OFLA provisions, and by abruptly ending Complainant's employment, Respondent denied Complainant the use of the OFLA leave to which she was entitled under ORS 659A.150 to 659A.186.

B. Retaliation or Discrimination – ORS 659A.183

ORS 659A.183 provides, in pertinent part:

> "It is an unlawful employment practice for a covered employer to:
>
> "(2) Retaliate or in any way discriminate against an individual with respect to hire or tenure or any other term or condition of employment because the individual has inquired about the provisions of ORS 659A.150 to 659A.186, submitted a request for family leave or invoked any provision of [the Oregon Family Leave Act]."

To establish a prima facie case of retaliation or discrimination for purposes of ORS 659A.183, the Agency must show that: 1) Complainant invoked a protected right under the OFLA; 2) Respondent made an employment decision that adversely affected Complainant; and 3) there is a causal connection between the Complainant's protected OFLA activity and Respondent's adverse action. *In the Matter of Magno-Humphries*, 25 BOLI 175, 196 (2004). The first two elements are undisputed. The only issue is whether Respondent ended Complainant's employment because she inquired about or was using OFLA leave.

Proof of a causal connection may be established through evidence that shows Respondent knowingly and purposefully discriminated against Complainant because she engaged in protected activity ["specific intent" test] or by showing that Respondent treated Complainant differently than her co-workers who were not engaged in the same protected activity ["different treatment" test]. *In the Matter of Roseburg Forest Products*, 20 BOLI 8, 28-31 (2000); OAR 839-005-0010(1). While specific intent may be established by direct evidence of a respondent's discriminatory motive, it may also be shown through circumstantial evidence. *See In the Matter of Wal-Mart Stores, Inc.*, 24 BOLI 37, 61 (2002), *citing In the Matter of Sierra Vista Care Center*, 9 BOLI 281, 296-97 (1991) ("[E]vidence includes inferences. There may be more than one inference to be drawn from the basic fact found; it is [the] Forum's task to decide which inference to draw. Thus, the absence of direct evidence of [respondent's] specific intent is not

determinative because such intent may be shown by the circumstantial evidence referred to herein"). (citations omitted) *See also Boynton-Burns v. University of Oregon*, 197 Or App 373, 380-381, 105 P3d 893, 897-898 (2005), *quoting DeCintio v. Westchester County Medical Center*, 821 F2d 111, 115 (2d Cir), *cert. den.* 484 U.S. 965, 108 S.Ct. 455 (1987)("Proof of a causal connection can be established [1] *indirectly*, by showing that the protected activity was followed closely by discriminatory treatment or through other evidence such as disparate treatment of fellow employees who engaged in similar conduct, or [2] *directly*, through evidence of retaliatory animus directed against a [complainant] by the [respondent]"). The Agency, at all times, has the burden of proving that Complainant was terminated or otherwise discriminated against for unlawful reasons. *Wal-Mart* at 61.

In this case, there is no direct or circumstantial evidence of discriminatory intent on Respondent's part. There is no evidence that management or other supervisory employees made any adverse statements about Complainant's use of OFLA leave. There is no evidence Respondent concocted the absentee policy to apply exclusively to Complainant because she invoked OFLA provisions. In fact, Respondent produced credible evidence that its absentee policy was uniformly applied to all employees and the Agency has not proffered any evidence to the contrary.

Although the forum has found that Respondent's application of the absentee policy effectively denied Complainant full use of her OFLA leave, the Agency has not established that the policy was enforced because Complainant was using her OFLA leave. Instead, the entire record shows Respondent's policy was applied to Complainant only because she failed to communicate with Respondent in any manner after her OFLA leave expired. Absent any evidence to the contrary, the forum concludes there is no causal connection between Complainant's invocation or use of OFLA and the application of Respondent's absentee policy to Complainant.

DAMAGES – DENIAL OF OFLA LEAVE

A. Lost Wages, Benefits and Out of Pocket Expense

The Agency alleged Complainant lost wages, benefits and out of pocket expenses estimated to be $56,000 due to Respondent's unlawful practices. Credible evidence established that Complainant was not released to return to work until she was released for light duty on July 26, 2006, well after her entitlement to OFLA leave had expired on or about March 31, 2006. She had no lost wages up until July 26 and there is nothing in the record that shows Respondent would have employed Complainant beyond that date. Also, there is no credible evidence that she sought employment in 2006 after she was released for light duty. Therefore,

the forum concludes Complainant lost no wages as a result of being denied her remaining weeks of leave.

As to Complainant's lost benefits and out of pocket expenses, credible evidence established that Respondent and the insurance carrier notified Complainant she was entitled to continue her medical benefits, uninterrupted, when her employment ended. She had an option to continue her insurance coverage that she did not pursue.[4] Although apparently Complainant accrued medical bills in 2004, 2005, and 2006 that remained unpaid as of May 19, 2009, none of those bills accrued after her employment and insurance coverage ended. Notwithstanding there is no evidence that the bills are related to the medical condition that caused her need for OFLA leave, most of the bills accrued in 2004 and 2005 before Respondent employed her. Consequently, Respondent is not liable for Complainant's out of pocket medical expenses. The Agency presented no evidence showing the value of any benefits Complainant would have been paid had she continued the remaining seven weeks of OFLA leave and without such evidence, Complainant has no claim.

B. Mental Suffering Damages

While the record is replete with evidence that Complainant suffered from many stressors unrelated to her employment before and after her employment ended, her daughter's credible testimony corroborated Complainant's testimony that for a period of time she was upset and unhappy that her employment had abruptly ended. Although Cobb often referred to the other stressors in Complainant's life, she credibly testified that Complainant was worried and concerned about the sudden loss of income to the family and was embarrassed about asking her children to help out with the rent. The financial stress of losing her job lessened in 2007 as evidenced by her tax return for that year that shows she made well over what she earned in 2005 while working for Respondent. However, for the emotional distress she suffered over the sudden loss of her job, Complainant is entitled to compensatory damages. The forum concludes that $15,000 is an appropriate amount to offset the effects of Respondent's unlawful practice.

ORDER

NOW, THEREFORE, as authorized by ORS 659A.850(2) and

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[4] Had she continued her insurance coverage, she would have been entitled to recover the amounts paid out for COBRA continuation coverage. *See In the Matter of Magno-Humphries*, 25 BOLI 175, 198 (2004)(finding the sums the complainant expended on insurance premiums would have been available for Complainant's use but for Respondent's denial of OFLA leave and that an award for her out of pocket expenses for her insurance coverage was justified to compensate her fully for the effects of the respondent's unlawful employment practice).

ORS 659A.850(4), to eliminate the effect of Respondent's unlawful employment practices, and as payment of the damages assessed for its violation of ORS 659A..183, the Commissioner of the Bureau of Labor and Industries hereby orders **Income Property Management Co.** to:

1) Deliver to the Bureau of Labor and Industries, 800 NE Oregon Street, Suite 1045, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries **in trust for Complainant Jenny Davis** in the amount of FIFTEEN THOUSAND DOLLARS ($15,000), representing compensatory damages for the mental suffering Complainant experienced as a result of Respondent's unlawful employment practice, plus interest at the legal rate on the sum of $15,000 from the date of the final order until paid; and

2) Cease and desist from denying any employee the use of the Oregon Family Leave Act provisions.

In the Matter of

MASS TRAM AMERICA, INC. and Ben Missler

Case No. 16-09

Final Order of Commissioner Brad Avakian

Issued February 19, 2010

SYNOPSIS

Respondent Mass Tram America, Inc., a corporation, employed Claimant to work 211 hours between March 27 and May 15, 2007, at the agreed rate of $10.00 per hour. Claimant worked 183.5 straight time hours and 27.5 overtime hours, earning $1,835.00 in straight time wages and $412.50 in overtime wages, for a total of $2,247.50, and was only paid $190.00. Respondent Mass Tram was ordered to pay Claimant $2,057.50 in unpaid, due and owing wages. Respondent Mass Tram willfully failed to pay the wages due and was ordered to pay $2,400.00 in penalty wages. Respondent Mass Tram was also ordered to pay a $2,400.00 civil penalty based on its failure to pay earned overtime wages to Claimant. The Order of Determination was dismissed against Respondent Ben Missler because the Agency failed to prove that he was Claimant's employer or to pierce the corporate veil. ORS 652.140(2), ORS 652.150; ORS 653.055; ORS 653.261; OAR 839-020-0030.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on Tuesday, December 15, 2009, at the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and

Industries, located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Chet Nakada, an employee of the Agency. Respondents did not appear at hearing and were held in default.

The Agency called the following witness: Wage claimant Rowan DeSantis (Claimant); Brenda Walsh, Claimant's coworker; and Wage and Hour Division compliance specialist Margaret Pargeter.

The forum received into evidence:

a) Administrative exhibits X-1 through X-11 (submitted or generated prior to hearing); and

b) Agency exhibits A-1 through A-12 (submitted prior to hearing) and A-13 (submitted at hearing at the ALJ's request).

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

FINDINGS OF FACT – PROCEDURAL

1) On July 13, 2007, Claimant Rowan DeSantis ("Claimant") filed a wage claim with the Agency alleging that Respondents had employed her and failed to pay wages earned and due to her. At the time she filed her wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for herself, all wages due from Respondents.

2) Claimant filed her wage claim within the statute of limitations.

3) On March 14, 2008, the Agency issued Order of Determination No. 07-2277 based upon Claimant's wage claim. The Order of Determination alleged:

> (a) Claimant was employed by Respondents during the period March 26, 2007 through April 26, 2007, at the regular rate of $10.00.00 per hour for each hour worked. During this period, Respondents were required by the provisions of ORS 653.261(1) and OAR 839-020-0030 to compensate Claimant at one and one-half times the regular rate of pay for each hour worked over 40 hours in a given work week. During the period March 26, 2007 through April 26, 2007, Claimant worked a total of 210.50 hours, 29.5 of which were hours worked over 40 hours in a given work week, and is entitled to $2,062.50, no part of which has been paid except the sum of $190.00, leaving a balance due and owing of $2,062.50 in unpaid wages, together with interest thereon at the legal rate per annum from June 1, 2007, until paid.
>
> (2) Respondents willfully failed to pay the wages and more than 30 days have elapsed

since the wages became due and owing and since a written notice was sent to the employer pursuant to ORS 652.140 and ORS 652.150. Claimant's wage rate per day during the period of employment pursuant to ORS 652.150 was $80.00 and there is now due and owing to the Claimant the sum of $2,400.00 as penalty wages with interest thereon at the legal rate per annum from July 1, 2007, until paid. In addition to the penalty wages due pursuant to ORS 652.150, Respondents paid Claimant less than the wages to which the wage claimant was entitled under ORS 653.010 to 653.261 and are therefore also liable to Claimant for civil penalties pursuant to the provisions of ORS 653.055(1)(b) in the amount of $2,400.00, with interest thereon at the legal rate per annum from July 1, 2007, until paid.

The Order of Determination required that, within 20 days, Respondents either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) On April 29, 2008, Respondents filed an answer and request for hearing. In pertinent part, Respondents alleged that Claimant was only allowed to charge up to 20 hours per week, that Claimant was trying to charge for work done for other projects not related to her employment with Respondents; that Claimant was never hired and "only on a 2 week trial basis," and that Claimant was trying to extort money from Respondents.

5) On August 17, 2009, the Agency filed a "BOLI Request for Hearing" with the forum.

6) On August 17, the Hearings Unit issued a Notice of Hearing to Respondents, the Agency, and Claimant stating the time and place of the hearing as December 15, 2009, at the office of the Oregon Bureau of Labor and Industries, W. W. Gregg Hearing Room, 1045 State Office Building, 800 NE Oregon St., Portland, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445.

7) At the time set for hearing, Respondents had not appeared and had not previously announced that they would not appear. Pursuant to OAR 839-050-0330(2), the ALJ waited 30 minutes before commencing the hearing. When Respondents did not appear or contact the hearings unit by telephone during that time, the ALJ declared Respondents in default and commenced the hearing.

8) At the outset of the hearing, the ALJ explained the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing.

9) After the Agency's opening statement, but before any witnesses were called, the Agency moved to amend its Order of Determination to:

a) Change the date of the issuance of the Order of Determination to March 14, 2008, instead of March 14, 2007.

b) Change the wage claim paid to March 26, 2007 through May 15, 2007.

c) Increase the total number of hours worked by Claimant to by .5 hours to 211 and the unpaid wages sought by $5.00 to $2,067.50.

The ALJ granted the Agency's motion to change the date of issuance of the Order of Determination and reserved ruling on the other two proposed amendments for the proposed order. The Agency's other two proposed amendments are **GRANTED.**[1]

[1] The Commissioner has the authority to award damages in excess of those sought in the charging document when the damages are awarded as compensation for statutory violations, *e.g.*, unpaid wages, that the agency alleged in its Order of Determination. *In the Matter of Contractor's Plumbing Service, Inc.,* 20 BOLI 257, 273 (2000).

10) On January 8, 2010, the ALJ issued a proposed order to notify the participants they were entitled to file exceptions to the proposed order within 10 days of its issuance.

11) On January 12, 2010, the Agency filed a motion for two-week extension of time to file exceptions the proposed order and for an audio copy of the hearing to review for the purpose of filing exceptions. The ALJ granted both motions.

12) On February 2, 2010, the Agency timely filed exceptions to the proposed order. Those exceptions are addressed in the Opinion section of this Order.

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FINDINGS OF FACT – THE MERITS

1) Respondent Mass Tram America, Inc. ("Mass Tram") incorporated as an Oregon domestic business corporation on October 28, 2005, with Ben Missler as its registered agent. On December 29, 2006, Mass Tram was administratively dissolved by the Oregon Corporations Division. On May 15, 2008, Mass Tram, through Ben Missler, filed an application for reinstatement with the Corporation Division and was reinstated on the same day. On December 26, 2008, Mass Tram was again administratively dissolved by the Oregon Corporation Division.

2) Mass Tram's business was a project to build a mass transportation system based on a monorail that would be solar and wind powered, using old 747 and 727

airplane bodies as the vehicles that would run on the monorail.

3) In or around March 2007, Claimant applied for a job with Mass Tram[2] as project director. At Mass Tram's office in Milwaukie Oregon, she was interviewed by Ben Missler and gave Missler her resume. At the end of the interview, Missler told Claimant that she was hired. Claimant, who usually worked at a higher rate of pay, agreed to work for $10.00 per hour, plus a bonus to be paid when "the first investor wrote a check." Missler told Claimant that she would be paid weekly for the work she had done each week.

4) Claimant started work for Mass Tram on March 26, 2007. Missler was her supervisor throughout her employment. (Testimony of Claimant, Walsh)

5) While she worked at Mass Tram, Claimant's work week was Saturday through Friday.

6) While she worked for Mass Tram, Claimant's job duties as project director included putting together an investment package, coordinating volunteers, upgrading Mass Tram's business plan, and putting together business presentations.

7) Initially, Missler expected Claimant to work 20 hours per week. She was not given a set schedule, but was expected to work five days a week. Claimant found it impossible to accomplish the job duties assigned to her in that time and began to work more hours almost immediately.

8) Throughout her employment, Claimant maintained a contemporaneous written record of the hours she worked and job duties that she performed and gave this record to Missler.

9) During her employment, Claimant assumed she was working for Mass Tram and was never told that the corporation had been administratively dissolved.

10) As of April 27, 2007, Missler had only paid Claimant $190.00 for her work. One payment was by a check dated March 30, 2007, that was made out for $100.00 and signed by Missler. Printed on the check were the words "Mass Tram America, Inc.," together with Mass Tram's address. The other payments were in cash.

11) During her employment, Claimant repeatedly asked to be paid and Missler kept telling her that he would pay her the following week. On April 27, 2007, both Claimant and her co-worker Brenda Walsh quit because they were not being paid for their work. On May 15, 2007, Claimant worked 3 ½ more hours for Mass Tram while making a sales presentation. Overall, she worked the

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[2] Although Mass Tram and Missler are both named as respondents, this order concludes that Mass Tram was Claimant's sole employer. Accordingly, the Findings of Fact – The Merits refer to Mass Tram as Claimant's employer.

following hours during each week of her employment:

March 26 - March 30: 29.5 hours.

March 31 - April 6: 34.5 hours

April 7 - April 13: 51 hours

April 14 - April 20: 56.5 hours

April 21 - April 27: 36 hours

May 15: 3.5 hours

In total, she worked 211 hours, including 183.5 straight time hours and 27.5 overtime hours, earning $1,835.00 in straight time wages and $412.50 in overtime wages, for a total of $2,247.50.

12) Claimant was only paid $190.00 for work, leaving a balance due and owing of $2,057.50 in unpaid, due and owing wages.

13) On August 2, 2007, the Agency sent a Notice of Wage Claim to Respondent Mass Tram America, Inc. The letter stated that Claimant had filed a wage claim alleging she was owed unpaid wages in the amount of $2,100.50 at the rate of $10.00 per hour from March 26, 2007 to May 15, 2007, plus unpaid bonus compensation of $16,033.50 for that same time period.

14) On August 24, 2007, the Agency received an unsworn, completed "Wage Claimant Investigation/Employer Response" form from Mass Tram America, Inc. that was filled out and signed by Ben Missler. On the form, Missler handwrote that he agreed to pay Claimant $10.00 per hour but claimed it was only for a two-week trial and that "she did not work out." He also stated that he kept no records of any hours worked by the Claimant.

15) Mass Tram failed to pay Claimant all earned, due, and payable wages within five days, excluding Saturdays, Sundays and holidays, after Claimant quit, and more than 30 days have elapsed from the date her wages were due.

16) Penalty wages for claimant under ORS 652.150 are computed by multiplying Claimant's hourly wage of $10.00 per hour x 8 hours x 30 days = $2400.00.

17) Civil penalties are computed in accordance with ORS 653.055 by multiplying Claimant's hourly wage of $10.00 per hour x 8 hours x 30 days ($10.00 x 8 x 30 = $2400.00).

18) Pargeter, Claimant and Walsh were credible witnesses.

ULTIMATE FINDINGS OF FACT

1) Respondent Mass Tram Inc., registered as an Oregon domestic business corporation on October 28, 2005, with Ben Missler as its registered agent. On December 29, 2006, the Oregon Corporation Division administratively dissolved Mass Tram.

2) Missler continued to operate Mass Tram after its dissolution, including during the period of Claimant's employment.

3) Missler was served with the Agency's Order of Determination

on March 20, 2008. On May 15, 2008, Missler, acting on behalf of Mass Tram, filed an application for reinstatement with the Corporation Division, and Mass Tram was reinstated on the same day. On December 26, 2008, Mass Tram was again administratively dissolved by the Corporation Division.

4) In March 2007, Missler hired Claimant as Mass Tram's project director at the wage rate of $10.00 per hour, with the agreement that Claimant would be paid a bonus when "the first investor wrote a check."

5) Claimant worked for Mass Tram from March 26 through April 27, 2007, when she quit. On May 15, 2007, she worked another 3 ½ hours as an employee of Mass Tram.

6) Missler, who supervised Claimant, only paid her $190.00 for her work. One payment was by a check dated March 30, 2007, that was made out for $100.00 and signed by Missler. Printed on the check were the words "Mass Tram America, Inc.," along with Mass Tram's address. The other payments were in cash.

7) In total, Claimant worked 211 hours, including 183.5 straight time hours and 27.5 overtime hours, earning $1,835.00 in straight time wages and $412.50 in overtime wages, for a total of $2,247.50, leaving a total of $2,057.50 in unpaid, due and owing wages.

8) On August 2, 2007, the Agency sent a Notice of Wage Claim to Respondent Mass Tram, stating that Claimant had filed a wage claim alleging she was owed unpaid wages in the amount of $2,100.50, computed at the rate of $10.00 per hour from March 26, 2007, to May 15, 2007, plus unpaid bonus compensation of $16,033.50 for that same time period. Missler received and responded to the Notice.

9) Mass Tram failed to pay Claimant all earned, due, and payable wages within five days, excluding Saturdays, Sundays and holidays, after Claimant quit, and more than 30 days have elapsed from the date her wages were due.

10) Penalty wages for Claimant under ORS 652.150 are computed by multiplying Claimant's hourly wage of $10.00 per hour x 8 hours x 30 days = $2400.00.

11) Civil penalties are computed in accordance with ORS 653.055 by multiplying Claimant's hourly wage of $10.00 per hour x 8 hours x 30 days ($10.00 x 8 x 30 = $2400.00).

CONCLUSIONS OF LAW

1) During all times material herein, Respondent Mass Tram was an employer subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and ORS 653.010 to 653.261, and Claimant was Mass Tram's employee.

2) The actions, inaction, and statements of Respondent Ben

Missler are properly imputed to Respondent Mass Tram.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondents herein. ORS 652.310 to 652.414.

4) Respondent Mass Tram violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid within five days, excluding Saturdays, Sundays and holidays, after Claimant quit. Mass Tram owes Claimant $2,057.50 in unpaid, due and owing wages, including $412.50 in overtime wages.

5) Respondent Mass Tram's failure to pay Claimant all wages due and owing was willful and Mass Tram owes $2,400.00 in penalty wages to Claimant. ORS 652.150.

6) Respondent Mass Tram did not pay Claimant overtime wages for 27.5 overtime hours worked and Mass Tram is liable for a $2,400.00 civil penalty to Claimant. ORS 653.055.

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

8) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to dismiss the Order of Determination as to Respondent Ben Missler. ORS 652.332.

OPINION

INTRODUCTION

Respondents defaulted when they did not make an appearance at the hearing. When a respondent defaults, the agency must present a prima facie case on the record to support the allegations of its charging document in order to prevail. *In the Matter of Okechi Village & Health Center,* 27 BOLI 156, 161 (2006). This consists of credible evidence of the following: 1) Respondent(s) employed Claimant; 2) The pay rate upon which Respondent(s) and Claimant agreed, if it exceeded the minimum wage; 3) Claimant performed work for which she was not properly compensated; and 4) The amount and extent of work Claimant performed for Respondent(s). *In the Matter of MAM Properties, LLC, 28 BOLI 172, 188 (2007).*

RESPONDENT MASS TRAM AMERICA, INC. WAS CLAIMANT'S EMPLOYER

In its Order of Determination, the agency alleged that Respondents Ben Missler, an individual, and Mass Tram America, Inc., an Oregon corporation, were jointly and severally liable for Claimant's unpaid wages. At hearing, the agency argued that Missler was liable for two reasons. First, since

Mass Tram had been administratively dissolved by the Corporation Division prior to Claimant's employment, it did not exist as a legal entity during Claimant's employment and could not have been Claimant's employer. Second, Missler's May 15, 2008, application for Mass Tram's reinstatement as an active corporation was a sham that should allow the agency to pierce the corporate veil. The agency bases the second argument on two facts: (1) Missler let Mass Tram's registration with the Corporations Division lapse at the end of 2006 and did not attempt reinstate it until seven weeks after service of the Order of Determination; and (2) Missler let Mass Tram's registration with the Corporations Division lapse again at the end of 2008. Under these circumstances, the agency argues that it is entitled to pierce the corporate veil and attain a judgment against Missler individually and Mass Tram. Although creative, the agency's argument is legally flawed.

In Oregon, an administratively dissolved corporation has five years from the date of dissolution to apply to the Secretary of State for reinstatement. When a corporation is reinstated, as Mass Tram was on May 15, 2008, the reinstatement "relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred." ORS 60.654(3). *See In the Matter of 82nd Street Mall, Inc.,* 30 BOLI 140, 148-49 (2009). As a result, Mass Tram's reinstatement on May 15, 2008, dated back to December 29, 2006, the effective date of Mass Tram's original dissolution. Because of this reinstatement, Mass Tram became Claimant's employer, albeit retroactively, and Mass Tram's subsequent administrative dissolution on December 26, 2008, only potentially affected actions taken by Missler under Mass Tram's corporate name *after that date* and did not rescind Claimant's retroactive status as an employee of Mass Tram.

Due to Mass Tram's May 15, 2008, reinstatement, Missler can only be held individually liable by "piercing the corporate veil." Oregon courts have consistently held that disregarding a legally established corporate entity is an extraordinary measure subject to specific conditions and limitations, including proof that a shareholder acted improperly and that the improper conduct caused the corporation to fail in its obligation to creditors. *In the Matter of Jorge E. Lopez,* 28 BOLI 10, 18-19 (2006). In this case, the Agency neither alleged nor proved any "improper conduct," examples of which include inadequate capitalization, "milking," and misrepresentation. *Id.* at 19, *citing Amfac Foods, Inc. v. International Systems & Controls Corporation,* 294 Or 94, 108-09, 654 P2d 1092, 1101-02 (1982). Absent any evidence of improper conduct, the forum concludes that Respondent Mass Tram is solely liable for Claimant's unpaid wages and any penalty wages or civil penalties

resulting from the failure to pay wages.[3]

In its exceptions, the Agency contended, as an alternative to establishing Missler's liability by piercing the corporate veil, that respondent Missler was Claimant's sole employer in law and in fact. The Agency argued that the only evidence connecting Mass Tram to Claimant's employment was Claimant's lone paycheck, on which the words "Mass Tram America, Inc." and Mass Tram's address were imprinted. The Agency also highlights the facts that Claimant was interviewed by Ben Missler, Missler told Claimant that she was hired, Claimant negotiated her salary and schedule with Missler, and that Missler paid Claimant in cash. Although those facts are undisputed, the record also indicates that Claimant interviewed at the office of Mass Tram, Inc. and that during her employment, Claimant assumed she was working for Mass Tram and was never told that the corporation had been administratively dissolved. While an employee's impression about the identity of the employer is not dispositive, in this case it was consistent with other indicia of employer identity, such as the name imprinted on the paycheck.

In its exceptions, the Agency also argues that Ben Missler must be the employer because Mass Tram did not legally exist either at the time of Claimant's employment or on the day of the hearing. The Agency is mistaken. Under ORS 60.654(3), a corporation is reinstated retroactively and is liable for all acts of the corporation during any period when the corporation was dissolved. There is no exception for liability or debts. Consequently, Respondent Missler cannot be held liable for Respondent Mass Tram's failure to pay wages to Claimant during the period of time when it was administratively dissolved, Respondent Mass Tram's involuntary dissolution in December 2008 does not change this result.

CLAIMANT WAS HIRED AT THE AGREED RATE OF $10.00 PER HOUR

Claimant credibly testified that Missler, Respondent's agent, agreed to pay her $10.00 per hour, and Missler acknowledged that agreement in his response to the Agency's Notice of Wage Claim.

CLAIMANT PERFORMED WORK FOR WHICH SHE WAS NOT PROPERLY COMPENSATED

Claimant's credible testimony and contemporaneous time records established that she worked

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[3] *Cf. In the Matter of Blue Ribbon Christmas Trees, Inc.,* 12 BOLI 209, 222 (1994) (When an individual was the sole owner and shareholder of a corporation and evidence indicated that he operated in a corporate capacity, the commissioner found that, despite some personal assurances to employees that they would be paid, the corporation was the employer, noting that "[c]orporate immunity exists to foster legitimate business risk. Unfortunately, it may also form a shield for the unscrupulous.").

a total of 211 hours, including 183.5 straight time hours and 27.5 overtime hours. In his response to the Agency's Notice of Wage Claim, Missler admitted that Claimant worked for two weeks, with a maximum of 20 hours per week, at the wage rate of $10.00 per hour. Claimant was only paid $190.00 for her work. Even if Claimant only worked two weeks as Respondents claim, she could have earned $400.00 (20 hours x 2 weeks x $10.00 = $400.00) based on Respondents' admission. Claimant's credible testimony and records prove that Claimant performed work for which she was not properly compensated. Respondents' admission corroborates that conclusion.

THE AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT

The final element of the agency's prima facie case requires proof of the amount and extent of work performed by claimant. The agency's burden of proof can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. A claimant's credible testimony may be sufficient evidence. *In the Matter of Ilya Simchuk*, 22 BOLI 186, 196 (2001). When the forum concludes that an employee was employed and improperly compensated, the burden shifts to the employer to produce evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. *In the Matter of David Creager,* 17 BOLI 102, 109 (1998). In this case, Claimant provided a contemporaneous record of her work hours and credibly testified that it accurately reflected the hours she worked. This evidence, along with her testimony establishing Mass Tram's work week as Saturday through Friday, proves that she worked 211 hours, including 183.5 straight time hours and 27.5 overtime hours. In contrast, Respondents provided no records or evidence whatsoever concerning the number of hours worked by Claimant, other than the admission mentioned in the previous section. The forum concludes that Claimant worked a total of 211 hours including 183.5 straight time hours and 27.5 overtime hours.

WAGES OWED TO CLAIMANT

Claimant earned a total of $1,835.00 in straight time wages and $412.50 in overtime wages. She was only paid $190.00, leaving a balance due and owing of $2,057.50.

PENALTY WAGES

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, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent.

In the Matter of Carl Odoms, 27 BOLI 232, 240-41 (2006).

Claimant credibly testified that she kept records of her hours worked and gave them to Missler during her employment. This establishes that Mass Tram, through its agent Missler, was aware of the hours that Claimant worked. Despite this awareness, Missler made no effort to pay Claimant the wages he knew she was entitled to. This amounts to a willful failure to pay Claimant the wages she was owed.

ORS 652.150(2) provides that "[i]f the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 100 percent of the employee's unpaid wages * * * unless the employer fails to pay the full amount of the employee's unpaid wages * * * within 12 days after receiving the written notice." On August 2, 2007, the Agency sent such a written notice of nonpayment to Respondents that Missler received. In response, Mass Tram failed to pay any of the unpaid wages sought in the notice. Therefore, penalty wages are not limited to 100% of Claimant's unpaid wages and are calculated pursuant to ORS 652.150(1): $10.00 per hour x 8 hours x 30 days = $2,400.00.

ORS 653.055 CIVIL PENALTIES

ORS 653.055 provides that the forum may award civil penalties to an employee when the employer pays that employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261. Here, Claimant earned a total of $2,057.50, including $412.50 in overtime wages, and was paid only $190.00, leaving a minimum of $222.50 in overtime wages due and owing.[4] Under ORS 653.055(1), an employer who fails to pay an employee overtime wages is liable to the employee for civil penalties that are computed in the same manner as penalty wages under ORS 652.150. *MAM Properties, LLC,* at 190. "Willfulness" is not an element of a violation of ORS 653.055. *In the Matter of Captain Hooks, LLP,* 27 BOLI 211, 2225 (2006). Respondent Mass Tram's failure to pay the minimum wage to Claimant entitles her to a civil penalty under ORS 653.055, calculated as follows: $10.00 per hour x 8 hours x 30 days = $2,400.00.

ORDER

NOW, THEREFORE, as authorized by ORS 652.140(2), ORS 652.150, ORS 653.055, and ORS 652.332 and as payment of the unpaid wages, penalty wages, and civil penalties, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **MASS TRAM AMERICA, INC.** to deliver to the Fiscal Services Office of the Bureau of

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[4] The forum need not determine whether Respondent Mass Tram was obligated to pay the straight time wages ($1,835.00) or overtime wages ($412.50) first because the actual amount paid by Mass Tram was less than either sum.

Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Rowan DeSantis, in the amount of SIX THOUSAND EIGHT HUNDRED AND FIFTY-SEVEN DOLLARS AND FIFTY CENTS ($6,857.50), less appropriate lawful deductions, representing $2,057.50 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from June 1, 2007, until paid; $2,400.00 in penalty wages, plus interest at the legal rate on that sum from July 1, 2007, until paid; and $2,400.00 in civil penalties, plus interest at the legal rate on that sum from July 1, 2007, until paid.

ADDITIONALLY, as Respondent Ben Missler has been found not to owe Claimant DeSantis any wages, the Commissioner of the Bureau of Labor and Industries hereby orders that Rowan DeSantis's wage claim against Ben Missler be and is hereby dismissed.

In the Matter of

BEST CONCRETE AND GRAVEL LLC and Marlow Pounds

Case No. 16-07

Final Order of Commissioner Brad Avakian

Issued February 19, 2010

SYNOPSIS

The Agency did not prove by a preponderance of credible evidence that Respondents engaged Claimant's personal services or agreed to pay him $7.50 per hour for personal services rendered. Consequently, the Commissioner dismissed Claimant's wage claim. ORS 652.140; ORS 652.150; ORS 653.055; ORS 653.261.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 19-20, 2008, in the Malheur County Economic Development Office, located at 316 NE Goodfellow St., Suite #2, Ontario, Oregon.

Chet Nakada, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "Agency"). James Garland Rum-

sey ("Claimant") was present throughout the hearing and was not represented by counsel. William F. Nichols, Attorney at Law, represented Respondents Best Concrete and Gravel, LLC (Respondent LLC), and Marlow Pounds (Respondent Pounds). Respondent Pounds was present throughout the hearing.

The Agency called as witnesses: Margaret Pargeter, BOLI Wage and Hour Division Compliance Specialist; Troy Shupe, Claimant's friend; Tom Gene Skinner, Claimant's cousin; George Thomas Skinner, Claimant's cousin; James Warren, Parole and Probation Officer, Malheur County Corrections; and Claimant.

Respondent called as witnesses: Marlow Pounds, Respondent; John Bardan, truck driver; Bill Eccles, truck driver; John Smellage, Respondent Pounds's tenant; Duane Smith, Respondent Pounds's tenant; and Brenda Dirks, tax preparer.

The forum received as evidence:

a) Administrative exhibits X-1 through X-37; and

b) Agency exhibits A-1 through A-17 (filed with the Agency's case summary), A-18 (admitted at hearing).

c) Respondent exhibits R-1 through R-14, R-16, R-18, R-19 (filed with Respondent's case summary), R-20 through R-22 (admitted at hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On or about December 13, 2004, Claimant filed a wage claim with the Agency alleging Respondents had employed him at the rate of $7.50 per hour and failed to pay his wages for the hours he worked between October 31 and December 11, 2004. Claimant later withdrew his wage claim and on or about June 3, 2005, filed a lawsuit in district court against Respondents and Pounds Farms, LLC, alleging he was owed wages and civil penalties. On or about November 28, 2005, Claimant re-filed his wage claim with the Agency. On January 9, 2006, at Claimant's request, the district court dismissed his case without prejudice.

2) When he re-filed his wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondents.

3) On April 3, 2008, the Agency issued Order of Determination No. 05-3734 alleging Respondents had employed Claimant during the period claimed, failed to pay him for all hours worked during that period,

and was liable for $1,404.38 in unpaid wages, plus interest. The Agency also alleged Respondents' failure to pay all of the wages when due was willful and both were liable to Claimant for $1,800 as penalty wages, plus interest. The Order gave Respondents 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) Respondents were served with the Order of Determination and thereafter, through counsel, timely filed an answer and requested a hearing. In the answer, Respondents denied all allegations, stating that Claimant was never employed by Respondents.

5) On June 24, 2008, the Agency submitted a request for hearing. On June 25, 2008, the Hearings Unit issued a Notice of Hearing stating the hearing would begin at 9:00 a.m. on September 30, 2008. The Notice of Hearing included a copy of the Order of Determination, a language notice, a Servicemembers Civil Relief Act notification, a Summary of Contested Case Rights and Procedures, and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

6) On July 1, 2008, the ALJ issued an order requiring Respondents' out-of-state counsel to submit an application to appear on Respondents' behalf *pro hac vice*. Respondents' counsel filed a notice of appearance and advised the forum by letter dated July 7, 2008, that he was a member in good standing with the Oregon State Bar and had been a Bar member since 1980.

7) On August 25, 2008, the ALJ ordered the Agency and Respondents each to submit a case summary that included: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and, for the Agency only, a brief statement of the elements of the claim and any wage and penalty calculations. The ALJ ordered the participants to submit their case summaries by September 19, 2008, and notified them of the possible sanctions for failure to comply with the case summary order.

8) On September 4, 2008, the Agency filed a motion to amend the Order of Determination to reduce the wages claimed from $1404.38 to $1,245.00 and to delete the sentence in Paragraph II stating:

> "During this period the employer was required by the provisions of OAR 839-020-0030 to compensate the wage claimant at one and one half times the regular rate of pay for each hour worked over 40 hours in a given work week."

As grounds for the motion, the Agency stated Claimant was not eligible for overtime as an employee subject to the overtime exemptions pertaining to employers regulated under the Federal Fair Labor Standards Act. The Agency further stated that Re-

spondents' counsel would not oppose the motion.

9) On September 12, 2008, the Agency case presenter filed a motion to postpone the hearing indefinitely due to a family emergency. Respondents did not object to the motion and requested that the hearing be reset after October 31, 2008, and that the deadline for filing case summaries be vacated and reset after the new hearing date was set. The Agency's motion was granted and on September 30, 2008, the ALJ issued an order resetting the hearing for 9:00 a.m. (Mountain Time) on November 19, 2008. The case summary due date was extended to November 7, 2008.

10) The Agency moved for a discovery order on October 13, 2008. Respondents did not file a response to the motion and the ALJ issued a discovery order on October 23, 2008, requiring Respondents to produce documents responsive to the Agency's informal discovery requests.

11) On October 29, 2008, by facsimile transmission, Respondents filed a motion for a discovery order compelling the Agency to furnish discovery previously requested but not provided. On October 31, 2008, also by facsimile transmission, Respondents sent the ALJ copies of affidavits in response to the ALJ's discovery order. The ALJ subsequently issued an order pertaining to fax filings citing the contested case rules and stating that documents sent by facsimile transmission would not be considered unless verbal approval was obtained beforehand.

12) On November 4, 2008, the Agency filed an objection to Respondents' motion for discovery order on the ground that the information sought was irrelevant and overbroad. The ALJ issued an order thereafter denying Respondents' motion for discovery order after concluding that Respondents' request for copies of all wage claims Claimant filed in the last ten years was not relevant to the issues before the forum.

13) The Agency and Respondents timely filed case summaries.

14) On November 12, 2008, the Agency filed an addendum to its case summary.

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

16) At the start of hearing, the ALJ granted the Agency's September 4, 2008, motion to amend the Order of Determination.

17) The ALJ issued a proposed order on October 9, 2009, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency timely filed exceptions that are addressed in the opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At times material, Respondent LLC was a domestic limited liability company doing business in Ontario, Oregon.

2) At times material, Respondent Pounds was Respondent LLC's managing member and an individual engaged in various enterprises. He holds a Master's degree in education and taught elementary school in the Ontario School District for 29 years. Before he started teaching school, he was a Navy pilot and flew 158 combat missions in Vietnam before completing active duty in 1970. For several years, he served as an elected board member of the Malheur Credit Union and the Ontario School District.

3) For 38 years, Respondent Pounds has owned a farm in Ontario, Oregon, operating as Pounds Farms LLC. Approximately 14 years ago, while still teaching school, Pounds acquired eight acres of industrial property through a bankruptcy proceeding. The property is a former sawmill site and lumber yard that eventually became a laminated wood plant. Surrounded by a chain link fence, the property includes three major buildings. The largest building is approximately 80' x 400' and composed of several rooms, including "kiln dried" rooms. The second building is approximately 100' x 120' and includes three different shops with an office area at the center of the building. The third is a "mechanic" building - a truck mechanic shop with double doors so trucks can get in and out. On each side is an awning that extends out approximately 30 feet. Pounds leased the shops to various businesses and rented storage space for recreational vehicles beneath the awnings. At some point, he built three offices, one for each shop area, to attract larger businesses. The buildings occupy one half of the property. A mobile office and assorted trucks, trailers, lumber and miscellaneous equipment occupy the other half.

4) In 2002, Respondent Pounds established Respondent LLC and bought a gravel pit that had "potential" for a concrete and gravel enterprise. Respondent LLC began acquiring trucks and equipment at auctions. The trucks and equipment were maintained at Pounds's industrial property site.

5) In 2004, Respondent Pounds had two semi-tractor trailers registered to Respondent LLC on the property "doing nothing" and he decided to lease them to outside drivers for a percentage of the load income. In April 2004, William Eccles, doing business as Bill Eccles Trucking, entered into a written one year lease agreement with Respondent LLC. In September 2004, John Bardan, doing business as J & B Transport, entered into a similar written lease agreement with Respondent LLC. Under the lease agreement, the drivers agreed to work directly with an independent broker, one with a "reputable background and history of paying accounts in a timely manner," to obtain the

loads. Both drivers ended up hauling loads for Services Transport, an independent broker in Idaho. Neither driver hauled any loads owned or controlled by Respondent Pounds or Respondent LLC. The drivers determined the number of loads they hauled each month, but under the lease agreement the trucks were expected to produce income at least 18 days per month. The drivers received 25 percent of the truck's "gross flat rate." They also received $15 for each additional pick-up or drop made during the course of a load haul. The broker paid the drivers a "lumping" fee if the drivers unloaded the trucks themselves. Under the lease agreement, "all money from broker must come directly through Lessor [Respondent LLC] for proper distribution." The drivers received payment for the loads "20 days after the bill of lading and paperwork [were] properly submitted [to Respondent LLC] for payment."

6) Under the lease agreements, Eccles and Bardan elected to have Respondent LLC maintain the trucks and equipment in accordance with Department of Transportation standards rather than do it themselves for an additional 12 percent of the gross revenues. Respondent LLC's obligations also included providing current and valid vehicle registration and plates for the trucks, maintaining full liability coverage on both trucks, and paying for the fuel. Among other things, the drivers were responsible for keeping the trucks clean and maintained in good condition, maintaining all applicable and necessary federal and state licenses and certificates necessary to operate the trucks in conformance with the laws, and completing and delivering the trucks' log books. Additionally, drivers were liable for the first $1,000 of damage caused to the trucks through operator negligence or error.

7) In or around September 2004, George "Tom" Skinner ("T. Skinner") asked Respondent Pounds for a job. At that time, he was living with his cousin, Tom Gene Skinner ("G. Skinner"), across the road from Pounds's industrial property. T. Skinner had previously owned an auto body and paint shop in Payette, Idaho, that had burned down in a fire. T. Skinner had tried starting up another auto body shop in Ontario, but ended up going into "drug rehab" for several months. Previously, Pounds had taken some cars to T. Skinner's auto body shop for paint jobs and had been happy with the work. He observed that the business appeared to be doing well. Pounds did not have a job for T. Skinner, but offered him an empty shop space to start up another auto body and paint shop. Pounds did not charge T. Skinner any rent for the first month and told him he could use the surplus materials on site for approved projects related to the shop. Pounds allowed T. Skinner to live in one of the empty trailers on site in exchange for maintaining the premises. T. Skinner did not sign a rental

agreement for the trailer or shop space. T. Skinner brought in painting equipment and windshield repair materials and soon had customers, including some referrals from Pounds. T. Skinner dealt directly with his customers and customers paid him for the work he performed. When Respondent LLC's truck mechanics were unavailable, Pounds sometimes asked T. Skinner to wash trucks or do minor repair work and paid him for the work in cash. T. Skinner was and is a self-described drug addict and has experienced legal problems involving drug abuse and anger problems that stem from his drug use. Pounds knew about T. Skinner's criminal history and that he had "meth" problems, but wanted to help him get back on his feet.

8) While living on Respondent Pounds's property, T. Skinner was under Malheur County Community Corrections supervision. He was on probation for reckless endangerment and contempt of court. During an office visit with his probation officer in September 2004, T. Skinner asked for a trip permit to travel out of state to pick up his tools. He told the officer that he worked for Pounds as a laborer. After that visit, Skinner quit checking in with his probation officer and continued to use illegal drugs while living and working on Pounds's property.

9) In or around late October 2004, Respondent Pounds went to Lewiston, Idaho, to be with his daughter, who was dying from cancer. While Pounds was gone, T. Skinner asked Claimant, his "cousin," to help him work on a truck. When Pounds returned from Idaho, T. Skinner told him Claimant had been looking for work and had helped him out with the truck. T. Skinner told Pounds that Claimant wanted to be paid by check and asked Pounds to write his cousin a check for the work. T. Skinner did not have a checking account and Pounds wrote Claimant a check for $47.50, deducting $2.50 "for the check" and deducted the amount from T. Skinner's invoice. T. Skinner gave the check to Claimant. At some point, Claimant approached Pounds with an offer to help Pounds "promote stuff." Pounds told him he had nothing to "promote" and Claimant then offered to sell some of the surplus equipment Pounds kept on the property. Pounds agreed to pay Claimant a commission if he found a buyer on eBay for a "Lincoln welder" that he wanted to sell for $650. After they made the agreement, Pounds never heard anything more about it and Claimant never sold anything on eBay for Pounds.

10) In November 2004, Respondent Pounds wrote two more checks to Claimant. One check, dated November 11, 2004, was for work Claimant performed for T. Skinner in his body shop. T. Skinner asked Pounds to write the check and then T. Skinner gave the check to Claimant. Another check, dated November 24, 2007, was for $142.50, and the check's memo section contained the nota-

tion, "$150 Loan." Pounds gave the check directly to Claimant.

11) Around November 1, 2004, Claimant began living in the office next to the one T. Skinner occupied. When Respondent Pounds discovered Claimant sleeping in the office, Claimant told him that T. Skinner had given him permission to sleep there. Although T. Skinner did not rent that particular office from Pounds, he told Pounds that Claimant had nowhere else to go and asked Pounds to let him stay. Pounds acquiesced and Claimant did some odd jobs in exchange for living in the office. During this time, Claimant was collecting unemployment benefits that were charged to his former employer, Auburn Chevrolet in Auburn, Washington.

12) After Claimant began sleeping on the property, he began asking Respondent Pounds about becoming a truck driver. Pounds asked John Bardan if he was interested in "taking on [Claimant]" to help him get his commercial driver's license ("CDL"). Claimant told Bardan that he had driven semi-trucks for several years in Montana and Idaho and wanted to get back into truck driving and Bardan decided to help Claimant prepare for his CDL driving test. He helped Claimant with the basics about truck driving, including making pre-trip inspections, hooking up trailers, and practicing maneuvers on Pounds's premises. With Respondent Pounds's knowledge, Bardan provided the truck he leased from Respondent LLC for Claimant's road test and paid for Claimant's CDL. Claimant failed the first test, but passed two weeks later and rode with Bardan as a student driver. Drivers and student drivers are required to keep daily logs of each trip. Prior to becoming a student driver, Claimant "went on runs" with Bardan while using a learner's permit and was not required to keep a daily log. He began keeping logs on or about November 31, 2004, as a student driver. Claimant never drove without Bardan and was never a "first seat driver." First seat drivers have primary control over the truck and Bardan always drove as the first seat driver. After each run, Bardan paid Claimant a percentage of what Bardan made on each load. He paid Claimant in cash and Claimant used it to buy food and pay bills. After the first week in November, Claimant primarily was on the road with Bardan.

13) On or about December 10, 2004, after delivering a load of wood pellets to a "receiver" in Sand Point, Idaho, Claimant and Bardan drove back to Ontario, Oregon, via Kennewick, Washington. Bardan was "not feeling up to par" and let Claimant do most of the driving. During an inspection at the Washington/Idaho border, Claimant was ticketed by the Washington State Patrol for not carrying a medical card. Claimant had a medical card and Bardan had assumed Claimant had it with him. When they stopped in Kennewick for food, Claimant almost hit a light pole while making a

turn. Around 10 p.m., outside of Baker City, Oregon, Claimant pulled in to a rest area and side-swiped another semi-tractor trailer, causing damage to both trailers. The Oregon State Police investigated the accident and Claimant and the other driver filled out accident reports at the scene. Bardan told Claimant that at this point there was "no way" that Respondent Pounds would let Claimant lease a truck. When they returned to Ontario around 4 a.m. on December 11, 2004, Bardan told Claimant that "he [Claimant] was done" and that Claimant could not drive with him anymore. After trying unsuccessfully to reach Respondent Pounds, Bardan called T. Skinner and told him about the accident. T. Skinner called Pounds and told him about the accident. Later in the morning, T. Skinner told Claimant to pack up his belongings and get off the property. Claimant packed his gear and moved across the street to G. Skinner's house. During the Sand Point trip, Bardan gave Claimant $100 that he used to buy a bag of groceries in Kennewick. Claimant took the groceries with him when he left. Claimant did not speak to Pounds after the accident and did not ask him for any wages. Bardan paid for the first $1,000 in damage to Respondent LLC's truck.

14) Claimant was paid for all of the work he performed before the trip to Sand Point, Idaho, on December 10, 2004. Although he had weekly reporting requirements, he did not report any of his earnings to the Washington State Employment Department.

15) On or about December 16, 2004, T. Skinner was sanctioned for his probation violations and placed in a work release center where he resided for 30 days. T. Skinner told the work release intake officer that he worked for Best Concrete and Gravel and lived behind the business in a trailer. He told the officer that his wages were $2,000 per month. He admitted to using marijuana two days before arriving at the work release center. In January 2005, T. Skinner gave the work release center a check made out to "Tom Skinner" for $675, dated January 4, 2004,[1] and signed by Respondent Pounds. In the memo portion, someone had written "LLC – paint shop." The check was used to pay T. Skinner's work release fees. During his stay at the work release center, T. Skinner brought in notes with Pounds's signature stating that T. Skinner was asked to work late in the evening on specific dates in late December 2004 and January 2005. Sometime thereafter, Pounds evicted T. Skinner and had T. Skinner escorted off the property by the police. After T. Skinner was evicted, Pounds discovered that a chain saw was missing from the premises and filed a small claims action against T. Skinner for its return. Thereafter, Pounds was awarded a

[1] The date on the check apparently was a typographical error.

judgment against T. Skinner in the amount of $818.00.

16) After T. Skinner was evicted, he filed for unemployment benefits with the Oregon Employment Department. His claim for benefits was denied and he appealed. After a hearing, a final order issued affirming the denial and concluding that T. Skinner was a self-employed independent contractor.

17) After Claimant filed his wage claim against Respondents in December 2004, and before T. Skinner was evicted from Respondents' premises, T. Skinner signed a statement stating:

> "Regarding James Rumsey Claim
>
> "I am Tom Skinner who works with Marlow Pounds. I operate an auto body shop on the facility and fill in as needed maintaining the trucks which operate on the road. First let me state that I have seen the reports which Marlow has written to you and agree that it is accurate of our dealings with James Rumsey. Except for my initially telling James he could help me out on a brake job in return for some food money, he was not employed here (I was going to give him some of my money if Marlow refused to pay for someone he had not approved of). James came back several times wanting work, but Marlow didn't need or want him. Finally Marlow allowed his offer to list some equipment on E-bay but he never did it. He used the situation to take over an empty office and ended up moving in without permission. We felt sorry for him and allowed him to temporarily stay after he said he would do odds and ends things around here to offset his being here. It turned out to be a bad deal because he wouldn't keep his word and got into things which he had no business with. James absolutely destroyed our phone system by disconnection [sic] many wires in the distribution box, broke our computers, made private long distance calls, and blamed his acts on me and others around here. He conned Marlow and John into letting him try to become a truck driver, but it turns out he wasn't capable or honest enough.
>
> "I am sincerely disappointed in what James did and can't believe he has the gull [sic] to make a claim for wages he was not employed to do, nor did. He wasn't even around here that part of the claimed period. He may be my relative but I never want to be in any way involved with James again. He demonstrated a lack of integrity and played a real con game on Marlow and John. There is no basis for this claim.
>
> "By the way, aren't you concerned about his collecting unemployment during this time? He kept asking me to file an electronic claim when

he wasn't around, dishonestly claiming he had made interviews for jobs and etc. that week. I chose to not be involved in his dishonest activities.

"Sincerely, Tom Skinner"

18) In 1999, Claimant was convicted of three felonies: distributing controlled substances; witness tampering, and child neglect.

19) Claimant's testimony was not credible. Notwithstanding his criminal history demonstrating felony convictions involving crimes of dishonesty, including witness tampering, his testimony was internally inconsistent, wholly self-serving, and, except for his admissions and statements against interest, altogether unpersuasive. His testimony that he recorded his hours in a "personal log" that he offered as an exhibit at hearing was contradicted by his testimony on cross-exam that he could not remember what work he performed for Respondents because it was "so long ago" and he "completely got rid of all [his] documents when [he] thought the case was over." His testimony that he asked Respondent Pounds for his wages after he was told to leave Respondents' property was contradicted by his testimony on direct and cross-exam that he never spoke to Respondent Pounds about anything, including purportedly unpaid wages, after that day. His testimony that he agreed to perform various odd jobs on the property for Respondent Pounds as rent for a place to sleep was contradicted by his testimony that Respondent Pounds agreed to pay him $7.50 per hour for the odd jobs he performed on the property. His testimony that he turned in his work hours to Respondent Pounds every two weeks and that Pounds paid him for those hours was later contradicted by his testimony that he always turned in his hours to T. Skinner and it was T. Skinner who paid him for the work he performed. He also testified it was T. Skinner who told him what work to perform and when to do it. Contrary to the claims he made to the Agency, Claimant readily admitted that he was paid everything he was owed until the trip to Sand Point, Idaho, to deliver wood pellets. Claimant also readily admitted that he was receiving unemployment benefits while living on Respondents' premises and did not submit the hours he purportedly worked for Respondents to the Washington State Employment Department. Claimant's multiple inconsistencies, combined with some unusual admissions, illustrate the truth of the adage that "[i]f you tell the truth, you don't have to remember anything." Claimant could not remember from one minute to the next what he had just stated under oath; hence, his testimony was not believed unless it was an admission, a statement against interest, or was not contradicted by other credible evidence. In some instances, it was not believed even if it was not contradicted by other credible evidence.

20) T. Skinner was not a credible witness. Although he was candid about his drug use, felony convictions, and the fact that he currently uses "pain killers" regularly, his testimony that he was Respondent Pounds's employee was inconsistent with his prior statement submitted to the Agency that he was self-employed and that Claimant was not an employee but had worked for T. Skinner for some food money. Additionally, Brenda Dirks credibly testified that she had conducted business with T. Skinner and understood he was self-employed.[2] Although T. Skinner testified he received a W-2 form from Respondent Pounds in 2004 and filed an income tax return through H & R Block, when given the opportunity to produce the income tax return for the record, he claimed he could not remember if he gave the 2004 W-2 to H & R Block. Although he was given 24 hours to obtain a copy of his 2004 income tax return from H & R Block, he failed to produce the document and offered no further explanation. Because he had owned and operated an auto body shop that had burned down prior to contacting Respondent Pounds about a job, and because he provided his own equipment to set up a business, the forum finds it more likely than not that T. Skinner was an independent business owner as he represented in his prior statement to the Agency. T. Skinner's testimony was not credited unless it was an admission or consistent with other credible evidence in the record.

21) G. Skinner, T. Skinner's nephew and Claimant's "second cousin," had little to offer for the record. He admitted he had no knowledge of T. Skinner's or Claimant's pay arrangements with Respondent Pounds, could not remember what work Claimant was performing for Respondents, had never talked to Claimant about his trips in the semi-truck, and, although he lived across the street from Respondent Pounds's property and talked to Claimant and T. Skinner regularly, he knew only what Claimant and T. Skinner told him, which apparently was not much. Consequently, G. Skinner's testimony was given little, if any weight.

22) Although Troy Shupe was a credible witness, his testimony primarily was based on what Claimant had told him. He had no personal knowledge about who hired Claimant, Claimant's pay rate, the amount and extent of work Claimant performed for Respondents, or whether or not Claimant was paid for the work he performed. For those reasons, Shupe's testimony was given little, if any, weight.

23) Respondent Pounds's testimony, albeit somewhat less than candid at times, was more credible than Claimant's. Pounds's attempt to portray Claimant as a virtual interloper who conned his way onto the property was negated by Pounds's acquiescence to Claim-

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[2] *See supra* Finding of Fact – The Merits 26.

ant's presence on the property and the fact that he did nothing to remove Claimant until Claimant damaged one of Respondent LLC's trucks while driving with Bardan. Also, Pounds's testimony that he did not know T. Skinner was sent back to the work release center in December 2004 was impeached by Malheur County Community Corrections documents that confirm Pounds knew about the reassignment. However, whether or not Pounds knew about T. Skinner's troubles in December 2004, after Claimant had left the property, is not relevant to the issues and the forum finds that his testimony otherwise was credible. The forum has credited his testimony when it was uncontroverted or supported by other credible evidence.

24) William Eccles was a credible witness. His testimony that he drove a truck for Respondent LLC under a lease agreement that required him to haul cargo at least 18 days per month in exchange for 25 percent of every load he hauled was corroborated by credible documentary evidence. He credibly testified that he procured loads through a broker – Service Transport - that was not affiliated with Respondent LLC or any other trucking company and that the proceeds from each haul was divided amongst Service Transport, Respondent LLC and Eccles. Additionally, he credibly testified that Respondent LLC paid him his share of the load once a week or every two weeks and that Respondent LLC did not control when he drove, how far he drove, or what cargo he hauled. Eccles's testimony on those matters was straightforward, unembellished, and not impeached. His testimony, therefore, was credited in its entirety.

25) John Bardan was a credible witness. His testimony that he drove a truck for Respondent LLC under a lease agreement that required him to haul cargo at least 18 days per month in exchange for 25 percent of every load he hauled was corroborated by credible documentary evidence. His testimony that he helped Claimant obtain his CDL, permitted Claimant to ride with him as a student driver, and paid him a percentage of the amount he made on each load was not disputed. The forum has credited Bardan's testimony in its entirety.

26) Brenda Dirks credibly testified that T. Skinner repaired her car in his shop after she hit a deer. According to Dirks, T. Skinner gave her a bid and when the repairs were completed, she wrote a check to T. Skinner as payment for the repairs. Although she acknowledged she has been preparing mileage taxes for Respondent LLC's trucks since 2004, her testimony was straightforward and not impeached and the forum credits her testimony in its entirety.

27) John Smellage was a credible witness. Smellage, 73 years old and undergoing cancer treatment at times material, lived in a trailer on the property when T.

Skinner lived there. He credibly testified that he had observed T. Skinner operating a paint and auto body shop on the premises and that he also saw Claimant hanging around "a lot," but never observed him performing any work. His testimony that he never saw Respondent Pounds and Claimant together and never heard Pounds direct T. Skinner to do any work was credible. Smellage's testimony was straightforward, limited to his firsthand observations, and not impeached in any way. The forum credits his testimony in its entirety.

28) Duane Smith testified he did not know Claimant or have any knowledge about Claimant's relationship with Respondents. Smith's testimony that T. Skinner was self-employed when he met him in late December 2004 is not relevant to the issue of whether one or both Respondents employed Claimant during the alleged wage claim period between October 31 and December 10, 2004. For that reason, Smith's testimony was given little, if any weight.

29) Jim Warren authenticated Malheur County Community Corrections documents that showed T. Skinner was placed in a work release program, beginning on December 16, 2004, after he violated his probation. Although Warren's testimony was credible, the documents are not relevant to Claimant's wage claim because they concern events that occurred after Claimant was ordered to leave Respondents' premises. At best, the documents show that Respondent Pounds wrote a check to T. Skinner in January 2005, referring to "LLC – Paint Shop" in the memo section, and that he wrote notes on T. Skinner's behalf indicating T. Skinner "was asked" to work late on certain dates in late December 2004 and January 2005. Even if those documents could be construed as evidence demonstrating an employment relationship between T. Skinner and Respondents, T. Skinner's employment status during that period is not relevant to Claimant's claim that one or both Respondents employed him between October 31 and December 10, 2004. For that reason, the documents and Warren's testimony about the documents were given little, if any, weight.

30) Margaret Pargeter was a credible witness. She testified that she had not investigated Claimant's wage claim and could only authenticate documents that were in the Agency's file when she received it from her supervisor. Her testimony was credited in its entirety.

ULTIMATE FINDINGS OF FACT

1) At times material, Respondent Pounds was the managing member of Respondent LLC, located in Ontario, Oregon. Respondent LLC leased commercial building space to various businesses and owned two tractor trailers that were leased to drivers in exchange for a percentage of the value of loads the drivers

hauled to various locations in and out of Oregon.

2) Respondent LLC leased building space to T. Skinner who was attempting to rebuild his auto body business after a fire destroyed his previous business known as Skinner's Auto Body in Payette, Idaho.

3) At times material, T. Skinner was self-employed and dealt directly with customers, some of whom were referred by Respondent Pounds.

4) Neither Respondent Pounds nor Respondent LLC directed or controlled T. Skinner's work or work hours.

5) T. Skinner lived in an empty trailer on the property and performed odd jobs around the property in lieu of paying rent.

6) Claimant, T. Skinner's cousin, first appeared at the property when Respondent Pounds was visiting his dying daughter in Idaho. Claimant helped T. Skinner fix a truck for Respondent Pounds. When Pounds returned from Idaho, T. Skinner asked him to make out a check to Claimant as payment for his work on the truck. Pounds gave T. Skinner a check and deducted the amount from T. Skinner's invoice.

7) Claimant moved into one of the offices next to T. Skinner's shop with Respondent Pounds's tacit permission and performed odd jobs around the property in lieu of paying rent.

8) Claimant told Respondent Pounds he was interested in becoming a truck driver and Pounds referred him to John Bardan, a long haul truck driver who leased a truck from Pounds.

9) Bardan agreed to help Claimant obtain his CDL and Claimant used the truck Bardan leased from Respondent LLC to practice for the driving test.

10) Between November 1 and December 10, 2005, Claimant rode with Bardan as a student driver and continued to ride with him after he got his license. Bardan paid Claimant a percentage of the amount he made on each load.

11) Claimant was asked to leave Respondents' property after he damaged the truck Bardan leased from Respondent LLC while delivering a load to Sand Point, Idaho.

12) Claimant was paid for all of the work he performed prior to the trip to Sand Point, Idaho.

13) There is insufficient evidence to determine if Claimant was paid in full for the Sand Point, Idaho, trip.

14) Respondents did not engage Claimant's services as a truck driver, did not agree to pay him $7.50 per hour, and are not liable for Claimant's unpaid wages, if any.

CONCLUSIONS OF LAW

1) At all times material herein, Respondents did not employ Claimant and were not employers subject to the provisions of ORS 652.110 to 652.200, 652.310 to

652.405, and ORS 653.010 to 261.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondents herein. ORS 652.310 to 652.414.

3) Respondents are not liable for unpaid wages under ORS 652.140 for failure to pay Claimant wages.

4) Respondents are not liable for penalty wages under ORS 652.150 for willful failure to pay wages or compensation to Claimant as provided in ORS 652.140.

5) Respondents are not liable for civil penalties under ORS 653.055 for failing to pay Claimant the minimum wage pursuant to ORS 653.025. ORS 653.055.

6) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to dismiss the wage claim filed by Claimant. ORS 652.332.

OPINION

To prevail on a wage claim, the Agency must prove by a preponderance of evidence that: 1) Respondents employed Claimant; 2) any pay rate upon which Respondents and Claimant agreed, if it exceeded the minimum wage; 3) Claimant performed work for which he was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondents. *In the Matter of Kurt E. Freitag*, 29 BOLI 164, 197 (2007).

Based on Claimant's admission that he was paid for the work he performed prior to his trip to Sand Point, Idaho, to deliver wood pellets, the only issues are whether Respondents employed Claimant as a truck driver, and, if so, whether Respondents owe Claimant $7.50 per hour for the hours he worked during the trip to and from Idaho.

ORS chapter 652 governs claims for unpaid agreed wages. Under that chapter, "employer" means any person who engages the personal services of one or more employees. "Employee" means any individual who, other than a co-partner or independent contractor, renders personal services in Oregon to an employer who pays or agrees to pay the individual a fixed pay rate. ORS 652.310(1)(a)&(b).

There is no credible evidence demonstrating that Respondent LLC or Respondent Pounds engaged Claimant's services as a truck driver at the agreed rate of $7.50 per hour. Credible evidence establishes that Claimant told Respondent Pounds he wanted to become a truck driver and Pounds referred him to John Bardan, an independent truck driver who leased a truck from Pounds. Based on Claimant's representations that he had prior experience as a truck driver, Bardan agreed to help him obtain a Commercial Drivers License ("CDL"). To that end, Bardan allowed Claimant to ride with him in

the truck he leased from Respondent LLC, paid for Claimant's licensing fees, and trained Claimant in truck driving basics. After obtaining a learner's permit, Claimant drove with Bardan for approximately 10 days before he caused an accident resulting in damage to the leased truck. Claimant acknowledged, albeit inadvertently, that he was paid for the work he performed prior to the Idaho trip and Bardan credibly testified he paid Claimant a percentage of what he made on each load that involved Claimant, including $100 he gave Claimant following the last trip. Even if the $100 payment was not equal to the percentage Bardan and Claimant agreed upon – and there is no evidence in the record establishing what that percentage was - neither Respondent Pounds nor Respondent LLC is liable for the difference because neither one engaged Claimant's personal services for an agreed upon rate. Based on those facts, there is no basis for Claimant's claim and his wage claim hereby is dismissed.

AGENCY'S EXCEPTIONS

The Agency's exceptions noted three technical errors in the proposed order that have been corrected. The remaining exceptions pertain to factual findings, including credibility findings, related to Respondents' defense that T. Skinner employed Claimant rather than Respondents. Based on Claimant's admission that he was paid for all of the work he performed before his trip to Sand Point, Idaho, the forum found that the ultimate issue was whether Respondents engaged Claimant's services as a truck driver and failed to pay him. The Agency's exceptions do not challenge that finding or the conclusion that Claimant performed work for John Bardan at times material to the ultimate issue. However, to the extent the Agency's exceptions challenge particular credibility findings that may or may not indirectly bear on the findings and conclusions herein, the exceptions are addressed below.

Exception 1 –Duane Smith's Testimony.

The Agency contends Smith's testimony was not relevant to Claimant's wage claim and correctly observes that although there was no credibility finding pertaining to Smith, his testimony was relied upon as "one of several witnesses" supporting the finding that T. Skinner was self employed and not Respondents' employee. The omission has been corrected and the factual finding adjusted accordingly. However, the Agency's contention that Smith's testimony otherwise was impeached by Respondent Pounds's 2004 income tax return that shows "no record of Western Mechanical or Smith" and by documents "signed by Marlow Pounds and given to Malheur County Community Corrections that [show] T. Skinner worked for Respondents in December 2004 and January 2005," has no merit. The 2004 income tax return was filed by Pounds Farm LLC and is not rele-

vant to any issues in this case. Pounds Farm LLC is not a named respondent in this case and there is nothing in the record suggesting that Smith's name or business name should appear on that document. Smith testified he leased space from Respondent LLC for a truck repair business and the Agency has not impeached that testimony with any evidence demonstrating otherwise.

Exception 2 – Troy Shupe's Testimony.

The Agency contends Shupe's testimony should have been accorded greater weight. The fact that Shupe once accompanied Claimant on a trip to an auto parts store and "went to Boise with Claimant to pick up a trailer that had hauled Christmas trees for Respondents" does not establish an employment relationship between Claimant and Respondents. Claimant's own testimony and that of T. Skinner shows Claimant performed work for T. Skinner's auto body shop and may have performed odd jobs for Respondent Pounds in exchange for a place to stay. Shupe's testimony did not establish that the trip to the auto parts store or the trip to pick up a trailer in Boise was for Respondents. Shupe's testimony was based on what Claimant told him and not on his personal knowledge. The Agency's exception is **DENIED**.

Exception 3 – John Smellage's Testimony.

The Agency challenges Smellage's ability to perceive the matters to which he testified, particularly whether he had the ability to make observations "from his living quarters, while having cancer treatments, and observing from the outdoors in November and December, in all types of weather when he is obviously hard of hearing." First, there is no evidence in the record that Smellage had a hearing problem in 2004. Moreover, his testimony primarily was about what he had observed and not what he had heard. Second, there is nothing in the record about the number and extent of Smellage's cancer treatments or whether they affected his ability to observe activities taking place on the property. Third, Smellage credibly testified that he routinely walked around the property each day and there is nothing in the record about the weather conditions during that time. Smellage had both the opportunity and the capacity to perceive the matters to which he attested and the character of his testimony was not impeached in any way. The Agency's exception is **DENIED**.

Exception 4 – T. Skinner's Testimony.

The Agency notes that the forum determined T. Skinner was self-employed based on "other credible evidence" and "respectfully asks, what evidence did the forum conclude was credible?" The finding speaks for itself and the Agency's exception is **DENIED**.

Exception 5 – John Bardan's Testimony.

The Agency "disagrees" with the finding "in which John Bardan's testimony was credited in its entirety." The Agency's argument that Bardan's testimony was "directly contradicted by other documents in evidence contemporaneously tracking T. Skinner's contact with the Malheur County as well as documents signed by Pounds saying he employed T. Skinner" has no merit. There are no documents in the record in which Respondent Pounds states he employed Claimant. In fact, Respondent Pounds has consistently denied he employed Claimant and the Agency has provided no evidence to prove otherwise. The Malheur County documents are not relevant to Claimant's wage claim and do not in any way impeach Bardan's testimony. The Agency's exception therefore is **DENIED**.

Exception 6 – Claimant's Testimony.

The Agency "disagrees" with the finding discrediting Claimant's testimony based on its own assessment that Claimant's testimony was credible. The Agency overlooks Claimant's multiple inconsistencies and admissions that contradict his previous statements to the Agency. Notably, the Agency fails to recognize the significance of Claimant's admission that he was convicted of tampering with witness testimony which demonstrates a proclivity for dishonesty. The Agency's exception is not well taken and therefore is **DENIED**.

Exception 7 – Respondent Pounds's Testimony.

The Agency contends that Respondent Pounds's testimony should be given little, if any, weight because "the record is replete with evidence of Pounds's attempts to orchestrate" witness testimony. The Agency refers to several exhibits showing Pounds prepared witness statements that were signed by T. Skinner, John Bardan, John Smellage, Brenda Dirks, and Rick Rios. While the witness statements were admitted as evidence in the record, they were accorded some weight only when the witness gave testimony at hearing and affirmed the accuracy of the contents. The Agency's exception is **DENIED**.

Exception 8 – Claimant's Washington State Patrol Citation.

The Agency proffers no basis for its contention that Respondent Pounds's handwritten response to the citation Claimant received from the Washington State Patrol demonstrates Pounds's lack of credibility. Rather, the Agency asks why "if Bardan was the true lessee of this truck" did Pounds "not have Bardan pay this ticket?" There is nothing in the record that shows anyone paid the ticket and Pounds's response to the Washington State Patrol only reiterates his position that Claimant was not his or Respondent LLC's employee. The Agency has not established how Pounds's response to the citation contradicts

his defense that he did not employ Claimant. For that reason, the Agency's exception is **DENIED**.

Exception 9 – Respondents' Defense.

The Agency objects to the finding that T. Skinner was self-employed and operated an auto body shop during times material to this case. The finding was based in part on T. Skinner's prior written statement that he operated an auto body shop at Respondents' facility. Although the prior statement was not sworn, T. Skinner acknowledged he was not under any duress when he signed the statement and that he had previously owned an auto body shop that had burned down before he began doing auto body work at Respondents' facility. The statement, plus credible testimony from one of T. Skinner's customers and witnesses to whom he represented himself as self-employed, was sufficient to support the finding. The Agency's exception is **DENIED**.

ORDER

NOW, THEREFORE, as Respondents have been found not to owe Claimant James Rumsey wages, the Commissioner of the Bureau of Labor and Industries hereby orders that James Rumsey's wage claim against **Best Concrete and Gravel, LLC, and Marlow Pounds** be and is hereby dismissed.

In the Matter of

BLANCHET HOUSE OF HOSPITALITY

Case No. 11-10

Final Order of Commissioner Brad Avakian

Issued February 19, 2010

SYNOPSIS

The Agency determined that Requester's affordable housing project was not "residential construction" and was subject to Oregon's prevailing wage rate laws. The Commissioner held that the Agency correctly determined that Requester's Project was subject to the prevailing wage rate laws because it was not "residential construction" under ORS 279C.810(2)(d). ORS 279C.800, ORS 279C.810, ORS 279C.840, OAR 839-025-0004(24).

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 3, 2009, in the W. W. Gregg Hearing Room, and on November 5, 2009, in the David Wright Room, both located in the State Office Building

at 800 NE Oregon Street, Portland, Oregon.

Jeffrey C. Burgess, case presenter and an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "Agency"). Michael E. Haglund, attorney at law, represented Blanchet House of Hospitality ("Requester"). Brian Ferschweiler, Requester's Executive Director, was present throughout the hearing as the person designated by Requester to assist in the presentation of its case.

Requester called as witnesses: Rich Ulring, President, Requester's Board of Directors; Brian Ferschweiler, Requester's Executive Director; Joseph Pinzone, lead architect for Requester's Project; and Joseph Weston, Portland-area property developer.

The Agency called as witnesses: Lois Banahene, BOLI's Prevailing Wage Rate Compliance Manager, and Susan Wooley, BOLI's Prevailing Wage Rate Technical Assistance Coordinator.

The forum received as evidence:

a) Administrative exhibits X-1 through X-14;

b) Agency exhibits A-1 through A-15 (submitted prior to hearing); and

c) Requester exhibits R-1 through R-12 (submitted at hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On May 21, 2009, Requester submitted a request for a determination about whether Requester's proposed project would be a public works on which payment of the prevailing wage rate would be required under ORS 279C.840. Requester's request included a statement describing the proposed project and its projected uses; its cost and funding sources; a copy of Requester's 100% Schematic Design package; a building rendering; a Disposition and Development Agreement negotiated between Requester and the Portland Development Commission ("PDC") that involved, among other things, transfer of the title of the development site currently owned by the PDC to the Requester; and the conditions precedent to obtaining the title transfer.

2) On June 25, 2009, the Agency issued a determination in which it concluded that Requester's proposed project will be subject to Oregon's prevailing wage rate laws. The Agency based its determination on the following:

- Because $750,000 or more in funds of a public agency will be used on the project, the project is a "public works" as defined in ORS 279C.800(6)(a)(B).

- Requester's project did not meet the definition of "residential construction" set out in ORS 279C.810(2)(d)(D).
- None of the other exemptions listed in ORS 279C.810(2) apply to the proposed project.

The Agency did not consider any local ordinances or codes in making its determination. Requester was given 21 days to contest the Agency's determination and request an administrative hearing.

3) Requester was served with the determination. On July 9, 2009, Requester filed a request for reconsideration of the Agency's determination in which it argued that its proposed project meets the definition of "residential construction." On the same date, Requester filed a request for hearing.

4) On July 14, 2009, the Agency denied Requester's request that the Agency reconsider its determination.

5) On August 4, 2009, the Agency submitted a request for hearing that included Requester's initial request for determination, the Agency's determination, Requester's request for reconsideration, the Agency's response, and Requester's request for a contested case hearing.

6) On August 5, 2009, the Hearings Unit issued a Notice of Hearing stating that the hearing would commence at 9:00 a.m. on November 3, 2009. The Notice of Hearing included copies of the Agency's determination, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0445.

7) On August 11, 2009, the ALJ issued an order requiring Requester to submit a written statement identifying all of Requester's reasons for contesting the Agency's determination. The order also required the Agency to submit copies of the determination, all materials Requester provided to support its request for a determination, and any other materials the Agency relied upon to reach its determination. The ALJ ordered the participants to submit the statement and documents by September 18, 2009, and notified them of the possible sanctions for failure to comply with the order.

8) The Agency timely submitted the requested documents, marked as Agency exhibits A-1 through A-15, and the ALJ admitted them into the record as exhibits.

9) Requester timely filed a statement identifying Requester's reasons for contesting the Agency's determination. Requester's stated reasons for contesting the determination were: (a) The project is a "residential building"; (b) The project's soup kitchen is not a "commercial kitchen"; and (c) Requester's project meets the definition of "residential construction" in ORS 279C.810(2)(d)(D). Requester's

statement was admitted into the record as an exhibit.

10) On October 12, 2009, the Agency submitted a list of persons it intended to call as witnesses and statements describing their proposed testimony.

11) On October 13, 2009, Requester submitted a list of persons it intended to call as witnesses and statements describing their proposed testimony.

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

13) The ALJ issued a proposed order on December 4, 2009, that notified the participants they were entitled to file exceptions to the proposed order within 10 days of its issuance.

14) On December 8, 2009, the Agency filed a motion for an extension of time to file exceptions to the proposed order in which the Agency case presenter cited his workload and noted that Requester's counsel did not object. On December 14, 2009, the ALJ granted the Agency's motion and granted the Agency a 10-day extension.

15) On December 23, 2009, the Agency filed exceptions to the proposed order. On January 4, 2010, Requester filed a response to the Agency's exceptions. The Agency objected to Requester's response. On January 7, 2010, the ALJ issued an order stating that Requester's response would not be considered because there is no provision in OAR 839-050-0000 *et seq* allowing a response to exceptions. The Agency's exceptions have been considered in the Final Order.

FINDINGS OF FACT – THE MERITS

THE "PROJECT"

1) Blanchet House of Hospitality ("Blanchet House"), an Oregon nonprofit corporation, presently operates a facility located at 340 NW Glisan, Portland, Oregon, that provides food, clothing and shelter to those in need in the Portland community. Blanchet House has operated this facility since 1952. During its entire history, Blanchet House has never charged for the meals it provides on a daily basis and operates its "soup kitchen"[1] solely for charitable purposes.

2) At present, Blanchet House provides housing in a structured setting for up to 29 unemployed men who reside at Blanchet House from a minimum of three months to a year or more. Those residents receive room and board in exchange for 36-42 hours of work per week[2] related to the operation of Blanchet House's soup kitchen. The soup kitchen serves

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[1] "Soup kitchen" is the term that Rich Ulring, president of Requester's board of directors, used in referring to the Blanchet House's public meal program.

[2] Ferschweiler testified that residents work six to seven hours per day, six days per week.

three meals a day, six days a week, to homeless, low income and working poor of inner northwest Portland, and to community volunteers who work in the soup kitchen, serving 600-800 meals daily. The soup kitchen serves residents three meals a day, seven days a week. Blanchet House's current dining room capacity is 41 persons at a time, and the meal service period is one hour in duration.

3) Blanchet House considers itself to be "first and foremost" a soup kitchen that also provides a transitional housing program.[3] (Testimony of Ferschweiler)

4) Prospective residents are required to volunteer 16 hours of work before they can become residents at Blanchet House. They are either recruited from Blanchet House's food line or referred to Blanchet House by outside agencies. All residents are in recovery from alcohol or drug dependence and must remain drug and alcohol free while living at Blanchet House. On average, residents stay three to six months, but some residents have stayed for up to two years. At a minimum, residents must stay at least 90 days. At any given time, six residents at Blanchet House who have been assigned more challenging tasks are considered "unpaid staff" and are required to stay at least six months.

5) With respect to its residents, Blanchet House's goal is to transition its residents to employment in the community and clean and sober living. Blanchet House requires that all residents must attend 30 AA meetings in their first 30 days of residence.

6) At the time of hearing, 10 of Blanchet House's 28 residents had lived at the Blanchet House for more than one year.

7) The project for which Requester sought a coverage determination (the "Project") involves the construction of a new three-story building with a basement at the southwest corner of NW Glisan Street, Portland, Oregon. That corner is presently occupied by the Dirty Duck Tavern and owned by the Portland Development Commission ("PDC"). As

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[3] Ferschweiler, Requester's Executive Director, testified as follows in response to questioning by Requester's counsel and the Agency's case presenter:

(Haglund) Q: "How would you describe the scope of operations at the Blanchet House at 4th and NW Glisan?"

A: "First and foremost we are a soup kitchen providing free meals three times a day, six days a week, to anyone who comes through that door. We also provide a transitional housing program for recovering addicts in the other two floors of the Blanchet House."

(Burgess) "Q: So how do you determine who's eligible to live there? Is it just first come, first serve?

"A: We require that each man volunteer 16 hours of work before he's allowed to move into the Blanchet. Patrick Daley makes that decision, along with some of his staff, but mainly Patrick makes that decision who comes into the program."

part of the Project, the Dirty Duck Tavern will be demolished and the PDC and Requester will swap properties, with Requester becoming the owner of the property on which the Project will be located and the PDC becoming the owner of the property upon which the Blanchet House is currently located. While the Project is under construction, Blanchet House will continue to operate at its present location. When construction has been completed, Blanchet House will move its current operation into the Project and the existing Blanchet House will be demolished.

8) The Project will have the same mission as the existing Blanchet House and will provide the same services, including a soup kitchen, employment, and housing for its residents.

9) At the Project, all residents will be tested for alcohol when they return to the building and will be drug tested once a week. There will be a resident curfew of 10 p.m. and residents returning to the building after that time will not be allowed inside.

10) SERA, a Portland architectural firm, is responsible for designing the Project and is being paid $685,000 for its work. Joseph Pinzone, one of SERA's principal architects, is in charge of SERA's work.

11) The Project will be privately owned and supported by private funds and more than $750,000 in public funds.

12) The anticipated cost of the Project is $10,597,267. The sources of funding for the Project include:

- $5,397,267 in Anticipated Proceeds from Capital Campaign.
- $1,000,000 in Estimated Net Land Exchange Value.
- $2,000,000 in anticipated New Market Tax Credits.
- $2,000,000 from the PDC (committed, but will not be paid until the Project has met criteria specified in an "Agreement for Disposition and Development" entered into between Requester and the PDC.)
- $200,000 from Green Investment Fund Grant.

13) The Project will have three floors built over a below-ground basement, and will provide housing for up to 51 residents.

14) The Project's basement will have a water storage area for storing collected rain water (2005 square feet; solely related to use by and on behalf of residents); storage areas for food and bikes for residents, non perishables and general building storage, and a resident weight/exercise room (2,545 square feet – solely related to use by and on behalf of residents); and food storage area (1,835 square feet) for the soup kitchen.

15) The Project's first floor will have a waiting area that will accommodate 50-70 persons

while they await their turn to eat, a separate resident entrance, guest bike parking, a dining room with 20 tables and 80 chairs, a kitchen in which food is prepared for residents and Blanchet House's guests, cold storage, a loading zone, a multi-purpose room, a counseling office to be used by a future counselor, a nurse station to provide medical services to residents and guests, janitor/handyman closet, two public restrooms, and offices for Blanchet House's executive director and manager. In total, the first floor will cover 9,310 square feet. Of that total, 3,558 square feet will be primarily related to use by and on behalf of residents.

16) The Project's second and third floors will be solely for use by residents and Blanchet's onsite manager. Each floor will have double and single occupancy units ("units") and a large common bathroom. One single unit that will be occupied by Blanchet House's paid onsite manager will have a private bathroom. No other units will have a private bathroom and no units will have cooking facilities. None of the units will have locks on the doors, phones, or cable television (televisions are not supplied and will only be available through donation). Each unit will have a bed, a nightstand, a small dresser, and a built in closet for each resident. Residents will not be allowed to have guests in their rooms.

17) The second floor will have a central restroom with showers, sinks, and toilets/urinals; a laundry room with washer and dryer; a personal supply closet that contains toilet paper, shampoo, soap, razors and shaving cream provided to residents by Blanchet House; a small non-smoking TV room with cable and an under-counter fridge, microwave and coffee maker; a large TV room for smokers with cable and two full size refrigerators, microwave and coffee maker, public phone, storage for videos, books, board games, couches and chairs for TV viewing, and a table for playing cards; and a janitor's closet that contains typical janitorial supplies used primarily by residents.

Approximately one-fourth of the second floor will be the outdoor, flat roof of the first floor that will be a common area accessible to all residents. Including the outdoor area, the second floor will be 9,660 square feet in size.

18) Like the second floor, the third floor will also have a public restroom with showers, sinks, and toilets/urinals; a laundry room with washer and dryer; a personal supply closet that contains toilet paper, shampoo, soap, razors and shaving cream provided to residents by Blanchet House; and a janitor's closet that contains typical janitorial supplies used primarily by residents.

In addition, the third floor will also have: a learning center that has basic computers with "no

internet" and a community board for such things as job postings, bus schedules, rehab programs and services; a clothing storage room containing donated items for residents' use with an internal lockable cabinet for newer and more expensive donated items. In total, the third floor will be 7,130 square feet in size.

19) Neither the second or third floors will have stoves except for the microwave ovens on the second floor TV rooms.

20) The Project contains an option for a future fourth floor containing separate units that would house 24 additional residents. The future fourth floor is also planned to have a public restroom with showers, sinks, and toilets/urinals; a laundry room with washer and dryer; a personal supply closet that contains toilet paper, shampoo, soap, razors and shaving cream provided to residents by Blanchet House; and a janitor's closet containing typical janitorial supplies used primarily by residents. Finally, it would also have a small non-smoking TV lounge with cable and an under-counter fridge, microwave and coffee maker.

21) The Project will have an elevator and stairs connecting the floors. It will also have central heating.

22) Excluding the potential fourth floor, the Project will have a total of 32,485 square feet of floor space. 24,898 square feet, or 77 percent, will be primarily devoted to use by and on behalf of residents.[4]

23) There was no evidence presented as to the Project's respective costs of construction related to residential and non-residential functions.

24) Residents at the Project will have incomes no greater than 60 percent of the area median income.

25) As at the present Blanchet House, residents at the Project will perform work related to the soup kitchen six to seven hours a day, six days a week in exchange for room and board, and their average length of stay is expected to remain the same.

THE AGENCY'S DETERMINATION

26) Susan Wooley has been the Technical Assistance Coordinator for the Agency's prevailing wage rate ("PWR") unit for the last six and one-half years. In that capacity, she presents seminars to contractors, subcontractors, and public agency personnel on PWR law. She is also a lead worker who reviews the work of rest of the PWR unit staff and writes PWR coverage determinations when they are requested.

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[4] In this calculation, square footage devoted to non-resident or mixed use includes basement storage (1,835 square feet), first floor dining area and queuing (3,980 square feet), first floor kitchen (1,260 square feet), and first floor loading (512 square feet).

27) Wooley was assigned to write a determination of whether the project was covered under prevailing wage laws in response to Requester's request for a determination. After reviewing the records that Requester submitted and the relevant statutes, Wooley prepared a memorandum on June 17, 2009, regarding Requester's coverage determination request.

28) In her memorandum, Wooley concluded that the Project would not be subject to PWR laws because it was "privately owned new construction of an apartment building that predominately provides affordable housing and that is not more than four stories in height." In conclusion, she noted:

> "One issue that I am not entirely sure of, however, is whether the kitchen and dining areas that will be built are really 'incidental' to the residential portion of the building. The residents are required to work there in exchange for room and board, and the meals are not being sold as they would be in a regular commercial establishment. That being the case, I am inclined to say the kitchen and dining areas are in support of the residential portion of the building, and are therefore incidental to the residential construction.
>
> "If you are also inclined to agree with this, then the new Blanchet House project will meet the definition of 'public works' in ORS 279C.800(6)(a)(B), but the exemption for 'projects for residential construction that are privately owned and that predominantly provide affordable housing' in 279C.810(2)(d) will apply to the project. As such, this project will not be subject to the prevailing wage rate laws."

29) On June 18, 2009, Wooley prepared a draft determination in which she concluded that "the proposed project is for residential construction that will be privately owned and that predominantly provides affordable housing. Therefore, the exemption from the prevailing wage rate law provided for in ORS 279C.810(2)(d) will apply to this project." Wooley gave the memorandum and draft determination to Lois Banahene, the Wage and Hour Division's Compliance Manager, and Christie Hammond, the Wage and Hour Division's Administrator, for their review. (Testimony of Wooley; Exhibits R-8, R-9)

30) Banahene manages the Agency's PWR unit and supervises its staff with regard to PWR coverage determinations. She has been working with the PWR unit since before 2000.

31) Wooley met with Banahene and Hammond after they reviewed her memorandum and draft determination. Banahene and Hammond disagreed with her draft determination and explained the reasons for their disagreement. Wooley summarized their meeting in a second memorandum to document why the Agency's determination differed

from her initial analysis. In that memorandum, Wooley noted that Hammond and Banahene disagreed with her initial analysis because "it didn't technically fit the residential construction standard, the definition * * * in our statute and rules," and noting they had reminded Wooley that:

> "[T]ransient housing is generally not considered to be an 'apartment' building. Also, for a housing unit to be considered an 'apartment,' it must include a bathroom and kitchen. The Blanchet House will be more dormitory-like, in that the rooms contain only one or two beds, desks and closets. Each floor of bedrooms has one shared restroom, a shared laundry room, and a shared kitchenette."

Subsequently, Wooley concluded that the Project would be providing "transient" housing because it was a "homeless shelter." She also reviewed the U.S. Department of Labor's "All Agency Memorandum No. 130: Application of the Standard of Comparison 'Projects of a Character Similar' Under Davis-Bacon and Related Acts" (AAM 130), which she had not consulted prior to writing her memo and draft determination, and concluded that the Project was really more like a dormitory, which AAM 130 lists under the category of "BUILDING CONSTRUCTION."

32) On June 25, 2009, the Agency issued its coverage determination in which it concluded that Requester's Project was not exempt from the prevailing wage rate laws as provided in ORS 279C.810(2)(d) because:

> "The definition of 'residential construction' in ORS 279C.810(2)(d)(D) is based on the U.S. Department of Labor's guidelines for this term. Pursuant to the U.S. Department of Labor's 'All Agency Memorandum No. 130: Application of the Standard of Comparison 'Projects of a Character Similar' Under Davis-Bacon and Related Acts,' residential construction includes single family houses or apartment buildings of no more than four stories in height. The proposed project is not construction of a single-family house or an apartment building. As such, the project does not meet the definition of 'residential construction' in ORS 279C.810(2)(d)(D). * * *"

33) Joseph Pinzone is a principal at SERA Architects who has had 20 years architectural experience and has been a licensed architect for 13 years. In the past five to seven years, his work has focused on private affordable housing and public subsidized affordable housing projects. He is the principal architect in charge of the Project on SERA's team and is responsible for "all the things that go on with respect to architectural and professional services for the Blanchet House." He is also acting as "the project leader from

a project management and technical advisory point of view." From 2002 until 2007, he served on the code committee of the American Institute of Architects ("AIA"), which is a liaison to the state code authorities. His testimony demonstrated his familiarity and expertise with residential structures, local codes and ordinances, and the terminology associated with them. Despite his potential bias because of SERA's financial interest, the form has credited his testimony in its entirety except for his conclusory testimony that the Project is "residential" in a "construction sense" under AAM 130.

34) Joseph Weston was called as an expert witness by Requester. He is a Portland-area real estate developer and investor and has been responsible for the development and construction of thousands of living units in apartments since 1968 in the Portland area. He has also built several thousand condominium living units in the Pearl District in Portland. He was a credible witness, except for his initial testimony concerning the number of persons sleeping in a room in dormitories, which he later clarified as referring to the sleeping porch at a fraternity house, and his conclusory testimony that the Project would have been classified as an "apartment building" under AAM 130 in 1978.

ULTIMATE FINDINGS OF FACT

1) Requester's project involves the construction of a new three-story building with a basement in Portland Oregon. The project will be privately owned and supported by more than $750,000 in public funds.

2) The Project will be a soup kitchen that also provides a transitional housing program for men ("the Project's residents") who are recovering from drug or alcohol addictions.

3) The Project's first floor will have a dining room, kitchen, cold storage, a loading zone, a multipurpose room, a counseling office, nurse station, janitor\handyman closet, two public restrooms, and offices for the Project's executive director and manager. The Project's residents and soup kitchen guests will eat all meals in the dining room and all meals will be prepared in the kitchen by the Project's residents and community volunteers. Approximately 600 to 800 meals will be served daily.

4) The Project's second and third floors will each have a number of double and single occupancy units with a large common bathroom. None of the units will have kitchen facilities or locks on the doors and only one will have a private bathroom. The Project will provide toiletries and janitorial supplies for the Project's residents. The units will provide housing for up to 51 residents who will live at the Project for a minimum of three months. It is anticipated that some residents will live at the Project for a year or more.

5) Residents in the Project's transitional housing program will not be allowed to have guests in

their rooms. All residents will be tested for alcohol when they return to the building and will be drug tested once a week. There will be a resident curfew of 10 p.m. and residents returning to the building after that time will not be allowed inside.

6) The Project's residents will be men whose incomes are no greater than 60 percent of the area median income.

7) The Project's residents will receive free room and board in exchange for working full time in the Project's soup kitchen that serves three meals a day to its residents, and six days a week, three meals a day, to homeless lower income and working poor of inner northwest Portland.

8) The project will also have a below-ground basement. The basement will have a water storage area for storing collected rain water; storage areas for food and bikes for residents, non-perishables and general building storage; a resident weight\exercise room; and a food storage area for the soup kitchen.

9) The project will have an elevator and stairs connecting all floors. It will also have central heating.

10) Seventy-seven percent of the Project's area will be primarily devoted to use by and on behalf of residents

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter herein. ORS 279C.817.

2) Requester's proposed Project is a public works under ORS 279C.800(6)(a)(B).

3) ORS 279C.800 to 279C.870 apply to Requester's Project because it is a not a project for "residential construction." ORS 279C.810(2)(d).

4) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to determine whether a project or proposed project is or would be a public works upon which payment of the prevailing wage rate is or would be required under ORS 279C.840. ORS 279C.817.

OPINION

INTRODUCTION

Requester sought a determination from the Commissioner as to whether its proposed Project is a public works on which payment of the prevailing wage rate will be required under ORS 279C.840. The Commissioner, acting through BOLI's Wage and Hour Division, determined that Requester was not entitled to a prevailing wage rate exemption because it did not involve "residential construction." Requester filed a request for reconsideration and a request for hearing, contending that the Project is a project "for residential construction" within the meaning of ORS 279C.810(2)(d). The Agency declined to consider Re-

quester's reconsideration request, and the case was set for hearing.

PAYMENT OF PREVAILING WAGE RATE REQUIRED ON ALL PUBLIC WORKS UNLESS AN EXEMPTION APPLIES

ORS 279C.840(1) requires that the prevailing wage rate must be paid to workers "upon all public works" by all contractors and subcontractors unless a statutory exemption applies. Requester contends that it is entitled to an exemption under ORS 279C.810(d) and OAR 839-025-0100(e) because it is a project for "residential construction" that is privately owned and predominantly provides "affordable" housing.

REQUESTER'S PROJECT IS A "PUBLIC WORKS"

Under ORS 279C.800(6)(a)(B), a term "public works" includes "[a] project for the construction * * * of a privately owned building * * * that uses funds of a private entity and $750,000 or more of funds of a public agency * * *." The participants stipulated that the Project will be privately owned and that it will use more than $750,000 in funds from the Portland Development Commission, a public agency. Accordingly, the forum concludes that the Project is a "public works."

REQUESTER'S PROJECT WILL BE PRIVATELY OWNED AND WILL PROVIDE "AFFORDABLE HOUSING"

The participants stipulated that the Project will be privately owned and that the upper two floors will provide "affordable housing," meaning that the Project's residents will have incomes no greater than 60 percent of the area median income. ORS 279C.810(1)(d)(A).

REQUESTER'S PROJECT IS NOT "RESIDENTIAL CONSTRUCTION" UNDER ORS 279C.810

"Residential construction" is defined in ORS 279C.810(1)(d) as follows:

> "(D)'Residential construction' includes the construction, reconstruction, major renovation or painting of single-family houses or apartment buildings not more than four stories in height and all incidental items, such as site work, parking areas, utilities, streets and sidewalks, pursuant to the United States Department of Labor's 'All Agency Memorandum No. 130: Application of the Standard of Comparison "Projects of a Character Similar" Under Davis-Bacon and Related Acts,' dated March 17, 1978. However, the commissioner may consider different definitions of residential construction in determining whether a project is a residential construction project for purposes of this paragraph, including definitions that:

"(i) Exist in local ordinances or codes[.]"

The statute identifies two specific structures as "residential construction" – single-family houses and apartment buildings less than five stories in height – and refers the Commissioner to AAM 130 for guidance. It also gives the Commissioner the discretion to consider different definitions contained in local ordinances or codes. However, since Requester did not identify any definition of "residential construction" in a local ordinance or code, this Order relies exclusively on the definition of "residential construction" contained in the first sentence of ORS 279C.810(1)(d)(D) to resolve this case and does not consider Requester's argument that the Project, under the City of Portland's building code, is a "residential structure" containing single room occupancy ("SRO") housing, thereby meeting the residential construction requirement in ORS 279C.810(2)(d)(D)(i).[5]

A. AAM 130.

AAM 130 was adopted by the U.S. Department of Labor ("DOL") in 1978 to assist contracting agencies in determining the appropriate wage rate schedule for public works, not as a guide to be used in determining whether a project is in fact a public works. It contains general definitions of four categories of construction -- building, residential, heavy, and highway – and lists, but does not define, examples of projects included in each category. Only the residential and building categories are relevant to this case.

AAM 130 defines "BUILDING CONSTRUCTION" as follows:

> "Building construction generally is the construction of sheltered enclosures with walk-in access for the purpose of housing persons, machinery, equipment, or supplies. It includes all construction of such structures, the installation of utilities and the installation of equipment, both above and below grade."

AAM 130 defines "RESIDENTIAL CONSTRUCTION" as:

> "those [projects] involving the construction, reconstruction, alteration, or repair of single-family houses or apartment buildings not more than four (4) stories in height. This includes all incidental items such as site work, parking areas, utilities, streets and sidewalks."

"BUILDING CONSTRUCTION" is followed by a long list of exam-

[5] The Portland city code defines "residential structure," but not "residential construction." The Commissioner has previously held that the Agency's discretion to consider different definitions of "residential construction" is limited to definitions of "residential construction." *In the Matter of Central City Concern,* 30 BOLI 94, 108 (2009).

ples, including dormitories, hospitals, hotels, and nursing and convalescent facilities. "RESIDENTIAL CONSTRUCTION" has a shorter list, including apartment buildings of four stories or less, multi--family houses, and married student housing. These are all private, self-contained autonomous residential units with incidental conveniences in common, not critical things like bathrooms and kitchens.

B. The Project Is Not An "Apartment Building"

Requester contends that the Project is "residential construction" under ORS 279C.810(2)(d)(D) because it meets the definition of an "apartment building" of four stories or less. It is undisputed that the Project is four stories or less in height.

The term "apartment building," as used in ORS 279C.810(2)(d)(D), is not defined by statute or administrative rule. In the case of *In the Matter of Central City Concern,* 30 BOLI 94 (2008), the first prevailing wage rate determination case to come before the forum, the Commissioner determined that "apartment building" was an inexact term and that it should be given its "plain, natural, and ordinary meaning," using the methodology set out by the Oregon Supreme Court in *PGE v. Bureau of Labor and Industries,* 317 Or 606 (1993). *Id* at 104. Relying on *Webster's Third New Int'l Dictionary* (unabridged ed 2002), the Commissioner defined "apartment building" as a "building containing a number of separate residential units and usually having conveniences (as heat and elevators) in common." *Id.* However, because the facts were undisputed that the project involved a building that was five stories in height and involved the purchase and remodel of a former hotel, the Commissioner did not find it necessary to parse that definition.

To define "apartment building," one must first ascertain the meaning of the word "separate" before applying that definition to the Project.

The relevant definition of "separate" follows:

> "**2a** : not shared with another : INDIVIDUAL, SINGLE <group consciousness …makes the individual think lightly of his own *separate* interests— M.R.Cohen> <the world's largest city deserves *separate* consideration— L.D.Stamp> **b** *often capitalized* : estranged from a parent body <there were 90 *Separate* churches, with 6,490 members— F.S.Mead>
>
> "**3 a** : existing by itself : AUTONOMOUS, INDEPENDENT <the partitioning of India created two *separate* jute economies— F.F.George> <reorganization of schools into *separate* primary and postprimary units— H.C.Dent> **b** : dissimilar in nature or identity : DISTINCT, DIFFERENT <my most recent works, in their *separate* ways, embody this tendency— Aaron Copland>

> <the full bibliography … lists 2204 *separate* publications—*Geographical Journal*> <built-in facilities … permit cooking in seven *separate* ways without the use of additional utensils—*Report of General Motors Corp*.>"

Webster's at 2069. In this case, the units are residential, in that they are used as a transitional dwelling place for the Project's residents. *Webster's* at 1931. However, to be separate, they must be "autonomous and independent." Without kitchens and bathrooms, the units cannot be "autonomous and independent" and are therefore not "separate." Because they are not "separate," the Project does not fall within the definition of "apartment building" and is not "residential construction" under ORS 279C.810(2)(d)(D).

C. The Project Is a "Dormitory"

Among the multitude of structures listed under the categories of "BUILDING CONSTRUCTION" and "RESIDENTIAL CONSTRUCTION" in AAM 130, none exactly describes the Project. In terms of similarity, the label "dormitory," listed as an example under "BUILDING CONSTRUCTION," comes closest. Like "apartment building," the word "dormitory" is not defined by statute or administrative rule and is an inexact term, and the forum once more relies on *Webster's*. *Webster's* defines "dormitory" as "a residence hall providing separate rooms or suites for individuals or for groups of two, three, or four with common toilet and bathroom facilities but usually without housekeeping facilities." *Webster's* at 675. Although not an exact fit, it is a fairly good match for the transitional housing part of the Project and is the closest match to any of the structures listed in AAM 130 under the categories of "BUILDING CONSTRUCTION" and "RESIDENTIAL CONSTRUCTION."

CONCLUSION

Requester's Project is a dormitory that is not residential construction" under ORS 279C.810(1)(d)(D) and is subject to Oregon's prevailing wage rate laws.

ORDER

NOW, THEREFORE, as authorized by ORS 279C.817, the Agency's determination, issued pursuant to ORS 279C.817, hereby is **AFFIRMED**.

In the Matter of
CHARLES EDWARD MINOR

Case No. 96-09

Final Order of Commissioner Brad Avakian
Issued March 31, 2010

SYNOPSIS

The Agency established by a preponderance of credible evidence that Respondent, a male, sub-

jected Complainant, a female, to offensive and unwelcome sexual conduct that created a hostile and intimidating work environment, in violation of ORS 659A.030(1)(b), then constructively discharged Complainant in violation of ORS 659A.030(1)(a). The forum awarded Complainant $50,000 for emotional and mental suffering damages. ORS 659A.030; OAR 839-005-0030; OAR 839-005-0035.

_____

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 9-10, 2010, at the Eugene office of the Bureau of Labor and Industries office located at 1400 Executive Parkway, Suite 200, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Patrick A. Plaza, an employee of the Agency. Complainant Stephanie Head was present throughout the hearing and was not represented by counsel. Respondent Charles Edward Minor ("Respondent") represented himself and was present throughout the hearing.

The Agency called the following witnesses: Complainant; Eric Yates, senior investigator, BOLI Civil Rights Division; Michelle Boyd, Complainant's co-worker; Amy Anderson, Complainant's friend; Eric Pardee, City of Springfield police officer; and Respondent Charles Edward Minor;

Respondent called himself as a witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-15 (submitted or generated prior to hearing); and

b) Agency exhibits A-1 through A-14 (submitted prior to hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On May 27, 2008, Complainant filed a verified complaint with the Agency's Civil Rights Division alleging that she was the victim of the unlawful employment practices of Respondent Charles Minor dba Phoenix Espresso. After investigation, the Agency found substantial evidence of an unlawful employment practice and issued a Notice of Substantial Evidence Determination on October 16, 2008.

2) On September 1, 2009, the Agency issued Formal Charges alleging that:

(a) Respondent unlawfully discriminated against Complainant based on her sex through his words and actions by creating a workplace environment that was hostile, intimidating, or offensive to Complainant, in violation of ORS 659A.030(1)(b) and OAR 839-005-0030(1)(b) and (2);

(b) Respondent constructively discharged Complainant based on her gender in violation of ORS 659A.030(1)(a) and OAR 839-005-0035 by intentionally creating or intentionally maintaining discriminatory working conditions related to Complainant's gender and physically assaulting her, thereby creating working conditions so intolerable that a reasonable person in Complainant's circumstances would have resigned because of them.

The Formal Charges sought lost wages, "in an amount to be proven at hearing," and "at least $50,000" in damages for "emotional, mental, and physical suffering."

3) On September 28, 2009, Respondent filed a hand-written answer to the Formal Charges.

4) On October 5, 2009, the Agency filed a motion for default based on Respondent's purported failure to file a complete answer to the allegations in the Formal Charges and failure to request a hearing in the answer that Respondent did file.

5) On October 12, 2009, the Agency moved to withdraw its motion for default and the ALJ granted the Agency's motion.

6) On October 21, 2009, the forum ordered the Agency and Respondent each to submit a case summary including: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; and a brief statement of the elements of the claim and any damage calculations (for the Agency only). The forum ordered the participants to submit case summaries by January 29, 2010, and notified them of the possible sanctions for failure to comply with the case summary order. The ALJ also enclosed a form designed to assist respondents who are not represented by an attorney in filing a summary.

7) On January 19, 2010, the Agency moved to amend the Formal Charges to correctly identify the location of Respondent's business as 3650 Main Street in Springfield, Oregon, as admitted by Respondent in his answer to the Formal Charges. The ALJ orally granted the Agency's motion in his opening statement at the hearing.

8) On January 29, 2010, the Agency filed a case summary. Respondent did not file a case summary.

9) On February 4, 2010, the Agency filed a motion in which it

asked the forum to take judicial notice of ORS 135.335 and 135.345 pertaining to pleadings in criminal matters, and that judgment following entry of a no contest plea is a conviction of the offense to which the plea is entered. The ALJ orally granted the Agency's motion in his opening statement at the hearing.

10) At the start of the hearing, the ALJ orally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

11) At hearing, Respondent and the Agency stipulated that Complainant worked 12 hours for Respondent for which she was not paid.

12) On March 8, 2010, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Charles Edward Minor owned and operated Phoenix Espresso, a drive-through coffee cart located at 3650 Main Street in Springfield, Oregon. Respondent, a man in his late 50s, has three bachelor degrees and a masters degree.

2) On August 11, 2007, Complainant, a female, applied for work with Respondent as a barista at Phoenix Espresso after Alyssa Furlong, a female friend of hers and an employee of Respondent, told her that Respondent was looking to hire someone. Respondent interviewed and hired her and agreed to pay her $8 per hour, plus tips. Respondent also told Complainant that he would not pay her until she had been trained "to his methods."

3) Complainant was 21 years old when Respondent hired her. Her previous work experience consisted of doing part time child care for some friends during the previous three years.

4) Complainant began working for Respondent on the same day she applied for work and worked a little more than two hours that day.

5) Complainant worked three hours a day for Respondent on August 12, 13, and 14, 2007. Respondent considered her to be in training on August 11-14 and did not pay her for any of the 11 total hours she worked on those days. Respondent also took half of an estimated $40 in total tips that Complainant received on those days.

6) On August 15, 2007, Complainant had to have all four of her wisdom teeth extracted. Her recovery was complicated because all four teeth were impacted and she developed a dry socket during her recovery. As a consequence, she did not return to work until August 27.

7) Complainant's mouth was still very tender on August 27. From August 27 to August 30,

Complainant worked the following hours: August 27 - 4 hours; August 28 - 4 hours; August 29 - 4 hours; August 30 - 5 hours.

8) During Complainant's employment, Respondent engaged in the following conduct:

- Telling Complainant he had hired Alyssa because of her "juicy boobs" and he liked girls with bigger chests.
- Telling Complainant she could wear low cut shirts and hang out more at the window to expose her cleavage to customers and she would make more tips.
- Talking to Complainant about an attractive woman who was a customer and saying he would like to take her to the opera and then "wreck her," a statement Complainant interpreted as meaning that Respondent wanted to take the woman to the opera and then have sex with her.
- After she observed wasps in Respondent's coffee cart, Complainant told Respondent that she was allergic to bee stings and carried an epinephrine shot in her purse. Respondent told her "I would put a long needle in your thigh" and that he would be glad to give her "mouth to mouth," at the same time winking and raising his eyebrows. Respondent repeated later "I can give you mouth to mouth."
- Respondent asked Complainant for a hug after his mother died on August 28. After that, she felt she could not leave work until she had given him a hug. If she did not hug Respondent before she left work for the day, he would tell her "hey, get back here and give me a hug." Respondent's hugs were "full frontal."
- On one occasion, Complainant spilled some coffee beans on the floor. When she bent to pick them up, Respondent, who was watching her, told her "you like bending over, don't you."

9) Respondent's comments to Complainant that she could wear low cut shirts and lean out the windows to expose her cleavage to customers to get more tips made Complainant feel "scared" and "embarrassed," as Complainant has been "kind of embarrassed of the shape of my body for a long time and for someone to claim I could use it as a tool like that was disgusting and it put me on edge."

10) Respondent's comment to Complainant about "bending over" made Complainant feel "awful," "disgusting," "sickened," and "scared that I was alone in there with him."

11) Complainant mostly worked by herself or with Respondent, although Furlong helped train her. Respondent's conduct described in Finding of Fact #8 – The Merits occurred when Complainant and Respon-

dent were alone together. Some of Respondent's comments described in Finding of Fact #8 – The Merits were made when Complainant was talking on her cell phone to her friend Amy Anderson and were overheard by Anderson.

12) Complainant felt that Respondent was always staring at her and assessing her appearance, which made her feel "disgusting."

13) Complainant complained to her good friend Amy Anderson about Respondent's conduct.

14) Complainant did not complain to Respondent about his behavior because she was afraid she would lose her job.

15) Respondent also told Furlong that she should hang more at the window and show more cleavage and she would make more tips, and Furlong told this to Complainant.

16) Michelle Boyd, another young woman, also worked for Respondent as a barista during Complainant's employment with Respondent. When she worked with Respondent, he would make hand gestures about female customer's bodies and wanting to take them home. On multiple occasions, Respondent told her that she could wear a low-cut shirt and act flirtatious like the baristas at Dutch Boy, another drive-through coffee cart, and that would help business. Boyd felt that Respondent "stared" at her chest, which made her feel uncomfortable. Respondent regularly asked Boyd for a hug and almost always did so at the end of her shift, sometimes pursuing her in the parking lot while Boyd was walking to her car.

17) On August 30, 2007, Respondent hit Complainant on the head with his fist when she forgot to empty the "portafilter." Complainant turned and told Respondent not to hit her. Respondent made a remark like "Oh yeah, does that hurt?" and hit her again on her head with his fist as she was walking away from him.

18) Complainant's teeth hit together the first time that Respondent hit her. Her teeth were not completely healed from her surgery and it was very painful for her. The second time he hit her was also very painful, and she began crying. She worked for another hour, finished her shift, got paid and left in tears. Respondent did not pay her for her last hour of work, but paid her in full in cash for the other 12 hours of work she had performed from August 27-August 30.

19) When Complainant left work, she telephoned her good friend Amy Anderson while crying, hyperventilating, and barely able to talk. Complainant told Anderson that Respondent had hit her on the head and that she was concerned for her safety. Anderson advised Complainant to call the police, then come to Anderson's house.

20) After talking with Anderson, Complainant called her father, who also advised her to report the incident to the police and said he would meet her at the police station. Complainant went to the Springfield police station, where she met her father and reported the incident to the police at 3:00 p.m. on August 30, 2007, and filed an incident report in which she alleged that Respondent had physically harassed her. Afterwards, she went to Anderson's house. When she arrived at Andersen's house, Complainant was very shaken up and had "large red bags under her eyes," her face was "splotchy," and she was still crying.

21) On August 30, 2007, Springfield Police officer Eric Pardee interviewed Complainant. Pardee took notes during the interview that summarized Complainant's statements. His notes included the following observations:

> "Head told me that her employer, Charles Minor, had hit her while she was at work. Minor owns Phoenix Espresso, where Head recently began working for him. Head said that Minor became upset about the way she had been making a drink, and he hit her on the top of her head while she was facing away from him. The blow caused Head's teeth to clank together, and she said it was painful. After being hit, Head immediately said, 'Ouch, hurt! Don't do that again.' Minor responded by saying either, 'Oh, you think that hurt? or that hurts huh?' and he hit her a second time on the top of her head. Head said both blows hurt, and she thought Minor had struck her with a closed fist. Head remained at work to finish her shift, which lasted about another hour. Head reported the incident to Police after speaking with her parents. Head gave me a set of her business keys to Phoenix Espresso and asked that I return them to Minor."

22) During the interview, Complainant also told Pardee that Respondent had told her that she should expose her breasts more and that she should show more cleavage and act more flirtatious towards the clientele to increase sales. Complainant told Pardee that she wanted no further contact with Respondent and to tell him that did not want him to contact her "in any way, shape or form in the future" and to tell him that she was quitting her job.

23) Complainant quit her job because she did not feel safe working with Respondent.

24) After interviewing Complainant, Pardee visited Respondent at Phoenix Espresso. Pardee summarized his visit to Respondent in notes he made later that day that included the following observations:

> "I told Minor that I was there to speak with him about what had occurred between he and Head today. I read Minor Miranda Warning, asked him if

> he understood each of his rights, and he said, 'Yes.' Minor told me there hadn't been any problems between himself and Head today. I informed Minor of the complaint Head had made. I asked Minor if he had hit Head today, and Minor said, 'Not that I recall.' I told Minor of the specific statements Head had reported that were spoken by herself and Minor during the incident. Minor told me he didn't say anything like Head was reporting. I again asked Minor if he had struck Head twice in the head and Minor said, 'I'm not saying that it didn't happen, but I don't remember it. I might have bopped her on the head, but it wasn't with any malice.'"

25) Pardee then arrested Minor and took him to the Lane County Jail. The next day, Respondent's case was docketed in the Springfield Municipal Court, with a note that Respondent was accused of a violation of the crime of "HARASSMENT" under ORS 166.065 (a)(A).[1] On December 12, 2007, Respondent entered into a Diversion Agreement that was signed by himself, the Springfield City prosecutor, and the Springfield Municipal Court Judge. In the Agreement, Respondent pled "no contest" to the harassment charges brought by Complainant. As part of the Agreement, Respondent agreed "not to contest that Stephanie Head would say and testify that I did harass and annoy or alarm Stephanie Head by touching her head with intent in the City of Springfield on 8\30\07." Respondent also agreed not have any contact with Complainant and to pay the Court $542 in fees and fines.

26) After being hit by Respondent, Complainant quit looking for work and turned into a "recluse" for the next 1½ months. Her attitude towards strangers changed. When she was at Anderson's house and people she didn't know came into the house, Complainant became "very jumpy." Complainant was always "scared" and became "anxious about everything." When Anderson has asked Complainant go with her to look for work, Complainant declined, saying that she did not want to be involved with another employer "that's going to disrespect her personal space." Before working for Respondent, Complainant and Anderson used to go out together, but at the time of the hearing Complainant still did not want to work or "go out" and "has turned into a little bit of an anxiety box."

27) Complainant sought counseling at Lane Community College after leaving Respondent's employment for the anxiety she had because of her experi-

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[1] The complaint specifically alleged that "on August 30, 2007," Respondent "unlawfully and intentionally," "at or near 3650 Main Street within the corporate limits of the City of Springfield" "harass[ed] Stephanie A. Head, by subjecting Stephanie A. Head to offensive physical contact by hitting her on the head twice."

ence working for Respondent. She attended four counseling sessions, once a week for four weeks.

28) Complainant has turned in a few resumes since she left Respondent's employment, but has not seriously sought work. Complainant fears that she may be exposed to the same behavior again.

29) Complainant attended fall term at Lane Community College in 2007. To get to one of her classes, she had to walk past the school cafeteria that had a coffee stand. Because of her experience with Respondent, the smell of the coffee made her feel as though she was going to vomit, so to avoid the smell she began walking around the outside of the building to get to the elevator.

30) One evening after she quit Respondent's employment, Complainant thought she saw Respondent's vehicle following her, so she drove past her driveway. This frightened her.

31) Complainant still does not like driving past Respondent's coffee booth and having to be in Respondent's presence at the hearing made her very nervous. Complainant still gets anxious when she sees cars that look like Respondent's. Complainant still gets nervous when she sees people who remind her of Respondent or when she hears people talk like Respondent. Complainant still has nightmares about Respondent.

CREDIBILITY FINDINGS

32) Amy Anderson had a clear recollection of events and answered questions in a forthright manner. She was not impeached during cross-examination and the forum has credited her testimony in its entirety.

33) Eric Yates is an experienced investigator who is employed with BOLI's Civil Rights Division. Except for authenticating documents, his testimony consisted of reading typed interview notes taken or documents received in the course of his investigation, as he had no independent recollection of his interviews or the contents of those documents. The forum has credited his testimony in its entirety.

34) Eric Pardee had been a police officer with the Springfield Police Department for 8½ years at the time of the hearing and was the officer who arrested Respondent in response to Complainant's complaint of physical harassment. He had an independent recollection of the incident, testified in a forthright manner without referring to his notes, and was not impeached in any manner on cross-examination. The forum has filed credited his testimony in its entirety.

35) Michelle Boyd responded in a forthright manner to questions on direct and cross examination. She had a clear recollection of relevant events and was not impeached on cross examination. The forum has

credited her testimony in its entirety.

36) Complainant had a clear recollection of events. Her testimony during direct examination and cross examination was specific, internally consistent, and consistent with earlier statements made to the Springfield police and to the Civil Rights Division. She was not impeached during cross examination. The forum has credited her testimony in its entirety.

37) Charles Minor was not a credible witness for several reasons.

First, he testified in an evasive manner. A prime example was his testimony concerning the Agency's allegation that he hit Complainant on the head. At the hearing, he testified "I don't believe I did" and "I don't recall," but never outright denied hitting her. He was similarly evasive when Pardee interviewed him on August 30, 2007, stating "I'm not saying that it didn't happen, but I don't remember it. I might have bopped her on the head, but it wasn't with any malice."

Second, some of his testimony was improbable. For example, his testimony that he did not recall entering into a Diversion Agreement with the Springfield Municipal Court or paying any money pursuant to that Agreement. He also testified that he was not even aware there was a Diversion Agreement until the week before the hearing. Even if that testimony was believed, it would demonstrate that Minor had such a poor memory that none of his testimony regarding the events during Complainant's employment could be relied upon.

Third, Respondent's answer was inconsistent with his testimony. In his answer, he denied that Complainant started work on August 11, that Complainant's last day of work was August 30, 2007, and that Complainant was at work on August 30, 2007. At the hearing, he ultimately admitted that she worked those dates and that she was at work on August 30, 2007.

Fourth, his testimony was contradicted by more credible evidence in the record. Respondent testified that Furlong and Boyd told him that Complainant was not getting the job done. In contrast, Boyd credibly testified that she never complained to Respondent about Complainant's work performance and that she had never worked with Complainant.

Fifth, Respondent produced a purple spiral bound notebook with the name "Stefanie" handwritten on the cover that he claimed contained Complainant's handwriting and showed the hours and dates she had worked, with the last date of week showing as August 12, 2007. However, Complainant credibly denied that the handwriting was hers, pointing out that she never spelled her name as "Stefanie," and Boyd credibly testified that the notebook showed the hours worked by another employee named "Stefanie" who

worked for Respondent immediately prior to Complainant.[2]

Based on all of the above, the forum has only credited Respondent's testimony when it was corroborated by other credible evidence in the record.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent, Charles Edward Minor owned and operated Phoenix Espresso, a drive-through coffee cart located at 3650 Main Street in Springfield, Oregon.

2) On August 11, 2007, Complainant applied for work with Respondent as a barista and was hired at the wage rate of $8 per hour. She began work that same day, working two hours, then worked three hours each day on August 12, 13, and 14.

3) Respondent did not pay Complainant for any of the hours that she worked on August 11-14 and also took half of an estimated $40 in total tips that Complainant received on those days.

4) On August 15, 2007, Complainant had to have all four of her wisdom teeth extracted, and she did not return to work until August 27.

5) From August 27 to August 30, 2007, Complainant worked the following hours: August 27 - 4 hours; August 28 - 4 hours; August 29 - 4 hours; August 30 - 5 hours.

6) During Complainant's employment, Respondent engaged in the following conduct:

- Telling Complainant he had hired her friend Alyssa because of her "juicy boobs" and he liked girls with bigger chests.
- Telling Complainant she could wear low cut shirts and hang out more at the window to expose her cleavage to customers and she would make more tips.
- Talking to Complainant about an attractive woman who was a customer and saying he would like to take her to the opera and then "wreck her," a statement Complainant interpreted as meaning that Respondent wanted to take the woman to the opera and then have sex with her.
- After she observed wasps in the Respondent's coffee cart, Complainant told Respondent that she was allergic to bee stings and carried an epinephrine shot in her purse, Respondent told her "I would put him a long needle in your thigh" and he would be glad to give her "mouth to mouth," at the same time winking and raising his eyebrows. Respondent repeated later "I can give you mouth to mouth."
- Respondent asked Complainant for a hug after his mother died on August 28. After that,

[2] On the cover of the note was the handwritten name "Stefanie." Complainant testified that she has never spelled her name that way.

she felt she could not leave work until she had given him a hug. If she did not hug Respondent before she left work for the day, he would tell her "hey, get back here and give me a hug." Respondent's hugs were "full frontal."

i On one occasion, Complainant spilled some coffee beans on the floor. When she bent to pick them up, Respondent, who was watching her, told her "you like bending over, don't you."

7) Respondent's conduct made Complainant feel "scared," "embarrassed," "awful," "disgusting," "sickened," and "scared that I was alone in there with him."

8) On August 30, 2007, Respondent hit Complainant on the head with his fist when she forgot to empty the "portafilter." After Complainant objected, hit her again on her head with his fist as she was walking away from him. Respondent's blows caused Complainant considerable pain. She worked for another hour, finished her shift, got paid and left in tears.

9) Respondent did not pay Complainant for her last hour of work, but paid her in full in cash for the other 12 hours of work she had performed from August 27-August 30.

10) Complainant was extremely upset when she left work on August 30. Acting on the advice of her friend Anderson and her father, Complainant went to the Springfield Police and filed an incident report in which she alleged that Respondent had physically harassed her.

11) Complainant quit her job because she did not feel safe while working with Respondent.

12) As a result of Complainant's report, Respondent was arrested and taken to the Lane County Jail. On December 12, 2007, Respondent entered into a Diversion Agreement in which he pled "no contest" to the harassment charges brought by Complainant.

13) During her employment with Respondent and from the time she quit Respondent's employment until the time of hearing, Complainant experienced substantial emotional, mental, and physical suffering as a result of Respondent's conduct described in Findings Fact ## 8 and 17 – The Merits.

14) Complainant has not looked for work since she quit working for Respondent.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Charles Edward Minor was an employer who used the personal services of Complainant, his employee, reserving the right to control the means by which Complainant's services were performed. ORS 659A.001(4).

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment

practices found. ORS 659A.800 to ORS 659A.865.

3) Respondent subjected Complainant to unwelcome sexual conduct directed toward her because of her gender that was sufficiently severe to alter her working conditions and create a hostile, intimidating, and offensive work environment. By doing so, Respondent committed an unlawful employment practice based on Complainant's sex in violation of ORS 659A.030(1)(b) and OAR 839-005-0030(1)(b) and (2).

4) Respondent constructively discharged Complainant, committing an unlawful employment practice in violation of ORS 659A.030(1)(a) and OAR 839-005-0035.

5) Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award Complainant back pay resulting from Respondent's unlawful employment practice and to award money damages for emotional and mental suffering sustained and to protect the rights of Complainant and others similarly situated. The sum of money awarded and the other actions required of Respondent in the Order below are an appropriate exercise of that authority.

OPINION

The Agency alleges that Respondent sexually harassed and constructively discharged Complainant. The Agency seeks $96 in back pay and at least $50,000 in damages for emotional suffering.

SEXUAL HARASSMENT

To establish sexual harassment, the Agency is required to prove the following elements: (1) Respondent was an employer subject to ORS 659A.001 to 659A.030; (2) Respondent employed Complainant; (3) Complainant is a member of a protected class (sex); (4) Respondent engaged in unwelcome conduct (verbal or physical) directed at Complainant because of her sex; (5) the unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating or offensive work environment; and (6) Complainant was harmed by the unwelcome conduct. *In the Matter of Gordy's Truck Stop, LLC,* 28 BOLI 200, 210 (2007). *See also* OAR 839-005-0030.

A. Respondent was an employer and employed Complainant.

There is no dispute that Respondent, a male, was an employer and sole proprietor subject to ORS 659A.001 to 659A.030 who employed Complainant, a female, during all times material.

B. Respondent engaged in unwelcome conduct (verbal or physical) directed at Complainant because of her sex.

Complainant's credible testimony established that

Respondent engaged in numerous instances of unwelcome verbal and physical conduct directed at Complainant because of her sex. They are set out in detail in Finding of Fact #8 – The Merits. This testimony is further supported by Boyd's credible testimony that Respondent also engaged in sexual conduct directed at her. The forum concludes that the conduct was unwelcome based on Complainant's credible testimony that it made her "scared," "embarrassed," "awful," "disgusting," "sickened," and "scared that I was alone in there with him," because of her complaints to Anderson and the Springfield Police about the conduct, and because she ultimately quit her job because of the conduct. The forum concludes that the unwelcome conduct was due to Complainant's sex because of Respondent's implied and direct references to sexual behavior, *e.g.* telling Complainant he had hired her friend Alyssa because of her "juicy boobs" and telling Complainant that she "like[d] bending over."

C. Respondent's unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating or offensive working environment.

The standard for determining whether conduct is sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment is from the objective standpoint of a reasonable person in Complainant's particular circumstances. *Gordy's at 212*; OAR 839-005-0030(2).

In making that determination, the forum looks at the totality of the circumstances, *i.e.*, the nature of the conduct and its context, the frequency of the conduct, its severity or pervasiveness, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. *Id.*

Nature of the conduct and its context – Complainant was 21 years old when employed by Respondent, working at her first job other than child care for friends. In contrast, Respondent was a man in his late 50s with several college degrees, Complainant's boss, and the owner of the business.

Frequency – All of the unwelcome conduct occurred on a daily basis within an eight day period of employment spanning from August 11 to August 30, 2007, during which Complainant worked a total of 28 hours.

Severity – The actionable conduct included "full-frontal"[3] hugs from Respondent that Respondent insisted upon; suggestions that Complainant lean out the window and expose more cleavage; telling Complainant he had hired her friend Alyssa because of her "juicy boobs" and he liked girls with bigger chests; talking to Complainant about an attractive woman who was a customer and saying he would like to take her to the opera and then "wreck her," a statement Complainant interpreted as meaning that Respondent wanted to take the woman to the opera and then have sex with her; telling Complainant, if she was stunned by a wasp that he "would put a long needle in [her] thigh" and would be glad to give her "mouth to mouth," at the same time winking and raising his eyebrows, then repeating the "mouth to mouth" comment; and telling Complainant, when she bent over, "you like bending over, don't you." The severity of this conduct was intensified by the fact that all of it occurred when Respondent and Complainant were working alone together.

Physically threatening or humiliating – Complainant credibly testified that the conduct made her feel "scared," "embarrassed," "awful," "disgusting," "sickened," and "scared that I was alone in there with him," and that she quit because she did not feel safe in Respondent's presence.

Unreasonable interference with Complainant's work performance – Complainant's reactions to Respondent's actionable conduct, culminating in her quitting her job, demonstrate that Respondent's conduct unreasonably interfered with her job performance.

Based on the above, the forum concludes that Respondent's actionable conduct was sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment from the objective standpoint of a reasonable person in Complainant's particular circumstances, and that the conduct created a hostile, intimidating or offensive working environment for Complainant.

D. Complainant was harmed by Respondent's sexual harassment.

At the time the harassment occurred, Complainant experienced the emotions of being "scared," "embarrassed," "awful," "disgusting," "sickened," and "scared that I was alone in there with him." This fulfills the "harm" element of the Agency's prima facie case.

E. Conclusion.

The Agency proved the elements of its prima facie case by a preponderance of the evidence and the forum concludes that Respondent sexually harassed Complainant in violation of ORS 659A.030(1)(b) and OAR 839-005-0030(1)(b) and (2).

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[3] Complainant used these words to describe the hugs that Respondent insisted upon, contrasting them with "side hugs."

CONSTRUCTIVE DISCHARGE

In a case alleging constructive discharge based on hostile work environment, the Agency must prove that Respondent: (1) intentionally created or maintained discriminatory working conditions related to Complainant's gender that were (2) so intolerable that a reasonable person in Complainant's circumstances would resign because of them, (3) Respondent desired to cause Complainant to leave his employment as a result, or knew or should have known Complainant was certain, or substantially certain, to leave his employment as a result of the working conditions, and (4) Complainant left Respondent's employment as a result of the working conditions. *In the Matter of Robb Wochnick,* 25 BOLI 265, 287 (2004). *See also* OAR 839-005-0035. The forum has consistently held that if an employer imposes objectively intolerable working conditions, *i.e.* that a reasonable person in Complainant's position would have resigned under those conditions, then the employee's resignation is a constructive discharge. *Gordy's* at 213.

In this case, Complainant was subjected to sexual conduct by Respondent throughout her brief employment that made her afraid to be alone with him. On her last day of work, Respondent hit her on the head twice in succession with his fist, the second time over her objection, and causing her serious pain. Although Respondent claimed not to recall hitting Complainant, the forum takes judicial notice of ORS 135.335 and 135.345 pertaining to pleadings in criminal matters, which provide that Respondent's no contest plea to Complainant's harassment charges is "conviction of the offense to which the plea is entered." Despite Complainant's pain, she worked another hour to finish her shift before going to the Springfield Police Department to file a report. While making her report, she gave Officer Pardee her work keys and asked him to return them to Respondent and to tell Respondent that she quit and wanted no further contact with him. At the same time, she also complained of Respondent's sexual conduct during her employment, indicating that in her mind it was linked to Respondent's fisticuff. Her stated reason for quitting was her fear for her safety, a fear Respondent had already generated because of his previous sexual conduct towards Complainant. The forum views Respondent's use of his fists on Complainant as the last link in the chain of Respondent's continuing conduct throughout Complainant's brief employment that made her fear for her safety. Under these circumstances, the forum finds that Respondent's fisticuff is inextricably linked to his previous objectionable sexual conduct, that Respondent imposed objectively intolerable working conditions that he should have known would have caused Complainant to resign and would have caused a reasonable person in Complainant's position to resign, and that Complainant

resigned because of those conditions, constituting a constructive discharge in violation of ORS 659A.030(1)(a) and OAR 839-005-0035.

DAMAGES

A. Back pay.

The commissioner has the authority to fashion a remedy adequate to eliminate the effects of unlawful employment practices. *In the Matter of Executive Transport, Inc.,* 17 BOLI 81, 96 (1998). The purpose of back pay awards in employment discrimination cases is to compensate a complainant for the loss of wages and benefits the complainant would have received but for the respondent's unlawful employment practices. ORS 659A.850(4)(b). The awards are calculated to make a complainant whole for injuries suffered as a result of the discrimination. *See, e.g., In the Matter of Trees, Inc.,* 28 BOLI 218, 251 (2007). A complainant who seeks back pay is required to mitigate damages by using reasonable diligence in finding other suitable employment. *In the Matter of Rogue Valley Fire Protection,* 26 BOLI 172, 184 (2005).

The Agency stated during its closing argument that it was only seeking back pay for the 12 hours Complainant worked on August 11-14 and August 30 for which she was not paid. As stated above, a back pay award is calculated to make a complainant whole for injuries suffered as a result of the discrimination. Here, there is no evidence that Respondent's failure to pay Complainant for those hours was in any way related to unlawful discrimination.

B. Emotional, mental, and physical suffering.

In determining an award for emotional and mental suffering, the forum considers the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. The actual amount depends on the facts presented by each complainant. A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. *Trees, Inc.,* at 218. It also considers the type and duration of the mental distress and the vulnerability of the complainant. *In the Matter of State Adjustment, Inc.,* 23 BOLI 19, 32-33 (2002), *amended* 230 BOLI 67 (2002). With regard to the particular sensitivity of a complainant, respondents must take complainants "as they find them." *Trees, Inc.* at 218.

The Agency established the emotional, mental, and physical suffering experienced by Complainant as a result of Respondent's unlawful conduct through the credible testimony of Complainant and her friend Amy Anderson. From August 11-14, and August 27-30, 2007, Complainant was subjected to a variety of types of verbal and physical sexual harassment by Respondent, culminating in her constructive discharge on August 30, 2007, after Respondent hit her on the head with his fist. The har-

assment itself, while ongoing, made her feel "scared" and "embarrassed," "awful," "disgusting," "sickened," "scared that I was alone in there with him," and "on edge." When Respondent hit her on the head, she was still recovering from major dental surgery and the blows caused her serious physical pain. Her reaction was to finish her shift, then call her friend Anderson and her father, both of whom advised her to file a report with the police. Anderson credibly testified that Complainant was crying, hyperventilating, and barely able to talk when Complainant called her, and that Complainant was very shaken up, had "large red bags under her eyes," her face was "splotchy," and she was still crying when she arrived at Anderson's house after making the police report.

Complainant was only 21 years old when she worked for respondent and her only prior work experience was part time child care for friends. After she quit working for Respondent, Complainant quit looking for work altogether because of her anxiety about encountering a similar situation with a new employer and turned into a "recluse" for the next 1½ months. Her attitude towards strangers changed and she became "anxious about everything" and nervous around strangers.

Complainant attended fall term at Lane Community College in 2007. She sought counseling there for the anxiety she had because of her experience working for Respondent and attended four counseling sessions, once a week for four weeks. To get to one of her classes, she had to walk past the school cafeteria that had a coffee stand. Because of her experience with Respondent, the smell of the coffee made her feel as though she was going to vomit, so to avoid the smell she began walking around the outside of the building to get to the elevator.

On one occasion after she quit Respondent's employment, Complainant became nervous because she thought Respondent's car was following her. She still gets anxious when she sees cars that look like Respondent's, when she sees people who remind her of Respondent, and when she hears people talk like Respondent. She still does not like driving past Respondent's coffee booth. Having to be in Respondent's presence at the hearing made her very nervous. Her good friend Anderson credibly testified that Complainant "has turned into a little bit of an anxiety box" since working for Respondent. Finally, she still has nightmares about Respondent.

In its Formal Charges, the Agency asked for damages for Complainant's emotional, mental, and physical suffering "in the amount of at least $50,000." Under the facts and circumstances of this case, the forum finds that $50,000 is an appropriate award to compensate Complainant for the emotional, mental, and physical suffering she experienced as a result of Respondent's unlawful employment practices.

ORDER

NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent's violations of ORS 659A.030(1)(a) and ORS 659A.030(1)(b), and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Charles Edward Minor** to:

Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries **in trust for Complainant Stephanie Head** in the amount of:

1) FIFTY THOUSAND DOLLARS ($50,000), representing compensatory damages for emotional, mental, and physical distress Stephanie Head suffered as a result of Respondent's unlawful practices found herein; plus,

2) Interest at the legal rate on the sum of $50,000 from the date of the Final Order until Respondent complies herein; and,

3) Cease and desist from discriminating against any employee based upon the employee's gender.

In the Matter of
Spud Cellar Deli, Inc.

Case Nos. 21-08 & 22-08

Final Order of Commissioner Brad Avakian

Issued June 14, 2010

SYNOPSIS

The Agency alleged that Respondent, through its male president, sexually harassed two female complainants. The Agency further alleged that Respondent retaliated against one complainant by reducing her work hours after she complained of the harassment. Finally, the Agency alleged that both complainants were constructively discharged based on their sex. The Commissioner found that one complainant was subjected to sexual harassment based on "tangible employment action" and "hostile work environment" theories of sexual harassment and constructively discharged because of her sex, while the other complainant was subjected to sexual harassment based on a "hostile work environment" theory of sexual harassment but not constructively discharged or a victim of retaliation. The Commissioner awarded $309.58 in back pay and $10,000 in damages for emotional distress damages to the first complainant and $5,000 in emotional distress damages to the second complain-

ant. ORS 659A.030, OAR 839-005-0010, OAR 839-005-0021, OAR 839-005-0030, OAR 839-005-0035.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 18-20, 2009, in the Oregon Employment Department conference room, Suite 105, located at 700 Union Street, The Dalles, Oregon.

Case presenter Jeffrey C. Burgess, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "Agency"). Miriam Ruiz-Najera and Simone D. Brincken ("Complainants") were present throughout the hearing and were not represented by counsel. Attorney Jennifer L. Bouman-Steagall represented Spud Cellar Deli, Inc. ("Respondent"). Gerald Huston, Respondent's corporate president, was present throughout the hearing as a corporate representative.

The Agency called as witnesses: Susan Moxley, Senior Investigator, BOLI Civil Rights Division; Complainants; Shawna Moss, police detective, The Dalles Police Department; Amanda Feriante, Respondent's former employee; Brandon Hoover, Respondent's former employee; Marilyn Roth, Respondent's landlord and publisher of The Dalles Chronicle newspaper; and Gino Feriante, Amanda Feriante's father.

Respondent called as witnesses: Jim Pernetti, free lance photographer; Adam Bradley, general manager, Staples; Carol Huston, Gerald Huston's wife; Hewitt Hillis, heating and electrical contractor, Oregon Equipment Company; Gerald Huston, Spud Cellar Deli, Inc. president and owner; Christina Harris, Respondent's former employee; and Tammy Kindrick, Respondent's current employee.

The forum received as evidence:

a) Administrative exhibits X-1 through X-16;

b) Agency exhibits A-1 through A-10 (filed with the Agency's case summary), A-11 through A-13 (submitted during the hearing).

c) Respondent exhibits R-1 through R-6 (filed with Respondent's case summary), R-7 through R-9 (submitted during the hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On or about February 3, 2006, Complainant Miriam Ruiz-Najera ("Complainant Ruiz-Najera") filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging Gerald Huston, Respondent's corporate president, subjected her to discriminatory working conditions, sexually harassed her, and failed to provide a workplace free from sexual harassment in that he allegedly 1) touched her thigh; 2) called her "muchacha caliente" which means "horny girl" in Spanish; 3) made comments about other females in her presence, such as, "Look at her boobs"; and 4) cut a hole in the wall of the women's bathroom "so he could view women in the bathroom." Complainant further alleged Respondent retaliated against her by cutting her work hours for reporting sexual harassment and constructively discharged her because she filed a police report against Respondent for "cutting a hole in the wall of the women's bathroom so that he could look at women in the bathroom." After investigation and review, the CRD found substantial evidence supporting some of Ruiz-Najera's allegations.

2) On or about May 9, 2006, Complainant Simone D. Brincken ("Complainant Brincken") filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging Gerald Huston, Respondent's corporate president, put his arm around her and asked if he could kiss her on the lips and that she said "no" and asked him to stop. She further alleged that Huston made unwelcome and offensive comments to at least five other female employees and that she was forced to quit as a result of the "sexually hostile environment" to which she was subjected. After investigation and review, the CRD found substantial evidence supporting Brincken's allegations.

3) On October 28, 2008, the Agency filed formal charges against Respondent, alleging that Gerald Huston, Respondent's corporate president, knowingly and purposely subjected Complainant Ruiz-Najera and other female employees to unwelcome sexual advances, sexual comments, offensive touching, and other conduct of a sexual nature,[1] that the conduct was directed toward Ruiz-Najera because of her gender, and that the conduct was implicitly made a term or condition of employment, or was used as the basis for employment decisions affecting Ruiz-Najera, including her work hours, her discharge and the denial of the privileges of employment. Additionally or alternatively, the Agency alleged the conduct, both verbal and physical, was suffi-

[1] The "other conduct of a sexual nature" alleged was that Complainant Ruiz-Najera had discovered what she believed to be a "peephole" in Respondent's women's restroom and that she later reported the peephole and Respondent's alleged sexually offensive conduct to The Dalles Police Department.

ciently severe or pervasive to have the purpose or effect of unreasonably interfering with Ruiz-Najera's work performance, thereby creating a hostile, intimidating or offensive working environment. The Agency further alleged Huston was Respondent's owner and president and of sufficient rank to be Respondent's proxy and, as such, Respondent is liable for the alleged conduct. The Agency also alleged Respondent retaliated against Ruiz-Najera by cutting her work hours because she made a police report against Respondent to The Dalles Police Department. The Agency alleged Respondent intentionally created or maintained discriminatory working conditions related to Ruiz-Najera's gender, that a reasonable person in Ruiz-Najera's circumstances would have found the working conditions so intolerable that she would have resigned because of them, and that Ruiz-Najera did not return to work as a result of those conditions. The Agency further alleged Respondent desired to cause Ruiz-Najera to leave her employment, or knew or should have known that she was certain, or substantially certain, to leave her employment as a result of the allegedly intolerable working conditions, thereby constructively discharging Ruiz-Najera. Along with the formal charges, the Agency filed a request for hearing.

4) On October 29, 2008, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:00 a.m. on January 13, 2009. With the Notice of Hearing, the forum included the formal charges, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

5) On October 28, 2008, the Agency filed formal charges against Respondent, alleging Gerald Huston, Respondent's corporate president, knowingly and purposely subjected Complainant Brincken and other female employees to unwelcome sexual advances, sexual comments, offensive touching, and other inappropriate conduct of a sexual nature, that the conduct was directed toward Brincken because of her gender, and that the conduct was implicitly made a term or condition of employment, or was used as the basis for employment decisions affecting Brincken, including her discharge and the denial of the privileges of employment. Additionally or alternatively, the Agency alleged that the conduct, both verbal and physical, was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with Brincken's work performance, thereby creating a hostile, intimidating or offensive working environment. The Agency further alleged that Huston was Respondent's owner and president and of sufficient rank to be Respondent's proxy and, as such, Respondent is liable for the alleged conduct. The Agency also alleged Respondent

intentionally created or maintained discriminatory working conditions related to Brincken's gender, that a reasonable person in Brincken's circumstances would have found the working conditions so intolerable that she would have resigned because of them, and that Brincken did not return to work as a result of those conditions. The Agency further alleged Respondent desired to cause Brincken to leave her employment, or knew or should have known that she was certain, or substantially certain, to leave her employment as a result of the allegedly intolerable working conditions, and, therefore, constructively discharged Brincken. Along with the formal charges, the Agency filed a request for hearing.

6) On October 29, 2008, the Hearings Unit issued a Notice of Hearing in the matter of Complainant Ruiz-Najera stating that the hearing would commence at 9:00 a.m. on January 13, 2009. On October 29, 2009, the Hearings Unit also issued a Notice of Hearing in the matter of Complainant Brincken stating that the hearing would commence at 9:00 a.m. on January 14, 2009. With the Notice of Hearing, the forum included the formal charges, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

7) On or about October 30, 2008, Respondent was served with both sets of formal charges and the respective notices of hearing.

8) On October 31, 2009, the Agency filed a motion to consolidate the two cases, citing questions of fact and law common to both cases. Respondent did not respond to the motion. On November 12, 2008, the ALJ issued an interim order that granted the Agency's motion and reset the hearing to begin at 9 a.m. on January 13, 2009.

9) Respondent timely filed an answer to the formal charges involving Complainant Ruiz-Najera. In its answer, Respondent admitted employing Ruiz-Najera during the period alleged and that Ruiz-Najera made a report to The Dalles Police Department, but denied that Ruiz-Najera was subjected to unwelcome or offensive sexual conduct, that she was retaliated against, or constructively discharged because she opposed the alleged conduct or filed a police report. Additionally, Respondent alleged six affirmative defenses.

10) Respondent timely filed an answer to the formal charges involving Complainant Brincken. In its answer, Respondent admitted employing Brincken during the period alleged and that Respondent told Brincken that some other employees had complained about him, but denied that Brincken was subjected to unwelcome or offensive sexual conduct. Respondent admitted Brincken quit her employment, but denied that she was constructively discharged because

she opposed the alleged sexual conduct. Additionally, Respondent alleged six affirmative defenses.

11) On December 19, 2008, the ALJ ordered the Agency and Respondent each to submit a case summary for each case that included: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and, for the Agency only, a brief statement of the elements of the claim and any wage and penalty calculations. The ALJ ordered the participants to submit their case summaries by January 5, 2009, and notified them of the possible sanctions for failure to comply with the case summary order.

12) On December 31, 2008, the Agency moved for a postponement of the hearing and an extension of time to file case summaries. The Agency's motion was made on the ground that Respondent's counsel had been traveling out of state due to a death in her family and was unable to adequately prepare for hearing. Respondent did not oppose the motion and the Agency stated that the motion was made "as a courtesy" to counsel and Respondent. On January 7, 2009, the ALJ granted the Agency's motion and extended the due date for filing case summaries. The hearing was rescheduled to commence on February 18, 2009, and the case summary deadline was extended to February 6, 2009.

13) The Agency and Respondent timely submitted case summaries.

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

15) The ALJ issued a proposed order on December 18, 2009, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Upon the Agency's motion, the participants were granted a 90-day extension of time to file exceptions. The Agency timely filed exceptions on April 8, 2010, that were primarily related to the proposed order's findings of witness credibility. In response to those exceptions, the entire record has been reviewed and changes have been made throughout this Final Order.

FINDINGS OF FACT – THE MERITS

1) At times material, Respondent Spud Cellar Deli, Inc. ("Spud") was a domestic corporation operating a restaurant in The Dalles, Oregon, under the assumed business name of Spud Cellar Deli ("Spud").

2) At times material, Gerald "Jerry" Huston, a male, was Respondent's owner and president.

3) Huston opened Spud on or about April 3, 2005. Initially, Huston spent much of his time overseeing the kitchen. The recipes were his own and he closely

watched how the employees prepared the recipes, how they plated the food, and how promptly they served the food to the customers. He also operated the cash register and helped bus tables, also managed the day to day operations, including taking inventory, ordering groceries, and doing the scheduling, and did the bookkeeping and handled the advertising and promotions. Some employees perceived Huston as being "in the way" and always "near" them all the time. Huston continues to run the deli in the same manner and, except for adding an enclosed lottery concession and moving some kitchen fixtures, the space Spud occupies has not changed significantly.

4) Spud has a small windowless office in the back, but Huston, who is claustrophobic, prefers to conduct his business from a dining table just outside the kitchen area near the back door ("Huston's table"). Huston can see part of the kitchen operations through a pass-through window between the kitchen and dining area. The kitchen area is small and, among other things, includes a sandwich preparation counter, a refrigerator, a utility rack, a freezer, a hand sink, and a table with soup pots. The distance between the sandwich preparation counter and the utility rack on the opposite side is approximately three feet eight inches. The distance between the sandwich preparation counter and everything else on the opposite side is less than three feet eight inches. When Spud first opened, a 48 inch stainless steel work table with a meat slicer stood where the utility rack now stands and the kitchen was "very cluttered." Two people could not work in the kitchen comfortably and employees tended to bump into each other while working in the kitchen.

5) The dishwashing area is next to the freezer and has three sinks for washing, rinsing, and bleaching the dishes. Dirty dishes are taken to the sink for washing after the tables are cleared. The sinks have been in the same place "since day one." Other than some minor changes, the kitchen area is about the same size as it was when Spud opened in 2005.

6) To use the restrooms, customers must go through a door at the back of Spud's dining area. That door leads to a hallway in which the restrooms are located next to each other on the left hand side of the hallway, with the men's restroom closest to the door leading from the dining area into the hallway. The women's restroom is next to another door at the end of the hallway that opens into a "giant unfinished storage room" owned by the local newspaper, The Dalles Chronicle. The Chronicle's office is on the other side of the storage room. Both restrooms have identical vents located approximately 10 to 12 inches from the floor in the side wall of each restroom. The vents are approximately 12 by 12 inches square and there is no ducting or wiring behind the vent covers. Except for the paint color in the men's restroom, the restrooms,

vents and storage room have not changed since 2002. The vent cover in the women's restroom covers a hole cut in the wall and there is a matching hole on the other side of the wall in the unfinished storage room that is also covered with a vent cover. The toilet in the women's room is visible from the storage room to an observer who crouches or is prone on the floor while looking through the vent.

7) Hewitt Hillis, owner of Oregon Equipment Company, a residential and commercial construction company, installed the bathroom vents in May 2002 during a bathroom remodel for the previous tenant, Holstein's Coffee Company.

8) Huston opened the restaurant primarily to become a lottery retailer. To that end, he began doing some remodeling. Marilyn Roth, owner of the building and The Dalles Chronicle, gave him permission to store his carpentry tools in the unoccupied storage room. Not all items in the storage room belonged to Huston, including some construction equipment and a ladder. On the far side of the storage room, there are two other doors, one leading directly to The Dalles Chronicle offices. For several months after the restaurant opened, the doors to the unoccupied storage room were unlocked during business hours and restaurant employees, newspaper employees, and customers had access to the area. During times material, the door to the hallway, restrooms and storage area could not be seen from Huston's table near the kitchen.

9) On or about July 29, 2005, Huston hired Complainant Brincken ("Brincken") to take food orders and do general clean up for Respondent at the wage rate of $7.25 per hour. Previously, Brincken and her husband had worked at a True Value hardware store with one of Respondent's employees, Amanda Feriante ("A. Feriante"). A. Feriante had encouraged Brincken to come and work with her at the Spud Cellar Deli and recommended that Huston hire Brincken.

10) Huston was Brincken's immediate supervisor throughout her employment with Respondent and was present in the deli "most of the time." Brincken worked with A. Feriante and four other employees, including Brandon Hoover, A. Feriante's boyfriend at that time.

11) Once, Huston asked Brincken if he could put his hand on her shoulder, telling her that other people had complained about that and he just wanted to make sure she was not uncomfortable. Brincken did not object and gave him permission to put his hand on her shoulder. Previously, Huston had put his hand on a female employee's shoulder while telling her she was doing a good job and the employee had told him that was sexual harassment.[2]

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[2] Huston told Moxley he had put his hand on a female employee's shoul-

12) A. Feriante worked for Respondent from April 20, 2005, until August 26, 2005. When she was first hired, Huston told her and several female co-workers that he was going to make a plexiglass changing room; that they would have to wear white T-shirts to work and he would have wet T-shirt contests and that he would turn the business into a "strip club" and have them be "pole dancers." He clearly meant comments as "jokes." On one occasion, Huston walked up behind Feriante with a lollipop in one hand and put his other hand around her and touched her just above her right hip while offering her candy. Once, he swatted her "on the butt" with some papers. These behaviors made her feel uncomfortable and objectified. On another occasion, Huston put his hand on her shoulder and complimented her on her work. Feriante saw Huston swat Andee Lynch on the behind with papers, but did not see Huston touch any other employees with his hands.

13) As of August 26, 2005, Respondent employed A. Feriante, Brandon Hoover, Brandie Grayson, Andee Lynch, and Brincken. Hoover was the only male other than Huston.

14) On August 26, 2005, Huston had a lengthy meeting with a Lottery Commission representative at Spud. Around 11 a.m., A. Feriante was talking with Andee Lynch outside Spud about something that Huston had said about Andee's daughter. Both were visibly upset. While they were talking, Amanda's father Gino Feriante ("G. Feriante") approached them and ascertained that they were upset about "sexual harassment" by Huston. G. Feriante was in the neighborhood because he had gone for a walk to visit Amanda at work on her break, something he did periodically.

15) G. Feriante became upset and went inside the restaurant to talk with Huston. At the time, Huston was talking with the Lottery Commission representative and had his back to G. Feriante. G. Feriante tapped Huston on the shoulder, told him to never put his hands on A. Feriante again, and added that if he did G. Feriante would be "coming after him." G. Feriante also told Huston not to touch any of Respondent's other female employees. In response, Huston called the police. When a police officer from The Dalles Police Department arrived, he interviewed Huston and G. Feriante. The officer told G. Feriante he could either see an attorney or go to the "Labor Board" about a possible "hostile work place claim." Huston declined to press charges against G. Feriante.

16) Later that same day, all of Respondent's employees ex-

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der while telling her she was doing a good job and the employee had told him that was sexual harassment but didn't recall the person's name; the forum infers this was the incident he referred to when he asked Brincken's permission to put his hand on her shoulder

cept Brincken walked off the job and did not return.

17) On August 29, 2005, Respondent hired two replacement employees – Lacey Owen and Silver Hartung, both female. Complainant Ruiz-Najera ("Ruiz-Najera"), a female, was hired on August 30, 2005. Respondent hired Tiffany Bates, a female, on September 28, 2005, after Owen left Respondent's employment on September 13, 2005.

18) On October 21, 2005, Huston, who had been talking on the phone with someone from the Lottery Commission, approached Brincken, put his hand around her shoulder like he was going to hug her, and asked her if he could kiss her on the lips. Brincken was "taken aback," felt "shocked," told him "no," and stepped back. Huston began talking about how the Lottery Commission was going to let him go through the process of having lottery machines. Huston's touching and proposal made her feel "gross" and "not happy" like she "had been violated" and her "personal boundary had been crossed."[3] She complained to Ruiz-Najera about the incident and complained she did not like to be touched because she was married. Brincken did not say anything else to Huston about the incident.

19) Previously, Andee Lynch had told Brincken that Huston said something to her about having a private evaluation in his office that involved strawberries and whipped cream. Brincken had also observed Huston making gestures towards other female employees, acting as though he were squeezing or going to smack them on the bottom. She also saw Huston come up behind other female employees and put his arm around their waist or on their shoulder. When Huston was not around, Brincken overheard those other employees talking about how that made them feel uncomfortable. Other employees also complained directly to her about Huston's behavior. As a result of what she heard and saw, Brincken tried to make sure she was not alone with or physically close to Huston, although other than his request to kiss her on the lips she never heard Huston make any sexually explicit or inappropriate comments to herself or anyone else.

20) The next day, Brincken decided to quit because of Huston's request for permission to kiss her and also decided not to tell Huston that she was leaving. She worked one more week, during which Huston was out of town the entire time. Brincken gave her letter of resignation to Tiffany Bates on October 28, 2005, and picked up her final paycheck at the same time.

21) Huston's behavior described in the Findings of Fact ## 11, 18 & 19 – The Merits was "up-

[3] Brincken testified that, although she had observed Huston touching other employees, "it's always different when it happens to you."

setting" to Brincken. She "tried not to think about it and tried not to let it affect [her]. It was "disturbing" and "it still upsets" her and she has tried to be more cautious with male employers since leaving Respondent's employment.

22) In October 2005, Brincken worked 170.8 hours for Respondent, earning gross wages of $1,238.30, an average of $309.58 per week.

23) Brincken begin looking for work immediately after leaving Respondent's employment and started work at another job on November 7, 2005, that paid the same as Respondent. She was happy working at her new job and did a good job; her experience with Huston did not keep her from doing a good job.

24) Ruiz-Najera was hired to wash dishes and bus tables for Respondent at the wage rate of $7.25 per hour. Huston was Ruiz-Najera's immediate supervisor throughout her employment. During her employment, Ruiz-Najera worked with Brincken, Tiffany Bates, Jessica Bonneau, Henry Banner, Christina Harris, Shanna Rice, and Paige Thomsen.

25) When Ruiz-Najera started work, she thought Huston was "nice," but after starting work heard that he "joked" around with female employees in a "sexual manner."

26) Beginning on August 29, 2005, Huston began asking his employees to read and sign a sexual harassment policy. The policy included a provision that required employees to report any sexual harassment to "the owner of Spud Cellar Deli; or other supervisor" but did not advise employees how to report harassment if Respondent's owner was the harasser. Huston intended to send employees to his personal attorney if any of them accused him of sexual harassment. Ruiz-Najera signed the policy on September 28, 2005. Brincken did not sign the policy and there is no evidence that she was asked to sign it.

27) Prior to mid-September 2005, Huston learned of the term "muchacha caliente" from a Hispanic acquaintance in Eugene who referred to his sister-in-law as "muchacha caliente" and told Huston that she was a "hot chick" and "very beautiful."

28) In mid-September 2005, Huston said "muchacha caliente" at work while directing the words at Ruiz-Najera. Huston said "muchacha caliente" again that day and told Ruiz-Najera his Hispanic friends had told him it meant "pretty girl." Ruiz-Najera told Huston it did not mean "pretty girl," but that it meant "horny girl" and she did "not want to hear it, especially if you are going to say it to me." Ruiz-Najera also told Huston that it was disrespectful. Later that same day, Huston told Ruiz-Najera he would verify the meaning of "muchacha caliente" with his Hispanic friends. Ruiz-Najera told him "okay, but I don't want to hear it." Huston then talked with his Hispanic friends

and they told him that "muchacha caliente" means "horny girl" and that it was not a respectful thing to say. The next time Huston said "muchacha caliente" to Ruiz-Najera, Huston said he had talked with his friends and verified that "muchacha caliente" did mean "horny girl." Ruiz-Najera again told Huston she did not want to hear it and that it did not mean "pretty girl." On another day, Huston said "muchacha caliente" to Ruiz-Najera once more and she told him that she did not want to hear it because it was insulting. Ruiz-Najera felt disrespected by Huston when he called her "muchacha caliente."

29) On November 7, 2005, Ruiz-Najera discovered that the hole behind the screen in the wall of the women's in the bathroom at Respondent's business went all the way through the wall to the storage room on the other side, where the hole was covered by another vent screen, and that there was an upside down bucket in the storage room near the vent screen. At approximately 3:30 p.m. that same day, Ruiz-Najera went to The Dalles police department and was interviewed by Officer Shawna Moss. She reported a "peep hole" in Respondent's women's bathroom, and said she believed Huston could have been watching through the "peep hole" as women used the toilet. Ruiz-Najera made a number of other statements to Moss, including telling Moss that the only reason she had not quit was because she needed the job to pay bills and that she had applied for work at other businesses, but had not yet been called in or hired. She also told Moss that that Huston "began saying 'muchacha caliente' (hot girl) in Spanish to [her]" and she had asked him to stop because it was disrespectful and meant "horny girl." She told Moss that Huston told her that he had learned it from his Mexican friends in Bend and he continued calling her that name even after she asked him to stop and "at one point, after [he] came back from Bend and told [her] that she was right, he confirmed that it did mean 'horny girl.'"

30) Also on November 7, 2005, Tiffany Bates telephoned The Dalles Police Department and told Officer Baska that she wanted to report that someone had made a "viewing hole "to watch woman [sic] use the bathroom at her place of employment." Later that day, Baska and Detective Shawna Moss walked to Respondent's business and spoke with Bates and Tracy Wedgwood, Bates' co-worker. Bates and Wedgwood told the officers that they were both concerned about their jobs and were not sure they wanted to pursue the matter.

31) On November 11, 2005, Baska contacted Marilyn Roth at her office and spoke to her about the case. Baska closed the case on the basis that "do [sic] to the fact that the suspect is very much aware of our finding it is highly unlikely a successful investigation would come to this."

32) Because of numerous physical problems, Huston was

and is physically unable to position himself in a manner so he could look through the vent screen from the storage room side of the wall and see the toilet in the women's bathroom.

33) During Ruiz-Najera's employment, Respondent had a two week payroll period. Beginning with the payroll period ending September 28, 2005, Ruiz-Najera worked the following hours:

- Payroll period ending 9/13/05: 81.93 hours
- Payroll period ending 9/28/05: 61.5 hours
- Payroll period ending 10/12/05: 46.46 hours
- Payroll period ending 10/29/05: 66.17 hours
- Payroll period ending 11/11/05: 61.5 hours
- Payroll period ending 11/29/05: 53.5 hours
- Payroll period ending 12/13/05: 32.92 hours

34) On or about December 10, 2005, Ruiz-Najera handed Huston a resignation note giving two weeks notice that she was quitting. Huston posted her resignation on Respondent's bulletin board. Before giving notice, Ruiz-Najera had begun looking for other employment. Shortly thereafter, her son became sick, and she called in to work so Respondent could find a replacement for her shift. She worked a few more days, then quit coming into work. At that point, Huston was not interested in continuing Ruiz-Najera's employment for a full two weeks after she gave her notice. After giving her notice, Ruiz-Najera actively looked for employment. On January 20, 2006, she began working at Staples.

35) Victoria Hartung, a female, worked for Respondent from August 29 until November 1, 2005. On November 9, 2005, she visited The Dalles Police Department to complain about Huston's behavior. Shawna Moss, a detective from The Dalles Police Department, interviewed Hartung. Among other things, Hartung told Moss that:

1. Huston tried to touch her on her shoulder once she stepped back.

2. Huston asked her if it offended her that he would try to touch her.

3. Huston told her that one of his crews had recently all walked out and filed sexual harassment charges on him.

4. She saw Huston put his arms around Tiffany and Brincken "several times," each time "standing beside either of the girls and putting his arm around them from behind with his hand on their shoulder. Huston would then give them a squeeze, pulling them closer to his side."

5. In a conversation about her family, she told Huston that her sisters "are curvier and had more meat on their bones" and Huston then told her that he thought she was "pretty curvey [sic] herself."

6. Brincken told her that Huston had asked if he could kiss her on the lips.

Although these are hearsay statements, the forum credits most of statements 1, 2, 3, and 6 as reliable because they are consistent with other credible evidence in the record. The forum discounts statement 4 because it is inconsistent with Brincken's credible testimony. Statement 5 is given no weight because, assuming it is true, neither Complainant was aware of the conversation.

36) At the time of the hearing, Tammy Kendrick, a female, had worked for Respondent and with Huston at Respondent's business continuously since October 2007. On one occasion during her employment, Huston patted her on the shoulder, told her she had done a good job, then asked her if it offended her when he patted her on the shoulder and she replied "no." The forum credits Kendrick's testimony in its entirety.

37) On November 11, 2005, Rayanna Lanquist and Regina Bergner, who both worked for Respondent for approximately three weeks in April 2005, visited The Dalles Police Department and spoke with detective Baska "about this case." They told Baska that both had worked for Huston when the restaurant first opened. Baska prepared a "Continuation Report" that stated, in pertinent part:

"Lanquist told me that she quit the restaurant because of the stress caused by her employer Gerald Huston. She said he would yell one minute and be nice the next and he continually changed his mind on how he would want something done. She said there were a lot of sexual innuendos and she gave some examples. She said that he referred to his female employees as strippers. On one occasion he brought in a wooden bench, and Lanquist, Bergner and another female employee were sitting on it. Huston made the comment he would like a picture of the three of them sitting on it naked. She said he was always making sexual comments.

"Bergner said that she too was a target of sexual harassment by Huston. Bergner said Huston said he told employees and customers that Bergner was his Norwegian stripper. Bergner does have an accent that sounds as if she might be from that area. I didn't ask Bergner if she was Norwegian however. Bergner also talked about the bench incident, but she also added that one time he came up behind her and wrapped his arms around her. She said it surprised her, but at first she thought it was one of the women, but when she turned her head to see she was shocked to see it was Huston.

"Both Lanquist and Bergner both started working for Huston when he first opened the restaurant in March. Both

said that the vent in the bathroom was not there when the restaurant was first opened, or when they left. I had showed them the photographs taken of the back side of the vent. Lanquist said she was the restaurant's manager at the time it opened up and she had been in the storage room on several occasions both when she worked for Holsteins and when she worked for Huston. Holsteins was the occupant just before Huston was. She said she knows for a fact that that vent was not there.

"I explained to both that because of some events that occurred the investigation had been compromised and the case was being closed till something else developed."

The forum gives these statements no weight because they are multiple hearsay, because Officer Baska did not appear as a witness and was not available for cross-examination, and because Lanquist's and Bergner's statements that there was no vent in the bathroom when they first started work for Respondent are untrue.

38) Tiffany Bates worked for Respondent from September 28 through November 30, 2005. On December 1, 2005, Bates contacted The Dalles Police Department and spoke to Detective Doug Kramer. After interviewing Bates, Kramer wrote a "Continuation Report" that stated, in pertinent part:

"Bates told me that she used to work at the Spud Cellar Deli/303 E. 3rd St and two weeks ago her Employer (Gerald Huston) smacked her on her left butt cheek while she was at work. Bates told me that she had dropped some meat that she was cutting and that was when Huston smacked her. Bates said that she had reported the incident to Sergeant Baska, but she didn't want to have a report made because she possibly would have been fired. Bates told me that she quit working at the Spud Cellar yesterday and has now decided she wants to pursue charges.

"I asked Bates if anyone witnessed Huston slapping her on the butt and she said that there were a few workers that saw, but Miriam Ruiz-Najera was the only one that would come forward and tell me that she saw it. Bates said that the rest of the employees are fearful of being fired if they say anything.

"I asked Bates if Huston said anything when he hit her and she said he did, but she can't recall what it was. I asked Bates if she said anything to Huston and she said no, she was shocked he did it and was afraid if she did say something he would fire her.

"Bates said that Huston has made several sexual comments to her in the past, like asking her about her sexual experiences with her boyfriend and making comments about

> mud wrestling and she has told him that those things are gross. I asked Bates if she had told him that she doesn't like him talking to her that way and she said no, for fear that he might fire her."

The forum gives these statements no weight because they involve multiple hearsay, because Officer Kramer did not appear as a witness and was not available for cross-examination, and because Bates's statement that she previously told Baska that Huston had smacked her on the butt is not included in Baska's November 7, 2005, notes of his interview with Bates.

39) Christina Harris has worked for Respondent on two occasions. She never worked with Complainant Brincken and worked with Complainant Ruiz-Najera for a week or less. Based on her denial of a statement potentially damaging to Huston that she made to Moxley, and two more statements – one made at the hearing and another made to Moxley -- that are contradicted by credible evidence in the record, the forum has not believed her testimony except when it was corroborated by other credible evidence. To summarize those statements, Harris told Moxley that she "imagines that Huston did say some sexual things." At hearing, she denied making that statement but the forum has determined that Moxley's interview notes were an accurate representation of statements made by Harris. She told Moxley that the father of the employee who filed a sexual harassment claim in court (Gino Feriante) came into the business and punched Huston in the face. In contrast, Huston claimed he was punched either on the back of the head or on the shoulder and Feriante credibly testified that he did not punch Huston, but "tapped" him. Finally, she testified that she looked at the hole in the wall of the women's bathroom, that it only went through one sheet of drywall and did not go through the other side of the wall, a statement contradicted by every other witness who testified on that issue.

40) Police detective Shawna Moss was a credible witness and the forum credits her testimony in its entirety.

41) Marilyn Roth, publisher of The Dalles Chronicle that owns the building in which Respondent's business is located and who leases the building space to Respondent, was a credible witness and the forum credits her testimony in its entirety.

42) Amanda Feriante was a credible witness and the forum credits her testimony in its entirety.

43) Gino Feriante testified as a rebuttal witness for the Agency regarding his encounter with Huston on August 26, 2005. He was a credible witness and the forum has believed his version of the encounter whenever it conflicted with Huston's testimony. The forum credits his testimony in its entirety.

44) Brandon Hoover was A. Feriante's boyfriend at the time they worked for Respondent and worked for Respondent from August 2 through August 26, 2005. At the time of the hearing A. Feriante was engaged to someone else, and her fiancé accompanied her to the hearing. Although the forum does not find that Hoover's testimony was influenced by his former relationship with Feriante, there are several reasons that lead to forum to distrust his testimony. First, he testified that he saw Huston give Brincken "a few good game slaps on the butt" and "grab her hip" once, incidents neither alleged nor testified to by Brincken. Had these events actually occurred, it is difficult for the forum to imagine, given the nature of the case, the Agency would not have alleged them in their Formal Charges, and that Brincken herself would not have testified to them. Second, he testified that Brincken told him she did not like Huston's slaps and grab, whereas Brincken never testified that she had complained to Hoover. Third, he testified that he worked in June, July, and August 2005 for Respondent. In contrast, Respondent's unchallenged payroll record generated by its agent Paychex, which shows the dates of employment for all of Respondent's employees in 2005, shows that Hoover worked from August 2 until August 26, 2005. A. Feriante also credibly testified that Hoover only worked "3-4 weeks" for Respondent before they both quit. Fourth, Hoover became argumentative during cross examination. For these reasons, the forum only credits his testimony where it was corroborated by other credible evidence in the record.

45) Jim Pernetti authenticated photographs he took of the vent between the storage area and the women's restroom three weeks prior to hearing and the forum credits his testimony in its entirety.

46) Adam Bradley, a general manager at Staples, credibly testified that Complainant Ruiz-Najera submitted an application for a job on December 30, 2005, and was hired to work at Staples on January 20, 2006, and the forum credits his testimony in its entirety.

47) Carol Huston ("C. Huston") was a credible witness, despite being married to Huston and having a financial interest in Respondent, and the forum credits her testimony in its entirety.

48) Susan Moxley has been an investigator for the Agency for 22 years. With regard to her telephone interview with Christina Harris, Moxley testified that she typed her interview notes within 15-20 minutes after interviewing Harris, that her notes were accurate, that she did not type anything that Harris did not say, and that if there had been any ambiguity in Harris's statements or question in Moxley's mind as to what Harris said due to an unclear phone connection, she would have asked Harris to clarify her statement. As to her interview with Huston, she testified that she

dictated her notes as soon as the interview was over, that she reviewed the typed notes for accuracy, that she corrected some typographical errors before putting the interview into the investigative file, and that her typed investigative notes are an accurate reflection of statements made by Huston. Her testimony as to the accuracy of her interview notes was not impeached and the forum credits her testimony in its entirety.

49) Gerald Huston's testimony was only partly credible. The forum reaches this conclusion for the following reasons. First, he told Moxley that Ruiz-Najera showed him she had removed her resignation letter from Respondent's bulletin board, but he did not know how she got into the office to do that, whereas at hearing, he testified that Henry Banner, another employee, had told him that Ruiz-Najera used a credit card to get into the office. Second, Huston told Moxley that Gino Feriante came in and slugged him on the back of the head while Huston was being interviewed by the Lottery Commission representative, then ran out. At hearing, Huston testified that Feriante took off "at a dead run." The police log maintained by The Dalles Police Department, which was received into evidence, reflects that Huston told the police that Feriante hit him "on the shoulder." The forum also notes Feriante's credible testimony that he is physically unable to run because of his disability.[4] Third, he told Moxley that every single employee he had in 2005 is or was on drugs, and eight or nine are in the regional prison for drugs and/or theft related charges. He qualified this statement on cross examination to say he meant only the employees in the "early part" of 2005. Fourth, he told Moxley, when asked to describe his use of the term "muchacha caliente" in Ruiz-Najera's presence, that Ruiz-Najera did not talk to him about this at all and that he had used the term "muy caliente" while talking to someone else in the restaurant. At the hearing, he denied calling Ruiz-Najera "muchacha caliente," but testified that he told employee Henry Banner the only two words he knew in Spanish were "muchacha caliente" and that he wanted to learn more Spanish. Ruiz-Najera also credibly testified that Huston referred to her "muchacha caliente" several times. Finally, he told Moxley that Brincken, on her last day of work, told him she was quitting while on her way out the door. In contrast, Brincken credibly testified that Huston was in Bend during her last week of work and she did not see him at all to tell him she was quitting. The forum only credits Huston's testimony that was either uncontested or corroborated by other credible testimony.

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[4] The forum has credited both Huston's and Feriante's unimpeached testimony about their disabilities and the restrictions those disabilities place on them.

50) Complainant Brincken's testimony was internally consistent and consistent with the statements made to the Agency in her "Employment Discrimination Questionnaire" ("Questionnaire") and on her "Civil Rights Division Complaint of Unlawful Practice." In addition, her testimony that she never heard Huston make any sexually explicit or inappropriate comments but that other female coworkers complained to her about Huston's comments is not inconsistent with her statement on her Questionnaire that Huston made "lude/inappropriate [sic] comments and remarks about certain employees." She did not testify as to the specific names of the female coworkers whom she observed Huston touch and who complained to her about his touching and comments. However, the Agency established that Ruiz-Najera was subjected to unwelcome comments during Brincken's employment, A. Feriante was subjected to unwelcome comments and touching by Huston in a period of time that could have overlapped Brincken's employment, and Brincken herself was told by Huston that others had objected to his putting his hand on their shoulder. The existence of these incidents is sufficient evidence from which to draw an inference that Brincken could have observed Huston touching coworkers and they could have complained about Huston's touching and comments to her. The forum credits Brincken's testimony in its entirety.

51) Complainant Ruiz-Najera's testimony was only partly credible. The forum reaches this conclusion based on her prehearing statements that were inconsistent with her testimony at hearing, the internal inconsistencies within her testimony at hearing, her testimony that was contradicted by Complainant Brincken's credible testimony, and her tendency to exaggerate.

Ruiz-Najera's prior inconsistent statements. First, she submitted a Questionnaire to the Agency in which she set out, in some detail, all the ways that Huston had harassed her before November 15, 2005. In that Questionnaire, she omitted any mention that Huston touched her on the shoulders. In contrast, on November 7, 2005, she told Detective Moss that Huston had touched her once on the shoulders. At hearing, she testified during cross examination that Huston had put his hands on her shoulders once or twice. Second, in the same Questionnaire, she omitted any mention of a "sink" incident. On November 7, 2005, she told Detective Moss that on one occasion when she was washing dishes, standing in front of the sink, Huston came up behind her and placed one hand on either side of her while holding a dish and she quickly moved aside out of the way and he told her he was just putting the dish in the sink. On direct examination, she testified that Huston came up behind her and placed his hands on the sink, one on either side of her, and that he did not have anything

in his hand at the time. On cross-examination, she then testified for the first time that, when Huston came up behind her at the sink, his torso touched her back. Third, in Ruiz-Najera's sworn complaint she alleged she was constructively discharged "on or about November 21, 2005." At hearing, she testified that she did not submit her resignation until December 10, 2005, and that her last day of work was December 14, 2005. Those dates differ significantly. Although the complaint form may have been drafted by the Civil Rights Division, Ruiz-Najera signed and dated the complaint in the presence of a notary and her signature appears directly under the words "I swear (or affirm) that I know and understand this complaint that it is true to the best of my knowledge, information and belief." Consequently, any statements on the complaint form carry the same weight as sworn statements by Ruiz-Najera made at hearing.

Ruiz-Najera's testimony that was contradicted by Brincken's credible testimony. First, Ruiz-Najera testified at hearing that Huston "would always put his hands on [Brincken]" and that she saw Huston slap Brincken "on the butt." She also testified that Brincken cried after Huston asked if he could kiss her. In contrast, Brincken did not testify to crying and did not even allege that Huston ever slapped her "on the butt" or that Huston had touched her on any other occasions than those set out in Findings of Fact ##11 & 18 -- The Merits. Second, Ruiz-Najera testified that Brincken heard Huston call her "muchacha caliente," but there was no corroborative evidence that Brincken heard that statement, despite Brincken's testimony as a Complainant and witness at the hearing.

Ruiz-Najera's tendency to exaggerate. First, Ruiz-Najera testified that she saw Huston touch female employees other than Brincken inappropriately, but that it was really hard for her remember who those employees were because it is "so painful to remember". She then testified that she saw Huston slap Tiffany Bates, but this testimony is not supported by any other reliable evidence.[5] Given the detail Ruiz-Najera was able to testify to regarding her own personal trauma from events that happened at the same time, the forum concludes that Ruiz-Najera found it hard to remember because there was nothing for her to remember.[6] Second, Ruiz-Najera testified that her discovery of the vent in the

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[5] Bates did not testify at hearing, and although she did told The Dalles Police Department office Doug Kramer that Huston slapped her on the butt, the forum considers this evidence unreliable for the reasons stated in Finding of Fact #38 – The Merits.

[6] This does not inherently conflict with the forum's conclusion that Brincken observed Huston touching employees because Brincken started work a month earlier than Ruiz-Najera and several employees whom Brincken worked with, including Feriante, quit before Ruiz-Najera was hired.

woman's restroom traumatized her to such an extent that she can still not use public restrooms unless she absolutely has to and if anything looks suspicious and there are paper towels, she uses Scotch tape that she always carries with her to tape a towel over the hole. She testified that it makes her sick to her stomach just to think about the hole. Despite this purported trauma and her belief that Huston was using the vent as a peep hole, she did not testify that she did anything to cover the vent hole in the women's restroom during the five weeks after she discovered the vent or that she stopped using the restroom, and she continued to work for Huston for the next five weeks.

Based on all of the above, the forum only credits her testimony when it was corroborated by other credible evidence. Specifically, the forum believes her testimony concerning Huston's "muchacha caliente" remarks as set out in Finding of Fact #28 -- The Merits because of Huston's lack of credibility on that issue and because it was consistent with her statement made to Detective Moss. The forum also believes her testimony that Brincken complained to her that Huston had asked if he could kiss her because Brincken credibly testified that event had occurred and that she complained to Ruiz-Najera. The forum also credits her testimony that she was insulted and felt disrespected by Huston's use of the term "muchacha caliente." Finally, the forum credits her testimony about discovering the bathroom vent, but attaches no significance to it because there is no credible evidence that Huston ever used it as a peep hole. In contrast, the forum does not believe her testimony that Huston touched her thigh because there was no evidence that he touched anyone else except on the shoulder and because of Ruiz-Najera's general lack of credibility.

ULTIMATE FINDINGS OF FACT

1) At times material, Respondent was a domestic corporation operating a restaurant in The Dalles, Oregon, under the assumed business name of Spud Cellar Deli ("Spud"). Gerald "Jerry" Huston, a male, was Respondent's owner and president.

2) Huston opened Spud on or about April 3, 2005. During all times material, he managed the business and hired and supervised all its employees, including Complainants. Spud leased the building space in which it conducted business from The Dalles Chronicle, a newspaper business located on the other side of the building from Spud. There was a large storage room located between the two businesses in which Huston stored some of his carpentry tools.

3) In 2002, 12" square bathroom vents were installed in the men's and women's restrooms leased in 2005 by Spud for customer use. The vents were still there at the time of hearing.

4) On or about July 29, 2005, Huston hired Brincken at the wage

rate of $7.25 per hour to take food orders and do general cleanup. Brincken worked with several other female employees, including Amanda Feriante and Complainant Ruiz-Najera.

5) On one occasion, Huston asked Brincken if he could put his hand on her shoulder, telling her that other people had complained about that and he just wanted to make sure she was not uncomfortable. Brincken did not object and gave him permission to put his hand on her shoulder. Previously, Huston had put his hand on a female employee's shoulder while telling her she was doing a good job and the employee had told him that was sexual harassment.

6) A. Feriante worked for Respondent from April 20, 2005, until August 26, 2005. When she was first hired, Huston, in a joking manner, told her and several female co-workers that he was going to make a Plexiglas changing room; that they would have to wear white T-shirts to work and he would have wet T-shirt contests and that he would turn the business into a "strip club" and have them be "pole dancers." He clearly meant comments as "jokes." On one occasion, Huston walked up behind Feriante with a lollipop in one hand and put his other hand around her and touched her just above her right hip while offering her candy. Once, he swatted her "on the butt" with some papers. These behaviors made her feel uncomfortable and objectified. On another occasion, Huston put his hand on her shoulder and complimented her on her work. During her employment, Feriante also saw Huston swat Andee Lynch, a female co-worker, on the behind with papers.

7) On August 26, 2005, all of Respondents' employees except Brincken walked off the job and did not return after an incident in which A. Feriante's father confronted Huston about his harassment of female employees.

8) On August 30, 2005, Respondent hired Complainant Ruiz-Najera at the wage rate of $7.25 per hour.

9) On October 21, 2005, Huston, who had been talking on the phone with someone from the Lottery Commission, approached Brincken, put his hand around her shoulder like he was going to hug her, and asked her if he could kiss her on the lips. Brincken was "taken aback," felt "shocked," told him "no," and stepped back. Huston began talking about how the Lottery Commission was going to let him go through the process of having lottery machines. Huston's touching and proposal made her feel "gross" and "not happy" like she "had been violated" and her "personal boundary had been crossed." She complained to Ruiz-Najera about the incident. Brincken did not say anything else to Huston about the incident.

10) Previous to October 21, 2005, Andee Lynch had told Brincken that Huston said something to her about having a private

evaluation in his office that involved strawberries and whipped cream. Brincken had also observed Huston making gestures towards other female employees, acting as though he were squeezing or going to smack them on the bottom. She also saw Huston come up behind other female employees and put his arm around their waist or on their shoulder. When Huston was not around, Brincken overheard those other employees talking about how that made them feel uncomfortable. Other employees also complained directly to her about Huston's behavior. As a result of what she heard and saw, Brincken tried to make sure she was not alone with or physically close to Huston, although other than his request to kiss her on the lips she never heard Huston make any sexually explicit or inappropriate comments to herself or anyone else.

11) On October 22, 2005, Brincken decided to quit because Huston asked if he could kiss her on the lips. She worked one more week and gave her letter of resignation to a coworker on October 28, 2005, picking up her final paycheck at the same time. She began looking for work immediately and started work at another job on November 7, 2005, that also paid $7.25 per hour. She lost $309.58 in gross wages during her week of unemployment.

12) Huston's behavior described in Ultimate Findings of Fact ##5, 9-10 caused Brincken to experience emotional and mental distress.

13) On or about August 30, 2005, Huston hired Ruiz-Najera to wash dishes and bus tables for Respondent at the wage rate of $7.25 per hour.

14) Beginning on August 29, 2005, Huston began asking his employees to read and sign a sexual harassment policy. The policy included a provision that required employees to report any sexual harassment to "the owner of Spud Cellar Deli; or other supervisor" but did not advise employees how to report harassment if Respondent's owner was the harasser. Ruiz-Najera signed the policy on September 28, 2005, but Brincken did not sign the policy and there is no evidence that she was asked to sign it.

15) In mid-September 2005, Huston said "muchacha caliente" at work while directing the words at Ruiz-Najera. Huston said "muchacha caliente" again that day and told Ruiz-Najera his Hispanic friends had told him it meant "pretty girl." Ruiz-Najera told Huston it did not mean "pretty girl," but that it meant "horny girl" and she did "not want to hear it, especially if you are going to say it to me." Ruiz-Najera also told Huston that it was disrespectful. Later that same day, Huston told Ruiz-Najera he would verify the meaning of "muchacha caliente" with his Hispanic friends. Ruiz-Najera told him "okay, but I don't want to hear it." Huston then talked with his Hispanic friends and they told him that "muchacha caliente" means "horny girl" and that it was not a respectful thing to

say. The next time Huston said "muchacha caliente" to Ruiz-Najera, Huston said he had talked with his friends and verified that "muchacha caliente" did mean "horny girl." Ruiz-Najera again told Huston she did not want to hear it and that it did not mean "pretty girl." On another day, Huston said "muchacha caliente" to Ruiz-Najera once more and she told him that she did not want to hear it because it was insulting. Ruiz-Najera felt disrespected by Huston when he called her "muchacha caliente."

16) On November 7, 2005, Ruiz-Najera discovered that the hole behind the screen in the wall of the women's in the bathroom at Respondent's business went all the way through the wall to the storage room on the other side, where the hole was covered by another vent screen, and that there was an upside down bucket in the storage room near the vent screen. That same day, she went to The Dalles police department and reported a "peep hole" in Respondent's women's bathroom and said she believed Huston could have been watching through the "peep hole" as women used the toilet. That same day, another female coworker telephoned The Dalles police department and made a similar report.

17) Two officers from The Dalles police department visited Spud on November 7, 2005, after receiving the complaints and inspected the vent. While at Spud, they talked with Tiffany Bates and Tracy Wedgwood, Ruiz-Najera's coworkers. On November 11, 2005, the police department closed the case.

18) Because of numerous physical problems, Huston was physically unable to position himself in a manner so he could look through the vent screen from the storage room side of the wall and see the toilet in the women's bathroom.

19) During Ruiz-Najera's employment, Respondent had a two week payroll period. Beginning with the payroll period ending September 28, 2005, Ruiz-Najera worked the following hours in her last seven payroll periods -- 81.93, 61.5, 46.46, 66.17, 61.5, 53.5, 32.92.

20) On or about December 10, 2005, Ruiz-Najera told Huston she was resigning, effective two weeks later. Shortly thereafter, her son became sick, and she called in to work so Respondent could find a replacement for her shift. She worked a few more days, then quit coming into work.

21) Huston's behavior described in Ultimate Finding of Fact #15 caused Ruiz-Najera to experience emotional and mental distress.

CONCLUSIONS OF LAW

1) At times material herein, Respondent was an employer subject to the provisions of ORS 659A.010 to ORS 659A.030 and ORS 659A.800 to ORS 659A.865.

2) The actions, inaction, statements, and motivation of Gerald

("Jerry") Huston are properly imputed to Respondent.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and subject matter herein and the authority to eliminate the effects of any unlawful employment practices found. ORS 659A.800 to ORS 659A.865.

4) Respondent did not subject Complainant Ruiz-Najera to unwelcome sexual conduct directed toward her because of her gender, such that submission to the conduct was implicitly made a condition of her employment or was used as a basis for employment decisions in violation of ORS 659A.030(1)(b).

5) Respondent subjected Complainant Ruiz-Najera to unwelcome sexual conduct directed toward her because of her gender that was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating, or offensive work environment, in violation of ORS 659A.030(1)(b) and ORS 659A.030(1)(a).

6) Respondent did not retaliate against Complainant Ruiz-Najera in violation of ORS 659A.030(1)(f).

7) Respondent did not constructively discharge Complainant Ruiz-Najera from employment in violation of ORS 659A.030(1)(a) and *former* OAR 839-005-0035.

8) Respondent subjected Complainant Brincken to unwelcome sexual conduct directed toward her because of her gender, such that submission to the conduct was implicitly made a condition of her employment or was used as a basis for employment decisions in violation of ORS 659A.030(1)(b).

9) Respondent subjected Complainant Brincken to unwelcome sexual conduct directed toward her because of her gender that was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating, or offensive work environment in violation of ORS 659A.030(1)(b) and OAR 839-005-0030(1)(b).

10) Respondent constructively discharged Complainant Brincken from employment in violation of ORS 659A.030(1)(a) and OAR 839-005-0035.[7]

11) Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award Complainant Brincken back pay resulting from Respondent's unlawful employment practice and to award money damages to Complainants Brincken and Ruiz-Najera for emotional and mental suffering sustained and to protect the rights of Complainants and others similarly situated. The sum of money awarded and the other actions required of Respondent in the Order

[7] In 2010, OAR 839-005-0035 was renumbered, without change in text, as OAR 839-005-0011.

below are an appropriate exercise of that authority.

OPINION

The Agency alleges that both Complainants were subjected to unwelcome sexual advances, sexual comments, offensive touching, and other conduct of a sexual nature from Huston, Respondent's proxy, and their submission to the conduct was implicitly made a condition of their employment or was used as a basis for employment decisions affecting Complainants; that Huston's conduct was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with their work performance and created a hostile, intimidating or offensive working environment for them; and that they were constructively discharged. In addition, Ruiz-Najera alleges that Respondent retaliated against her for complaining of the harassment. The Agency seeks back pay and emotional distress damages for both Complainants.

COMPLAINANT BRINCKEN

A. Sexual harassment.

The Agency alleges two theories of sexual harassment – "tangible employment action" and "hostile environment" with regard to Brincken. Specifically, the Agency alleges that (1) Respondent, through its proxy Huston, subjected Brincken to unwelcome sexual conduct directed toward her because of her gender and that submission to the conduct was implicitly made a condition of her employment or was used as a basis for employment decisions, in violation of ORS 659A.030(1)(b) and OAR 839-005-0030(1)(a);[8] and that (2) the sexual conduct was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating, or offensive work environment, in violation of ORS 659A.030(1)(b) and OAR 839-005-0030(1)(b).

The Agency established the following facts in support of these theories:

1. Huston asked Brincken if he could put his hand on her shoulder, telling her that other people had complained about that and he just wanted to make sure she was not uncomfortable. Brincken did not object and gave him permission to put his hand on her shoulder.

2) Previous to October 21, 2005, Andee Lynch had told Brincken that Huston said something to her about having a private evaluation in his office that involved strawberries and whipped cream. Brincken had also observed Huston making gestures towards other female employees, acting as though he were squeezing or going to smack them on the bottom. She also saw Huston come up behind other female employees and

[8] The Formal Charges specifically allege violations of OAR 839-005-0030, an administrative rule that defines the different types of sexual harassment and spells out theories of liability.

put his arm around their waist or on their shoulder. When Huston was not around, Brincken overheard those other employees talking about how that made them feel uncomfortable. Other employees also complained directly to her about Huston's behavior. As a result of what she heard and saw, Brincken tried to make sure she was not alone with or physically close to Huston, although other than his request to kiss her on the lips, she never heard Huston make any sexually explicit or inappropriate comments to herself or anyone else.

3) On October 21, 2005, Huston approached Brincken, put his hand around her shoulder like he was going to hug her, and asked her if he could kiss her on the lips. Brincken was "taken aback," felt "shocked," told him "no," and stepped back. Huston's touching and proposal made her feel "gross" and "not happy" like she "had been violated" and her "personal boundary had been crossed."

4) On October 22, 2005, Brincken decided to quit because of Huston's request for a kiss.

"*Tangible Employment Action*"

The Agency's prima facie case under the tangible employment action theory consists of the following elements: (1) Respondent was an employer subject to ORS 659A.001 to 659A.030; (2) Respondent employed Brincken; (3) Brincken is a member of a protected class (sex); (4) Respondent, through Huston, engaged in unwelcome conduct (verbal or physical) directed at Brincken because of her sex; (5) Submission to that conduct was implicitly made a condition of Brincken's employment or was used as a basis for employment decisions; and (6) Brincken suffered harm through a tangible employment action taken by Respondent based on Huston's conduct. *See, e.g., In the Matter of Barbara Bridges,* 25 BOLI 107, 119-20 (2004). The first three elements are undisputed. The Agency established the fourth element by Brincken's credible testimony regarding Huston's requested kiss. In this case, the fifth and sixth elements are intertwined. The harm was Brincken's leaving Respondent's employment as a direct result of Huston's proposal. As discussed in more detail later, the forum has determined that Brincken's leaving was a constructive discharge. Among other things, "tangible employment action" includes constructive discharge. OAR 839-005-0030(4). *See also Pennsylvania State Police v. Suders,* 542 U.S. 129 (2004). When the evidence shows that an employee is constructively discharged as a direct

result of a employer's request that the employee submit to unwelcome sexual conduct, that constructive discharge is properly considered an employment decision that was made as a result of a request for submission to the conduct. In conclusion, the forum finds that Respondent, through Huston, violated ORS 659A.030(1)(b) and OAR 839-005-0030(1)(a) with respect to Brincken.[9]

"*Hostile Environment*"

The Agency's prima facie case under the "hostile environment" theory consists of the following elements: (1) Respondent was an employer subject to ORS 659A.001 to 659A.030; (2) Respondent employed Complainant; (3) Complainant is a member of a protected class (sex); (4) Respondent, through its proxy, engaged in unwelcome conduct (verbal or physical) directed at Complainant because of her sex; (5) the unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating or offensive work environment; and (6) Complainant was harmed by the unwelcome conduct. *In the Matter of Robb Wochnick*, 25 BOLI 265, 282 (2004); OAR 839-005-0030(1)(b).

The first three elements are undisputed. The remaining elements require more discussion.

The fourth element of the Agency's case is that Respondent, through Huston, engaged in unwelcome conduct (verbal or physical) directed at Brincken because of her sex. Huston's status as Respondent's owner, president, and manager is not at issue. As Respondent's corporate officer, Huston's conduct is properly imputed to Respondent and Respondent is strictly liable for any unlawful harassment found herein. *See* OAR 839-005-0030(3)("[a]n employer is liable for harassment when the harasser's rank is sufficiently high that the harasser is the employer's proxy, for example, the respondent's president, owner, partner or corporate officer"). The facts set out in Findings of Fact #11, 18-21 – The Merits are all relevant to the forum's determination of whether or not Huston's conduct was unwelcome. This includes the conduct that specifically targeted Brincken as well as Huston's other sexual conduct directed at women that Brincken observed or that was reported to her.[10] Brincken did not

[9] Although Respondent raised the affirmative defenses available under OAR 839-050-0030(5), the forum does not address those defenses at this time because they are not available when the harassment consists of a "tangible employment action."

[10] *See, e.g., In the Matter of State Adjustment, Inc.,* 23 BOLI 19, 27, 31-32 (2002) (forum's determination that female complainant was subjected to hostile environment sexual harassment relied in part on the harasser's derogatory references to women and explicit sexually explicit jokes that, although not directed specifically at complainant, were "within Complainant's earshot"); *In the Matter of RJ's All American Restaurant,* 12 BOLI 24,

testify that the first instance when Huston asked permission to put his hand on his shoulder was unwelcome to her; her testimony was she gave permission, so long as it was "just her shoulder." In contrast, she specifically testified that the sexual conduct she observed Huston directing at other women caused her to change her behavior to make sure she was not alone with or physically close to Huston. From this, the forum infers she found that conduct unwelcome. Finally, her credible testimony describing her reaction to Huston's "kiss" proposal and her decision to quit as a direct result of that conduct leaves no doubt in the forum's mind that Brincken found that behavior unwelcome. The sexual nature of the above-mentioned conduct shows that it was directed towards Brincken and her female coworkers because they were women. This satisfies the fourth element of the Agency's prima facie case.

The fifth element of the Agency's case is whether the unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating or offensive work environment. The standard for determining whether harassment based on an individual's sex is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is "whether a reasonable person in the circumstances of the complaining individual would so perceive it." OAR 839-050-0030(2). "[T]he rule is drafted in the disjunctive; evidence that conduct created an intimidating *or* a hostile *or* an offensive working environment suffices." (emphasis in original) *Fred Meyer, Inc. v. Bureau of Labor and Industries and Georgia Stack-Rascol,* 152 Or App 302, 307, 954 P.2d 804, 807 (1998). The forum looks at the totality of the circumstances, *i.e.*, the nature of the conduct and its context, the frequency of the conduct, its severity or pervasiveness, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. *In the Matter of Gordy's Truck Stop, LLC,* 28 BOLI 200, 212 (2007). The forum recognizes an inverse relationship between the requisite severity and pervasiveness of

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27, 30-32 (1993) (forum's determination that female complainant was subjected to hostile environment sexual harassment included finding that complainant was aware that the harasser had embraced another female employee against her will and made a show of speaking with and sitting by attractive female customers, "further sexually charg[ing] * * * the atmosphere"); *In the Matter of Lee Schamp,* 10 BOLI 1, 17-18 (1991) (in determining whether female complainant was subjected to hostile environment sexual harassment, forum considered that complainant observed her harasser or had the harasser's victims tell her that the harasser had snapped their bra straps, squirted water onto female employee's breasts and buttocks, crowded against female employees in a sexual manner, touched female employees on the breast and buttocks, and commented on female breasts and on female employee's private lives).

harassing conduct – as the severity of the conduct increases, the frequency of the conduct necessary to establish harassment decreases. *In the Matter of Chalet Restaurant and Bakery,* 10 BOLI 183, 195-96 (1992), *affirmed without opinion, JLG4, Inc. v. Bureau of Labor and Industries*, 125 Or App 588, 865 P2d 1344 (1993).

The evidence set out in Findings of Fact #11, 18-21 – The Merits provides the factual context for the forum's evaluation as to whether or not Huston's conduct was sufficiently severe or pervasive to have had the purpose or effect of creating a hostile, intimidating or offensive working environment.

To begin, the forum recognizes that isolated incidents of verbal harassment, standing alone, do not constitute unlawful sexual harassment unless they are extremely serious. *Clark County School District v. Breeden,* 532 U.S. 268, 277 (2001).[11] However, this is not an "isolated incident" case limited to the "kiss" incident because of the sexually charged atmosphere created by Huston through his pervasive sexual conduct directed at Brincken's female coworkers that Brincken observed or became aware of through complaints by those coworkers, as described in Finding of Fact #19 – The Merits. In addition, the "kiss" incident was not purely verbal, in that the prelude to the kiss proposal was Huston's act of putting his hand on Brincken in a manner that she perceived as a prelude to a hug. Because of what she had already observed or heard about, Brincken was already doing all she could to ensure that she was not alone with or physically close to Huston before the "kiss" incident. This evidence establishes the existence of an intimidating work environment for Brincken prior to the "kiss" incident. Her testimony that Huston's touching and "kiss" proposal made her feel "gross" and "not happy" like she "had been violated" and her "personal boundary had been crossed" establishes that Huston's behavior was offensive to her, and her complaint to Ruiz-Najera establishes that this was compounded because she was married. Viewed in the totality of the circumstances, the forum finds that Huston subjected Brincken to unwelcome sexual conduct that was sufficiently pervasive to have had the purpose or effect of creating an intimidating and offensive work environment and that a reasonable person in Brincken's

[11] In *Breeden*, Breeden was reviewing job applicant files with her male supervisor and a coworker, also male. Her supervisor read aloud a comment that one of the applicants made to a colleague at a previous place of employment: "I hear making love to you is like making love to the Grand Canyon." After Breeden's supervisor stated that he did not know what that comment meant, a male coworker offered to explain it to him later and both men chuckled. The Supreme Court found no actionable harassment from this "isolated incident."

circumstances would have so perceived it.[12]

The final element of the Agency's case is proof that Brincken was harmed by the unwelcome conduct. Brincken's credible testimony established that she felt intimidated and offended by Huston's unwelcome sexual conduct, in that she tried to avoid being physically near him as much as possible and was offended by him touching her and asking her for a kiss.

Finally, the forum notes that Respondent, in its answer, raised the affirmative defense that:

> "To the extent Complainant suffered harassment, retaliation, or improper treatment, if any, Respondent exercised reasonable care to prevent and timely correct any such behavior, and Complainant unreasonably failed to take advantage of preventative or corrective opportunities provided by Respondent, or failed to avoid harm otherwise."

Respondent's affirmative defense is only available in "hostile work environment" claims and is directed at the provisions of OAR 839-005-0030(5) which state:

> "(5) Harassment by Supervisor, No Tangible Employment Action: When sexual harassment by a supervisor with immediate or successively higher authority over an individual is found to have occurred, but no tangible employment action was taken, the employer is liable if:
>
> "(a) The employer knew of the harassment, unless the employer took immediate and appropriate corrective action.
>
> "(b) The employer should have known of the harassment. The division will find that the employer should have known of the harassment unless the employer can demonstrate:
>
> "(A) That the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and
>
> "(B) That the complaining individual unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm."

This defense fails because of OAR 839-005-0030(3), a rule that imposes strict liability on an employer when a Respondent employer's "proxy" is the harasser.[13]

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[12] *Compare In the Matter of Moyer Theatres, Inc.,* 18 BOLI 123, 136 (1999) (when one of respondent's supervisors once tugged on the complainant's skirt, told her she had a nice dress, and made a comment to her along the lines of "looking mighty fine today, are you," these incidents, standing alone, were not sufficiently severe or pervasive to create a hostile, intimidating or offensive work environment).

[13] That rule reads as follows: "Employer proxy: An employer is liable for harassment when the harasser's rank

In conclusion, the forum finds that Respondent, through Huston, violated ORS 659A.030(1)(b) and OAR 839-005-0030(1)(b) with respect to Brincken.

B. Constructive discharge.

To establish that Brincken was constructively discharged, the Agency must prove that Huston: 1) intentionally created or maintained discriminatory working conditions related to Brincken's gender that were 2) so intolerable that a reasonable person in Brincken's circumstances would have resigned because of them; 3) Huston desired to cause Brincken to leave her employment as a result, or knew or should have known that Brincken was certain, or substantially certain, to leave employment as a result of the working conditions; and 4) Brincken left her employment as a result of those working conditions. *See* OAR 839-005-0011*; In the Matter of Gordy's Truck Stop, LLC,* 28 BOLI 200, 213 (2007). This forum has consistently held that if an employer imposes objectively intolerable working conditions, *i.e.*, that a reasonable person in complainant's position would have resigned under those conditions, the employee's resignation due to those conditions is a constructive discharge. *Id*. The forum examines the evidence with these considerations in mind.

1. Huston intentionally created or maintained discriminatory working conditions related to Brincken's gender.

Undisputed evidence establishes that at least one female employee found Huston's touching to be offensive prior to Brincken's employment, and that Huston said as much to Brincken when he first asked permission to put his hand on her shoulder.[14] Brincken's credible testimony, supported by the credible testimony of A. Feriante, establishes that Huston routinely made gestures towards other female employees, acting as though he were squeezing or going to smack them on the bottom and came up behind other female employees and put his arm around their waist or on their shoulder. Brincken witnessed that behavior, overheard those other employees talking about how that made them feel uncomfortable, and other employees complained directly to her about Huston's behavior. Because that conduct was of a sexual nature, the forum concludes it was related to Brincken's gender. This satisfies the first element of the Agency's prima facie case.

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is sufficiently high that the harasser is the employer's proxy, for example, the respondent's president, owner, partner or corporate officer."

[14] Despite these complaints, the credible testimony of Kendrick established that Huston still touched at least one female employee by patting her on the shoulder, then asking if it offended her, *after* Brincken and Ruiz-Najera filed their complaints.

2. The conditions were so intolerable that a reasonable person in Brincken's circumstances would have resigned because of them.

Respondent's deli occupied a relatively small area, with somewhat cramped work spaces and areas for the staff to move in. During her employment, Brincken, who was married, observed Huston engage in sexual conduct towards other female employees and went out of her way to avoid physical contact with him because she was afraid she would be the next target of his unsolicited touching. She was also aware that Respondent's other female employees walked off the job on August 26, 2005, after G. Feriante confronted Huston about touching his daughter and other female employees. Although there is no direct evidence on this point, it does not require a giant leap of faith for the forum to draw the inference that Brincken was aware of the circumstances under which those other employees walked off the job. When Huston placed his hand on her as though to hug her, then asked if he could kiss her, this was the proverbial straw that broke the camel's back. In Brincken's own words, although she had observed Huston touching other employees, "it's always different when it happens to you." Under these circumstances, the forum finds that Brincken's working conditions were so intolerable that a reasonable person in her circumstances would have resigned because of them.

3. Huston knew or should have known that Brincken was certain, or substantially certain, to leave employment as a result of the working conditions.

By the time the "kiss" incident occurred, several of Respondent's female employees had already quit, at least in part because of Huston's conduct. This occurred just after A. Feriante's father had come into Spud and confronted Huston about touching his daughter and other female employees. The fact that he asked Brincken if it was alright for him to put his hand on her shoulder and his statement to her that other female employees had complained of that behavior shows Huston knew that Respondent's female employees did not like him to touch them. Respondent argues that the "kiss" incident occurred as a result of Huston's excitement from getting a phone call from the Lottery Commission, as though the absence of a libidinous motivation excuses his behavior. That argument carries no weight. Huston lost part of his workforce earlier due to similar behavior. Knowing that other female employees had complained about his touching them, Huston should have anticipated that Brincken would have objected to him putting his hand on her without permission,[15] as though he was going to hug her,

[15] There is no evidence that Brincken gave Huston carte blanche authority to put his hand on her shoulder when he originally asked to do that.

then asking her if he could kiss her on the lips, and could have reasonably anticipated that the request for a kiss on the lips, a more intimate act, would result in Brincken's quitting.

4. Brincken left her employment as a result of those working conditions.

Brincken unequivocally testified that she quit as a direct result of the "kiss" incident and decided to quit the day after it occurred. She remained at work for an additional week only because Huston was out of town the entire time.

5. Conclusion.

The forum concludes that a reasonable person in Brincken's position would have resigned under the working conditions imposed on Brincken and finds that Brincken was constructively discharged, in violation of ORS 659A.030(1)(a).

C. Damages.

The Agency seeks back pay "estimated to be in excess of $500" and mental suffering damages of $30,000 for Brincken.

Back Pay

The purpose of back pay awards in employment discrimination cases is to compensate a complainant for the loss of wages and benefits the complainant would have received but for the respondent's unlawful employment practices. *In the Matter of From the Wilderness, Inc.,* 30 BOLI 227, 290 (2009), *appeal pending*. Brincken's last day of work was October 28, 2005. She immediately began looking for work and started work at another job that paid the same as Respondent on November 7, 2005. The forum calculates that she lost one week's pay, which the forum estimates to be $309.58.[16]

Mental & Emotional Suffering Damages

In determining an award for emotional and mental suffering, the forum considers the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. It also considers the type and duration of the mental distress and the vulnerability of the complainant. The actual amount depends on the facts presented by each complainant. A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. *From the Wilderness, Inc.,* at 291-92.

Although Brincken was sexually harassed and constructively discharged, the record is somewhat meager as to the mental and emotional suffering she experienced as a result of Respondent's unlawful employment practices, being limited to her following brief testimony on that subject:

i During her employment, as a result of Huston's sexual conduct that she saw and heard about, Brincken tried to make sure she was not alone with or physically close to Huston.

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[16] *See* Finding of Fact #22 – The Merits.

- Huston's touching and proposal for a kiss made her feel "shocked," "gross" and "not happy" like she "had been violated" and her "personal boundary had been crossed."
- Huston's sexual conduct was "upsetting" to her and she tried not to think about it and tried not to let it affect her.
- She found Huston's sexual conduct "disturbing" and "it still upsets" her; she has been more cautious with male employers since leaving Respondent's employment.

Her lack of testimony concerning (a) how Huston's sexual conduct and her discharge affected her subsequent employment; (b) how that the discharge had caused her any financial stress; (c) the degree to which she has been "upset" since leaving Respondent's employment; or (d) how that "upset" has manifested itself is also pertinent to the appropriate amount of an award of damages for emotional and mental suffering

Based on the record as a whole, the forum finds that $10,000 is adequate to compensate Complainant Brincken for her emotional and mental suffering.

COMPLAINANT RUIZ-NAJERA

A. Sexual harassment.

The Agency also alleges "tangible employment action" and "hostile environment" theories of sexual harassment with regard to Ruiz-Najera. The Agency established the following facts in support of these theories:

- Huston learned of the term "muchacha caliente" from a Hispanic acquaintance who referred to his sister-in-law as "muchacha caliente" and told Huston that his sister-in-law was a "hot chick" and "very beautiful."
- In mid-September 2005, Huston said "muchacha caliente" at work while directing the words at Ruiz-Najera. Huston said "muchacha caliente" again that day and told Ruiz-Najera his Hispanic friends had told him it meant "pretty girl." Ruiz-Najera told Huston it did not mean "pretty girl," but that it meant "horny girl" and she did "not want to hear it, especially if you are going to say it to me." Ruiz-Najera also told Huston that it was disrespectful. Later that same day, Huston told Ruiz-Najera he would verify the meaning of "muchacha caliente" with his Hispanic friends. Ruiz-Najera told him "okay, but I don't want to hear it."
- Huston then talked with his Hispanic friends and they told him that "muchacha caliente" means "horny girl" and that it was not a respectful thing to say.
- The next time Huston said "muchacha caliente" to Ruiz-Najera, Huston said he had talked with his friends and verified that "muchacha caliente" did mean "horny girl." Ruiz-Najera again told Huston she did not want to hear it and

that it did not mean "pretty girl."

- On another day, Huston said "muchacha caliente" to Ruiz-Najera once more and she told him that she did not want to hear it because it was insulting.
- Ruiz-Najera felt disrespected by Huston when he called her "muchacha caliente."

"*Tangible Employment Action*"

The Agency's prima facie case under the tangible employment action theory consists of the following elements: (1) Respondent was an employer subject to ORS 659A.001 to 659A.030; (2) Respondent employed Ruiz-Najera; (3) Ruiz-Najera is a member of a protected class (sex); (4) Respondent, through Huston, engaged in unwelcome conduct (verbal or physical) directed at Ruiz-Najera because of her sex; (5) Submission to that conduct was implicitly made a condition of Ruiz-Najera's employment or was used as a basis for employment decisions; and (6) Ruiz-Najera suffered harm through a tangible employment action taken by Respondent based on Huston's conduct. As in Brincken's case, the first three elements are undisputed. The Agency established the fourth element by Ruiz-Najera's credible testimony regarding Huston's "muchacha caliente" remarks. Unlike Brincken's case, there is no evidence that submission to that conduct was implicitly made a condition of Ruiz-Najera's employment or was used as a basis for employment decisions. The Agency alleged that Huston made negative employment decisions concerning Ruiz-Najera based on her objections to his conduct that specifically included reducing her work hours, discharging her, and denying her privileges of employment. An inspection of Ruiz-Najera's work hours does not reveal a consistent pattern of reduction in her work hours that can be tied to her objections to the "muchacha caliente" comments.[17] Credible evidence in the record showed no other privileges of employment that she was denied. Finally, the forum has determined that Ruiz-Najera was not constructively discharged, as will be discussed in more detail later. In conclusion, the forum finds that Respondent did not violate ORS 659A.030(1)(b) and OAR 839-005-0030(1)(a) with regard to Ruiz-Najera.

"*Hostile Environment*"

The Agency's prima facie case under the "hostile environment" theory consists of the following elements: (1) Respondent was an employer subject to ORS 659A.001 to 659A.030; (2) Respondent employed Ruiz-Najera; (3) Ruiz-Najera is a member of a protected class (sex); (4) Respondent, through its proxy, engaged in unwelcome conduct (verbal or physical) directed at Ruiz-Najera because of her sex; (5) the unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating or offensive

[17] *See* Finding of Fact #33 – The Merits.

work environment; and (6) Ruiz-Najera was harmed by the unwelcome conduct.

Once more, the first three elements are undisputed.

The fourth element of the Agency's case is that Respondent, through Huston, engaged in unwelcome conduct (verbal or physical) directed at Ruiz-Najera because of her sex. Huston's status as Respondent's owner, president, and manager is not at issue. As Respondent's corporate officer, Huston's conduct is properly imputed to Respondent and Respondent is strictly liable for any unlawful harassment found herein.

Huston's testimony established that he understood "muchacha caliente" to mean "hot chick" and "very beautiful" the first time he directed the term "muchacha caliente" at Ruiz-Najera. After that, he understood that it meant "horny girl" to Ruiz-Najera. Based on that evidence, the forum concludes that Huston directed the words "muchacha caliente" at Ruiz-Najera because of her female gender. Her objections to the comments and credible testimony that she found the comments insulting and disrespectful establish that they were unwelcome, thereby satisfying the fourth element of the Agency's prima facie case.

The fifth element of the Agency's case is whether the unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating or offensive work environment. As in Brincken's case, the forum again recognizes that isolated incidents of purely verbal harassment, standing alone, do not constitute unlawful sexual harassment unless they are extremely serious.

First, the forum evaluates the severity of Huston's conduct. To begin with, Huston was Respondent's president, owner, and manager and Ruiz-Najera's immediate supervisor. His conduct was purely oral. All his remarks were specifically directed at Ruiz-Najera[18] and all were made in the workplace. The first time Huston said "muchacha caliente" he understood it to mean "hot chick" and "very beautiful." After the second time Huston referred to Ruiz-Najera as "muchacha caliente," he clearly understood that the term meant "horny girl" to her and she told him directly that she did not want to hear it. When his Hispanic friends confirmed that "muchacha caliente" meant "horny girl" and was disrespectful, Huston again called Ruiz-Najera "muchacha caliente" *after* telling her his friends had confirmed it meant "horny girl." Finally, the term "horny girl" has a specific sexual connotation.[19]

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[18] There was no evidence that Respondent employed anyone else who understood Spanish and "hot chick," "very beautiful," and "horny girl" all refer to one person, not women in general.

[19] *Webster's* defines "horny" as "easily excited sexually — usually considered

Next, the forum evaluates the pervasiveness of Huston's conduct. This is not an "isolated incident" case because of the number of times Huston directed the remark "muchacha caliente" at Ruiz-Najera. Although the evidence does not show the exact time period within which Huston made those remarks, it does show a starting point – mid-September 2005 – and they could not have been made after early December 2005. Based on the statements about Huston's "muchacha caliente" remarks that Ruiz-Najera made to Moss on November 7, 2005, the forum infers that Huston made most, if not all of the remarks before November 7, 2005.[20]

Ruiz-Najera's credible testimony that Huston's remarks made her feel disrespected and insulted and that she objected to the remarks for those reasons establishes that Huston's behavior was offensive to her. Viewed in the totality of the circumstances, the forum finds that Huston subjected Ruiz-Najera to unwelcome sexual conduct that was sufficiently severe and pervasive to have had the purpose or effect of creating an offensive work environment and that a reasonable person in Ruiz-Najera's circumstances would have so perceived it.

The last element of the Agency's case is proof that Ruiz-Najera was harmed by the unwelcome sexual conduct. Ruiz-Najera's credible testimony established that she felt disrespected and insulted by Huston's use of the term "muchacha caliente." This establishes the harm element of the Agency's prima facie case.

Finally, the forum notes that Respondent, in its answer, again raised the affirmative defense available in OAR 839-005-0030(5). As in Brincken's case, this defense fails because of the forum's conclusion that Huston is Respondent's "proxy."

In conclusion, the forum finds that Respondent, through Huston, violated ORS 659A.030(1)(b) and OAR 839-005-0030(1)(b) with respect to Ruiz-Najera.

B. Retaliation

The Agency alleges that Respondent retaliated against Ruiz-Najera for opposing Huston's sexual harassment, in violation of ORS 659A.030(1)(f), "by cutting her hours of work, causing her a loss of income." The evidence shows that Ruiz-Najera opposed Huston's sexual harassment in two ways: (1) by telling him not to call her "muchacha caliente," beginning in mid-September 2005; and (2) by complaining to The Dalles Police Department on November 7, 2005, about the "peephole" and also telling Officer Moss that Huston had been calling her "muchacha caliente." Through Ruiz-Najera's credible testimony, the forum has con-

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vulgar." *Webster's Third New Int'l Dictionary* 1091-92 (Unabridged ed 2002).

[20] *See* Finding of Fact #29 – The Merits, *supra*.

cluded that she told Huston that she did not want to be called "muchacha caliente." In contrast, there is no evidence that Huston knew that Ruiz-Najera complained to the police. Ruiz-Najera began work on August 30, 2005, and the hours she worked during each of Respondent's two week payroll periods are set out in Finding of Fact #33 – The Merits. Those records show that she worked 81.93 hours during her first two weeks, then worked 61.5, 46.46, 66.17, 61.5, 53.5, and 32.92 hours during her remaining payroll periods. The forum attributes the large number of hours worked by Ruiz-Najera during her first two weeks to the fact that all of Respondent's employees except for Brincken and Henry Banner had quit immediately before she was hired, and there is insufficient evidence from which to determine how many days Ruiz-Najera worked during her last payroll period. This evidence does not rise to the level of the preponderance of evidence the Agency needs to prove retaliation.

C. Constructive discharge.

The elements of the Agency's prima facie case with respect to Ruiz-Najera's alleged constructive discharge are the same as in Brincken's case. Unlike Brincken's case, Ruiz-Najera's case fails because of the Agency's failure to prove the fourth element of its prima facie case – that Ruiz-Najera left her employment as a result of those working conditions. The working conditions that Ruiz-Najera was subjected to were the "muchacha caliente" comments. However, she testified that the working condition that caused her to begin looking for another job was learning of the existence of the bathroom "peephole" on November 7, 2005. That testimony, coupled with her dramatic testimony about the extensive trauma the vent caused and continues to cause her, causes the forum to conclude that Ruiz-Najera quit because of her perception that the bathroom vent was a peephole created and used by Huston to spy on women while they were using the toilet. Because there was no evidence that this was a discriminatory working condition created or maintained by Huston, there can be no constructive discharge.

D. Damages.

The Agency seeks lost wages "estimated to be in excess of $2,000" and mental suffering damages of $50,000 for Ruiz-Najera.

Back Pay

Back pay is awarded when the forum concludes that an unlawful discharge has occurred. Since Ruiz-Najera was not unlawfully discharged, she is not entitled to any back pay.

Mental & Emotional Suffering Damages

The forum bases its award of damages for mental and emotional suffering solely on the suffering that Ruiz-Najera experienced as a result of being on the

receiving end of Huston's "muchacha caliente" remarks. Although the forum disbelieved much of Ruiz-Najera's testimony because of the reasons set out in Finding of Fact #51 – The Merits, the forum credits her testimony that she felt insulted and disrespected by Huston's remarks, in part because of the very nature of the remarks. That is sufficient harm on which to base an award of damages for mental and emotional suffering and the forum bases its award solely on that harm. Under the circumstances, the forum finds that $5,000 is an adequate sum to compensate Ruiz-Najera for her emotional and mental suffering.

ORDER

NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent's violations of ORS 659A.030(1)(a) and ORS 659A.030(1)(b), and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Spud Cellar Deli, Inc.** to:

(1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries **in trust for Complainant Simone Brincken** in the amount of:

a) THREE HUNDRED NINE DOLLARS AND FIFTY-EIGHT CENTS ($309.58), less lawful deductions, representing income lost by Simone Brincken between October 29 and November 6, 2005, as a result of Respondent's unlawful practice found herein; plus,

b) Interest at the legal rate on the monthly accrual of wages lost between October 29 and November 6, 2005;

c) Interest at the legal rate on the sum of $309.58 from November 7, 2005, until paid; plus

d) TEN THOUSAND DOLLARS ($10,000.00), representing compensatory damages for mental distress Simone Brincken suffered as a result of Respondent's unlawful practice found herein; plus,

e) Interest at the legal rate on the sum of $10,000.00 from the date of the Final Order until Respondent complies herein.

(2) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries **in trust for Complainant Miriam Ruiz-Najera** in the amount of:

a) FIVE THOUSAND DOLLARS ($5,000.00), representing compensatory damages for mental distress Miriam Ruiz-Najera suffered as a result of Respondent's unlawful practice found herein; plus,

b) Interest at the legal rate on the sum of $5,000.00 from the date of the Final Order until Respondent complies herein.

(3) Cease and desist from discriminating against any employee based upon the employee's gender.

In the Matter of

PAUL SAMUELS dba SAMUELS AUTO BODY

Case No. 22-10

Final Order of Commissioner Brad Avakian

Issued December 15, 2010

SYNOPSIS

Respondent employed Claimant in 2008 at Respondent's auto body and paint shop at the agreed rate of $10 per hour. Claimant worked a total of 1668 hours, including 1,252 straight time hours and 416 overtime hours. He earned $12,520 for his straight time work and $6,240 for his overtime work, for a total of $18,760, and was only paid $6,750. Respondent was ordered to pay Claimant a total of $11,710 as unpaid, due, and owing wages. Respondent's failure to pay the wages was willful, and he was ordered to pay Claimant $2,400 in penalty wages. Respondent was also ordered to pay $2,400 in civil penalties based on his failure to pay overtime wages to Claimant. ORS 652.140(2), ORS 652.150, ORS 653.055, ORS 653.261, OAR 839-020-0030.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 16, 2010, at the Salem office of the Oregon Bureau of Labor and Industries, located at 3865 Wolverine Street NE, Building E-1, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Chet Nakada, an employee of the Agency. Wage claimant Byron Nelson (Claimant) was present throughout the hearing and was not represented by counsel. Respondent Paul Samuels did not appear at the hearing and was held in default.

The Agency called the following witnesses: Claimant; BOLI Wage and Hour Division compliance specialist Cristin Casey; and Lowell Davis (telephonic), property lessor to Respondent.

The forum received into evidence:

a) Administrative exhibits X-1 through X-13 (submitted or generated prior to hearing); and

b) Agency exhibits A-1 through A-16[1] (submitted prior to hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On November 17, 2008, Claimant filed a wage claim with the Agency alleging that Paul Samuels. had employed him and failed to pay wages earned and due to him. At the same time, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent.

2) On May 22, 2009, the Agency issued Order of Determination No. 08-3470 based on the wage claim filed by Claimant and the Agency's investigation. In pertinent part, the Order alleged that:

- Respondent employed Claimant from March 24, 2008 through October 28, 2008, at the regular rate of $10 per hour;
- Claimant worked a total of 1,669 hours, of which 417 were overtime hours, earning $18,775;
- Respondent has only paid Claimant $7,050, leaving a balance due and owing of $11,725 in unpaid wages, plus interest thereon at the legal rate per annum from December 1, 2008, until paid;
- Respondent willfully failed to pay these wages and owes Claimant $2,400 in penalty wages, with interest thereon at the legal rate per annum from January 1, 2009, until paid;
- Respondent paid Claimant less than the wages to which he was entitled under ORS 653.010 to 653.261 and is liable to Claimant for $2,400 in civil penalties pursuant to ORS 653.055(1)(b), with interest thereon at the legal rate per annum from January 1, 2009, until paid.

3) On June 10, 2009, Respondent filed an answer and request for hearing through attorney Stacy Fletcher in which Respondent, in pertinent part:

- Denied he was Claimant's employer;
- Affirmatively alleged that Claimant was an independent contractor for Samuels Auto Body and was never required to work 40 hours per week;
- Denied that Claimant earned wages at the rate of $10 per hour;
- Denied that Claimant worked a total of 1,669 hours;

[1] The originals for exhibit A-1, pp. 4-8 were received into evidence in substitution for the copies submitted with the Agency's case summary because the copies were partially illegible.

- Denied that he owes Claimant $11,725 in unpaid wages or any interest;
- Denied that he willfully failed to pay wages to Claimant and alleges that he is not liable for a penalty wages or civil penalties as alleged in the Order;
- Affirmatively alleged a lack of subject matter jurisdiction because Claimant was an independent contractor;
- Affirmatively alleged lack of subject matter jurisdiction because Claimant was the owner of the business;
- Affirmatively alleged lack of jurisdiction because Claimant was paid a commission on services performed and received at least the minimum wage for all hours worked.

4) On June 11, 2010, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimant setting the time and place of hearing for 10:00 a.m. on November 16, 2010, at BOLI's Portland office.

5) On July 7, 2010, the ALJ ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and a brief statement of the elements of the claim, a statement of any agreed or stipulated facts, and any wage and penalty calculations (for the Agency only). The ALJ ordered the participants to submit case summaries by November 5, 2010, and notified them of the possible sanctions for failure to comply with the case summary order.

6) On September 20, 2010, Agency filed a motion for discovery order seeking documents and information. In support of its motion, the Agency attached a copy of a letter dated August 31, 2010, in which the Agency made an informal discovery request for the same documents and information. In addition, the Agency case presenter stated that the Agency had been informed by Stacy Fletcher that Fletcher was no longer representing Respondent.

7) On September 29, 2010, the ALJ granted the Agency's motion for a discovery order and required Respondent to provide the requested documents and information by October 13, 2010.

8) On October 5, 2010, the Agency filed a motion to change the location of the hearing from Portland to Salem. Respondent did not object to the motion. On October 11, 2010, the ALJ issued an interim order granting the Agency's motion and changed the starting time for the hearing from 10 a.m. to 1 p.m.

9) On November 10, 2010, the Agency and Respondent filed a joint motion for a prehearing conference. The ALJ conducted and recorded a telephonic prehearing conference with Mr. Nakada and Respondent Samuels from 3:32 p.m. to 3:45 p.m. on November 10. During the conference, Respondent stated that he had just learned of the case summary order because his former attorney

did not forward that order to him. Respondent stated that he wished to file a case summary. With Respondent's concurrence, the ALJ stated that he would have a copy of the case summary order sent as a .PDF attachment to Respondent's e-mail address. The ALJ also ruled that Respondent could have an extension until noon on November 15 to submit his case summary, and that it must be received by the Hearings Unit in Portland and by Mr. Nakada by that time. The case summary was mailed to Respondent's e-mail address (bj_swindling@yahoo.com) at 4:08 p.m. on November 10, 2010. The Hearings Unit Coordinator ("HUC") also sent a copy of the case summary order by regular and certified mail to Respondent on November 12. On November 15, the HUC received signed confirmation from the U. S. Post Office that Respondent had received the certified mail.

10) Respondent did not make an appearance at the hearing and did not notify the Agency or the ALJ that he would not appear at the time and place set for hearing. The ALJ waited until 1:30 p.m., then declared Respondent in default and commenced the hearing.

11) At hearing, the ALJ granted the Agency's motion to amend the Order of Determination to reduce the wages sought from $11,725 to $11,710.

12) The ALJ issued a proposed order on December 1, 2010, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) On September 10, 1997, Samuels Autobody & Paint Works, L.L.C. registered as a domestic limited liability company with the Oregon Secretary of State Corporation Division. Paul Samuels was listed as registered agent and member, with a member address of 2810 Liberty Street NE, Salem, Oregon.

2) Lowell J. Davis and K. Sharon Davis own a building and land located at 2810 and 2820 Liberty Street NE, Salem, Oregon ("the Davis property"). In 1998 they entered into a lease agreement with Respondent Samuels ("Respondent"), acting as an individual, for rental of the property located at that address consisting of "[a]pproximately 4,100 square feet of shop and office space to be used as auto body and paint works."

3) Samuels Autobody & Paint Works, L.L.C. was involuntarily dissolved by the Corporation Division on November 4, 1999.

4) Respondent continued to lease and pay rent on the Davis property until August 2010, including all of 2008, when Respondent abandoned the property after Lowell Davis threatened him with eviction for nonpayment of rent. Throughout the lease, Respondent paid rent to Davis by transferring money directly into Davis's bank account.

5) After the LLC dissolved, Respondent continued to operate an auto body and paint shop at the Davis property under the name Samuels Auto Body & Paint Works, including all of 2008.

6) In March 2008, Claimant was working at Sterling Auto, another local auto body and paint shop, doing the same type of work that he performed for Respondent. Respondent, who knew Claimant from school, solicited Claimant to work for Respondent. At the end of March 2008, Claimant agreed to work for Respondent. Respondent agreed to pay him $400 a week for working 8:00 a.m. to 5:30 p.m., Monday through Friday. Claimant began work for Respondent on March 24, 2008. When Claimant began work, Respondent had him fill out a W-4 form.

7) During Claimant's employment, Claimant did masking, painting prep, job estimates, sales service, painting, and had general managerial authority over the shop.

8) Respondent provided Claimant with a uniform consisting of three identical shirts and pants. Each shirt had the words "Byron" and "Samuels' Auto Body & PAINT WORKS" monogrammed above its two pockets. Claimant wore the uniform to work every day.

9) During Claimant's employment, Respondent paid for and provided him with 80 business cards containing Respondent's business name and address and Claimant's name, with the words "Shop Manager" printed under Claimant's name. Claimant was expected to hand these cards out to potential customers.

10) Claimant's workday began at 8 a.m., when he opened Respondent's shop. He ate lunch every day at the shop but was always on call or "overseeing something" related to Respondent's business while he ate. His workday generally ended between 6:45 p.m. and 7 p.m., when he finished closing up Respondent's shop for the day. Respondent set Claimant's work hours.

11) Claimant invested no money in Respondent's business and did no advertising for Respondent's business. While employed by Respondent, there was no evidence that Claimant did any other gainful work.

12) Respondent provided the tools that Claimant used while working for Respondent. Claimant did not use any of his own tools while performing work for Respondent.

13) While employed by Respondent, Claimant maintained a hand written contemporaneous record of his hours worked, the amount of money he was paid, and the dates that he was paid. Except for Claimant's final paycheck, Respondent always paid Claimant in cash.

14) Respondent did not maintain any time records showing the hours that Claimant worked.

15) Claimant worked the following hours while employed by Respondent:

Week Ending	Total Hrs	ST[2] Hrs	OT[3] Hours
3/29/08	54.5	40	14.5
4/5/08	54.75	40	14.75
4/12/08	54.75	40	14.75
4/19/08	53.5	40	13.5
4/26/08	59.75	40	19.75
5/3/08	54.75	40	14.75
5/10/08	54	40	14
5/17/08	59	40	19
5/24/08	54.75	40	14.75
5/31/08	43.75	40	3.75
6/7/08	55.75	40	15.75
6/14/08	56.75	40	16.75
6/21/08	53	40	13
6/28/08	56.5	40	16.5
7/5/08	43.75	40	3.75
7/12/08	59.75	40	19.75
7/19/08	58	40	18
7/26/08	54.25	40	14.25
8/2/808	58	40	18
8/9/08	54.75	40	14.75
8/16/08	53.25	40	13.25
8/23/08	50.5	40	18.5
8/30/08	59.5	40	19.5
9/6/08	47.75	40	7.75
9/13/08	42.75	40	2.75
9/20/08	43	40	3
9/27/08	53.5	40	13.5
10/4/08	54.25	40	14.25
10/11/08	52.25	40	12.25
10/18/08	43.5	40	3.5
10/25/08	53.75	40	13.75
11/1/08	12	12	0

[2] ST = straight time hours

[3] OT = overtime hours

16) Claimant worked a total of 1,668 hours, including 1,252 straight time hours and 416 overtime hours. He earned $12,520 for his straight time work (1,252 hours x $10 per hour) and $6,240 (416 hours x $15 per hour) for his overtime work. In total, he earned $18,760.

17) Respondent paid Claimant the following amounts on the dates listed below. All payments were for wages earned.

Payment Dates	Amt. Paid
March 24	$300
April 14	$300
April 20	$300
May 1	$400
May 16	$300
May 29	$300
June 5	$300
June 16	$300
June 27	$300
July 7	$400
July 17	$300
July 28	$300
August 1	$400
August 11	$300
August 20	$300
September 1--	$400
September 8	$300

September 22	-	$300
September 29		$320
October 17		$300
October 28		$330

In total, Respondent paid Claimant $6,750. Respondent paid Claimant in cash each time except for the October 28 payment, when Respondent gave Claimant a check.

18) Claimant quit Respondent's employ on the morning of October 28, 2008, because Respondent was not paying him his full wages, despite Claimant's repeated requests for his pay.

19) When Claimant quit, Respondent owed him $11,710 in unpaid wages. Respondent has not paid any additional wages to Claimant and still owes Claimant $11,710 in unpaid wages.

20) On December 30, 2008, the Agency mailed a document entitled "Notice of Wage Claim" to Respondent at 2810 Liberty Street NE, Salem, OR 97303 that stated:

> "You are hereby notified that "BYRON NELSON has filed a wage claim with the Bureau of Labor and Industries alleging:
>
> "Unpaid wages of $4,700.00[4] at the rate of $400.00 per week from March 24, 2008 to October 28, 2008.
>
> "IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address.
>
> "IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation which supports your position, as well as payment of any amount which you concede is owed the claimant to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.
>
> "If your response to the claim is not received on or before January 14, 2009, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

21) On June 16, 2009, Samuels Autobody & Paint Works, LLC re-registered as a domestic limited liability company with the Oregon Secretary of State Corporation Division, with a renewal date of June 16, 2010. Daniel Davis was listed as registered agent and member, with a member address of 2810 Liberty Street NE, Salem, Oregon.

22) Penalty wages are computed as follows for Claimant, in accordance with ORS 652.150: $10 per hour x 8 hours x 30 days = $2,400.

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[4] Casey testified that the Notice only sought $4,700 because it did not include computation for overtime wages.

23) ORS 653.055 civil penalties are computed as follows for Claimant: in accordance with ORS 652.150 and ORS 653.055: $10 per hour x 8 hours x 30 days = $2,400.

24) Claimant, Davis, and Casey were all credible witnesses.

ULTIMATE FINDINGS OF FACT

1) In 2008, Respondent Paul Samuels owned and operated a business under the assumed business name of Samuels Auto Body & Paint Works, located at 2810 Liberty Street NE in Salem, Oregon.

2) Respondent solicited and hired Claimant to work for him in March 2008 at the agreed rate of $400 per week, based on 40 hours per week.

3) During Claimant's employment, Respondent paid for and provided Claimant with a uniform and business card with Respondent's name and address on it. Respondent provided all the tools Claimant used to perform his work. Claimant invested no money in Respondent's business, did no advertising for Respondent's business, and had no opportunity to earn in a profit apart from his wages.

4) Respondent set Claimant's work hours, which began at 8 a.m., when he opened Respondent's shop. Claimant ate lunch while he worked. His workday generally ended between 6:45 p.m. and 7 p.m., when he had finished closing up Respondent's shop for the day.

5) Claimant worked a total of 1,668 hours while in Respondent's employ, including 1,252 straight time hours and 416 overtime hours. He earned $18,760 for his work (1,252 hours x $10 per hour = $12,520) and $6,240 (416 hours x $15 per hour = $6,240).

6) Respondent only paid Claimant $6,750 for his work.

7) Claimant quit Respondent's employ on October 28, 2008, because Respondent was not paying him his full wages.

8) When Claimant quit, Respondent owed him $11,710 in unpaid wages. Respondent has not paid any additional wages to Claimant and still owes Claimant $11,710 in unpaid wages.

9) On December 30, 2008, the Agency mailed a notice to Respondent's correct business address that notified Respondent of Claimant's wage claim and demanded that Respondent pay the unpaid, due, and owing wages if the claim was correct.

10) Penalty wages are computed as follows for Claimant, in accordance with ORS 652.150: $10 per hour x 8 hours x 30 days = $2,400.

11) ORS 653.055 civil penalties are computed as follows for Claimant: in accordance with ORS 652.150 and ORS 653.055: $10 per hour x 8 hours x 30 days = $2,400.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Samuels was an em-

ployer who directly engaged the personal services of Claimant in Oregon and suffered or permitted Claimant to work and Claimant was Respondent's employee, subject to the provisions of ORS 652.110 to 652.200 and ORS 652.310 to 652.405.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 652.310 to 652.405.

3) Respondent violated ORS 652.140(2) by failing to pay to Claimant all wages earned and unpaid not later than five days, excluding Saturdays, Sundays and holidays, after Claimant quit Respondent's employment. Respondent owes Claimant $11,710 in unpaid, due, and owing wages.

4) Respondent willfully failed to pay Claimant all wages due and owing and Respondent owes $2,400 in penalty wages to Claimant. ORS 652.150.

5) Respondent paid Claimant less than the wages to which he was entitled under ORS 653.010 to 653.261 by failing to pay him overtime wages for all hours worked over 40 in a given workweek and is liable to pay civil penalties to Claimant in the amount of $2,400. ORS 653.055(1)(b).

OPINION

CLAIMANT'S WAGE CLAIM

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; 3) Claimant performed work for which he was not properly compensated; and 4) The amount and extent of work Claimant performed for Respondent. *In the Matter of Creative Carpenters Corporation, 29 BOLI 271, 277 (2007).* In a default case, the forum may consider any unsworn and unsubstantiated assertions contained in a respondent's answer, but those assertions are overcome whenever they are contradicted by other credible evidence in the record. *In the Matter of Sehat Entertainment, Inc.,* 30 BOLI 170, 181 (2009).

CLAIMANT WAS EMPLOYED BY RESPONDENT

Under ORS 652.310(1), an "employer" is someone who "engages personal services of one or more employees * * *." ORS 653.010 defines "employ" as "to suffer or permit to work * * *." Both definitions are relevant in this case because the Agency is seeking unpaid agreed straight time and unpaid overtime wages.

The forum begins by evaluating Respondent's affirmative defense that no wages are owed because Claimant was an independent contractor, not an employee. Respondent did not appear at hearing to back up his claim, and the only evidence supporting of this defense are the unsworn summary assertions in Respondent's answer. The forum notes that Respondent must prove this defense by a preponderance

of the evidence in order to prevail. *In the Matter of Gary Lee Lucas,* 26 BOLI 198, 210 (2005).

This forum applies an "economic reality" test to distinguish an employee from an independent contractor under Oregon's minimum wage and wage collection laws. *Id.* 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.

Id. See also In the Matter of Orion Driftboat and Watercraft Company, 26 BOLI 137, 146 (2005); *In the Matter of Kilmore Enterprise*s, 26 BOLI 111,120-21 (2004).

The Agency established the following relevant facts through Claimant's credible testimony:

1. Respondent solicited and hired Claimant at the agreed rate of $400 per week for 40 hours of work;
2. Respondent set Claimant's work hours;
3. Claimant made no financial investment in Respondent's business;
4. Respondent provided all the tools used by Claimant in his work;
5. Claimant had no opportunity for profit or loss apart from his wages; and
6. Claimant performed the same kind of work for his previous employer that he performed for Respondent.

There was no evidence presented that Claimant engaged in any other gainful employment while he worked for Respondent, that Claimant worked on any vehicles during his work time with Respondent that gave him the opportunity to earn any money other than his agreed wage, or as to the expected duration of Claimant's employment.[5]

There is one additional piece of evidence offered into evidence by the Agency that the forum must consider, a document entitled "Independent Contractor's and Confidential Information Agreement." That document, which was sent to the Agency by Respondent, is dated February 29, 2008, and bears a printed name and signature purporting to be Claimant's. Even if such an agreement

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[5] The forum has previously recognized that "[i]ndependent contractors are generally engaged to perform a specific project for a limited period." *In the Matter of Triple A Construction, LLC,* 23 BOLI 79, 93 (2002).

provided a legitimate defense,[6] the forum would disregard it for two reasons: (1) Claimant credibly testified that he has never seen and did not sign the document; and (2) Claimant's purported signature and hand printed name on the Agreement are substantially dissimilar from Claimant's acknowledged signature and hand printed name on the wage claim form and assignment of wages he submitted to the Agency when Claimant presumably had no idea that the authenticity of his handwriting would be subject to scrutiny by the forum.

Based on this evidence, the forum concludes that Respondent did not meet its burden of proof and that Claimant was not an independent contractor. In contrast, the same evidence establishes that Respondent engaged Claimant's personal services and suffered or permitted him to work, leading to the conclusion that Respondent was an employer who employed Claimant.

THE PAY RATE TO WHICH RESPONDENT AND CLAIMANT AGREED

Claimant credibly testified that Respondent agreed to pay him $400 a week to work from 8 a.m. to 5:30 p.m., five days a week. Factoring in the 30 minutes a day that Claimant was legally entitled to take for a lunch break,[7] this constitutes an agreement to work 40 hours for $400, or an agreed wage rate of $10 per hour. Claimant's overtime rate for hours worked over 40 in a given workweek is calculated by multiplying $10/hour x 1.5 = $15/hr. OAR 839-020-0030(1).

CLAIMANT PERFORMED WORK FOR WHICH HE WAS NOT PROPERLY COMPENSATED

By any method of calculation, Claimant performed work for which he was not properly compensated. Respondent paid Claimant $6,750 for his work, which was only enough to compensate him for 675 hours of straight time work, based on a

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[6] *See In the Matter of Forestry Action Committee,* 30 BOLI 63, 75 (2008) (an "independent contractor agreement," even if signed by a claimant, is not controlling in determining whether the claimant was an independent contractor.)

[7] *See* OAR 839-020-0050(2) & (3), which provides:

"(2)(a) Except as otherwise provided in this rule, every employer shall provide to each employee, for each work period of not less than six or more than eight hours, a meal period of not less than 30 continuous minutes during which the employee is relieved of all duties.

"(b) Except as otherwise provided in this rule, if an employee is not relieved of all duties for 30 continuous minutes during the meal period, the employer must pay the employee for the entire 30-minute meal period."

wage rate of $10/hr. Even calculated at Oregon's statutory 2008 minimum wage of $7.95/hr., Respondent still only paid Claimant for 849 hours of work ($6,750 divided by $7.95 = 849). In comparison, Claimant worked 1,668 hours.

AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT

The final element of the Agency's case requires proof of the amount and extent of work performed by Claimant. When the forum concludes that an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. In this case, Respondent produced no records, instead submitting a written statement to the Agency saying that he had no time records for Claimant. 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." *In the Matter of Kilmore Enterprises,* 26 BOLI 111, 122 (2004). A claimant's credible testimony may be sufficient evidence to show the amount of hours worked by the claimant and amount owed. *Id.* at 123.

At hearing, Claimant credibly testified that he maintained a contemporaneous daily record of the hours and schedule that he worked. Although Claimant did not produce that record at hearing, he credibly testified that the calendar of hours worked that he gave the Agency during its investigation and that was received into evidence contained the same information as his contemporaneous record. The forum relies on that latter calendar to determine the number of straight time and overtime hours at Claimant worked. In total, Claimant worked 1,252 straight time hours and 416 overtime hours, for which Claimant earned $12,520 for his straight time work (1,252 hours x $10 per hour) and $6,240 (416 hours x $15 per hour) for his overtime work, for a total of $18,760. Respondent only paid Claimant $6,750 for his work, leaving unpaid, due, and owing wages of $11,710.

RESPONDENT'S AFFIRMATIVE DEFENSES OF LACK OF JURISDICTION

Respondent's affirmative defenses of lack of jurisdiction[8] are all predicated on Respondent's allegations that Claimant was an independent contractor, that Claimant owned the business, or that Claimant received a commission for work performed and was paid at least the minimum wage for all hours worked. These affirmative defenses fail because Respondent has not met his burden of proof regarding the alleged facts that would support these defenses.

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[8] *See* Finding of Fact 4 – Procedural.

CLAIMANT IS OWED PENALTY WAGES

The forum may award penalty wages when a respondent's failure to pay wages 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. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

The Agency established by a preponderance of the evidence that: (1) Claimant and Respondent agreed upon a wage rate of $10 per hr.; (2) Respondent set Claimant's work hours and was aware of them; and (3) Claimant repeatedly requested that Respondent pay him his due and owing wages and finally quit after Respondent continually failed to pay those wages. It is an employer's duty to keep an accurate record of the hours worked by its employees. ORS 653.045; *In the Matter of Tina Davidson,* 16 BOLI 141, 148 (1997). The fact that Respondent kept no record of Claimant's hours worked does not allow him to evade his responsibility for penalty wages, nor does his failed defense that Claimant was an independent contractor.[9] There is no evidence that Respondent acted other than voluntarily and as a free agent in underpaying Claimant and the forum concludes that Respondent acted willfully in failing to pay Claimant his wages and is liable for penalty wages under ORS 652.150.

ORS 652.150(1) and (2) provide, in pertinent part:

> "(1) Except as provided in subsections (2) and (3) of this section, if an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 * * *, then, as a penalty for the nonpayment, the wages or compensation of the employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced.
>
> "(2) If the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation unless the employer fails to pay the full amount of the employee's unpaid wages or compensation within 12 days after receiving the written notice. If the employee or a person on behalf of the employee fails to send the written notice, the penalty may

[9] *See, e.g., In the Matter of Bukovina Express, Inc.,* 27 BOLI 184, 203 (2006) (a respondent's ignorance or misunderstanding of the law does not exempt that respondent from a determination that it willfully failed to pay wages earned and owed.)

not exceed 100 percent of the employee's unpaid wages or compensation. * * *"

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 on December 30, 2008. The Agency's Order of Determination, issued on May 22, 2009, repeated this demand, adding overtime wages.[10] Respondent failed to pay the full amount of Claimant's unpaid wages within 12 days after receiving the written notices and has still not paid them. Consequently, the forum assesses 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 Claimant equal $2,400 ($10 per hour x eight hours x 30 days).

ORS 653.055 CIVIL PENALTIES

In its Order of Determination, the Agency alleged that Claimant is entitled to a civil penalty of $2,400 based on Respondent's failure to pay Claimant "the wages to which Claimant was entitled under ORS 653.010 to 653.261." ORS 653.055 provides that the forum may award civil penalties to an employee when the employer pays less than the wages to which the employee is entitled under ORS 653.010 to 653.261, computed in the same fashion as ORS 652.150 penalty wages. This includes unpaid overtime wages. "Willfulness" is not an element. *In the Matter of Captain Hooks, LLP,* 27 BOLI 21, 225 (2006).

Claimant, who worked for the agreed wage rate of $10 per hour, was entitled to be paid overtime wages for any work he performed in excess of 40 hours in a work week. OAR 839-020-0030. He earned $12,520 for his straight time work (1,252 hours x $10 per hour) and $6,240 (416 hours x $15 per hour) for his overtime work, for a total of $18,760. In contrast, Respondent only paid Claimant $6,750 for his work, a sum that did not even come close to paying Complainant in full for his straight time hours, much less his overtime hours. Respondent's failure to pay overtime wages to Claimant entitles Claimant to a civil penalty of $2,400 ($10 per hour x eight hours x 30 days) in addition to the penalty wages awarded under ORS 652.150.

ORDER

NOW, THEREFORE, as authorized by ORS 652.140(2), ORS 652.150, ORS 653.055, ORS 653.261, and ORS 652.332, and as payment of the unpaid wages, penalty wages, and civil penalties, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **PAUL SAMUELS** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon

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[10] *See In the Matter of MAM Properties, LLC,* 28 BOLI 172, 190 fn. 7 (2007) (the Agency's Order of Determination constitutes a written notice of nonpayment of wages).

Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Claimant in the amount of SIXTEEN THOUSAND FIVE HUNDRED AND TEN DOLLARS ($16,510), less appropriate lawful deductions, representing $11,710 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from December 1, 2008, until paid; $2,400 in penalty wages, plus interest at the legal rate on that sum from January 1, 2009, until paid; and civil penalties of $2,400, plus interest at the legal rate on that sum from January 1, 2009, until paid.

In the Matter of

DAVID W. LEWIS aka Bandon Boatworks

Case No. 18-11

Final Order of Commissioner Brad Avakian

Issued April 21, 2011

SYNOPSIS

Seven wage claimants worked for Respondent at varying rates of pay between October 16 and November 23, 2008, and were not paid any wages. The Agency determined that Respondent owed them $4,034.35 in unpaid, due and owing wages and paid the claimants $4,034.35 from the Wage Security Fund ("WSF"). The Agency sought to recover the $4,034.35 paid out from the WSF, plus a 25 percent penalty on those funds, and the forum ordered Respondent to repay the full amount paid out by the WSF, plus a 25 percent penalty of $1,008.59, with interest on both sums. ORS 652.140(2), ORS 652.414.

The above-entitled case was assigned to Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Patrick A. Plaza, an employee of the Agency. Because this matter was resolved on summary judgment before a Notice of Hearing was issued, no hearing was scheduled or held.

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

FINDINGS OF FACT – PROCEDURAL

1) On January 6, 2010, the Agency issued Order of Determi-

nation #09-3453 ("Order") in which it alleged the following:

- Seven wage claimants ("Claimants") were employed in Oregon by David W. Lewis aka Bandon Boatworks ("Respondent") and "performed work, labor and services" for Respondent between October 16 and November 23, 2008.
- All Claimants filed wage claims and assigned their unpaid wages to the Oregon Bureau of Labor and Industries. In total, $4,034.35 in wages was unpaid. The Agency subsequently determined that $4,034.35 in unpaid wages was due and owing to Claimants and caused $4,034.35 in unpaid wages to be paid out to Claimants from the Wage Security Fund ("WSF").
- Respondent owes $15,180 to Claimants as ORS 652.150 penalty wages, along with interest, and $9,540 to Claimants as ORS 653.055(1)(b) civil penalties, along with interest.
- The Commissioner of BOLI is entitled to recover the $4,034.35 paid out from the WSF and a 25 percent penalty on that amount, with interest.

2) On February 11, 2010, Respondent, through Oregon attorney Manuel Hernandez, filed an answer and request for a contested case hearing in which Respondent admitted owing Claimants $4,034.35 in unpaid wages and admitted that $4,034.35 had been paid out to Claimants from the WSF. Respondent denied it was liable for ORS 652.150 penalty wages or ORS 653.055(1)(b) civil penalties.

3) On February 3, 2011, the Agency filed a motion for summary judgment, alleging that, as a matter of law, Respondent owes $4,034.35 to the Wage Security Fund ("WSF") for unpaid wages paid out to the Claimants, along with a 25 percent penalty of $1,529.62. At the same time, the Agency moved to amend its Order of Determination ("Order") to waive recovery of $15,180 in penalty wages under ORS 652.150 and $9,540 in civil penalties under ORS 653.055(1)(b).

4) On February 3, 2011, the ALJ issued an order requiring Respondent's written response to the Agency's motions no later than February 17, 2011. Respondent did not file a response. On February 25, 2011, the ALJ issued a ruling **GRANTING** the Agency's motions. That ruling is reprinted below:

"**History Of The Case**

"On January 6, 2010, the Agency issued Order of Determination #09-3453 ('Order') in which it alleged that seven wage claimants ('Claimants') were employed in Oregon by David W. Lewis aka Bandon Boatworks ('Respondent') and 'performed work, labor and services' for Respondent for which they were not paid. The Order alleged that Respondent owed $4,034.35 to Claimants

and that $4,034.35 had been paid to Claimants from the WSF. The Order further alleged that Respondent owed $15,180 as ORS 652.150 penalty wages, along with interest, and $9,540 as ORS 653.055(1)(b) civil penalties, along with interest. Finally, the Agency alleged that the Commissioner of BOLI is entitled to recover the $4,034.35 paid out from the WSF and a 25 percent penalty on that amount, with interest.

"**Ruling On Agency's Motion To Amend Order Of Determination**

"The Agency's motion to amend its order is GRANTED and the Agency's request for ORS 652.150 penalty wages and ORS 653.055(1)(b) civil penalties is deleted from the Agency's Order. This leaves Respondent's repayment of the WSF and a penalty under ORS 652.414(3) as the only issues in the case.

"**Summary Judgment Standard**

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

"' * * * No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at [hearing].' ORCP 47C.

"The only evidence submitted by the Agency in support of its motion for summary judgment was its original Order, accompanied by Respondent's answer and request for hearing. The forum bases its decision on those documents and their legal significance.

"**The Agency Is Entitled To Recover The Amount Paid Out By The WSF**

"The Agency's prima facie case consists of proof of the following elements: (1) Respondent employed Claimants; (2) An amount was paid to Claimants from the WSF as unpaid wages; and (3) Respondent is liable for the amounts paid from the WSF. *See, e.g., In the Matter of Bukovina Express, Inc.,* 27 BOLI 184, 199 (2006); *In the Matter of Lisa Sanchez,* 27 BOLI 56, 61 (2005). In its answer, Respondent admitted that it employed all seven Claimants in Oregon during the

wage claim periods set out in the Order, that Claimants earned a total of $4,034.35 in wages for which they were not paid, and that $4,034.35 was paid out to Claimants from the WSF pursuant to ORS 652.414. In cases involving payouts from the WSF, when (1) there is credible evidence that a determination on the validity of the claim was made; (2) there is credible evidence as to the means by which that determination was made; and (3) the Agency has paid out money from the WSF and seeks to recover that money, there is a rebuttable presumption that the Agency's determination is valid for the sums actually paid out. *In the Matter of Carl Odoms,* 27 BOLI 232, 240 (2006). Although the Agency presented no evidence other than the allegations in the Order and Respondent's admissions to support the first and second elements of this presumption, that evidence, coupled with the presumption that '[o]fficial duty has been regularly performed,'[1] leads to the forum to conclude that the Agency's determination was valid for the $4,034.35 paid out from the WSF. That leaves no material facts in dispute. Accordingly, the Agency is entitled as a matter of law to recover the $4,034.35 WSF payout from Respondent.

"**The Agency Is Entitled To A 25 Percent Wage Security Fund Penalty**

"ORS 652.414(3) entitles the Agency to recover 'a penalty of 25 percent of the amount of wages paid from the Wage Security Fund or $200, whichever amount is the greater.' Respondent denied this allegation in his answer. Respondent's denial does not insulate him from summary judgment, given his admission that he owed the $4,034.35 paid out to Claimants from the WSF. Under ORS 652.414(3), if the WSF makes a payout, then a penalty is automatically due from a liable Respondent. The only question is the amount. In its Order of Determination, the Agency seeks a penalty of $1,529.62, computed by applying the statutory equation of '25 percent or $200' to each Claimant separately, then adding the totals together.[2] In previous cases involving multiple wage claimants in which a WSF penalty was assessed, the Commissioner has consistently ordered respondents to pay a 25 percent penalty on the total amount of wages paid out. In

[1] *See* ORS 40.135(1).

[2] The Order seeks $200 penalties for each of five claimants who were respectively paid $283.17, $499.24, $708.78, and $297.51 from the WSF, for a total of $1,000, and penalties of $268.49 and $261.13 for wage claimants who were paid $1,073.95 and $1,908.00 from the WSF, for a total of $1,529.62.

2009, the Commissioner specifically held that that this is the correct method of computation under ORS 652.414(3). *See In the Matter of Blachana, LLC,* 30 BOLI 197, 225-26 (2009), *appeal pending*.[3] The forum follows *Blachana* to compute the WSF penalty in this case. That penalty amounts to $1,008.59 ($4,034.35 x .25 = $1,008.59). The Agency is entitled to recover a WSF penalty in the amount of $1,008.59 from Respondent.

"**Conclusion**

"The Agency is entitled to recover its WSF payout of $4,034.35, along with a WSF penalty of $1,008.59 from Respondent. Procedurally, the next step in this contested case proceeding will be the forum's issuance of a Proposed Order that incorporates this interim order."

This ruling is **AFFIRMED**.

5) On March 17, 2011, the ALJ issued a Proposed Order. On May 1, 2002, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

[3] In further support of its statutory analysis in *Blachana* and its conclusion in this case, the forum notes that ORS 652.414(3) only refers to a "penalty" in relationship to "amounts paid from the Wage Security Fund." (*emph. added)*

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent David W. Lewis was an Oregon employer doing business under the name of Bandon Boatworks.

2) Respondent employed Claimant Leslie Ballantyne from October 20 to November 21, 2008, at the wage of $7.95 per hour. Ballantyne was not paid at all for 58 hours of work and received a "non-sufficient" check in the amount of $247.68 for other work she performed. In total, Ballantyne earned $708.78 and was paid no wages, leaving $708.78 in unpaid, due and owing wages. Ballantyne was paid $708.78 from the WSF.

3) Respondent employed Claimant Jesse Downs from October 16 to November 21, 2008, at the wage of $7.95 per hour. Downs was not paid at all for 22 hours of work and received a "non-sufficient" check in the amount of $108.27 for other work that Downs performed. In total, Downs earned $283.17 and was paid no wages, leaving $283.17 in unpaid, due and owing wages. Downs was paid $283.17 from the WSF.

4) Respondent employed Claimant Dena Freed from October 24 to November 22, 2008, at the wage of $7.95 an hour. Freed was not paid at all for 42.75 hours of work and received a "non-sufficient" check in the amount of $159.38 for other work Freed performed. In total, Freed earned

$499.24 and was paid no wages, leaving $499.24 in unpaid, due and owing wages. Freed was paid $499.24 from the WSF.

5) Respondent employed Claimant Charles Heil, Jr., from October 16 to November 23, 2008, at the wage of $12.00 an hour. Heil was not paid at all for 35.5 hours of work and received a "non-sufficient" check in the amount of $647.95 for other work he performed. In total, Heil earned $1,073.95 and was paid no wages, leaving $1,073.95 in unpaid, due and owing wages. Heil was paid $1,073.95 from the WSF.

6) Respondent employed Claimant Bridgett Huff from October 16 to November 21, 2008, at the wage of $7.95 an hour. Huff was not paid at all for 77 hours of work and received a "non-sufficient" check in the amount of $432.35 for other work she performed. In total, Huff earned $1,044.50 and was paid no wages, leaving $1,044.50 in unpaid, due and owing wages. Huff was paid $1,044.50 from the WSF.

7) Respondent employed Claimant Greg Kloumasis from November 17 to November 22, 2008, at the wage of $11.50 an hour. Kloumasis worked 25.87 hours, earning $297.51. Respondent paid Kloumasis no wages, leaving $297.51 in unpaid, due and owing wages. Kloumasis was paid $297.51 from the WSF.

8) Respondent employed Claimant Peggy Kyle from November 17 to November 22, 2008, at the wage of $7.95 an hour. Kyle worked 16 hours, earning $127.20. Respondent paid Kyle no wages, leaving $127.50 in unpaid, due and owing wages. Kyle was paid $127.50 from the WSF.

9) The Agency determined that the wage claimants were owed the unpaid wages set out in Findings of Fact ##2-8 – The Merits before making its WSF payout. In total, the Agency paid out $4,034.35 from the WSF.

10) Twenty-five percent of $4,034.35 is $1,008.59.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent David W. Lewis was an Oregon employer doing business under the name of Bandon Boatworks.

2) Respondent employed all seven wage claimants in Oregon from October 16, 2008, to November 23, 2008.

3) Claimants earned the following wages while employed by Respondent and were paid nothing:

Claimant	**Wages Earned**
Leslie Ballantyne	$708.78
Jesse Downs	$283.17
Dena Freed	$499.24
Charles Heil, Jr.	$1,073.95
Bridgett Huff	$1,044.50
Greg Kloumasis	$297.51
Peggy Kyle	$127.20

4) BOLI's Wage and Hour Division determined that all seven wage claims were valid and paid

$4,034.35 in unpaid wages to Claimants from the WSF.

5) Twenty five percent of $4,034.35 is $1,008.59.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent employed Claimants. ORS 652.310, 653.010.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 652.330, 652.332.

3) Respondent violated ORS 652.140 by failing to pay Claimants all wages earned and unpaid after the termination of their employment.

4) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries is entitled to recover from Respondent the sum of $4,034.35 paid to the Claimants from the WSF and sought in the Order of Determination, along with a 25 percent penalty of $1,008.59 assessed on that sum, plus interest until paid. ORS 652.332, ORS 652.414(3).

OPINION

CLAIMANTS' WAGE CLAIMS

To establish Claimants' wage claims, it was necessary for the Agency to prove the following elements by a preponderance of the evidence: 1) Respondent employed Claimants; 2) The pay rate upon which Respondent and Claimants agreed, if more than the minimum wage; 3) Claimants performed work for which they were not properly compensated; and 4) The amount and extent of work Claimants performed for Respondent. *In the Matter of Creative Carpenters Corporation, 29 BOLI 271, 277 (2007).* The Agency proved its case through Respondent's admissions and the forum granted summary judgment to the Agency regarding the validity of the wage claims and the amount owed to each Claimant.

WAGE SECURITY FUND REIMBURSEMENT

The Agency also moved for summary judgment on this issue. The motion was granted by the forum and requires no more discussion. Respondent is liable to reimburse the Agency $4,034.35 for unpaid wages paid out from the WSF and a 25 percent penalty of $1,008.59.

ORDER

NOW, THEREFORE, as authorized by ORS 652.414 and as payment of payment of amounts paid from the Wage Security Fund ("WSF"), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **David W. Lewis aka Bandon Boatworks** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

> A certified check payable to the Bureau of Labor and Industries in the amount of FIVE THOUSAND FORTY TWO

DOLLARS AND NINETY FOUR CENTS ($5,042.94), representing $4,034.35 paid to Leslie Ballantyne, Jesse Downs, Dena Freed, Charles Heil, Jr., Bridgett Huff, Greg Kloumasis, and Peggy Kyle from the WSF, and a 25 percent penalty of $1,008.59 on the sum of $4,034.35, plus interest at the legal rate on the sum of $5,042.94 from November 9, 2009, until paid.

In the Matter of

FRASER'S RESTAURANT & LOUNGE, INC., dba Fraser's Restaurant & Quarterdeck Lounge, and THOMAS ALLEN FRASER

Case No. 23-11

Final Order of Commissioner Brad Avakian

Issued April 21, 2011

SYNOPSIS

Six wage claimants worked for Respondent Fraser's Restaurant & Lounge, Inc. between February 1 and May 13, 2010, and a seventh wage claimant worked for Respondent Thomas Allen Fraser from May 18 through June 11, 2010. All seven performed work for which they were not properly compensated. Based on Respondents' admissions, the forum granted summary judgment to the Agency regarding the validity of the wage claims and ordered Respondents to pay $12,565.80 in unpaid wages. ORS 652.140(2).

The above-entitled case was assigned to Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Patrick A. Plaza, an employee of the Agency. After the Agency issued an Order of Determination, but prior to a Notice of Hearing being issued, the Agency moved for and was granted partial summary judgment. The Agency subsequently amended its Order of Determination to delete all allegations left unresolved in the ALJ's interim order granting the Agency's motion for partial summary judgment. As a result, no hearing was scheduled or held.

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

FINDINGS OF FACT – PROCEDURAL

1) On January 6, 2010, the Agency issued Order of Determi-

nation #09-3453 ("Order") in which it alleged the following:

- Seven wage claimants -- Tracee Lyn Eggert, Kathy Veronica Giddens, Melissa L. Heikes, Susan Hohlweg, Lea Kathleen Stidham, Stacey Ann Whiteley, and Cheryl Ann Whitney ("Claimants") -- were employed in Oregon by Fraser's Restaurant & Lounge, Inc. ("FRLI") dba Fraser's Restaurant & Lounge and Thomas Allen Fraser and Marcia S. Fraser, dba Frasers, as successors in interest to FRLI. The Claimants "performed work, labor and services" for Respondents between February 1 and June 11, 2010.
- All Claimants filed wage claims and assigned their unpaid wages to the Oregon Bureau of Labor and Industries. In total, $12,565.80 in wages was unpaid.
- Respondents owe $14,112.00 to Claimants as ORS 652.150 penalty wages, along with interest, and $14,112.00 to Claimants as ORS 653.055(1)(b) civil penalties, along with interest.

2) On August 4, 2010, Respondents Thomas and Marcia Fraser filed answers and requested a hearing. Both denied that they were successors in interest to FRLI or that they owed any penalty wages or civil penalties. Thomas Fraser admitted that he owed the wages claimed by Whiteley.

3) On August 9, 2010, Respondent FRLI filed an answer and request for hearing in which it admitted owing the wages claimed by all Claimants except Whiteley and denied it owed any penalty wages or civil penalties because of its inability to pay wages.

4) On November 1, 2010, the Agency filed a motion for partial summary judgment alleging that, as a matter of law, Respondents jointly and severally owed the unpaid wages to Claimants as set out in the Order of Determination. At the same time, the Agency moved to amend the Order of Determination to delete the Agency's pleading for ORS 653.055(1)(b) civil penalties.

5) On November 3, 2010, the ALJ issued an order requiring Respondents' written response to the Agency's motions no later than November 15, 2010. Respondents did not file a response. On November 30, 2010, the ALJ issued a ruling **GRANTING** the Agency's motion to amend in its entirety and its motion for partial summary judgment in part. The ruling on the Agency's motion for partial summary judgment is reprinted below:

> "On November 1, 2010, the Agency moved for partial summary judgment in this wage claim case, contending that there is no issue as to any material fact that 'Respondents, jointly and severally, owe unpaid wages to each of the seven claimants' as set forth in the Agency's Order of Determination. Respondents

have had nearly a month to respond to the Agency's motion and have not done so.

"**History Of The Case**

"On July 12, 2010, the Agency issued Order of Determination #10-0981 ('Order') in which it alleged that seven wage claimants 'performed work, labor and services for Fraser's Restaurant & Lounge, Inc. dba Fraser's Restaurant & Deck Lounge, and, Thomas Allen Fraser and Marcia S. Fraser, dba Frasers, as Successors In Interest to Fraser's Restaurant & Lounge, Inc.' The Order alleged that each claimant was entitled to the unpaid wages listed below, computed at the rate of $8.40 per hour for straight time hours and $12.60 per hour for overtime hours.

(Ed. note: The table below has been modified from the original to delete the first name of each claimant and delete the word "date" from the captions "Date wages earned" and "Date wages due" to fit the FOLIO format.)

Claimant	Wages earned	Wages due
Hohlweg:	2/1/10 – 3/29/10	$1159.20
Heikes:	2/1/10 – 4/30/10	$2771.10
Whitney:	2/1/10 – 4/30/10	$1740.90
Giddens:	2/2/10 – 3/22/10	$2360.40
Stidham:	3/1/10 – 4/16/10	$1081.50
Eggert:	3/1/10 – 5/13/10	$2709.00
Whiteley:	5/18/10 – 6/11/10	$743.70

"In total, the Order alleged that Respondents were jointly and severally liable for $12,565.80 in unpaid wages, $14,112.00 in ORS 652.150 penalty wages, and $14,112.00 in ORS 653.055(1)(b) civil penalties.

"On November 1, 2010, the Agency filed a motion to amend the Order to delete the Agency's pleading for $14,112.00 in civil penalties based on ORS 653.055(1)(b). On November 24, 2010, I granted the Agency's motion. The Agency did not seek summary judgment with respect to the penalty wages sought in the Order. Consequently, the only issues considered by the forum in ruling on the Agency's motion are: (1) whether the claimants are entitled to the unpaid wages sought in the Order and, (2) If so, who is liable to pay those wages.

"**Summary Judgment Standard**

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

"' * * * No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror

could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at [hearing].' ORCP 47C.

"The evidentiary 'record' considered by the forum in deciding this matter consists of: (1) The Agency's Order and Respondents' answers and requests for hearing; (2) The exhibits attached to the Agency's motion for partial summary judgment.

"**Liability Of Fraser's Restaurant & Lounge, Inc., dba Fraser's Restaurant & Quarterdeck Lounge**

"In its answer and request for hearing, Fraser's Restaurant & Lounge, Inc. ('Fraser's, Inc.') stated '[i]n response to #2 we agree for all wage claims except for Stacey Whiteley.' Paragraph #2 of the Order incorporates the wage claims of all seven claimants by reference to Exhibit A attached to the Order[1] and includes the following language:

"'* * * During the periods set out [earlier in this interim order] the Wage Claimants performed work, labor and services for Fraser's Restaurant & Lounge, Inc. dba Fraser's Restaurant & Deck Lounge, and, Thomas Allen Fraser and Marcia S. Fraser, dba Frasers, as Successors In Interest to Fraser's Restaurant & Lounge, Inc. (the 'Employers'). The Employers were required by the provisions of ORS 653.025 to compensate the Wage Claimants at a rate not less than $8.40 per hour for each hour worked. In addition, the Employers were required by the provisions of ORS 653.261(1) and OAR 839-020-0030 to compensate the Wage Claimants one and one-half times the regular rates of pay for each hour worked over 40 hours in a given work week. The Wage Claimants worked a total of 1,578.75 hours, 24.5 of which were hours worked over 40 hours in a given work week, and are entitled to $13,364.40 in wages, of which the Employers paid the sum of $798.60, leaving a balance due and owing of $12,565.80, along with interest as set out in Exhibit A.'

"Based on the language contained in Paragraph #2 of the Order, Fraser's Inc.'s statement constitutes an admission that it employed Claimants Hohlweg, Heikes, Whitney, Giddens, Stidham, and Eggert, and that those six claimants worked the dates and earned

[1] Exhibit A sets out the names of the seven wage claimants, their dates of employment, their rate of pay, the number of straight time and overtime hours that they worked, the amount they were paid, and the amount of unpaid wages currently owed to them.

the amounts and are owed the unpaid wages recited on page two of this interim order.

"Fraser's, Inc. denied that it employed or owes any wages to Claimant Whiteley. Corporation Division records submitted by the Agency in support of its motion show that Frasers registered for business on May 12, 2010, and that Fraser's, Inc. filed articles of dissolution on June 4, 2010. In the answers and requests for hearing filed by Thomas and Marcia Frazier, they both stated that Fraser's, Inc. closed on April 30, 2010, and that Frasers opened for business on May 12, 2010. The Agency submitted no evidence to the contrary. Consequently, for purposes of this motion, the forum concludes that Fraser's, Inc. closed on April 30, 2010. Since Stacy Whiteley did not begin her employment until May 18, 2010, she could not have been employed by Fraser's, Inc.

"In conclusion, the forum **GRANTS** the Agency's motion with regard to Fraser's, Inc.'s liability for the amount of unpaid wages set out in the Agency's Order as to Claimants Hohlweg, Heikes, Whitney, Giddens, Stidham, and Eggert. The forum **DENIES** the Agency's motion with regard to Fraser's, Inc.'s liability for the amount of unpaid wages set out in the Agency's Order as to Claimant Whiteley.

"**Liability Of Thomas And Marcia Fraser For Claimant Whiteley's Unpaid Wages**

"In his answer and request for hearing, Thomas Fraser admitted that he was the sole proprietor of Frasers, that Claimant Whiteley was his employee, and that he agreed with Whiteley's wage claim as set out in paragraph #2 of the Agency's Order. Marcia Fraser agreed that Claimant Whiteley was employed by Frasers but did not admit any ownership interest in Frasers. The Corporation Division records provided by the Agency in support of its motion show that Thomas Fraser is the authorized representative and registrant for Frasers and do not reflect any ownership interest by Marcia Fraser. Additionally, the Agency refers to Frasers as a sole proprietorship on pages 4 and 6 of its motion. By its very nature, a sole proprietorship can only be owned by one person. In this case, it appears that Thomas Fraser is that person. As such, Thomas Fraser is liable for Claimant Whiteley's unpaid wages. For purposes of this motion, Marcia Fraser was not an employer and is not liable for Claimant Whiteley's unpaid wages.

"In conclusion, the forum **GRANTS** the Agency's motion with regard to Thomas Fraser's liability for the amount of Claimant Whiteley's unpaid wages as set out in the

Agency's Order. The forum **DENIES** the Agency's motion with regard to Marcia Fraser's liability for the amount of Claimant Whiteley's unpaid wages as set out in the Agency's Order.

"**Liability Of Marcia Fraser As Successor In Interest To Fraser's, Inc.**

"The Agency alleges that Thomas and Marcia Fraser, doing business as Frasers, are successors in interest to Fraser's, Inc. and thereby liable for the unpaid wages owed by Fraser's, Inc. Based on the record to date, the forum has already concluded that Frasers is a sole proprietorship owned by Thomas Fraser and that Marcia Fraser has no ownership interest. Accordingly, there is no basis in fact or in law to justify granting partial summary judgment against Marcia Fraser on the theory that she is liable as a successor employer to the unpaid wages owed by Fraser's, Inc.

"The forum **DENIES** the Agency's motion for partial summary judgment with regard to Marcia Fraser's liability for the amount of unpaid wages set out in the Agency's Order as to Claimants Hohlweg, Heikes, Whitney, Giddens, Stidham, and Eggert.

"**Liability Of Thomas Fraser As Successor In Interest To Fraser's, Inc.**

"Having denied the Agency's motion as to Marcia Fraser, the forum evaluates the Agency's claim of successorship against Thomas Fraser, the undisputed sole proprietor of Frasers.

"This forum has long held that the test to determine whether an employer is a successor is whether it conducts essentially the same business as conducted by the predecessor. The six elements to consider include: the name or identity of the business; its location; the lapse of time between the previous operation and the new operation; whether the same or substantially the same work force is employed; whether the same product is manufactured or the same service is offered; and, whether the same machinery, equipment, or methods of production are used. Not every element needs to be present to find a successor employer. The forum considers all of the facts together to reach a determination. *In the Matter of Bukovina Express, Inc.,* 27 BOLI 184, 201 (2006).

"**A. <u>The Name Or Identity Of The Business</u>**

"The predecessor's name is Fraser's Restaurant & Lounge, Inc. dba Fraser's Restaurant & Quarterdeck Lounge ('Fraser's, Inc.'). The name of the alleged successor is Frasers. The president, secretary, and a registered agent of Fraser's, Inc. was Gertrude Fraser. The vice president was Thomas Fraser. Thomas and Marcia

Fraser were both directors. The authorized representative and registrant of Frasers is Thomas Fraser. Records from the Oregon Liquor Control Commission to show that Fraser's, Inc. renewed its OLCC license on June 3, 2010, with a premises address of 1032 Oregon Avenue SW, Bandon, OR 97411, Frasers' principal place of business. Although Respondents Thomas and Marcia Fraser allege in their respective answers that Frasers did not purchase Fraser's, Inc., the forum concludes that these similarities in name and identity support a finding of successorship.

"**B. Location**

"The principal place of business of the predecessor is listed with the Corporation Division as 'Hwy 101 & 10th, PO Box 687, Bandon, OR 97411.' The principal place of business of Fraser's Restaurant & Quarterdeck Lounge is listed with the Corporation Division as '1032 Oregon St. SW (Hwy 101 & 10th SW), PO Box 687, Bandon, OR 97411.' The principal place of business of Frasers is listed with the Corporation Division as '1032 Oregon St. SW, PO Box 681, Bandon, OR 97411.' Based on these Corporation Division records, the forum concludes that Frasers is doing business in the same location as Fraser's, Inc. This indicates successorship.

"**C. The Lapse Of Time Between The Previous Operation And The New Operation**

"Fraser's, Inc. filed articles of dissolution with the Corporation Division on June 4, 2010. Frasers filed an application for registration with the Corporation Division on May 12, 2010. Respondent Thomas Fraser states in his answer that the Fraser's, Inc. closed on April 30, 2010, and that Frasers opened a store for business on May 12, 2010. He also admits that Whiteley was employed by Frasers from May 18 through June 11, 2010. Based on Thomas Fraser's statements, the forum concludes Frasers opened its doors for business only 12 days after Fraser's, Inc. closed its doors. This brief lapse of time indicates successorship.

"**D. Whether The Same Or Substantially The Same Work Force Is Employed**

"There is no evidence in the record to show that Fraser's, Inc. and Frasers employed any of the same employees.

"**E. Whether The Same Product Is Manufactured Or The Same Service Is Offered**

"Aside from its name and the existence of an OLCC liquor license, the record is devoid of evidence as to the type of business that the Fraser's Restaurant & Lounge, Inc. operated. There is no evidence in the record as to the

type of business that Frasers operates, other than a tenuous inference that it serves alcohol drawn from the fact that Fraser's, Inc. renewed its OLCC license the day before it filed articles of dissolution and Frasers operates out of the same location as Fraser's, Inc.

"**F. Whether The Same Machinery, Equipment, Or Methods Of Production Are Used.**

"There is no evidence in the record as to whether Frasers uses the same machinery, equipment, or methods of production as Fraser's, Inc.

"**Conclusion**

"Except for some Corporation Division records, the Agency's argument that Thomas and Marcia Fraser are successors to Fraser's, Inc. is based solely on conjecture. The Agency has presented no evidence whatsoever to satisfy three elements of the six element test used by the forum to determine successorship. Likewise, the Agency has presented no evidence to prove the specific type of business that Frasers operates.[2] Based on the record to date, this forum is unable to conclude as a matter of law that Frasers conducts essentially the same business as Fraser's, Inc. The Agency's motion for partial summary judgment against Thomas Fraser on the theory that he is liable as a successor employer to the unpaid wages owed by Fraser's, Inc. is **DENIED**.

"**Case Status**

" The following allegations contained in the Agency's Order remain unresolved:

1. Whether Fraser's, Inc. is liable for Claimant Whiteley's unpaid wages.
2. Whether Fraser's, Inc. is liable for penalty wages to all seven wage claimants.
3. Whether Thomas Fraser dba Frasers is a successor in interest to Fraser's, Inc., and the extent of his liability, if any, for the unpaid wages due to wage claimants Hohlweg, Heikes, Whitney, Giddens, Stidham, and Eggert.
4. Whether Marcia Fraser has an ownership interest in Frasers. If so, the extent of her liability, if any, for the unpaid wages due to Whiteley as Whiteley's employer and to wage

[2] The continued existence of a Fraser's Inc.'s OLCC license, when Fraser's, Inc. conducted business at the same location as Frasers and Frasers' owner was one of the Fraser's Inc.'s corporate officers, does not prove that Frasers serves alcohol when there is no other evidence in the record to support that fact.

claimants Hohlweg, Heikes, Whitney, Giddens, Stidham, and Eggert as a successor in interest to Fraser's, Inc.

5. Whether Thomas and Marcia Fraser are liable for ORS 652.150 penalty wages to the wage claimants."

This ruling is **AFFIRMED**.

6) On March 3, 2011, the Agency moved to amend its Order of Determination to make the following changes:

1. To delete the Agency's allegation that FRLI owes wages to Claimant Stacey Whiteley;
2. To remove Marcia Fraser as a named respondent;
3. To forego pursuit of all penalty wages assessed under ORS 652.150 against all named respondents; and
4. To withdraw its allegations that Thomas Fraser is liable for unpaid wages of FRLI's employees based on the theory of successor liability.

The Agency also asked the forum to issue proposed and final orders reiterating the findings in the ALJ's interim order dated November 30, 2010. Respondents filed no objections to the Agency's motion and the ALJ granted the Agency's motion on March 16, 2011.

7) On March 21, 2011, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent FRLI was an Oregon domestic business corporation and an employer doing business in Bandon, Oregon that suffered or permitted one or more persons to work.

2) Respondent FRLI employed Claimant Eggert from March 1 through May 13, 2010, at the straight time wage of $8.40 per hour and $12.60 per hour for overtime hours. Eggert worked 330.25 straight time hours and 6.5 overtime hours, earning a total of $2,856.00. Eggert was only paid $147.00, leaving $2,709.00 in unpaid, due and owing wages.

3) Respondent FRLI employed Claimant Giddens from February 2 through March 22, 2010, at the straight time wage of $8.40 per hour and $12.60 per hour for overtime hours. Giddens worked 254 straight time hours and 18 overtime hours, earning a total of $2,360.40. Giddens was paid nothing, leaving $2,360.40 in unpaid, due and owing wages.

4) Respondent FRLI employed Claimant Heikes from February 1 through April 30, 2010, at the straight time wage of $8.40 per hour. Heikes worked 332.75 straight time hours, earning a total of $2,795.10. Heikes was only paid $24.00, leaving $2,771.10 in unpaid, due and owing wages.

5) Respondent FRLI employed Claimant Hohlweg from February 1 through March 29, 2010, at the straight time wage of $8.40 per hour. Hohlweg worked 177 straight time hours, earning a total of $1,486.80. Hohlweg was only paid $327.60, leaving $1,159.20 in unpaid, due and owing wages.

6) Respondent FRLI employed Claimant Stidham from March 1 through April 16, 2010, at the straight time wage of $8.40 per hour. Stidham worked 128.75 straight time hours, earning a total of $1,081.50. Stidham was paid nothing, leaving $1,081.50 in unpaid, due and owing wages.

7) Respondent FRLI employed Claimant Whitney from February 1 through April 30, 2010, at the straight time wage of $8.40 per hour. Whitney worked 207.25 straight time hours, earning a total of $1,740.90. Whitney was paid nothing, leaving $1,740.90 in unpaid, due and owing wages.

8) At all times material herein, Respondent Thomas Allen Fraser was an individual and an employer doing business under the name of Frasers in Bandon, Oregon who suffered or permitted one or more persons to work.

9) Respondent Thomas Frazier employed Claimant Whiteley from May 18 through June 11, 2010, at the straight time wage of $8.40 per hour. Whiteley worked 124.25 straight time hours, earning $1043.70 and was paid only $300.00, leaving $743.70 in unpaid, due and owing wages.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent FRLI was an Oregon domestic business corporation and an employer doing business in Bandon, Oregon that suffered or permitted one or more persons to work, including Claimants Eggert, Giddens, Heikes, Hohlweg, Stidham, and Whitney.

2) At all times material herein, Respondent Thomas Allen Fraser was an individual and employer doing business under the name of Frasers in Bandon, Oregon who suffered or permitted one or more persons to work, including Claimant Whitely.

3) Claimants Eggert and Giddens were employed by Respondent FRLI at the straight time wage of $8.40 per hour and overtime wage of $12.60 per hour and worked straight time and overtime hours for which they were not paid. Respondent FRLI owes them the following unpaid wages:

Claimant	**Wages Owed**
Eggert	$2,709.00
Giddens	$2,360.40

4) Claimants Heikes, Hohlweg, Stidham, and Whitney were employed by Respondent FRLI at the straight time wage of $8.40 per hour and performed work for which they were not paid. Respondent FRLI owes them the following unpaid wages:

Claimant	Wages Owed
Heikes	$2,771.10
Hohlweg	$1,159.20
Stidham	$1,081.50
Whitney	$ 743.70

5) Claimant Whiteley was employed by Respondent Thomas Fraser at the straight time wage of $8.40 per hour and performed work for which Whitely was not paid. Respondent Thomas Fraser owes Whiteley $1,740.90 in unpaid wages.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent FRLI employed Claimants Eggert, Giddens, Heikes, Hohlweg, Stidham, and Whitney. ORS 653.010.

2) At all times material herein, Respondent Thomas Fraser employed Claimant Whitely. ORS 653.010.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondents herein. ORS 652.330, 652.332.

4) Respondents violated ORS 652.140 by failing to pay Claimants all wages earned and unpaid after the termination of their employment.

5) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries is entitled to recover from Respondents, as assignee of the Claimants, unpaid wages in the amount of $12,565.80, plus interest until paid. ORS 652.332.

OPINION

CLAIMANTS' WAGE CLAIMS

To establish Claimants' wage claims, it was necessary for the Agency to prove the following elements by a preponderance of the evidence: 1) Respondents employed Claimants; 2) The pay rate upon which Respondents and Claimants agreed, if more than the minimum wage; 3) Claimants performed work for which they were not properly compensated; and 4) The amount and extent of work Claimants performed for Respondents. *In the Matter of Creative Carpenters Corporation, 29 BOLI 271, 277 (2007).* The Agency proved its case through Respondents' admissions and the forum granted summary judgment to the Agency regarding the validity of the wage claims and the amount owed to each Claimant.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Fraser's Restaurant & Lounge, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

> A certified check payable to the Bureau of Labor and Industries in the amount of ELEVEN THOUSAND EIGHT HUN

DRED TWENTY TWO DOLLARS AND TEN CENTS ($11,822.10), less appropriate lawful deductions, representing gross earned, due and payable wages owed to Tracee Lyn Eggert, Kathy Veronica Giddens, Melissa L. Heikes, Susan Hohlweg, Lea Kathleen Stidham, and Cheryl Ann Whitney, plus interest at the legal rate on the sums of:

a) $2,360.40 from April 1, 2010, until paid;

b) $2,240.70 from May 1, 2010, until paid;

c) $7,221.00 from June 1, 2010, until paid.

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Thomas Allen Fraser** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

A certified check payable to the Bureau of Labor and Industries in the amount of SEVEN HUNDRED FORTY-THREE DOLLARS AND SEVENTY CENTS ($743.70), less appropriate lawful deductions, representing gross earned, due and payable wages owed to Stacey Ann Whiteley, plus interest at the legal rate on the sum of $743.70 from July 1, 2010, until paid.

———————

In the Matter of

MARK A. FRIZZELL and LAUNA G. FRIZZELL

Case No. 05-11

Final Order of Commissioner Brad Avakian

Issued June 13, 2011

———————

SYNOPSIS

Respondent Mark Frizzell, a commercial fisherman, employed Claimant in 2009 as a crew member to assist Respondent in the 2009-2010 crab harvest. Claimant worked a total of 137 hours preparing Respondent's crab gear for the crab harvest. He was fired shortly before crab season began. If Claimant had participated in the crab harvest, he would have been paid a percentage of the total harvest. Instead, the only pay he received was in the form of cash and check draws and cans that he could cash in for a deposit return, totaling $497. Under these circumstances, the forum concluded that Claimant was entitled to be paid at the minimum wage rate for all of his work on Respondent's crab gear. Computed at Oregon's 2009 minimum wage of $8.40 per hour, Claimant earned $1,150.80, leaving $653.80 in unpaid, due, and owing wages. Respondent's failure to pay the wages was willful and the forum awarded Claimant $2,016.00 in penalty wages. The forum also awarded Claimant $2,016.00 as a civil penalty based on Respondent's failure to pay Claimant the minimum wage for all hours worked.

The forum determined that Respondent Launa Frizzell did not employ Claimant and dismissed the charges against her. ORS 652.140(1), ORS 652.150, ORS 653.025, ORS 653.055, ORS 653.261.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 8-9, 2011, at the Newport office of the Oregon Department of Human Services, located at 120 NE Avery Street, Newport, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Chet Nakada, an employee of the Agency. Wage claimant John Laws (Claimant) was present throughout the hearing and was not represented by counsel. Respondents Mark and Launa Frizzell represented themselves and were present throughout the hearing.

The Agency called the following witnesses: Claimant; BOLI Wage and Hour Division compliance specialist Bernadette Yap-Sam (telephonic); Tamera Ranes, Claimant's girlfriend; and Mark and Launa Frizzell.

In addition to themselves, Respondents called the following witnesses: Shawn Callahan and Doug McCall, former crew members; and Tyana Frizzell, Respondents' daughter.

The forum received into evidence:

a) Administrative exhibits X-1 through X-20 (submitted or generated prior to hearing); and

b) Agency exhibits A-1 through A-10 (submitted prior to hearing), A-11 (submitted at hearing), and A-12 (submitted after hearing);

c) Respondents' exhibits R-1, R-5, R-10A, R-10B, R-10C, R-13, R-16 through R-19, R-21, R-22, R-24, R-25, R-26, R-27, and R-28 (submitted prior to hearing). R-10A, R-10B, R-10C were originally all numbered as R-10 but were renumbered and paginated at hearing to make the record clear. Respondents' exhibits R-2 through R-4, R-6, R-7, R-30, and R-31 (submitted prior to hearing) were offered but not received. Respondents' exhibits R-29 and R-30, which were photos taken on Respondents' cell phones of which no copy had been made, were not received. The ALJ gave Respondents the opportunity to make an offer of proof for each exhibit that was offered but not received.

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

FINDINGS OF FACT – PROCEDURAL

1) On December 18, 2009, Claimant filed a wage claim with the Agency alleging that Mark Frizzell ("M. Frizzell") had employed him and failed to pay wages earned and due to him. At the same time, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent.

2) On May 19, 2010, the Agency issued Order of Determination No. 09-3761 based on the wage claim filed by Claimant and the Agency's investigation. In pertinent part, the Order alleged that:

- Respondents employed Claimant from September 21 through November 24, 2009, and were required to pay Claimant no less than $8.40 per hour for each hour worked;
- Claimant worked a total of 292 hours, earning $2,452.80;
- Respondents have only paid Claimant $240.00, leaving a balance due and owing of $2,212.80 in unpaid wages, plus interest thereon at the legal rate per annum from December 1, 2009, until paid;
- Respondents willfully failed to pay these wages and owe Claimant $2,016.00 in penalty wages, with interest thereon at the legal rate per annum from January 1, 2010, until paid.
- Respondents owe Claimant $2,016.00 in civil penalties based on Respondents' failure to pay Claim at the minimum wage for all hours worked.

3) On May 31, 2010, Respondents each filed an answer and request for hearing in which they each alleged:

- Claimant worked on an agreed upon percentage basis, not for an hourly wage;
- Claimant did not work the hours claimed in the Order of Determination;
- Claimant was self-employed like all commercial fishermen and was paid "on a percentage of the catch only";
- Respondents do not owe Claimant any wages;
- Because Respondents do not owe Claimant wages, Respondents do not owe Claimant any penalty wages.

4) On August 25, 2010, the Hearings Unit issued a Notice of Hearing to Respondents, the Agency, and Claimant setting the time and place of hearing for 9:00 a.m. on March 8, 2011, at the Newport offices of the Oregon Department of Human Services.

5) On August 31, 2010, the ALJ ordered the Agency and Respondents each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and a brief statement of

the elements of the claim, a statement of any agreed or stipulated facts, and any wage and penalty calculations (for the Agency only). The ALJ ordered the participants to submit case summaries by February 25, 2011, and notified them of the possible sanctions for failure to comply with the case summary order.

6) Respondents filed virtually identical case summaries on February 16, 2011.

7) On February 14, 2011, Respondents filed a request for discovery in which they stated the following:

> "[We] hereby request and subpoena all original documents showing [Claimant's] hourly wages (State Law Wage not the percentage) he received while working on commercial fishing boats during the entire year in question (2009). I do not want a calendar or a letter fabricated after the fact, I want to see the actual original check stubs and receipts to prove this.
>
> "Mr. Law was paid a higher percentage like all fishermen to cover all gear work that is performed. Commercial Fisherman [sic] do not get paid an hourly wage since they are already being compensated through the percentage. All boat owners would pay a lesser percentage if they paid an hourly wage on top of a percentage of the catch. They are considered self-employed or independent contractor [sic] and received a 1099.
>
> "That is why I am asking for the documents that show him actually being paid a state required hourly wage, not his percentage broke [sic] down in days and hours worked to average an hourly."

In response, the ALJ issued an order requiring Respondents to state whether they wanted a discovery order or subpoena issued, should their motion for discovery be granted.

8) On February 17, 2011, the ALJ conducted and recorded a telephonic prehearing conference with Mr. Nakada, M. Frizzell, and Launa Frizzell ("L. Frizzell"). During the conference, the ALJ explained the difference between issuing a subpoena and a discovery order. During the conference, M. Frizzell stated that he cannot read. He also stated that L. Frizzell, his wife, can read and would read all documents related to the case to him. That same day, Respondents filed a letter stating that they would like a discovery order, not a subpoena.

9) In response to Respondents' motion for a discovery order, the Agency timely filed a response in which it stated that it "has no documents Respondents are asking for in its request for a discovery order." The Agency did not make a relevancy objection to the requested discovery. On February 22, 2011, the ALJ issued an interim order granting Respon-

dents' motion that stated, in pertinent part:

> "Respondents' defenses both include allegation that commercial fishermen, including Claimant, are paid on a percentage basis only, not hourly wage, and are considered self-employed. Based on Respondents' pleading, I find that the discovery requested by Respondents is reasonably likely to produce information generally relevant to Respondents' defense. Accordingly, Respondents' motion is **GRANTED**."

10) Respondents' case summary included a request that the forum dismiss the case. The forum treated Respondents' request as a motion to dismiss. On February 25, 2011, the ALJ issued an interim order denying Respondents' request. In pertinent part, the interim order stated:

> "* * * Respondents asked the forum 'to dismiss this case and waive all penalty [sic] and fees that have been assessed against us' on the grounds that Respondents' Exhibit R-10 makes it 'obvious' that Claimant's 'Calendar of events, days worked and hours worked were fabricated after-the-fact and not kept in a contemporaneous manner as claimed by claimants [sic] on 5-17-2010 in their statement to BOLI.
>
> "Until the Agency files its case summary, I have no way of knowing, aside from reading the allegations in the Order of Determination, which specific dates and times the agency contends that Claimant * * * worked. I note Respondents' exhibits appear to concede that Claimant did work some hours, albeit less than the amount claimed in the Order of the Determination. Even then, the potential existence of a partial discrepancy is not grounds for dismissing the case, as it is possible that a claim may be valid in some respects and not others."

11) On February 25, 2011, the Agency filed its case summary. Agency filed an addendum to its case summary on February 28, 2011.

12) On February 28, 2011, the Agency sent a letter to the ALJ stating that it was arranging to have security present at the hearing because of security concerns that were outlined in the letter.

13) An officer from the City of Newport Police Department was present throughout the hearing.

14) During the second day of hearing, Respondent Mark Frizzell made the following requests:

- That he be given the opportunity to retain an attorney;
- That the case be removed to federal court;
- For a court trial with a jury.

The ALJ denied each request.

15) On March 16, 2011, the ALJ re-opened the record on his own motion to obtain a copy of Claimant's original 2008-2009 planner for inspection. At hearing, copies of that planner showing entries for September 21 through November 29, 2009, had been offered and received into evidence. At hearing, the Agency had proffered the original planner for inspection, but the ALJ declined the Agency's offer at that time. Claimant sent his original planner directly to the ALJ, who received it on March 22, 2011, and marked and received it into the record as Exhibit A-12.

16) The ALJ issued a proposed order on April 20, 2011, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On April 26, 2011, the Agency filed exceptions. Those exceptions are discussed at the end of the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Mark Frizzell ("M. Frizzell") was a commercial fisherman who owned the fishing vessel *Intrepid* and used it to catch crab and fish in the Pacific Ocean off the coasts of Oregon and Washington. M. Frizzell lived in Newport, Oregon, and docked the *Intrepid* in Newport when it was not on a fishing trip. M. Frizzell hired everyone who worked on the *Intrepid* or performed work to prepare it for fishing trips.

2) At all times material herein, Launa Frizzell ("L. Frizzell") was married to M. Frizzell. She acted as M. Frizzell's bookkeeper, wrote out checks, and processed accounts receivable for M. Frizzell.

3) Traditionally, deck hands and the skipper who are hired to work on commercial fishing vessels are paid an agreed rate that consists of a percentage of the gross value of the total catch each fishing trip. In exchange for that percentage, they are expected to prepare the vessel and fishing gear required for each trip, work on the boat while it is fishing, and clean the vessel after the trip. They are expected to pay for their own groceries. Traditionally, they receive an IRS 1099 at the end of the year.

4) M. Frizzell hired Claimant, an experienced commercial fisherman, in the summer of 2009 to skipper the *Intrepid* while it was fishing for tuna and to work as a deck hand during the crab harvest. For tuna trips, M. Frizzell agreed to pay him 13 percent of the catch and later raised it to 16 percent. M. Frizzell agreed to pay Claimant 12 percent of the crab catch. Claimant and M. Frizzell did not execute a written employment contract.

5) Beginning in August 2009, Claimant skippered the *Intrepid* on commercial tuna fishing trips for M. Frizzell until September 17, 2009. Claimant was paid in full for those trips.

6) After the fishing trip that ended on September 17, 2009,

Claimant, Doug McCall, and Shawn ("Red") Callahan cleaned up the "tuna mess," then sanded and painted the *Intrepid*.

7) After fishing for tuna, it takes a day or more to clean up the *Intrepid* and perform routine mechanical maintenance so that it can be prepared for crab season.

8) From September 17 to October 1, 2009, Claimant performed the following work related to cleaning up the "tuna mess" or preparing the *Intrepid* for crab season:

September 21: 7.5 hours cleaning up tuna mess

September 22: 7.5 hours crab-related work

September 23: 7.5 hours crab-related work

September 24: 7.5 hours crab-related work

9) Between October 3 and October 11, 2009, Claimant skippered the *Intrepid* on its last commercial tuna fishing trip of the 2009 season. Claimant was paid in full for that trip. At the end of the trip, he owed M. Frizzell $240 for groceries. Claimant's share of the catch was only $397.76. Because Claimant had medical bills to pay and he and M. Frizzell anticipated that Claimant would be working through crab season, M. Frizzell told Claimant he would not deduct the $240 from Claimant's check, but would instead deducted from Claimant's first crab check.

10) Preparation of the *Intrepid* for crab season involved repairing M. Frizzell's crab pots, drilling holes in "baiters," attaching bridles, and painting buoys. This work was done either on the *Intrepid*, in the crab yard where M. Frizzell kept his crab pots, or at Frizzell's house. During the 2009 crab season, M. Frizzell had 300 crab pots, each weighing approximately 120 pounds, including baiter, 900 buoys, bridle, and the weighted ropes used to lower and raise the pots from the ocean floor.

11) McCall was let go by M. Frizzell on October 16, 2009. At that time, 87 of M. Frizzell's 300 crab pots had been repaired.

12) During the wage claim period, Claimant worked a number of days with Callahan doing work related to crab gear.

13) Callahan did not have a valid Oregon driver's license during the wage claim period. He drove to work for the first "2-3 days" that he worked for Respondent, and then decided it was a bad idea to drive without a license. Thereafter, Claimant picked Callahan in the morning and gave Callahan a ride to work. On those days, it was common that Claimant would telephone Callahan when he arrived at Callahan's driveway in the morning or Callahan would telephone Claimant to tell them he was ready to be picked up.

14) During the wage claim period, M. Frizzell hired Justin _____ to paint the buoys used on the *Intrepid* and paid him a piece rate wage.

15) Claimant worked the following schedule for Respondent from October 12 through November 23, 2009:

October 12: 4 hours cleaning up tuna mess

October 13: 4 hours cleaning up tuna mess, 1 hour crab-related work

October 14: 5 hours crab-related work

October 19: 7.5 hours crab-related work

October 21: 7.5 hours crab-related work

October 22: 7.5 hours crab-related work

October 26: 5 hours crab-related work

October 27: 5 hours crab-related work

October 28: 5 hours crab-related work

October 29: 5 hours crab-related work

October 30: 6 hours crab-related work

October 31: 5 hours crab-related work

November 1: 5 hours crab-related work

November 4: 5 hours crab-related work

November 5: 5 hours crab-related work

November 7: 6 hours crab-related work

November 8: 6 hours crab-related work

November 9: 6 hours crab-related work

November 20: 5 hours crab-related work

November 21: 5 hours crab-related work

November 22: 5 hours crab-related work

November 23: 7 hours crab-related work

16) In total, Claimant performed 137 hours of crab-related work for M. Frizzell from September 22 through November 23, 2009.

17) M. Frizzell fired Claimant at the end of the work day on November 23, 2009.

18) Despite being fired, Claimant showed up for work on November 24, 2009, and worked for at least an hour. There was no evidence presented that M. Frizzell was contemporaneously aware that Claimant was working on November 24 or that he had authorized Claimant to work that day.

19) In November 2009, Claimant received $257 in draws as an advance against the percentage of the catch he expected to earn from the *Intrepid's* crab harvest. The draws were paid in the form of checks for $200 and $20, $20 in cash, and $17 worth of cans with a return deposit that Claimant was able to return for cash.

20) On October 1, 2009, sunset occurred at 6:58 p.m. in Newport; by October 31 sunset had moved back to 6:08 p.m. On November 1, 2009, sunset occurred at 5:06 p.m.[1] in Newport; by November 24 sunset had moved back to 4:41 p.m.

21) The 2009 crab season in Oregon began on December 1, 2009, and lasted five months. M. Frizzell and Callahan fished for crab in the *Intrepid*. Claimant was not paid a percentage of the *Intrepid's* crab harvest or any money other than the $497 in draws he received in October and November 2009.

22) Claimant received all of his draws from L. Frizzell. Six of them, including four related to the tuna catch, and two related to

[1] The forum takes judicial notice of the fact that Daylight Savings Time ended on November 1, 2009.

crab work, were given to Claimant in the form of checks. M. and L. Frizzell's names, address, and phone number is printed on each check, and they are signed by L. Frizzell. The Frizzells did not keep receipts for cash draws that they paid out.

23) Including the $240.00 tuna draw, Claimant had received $497.00 in outstanding draws at the time he was fired. Calculated at Oregon's 2009 statutory minimum wage of $8.40 per hour, Claimant earned $1,150.80 in gross wages (137 hours x $8.40 per hour = $1,150.80), leaving $653.80 in unpaid, due and owing wages as of Claimant's last day of work.

24) Respondents did not keep a record of the hours worked by Claimant during the wage claim period.

25) Claimant did not work for anyone else but M. Frizzell during the wage claim period.

26) Claimant invested no money in the *Intrepid* or M. Frizzell's fishing business. Other than his raingear and boots, he provided no equipment or tools. M. Frizzell was his boss, told him what work to do, and provided him with the pair of pliers he needed to do his work.

27) Respondents gave Claimant an IRS Form 1099-MISC for 2009 that stated Claimant had received $3,866.31 in "Fishing boat proceeds" from "Mark A. Frizzell."

28) Oregon's statutory minimum wage into 2009 was $8.40 per hour.

29) On December 30, 2009, the Agency mailed a document entitled "Notice of Wage Claim" to Mark Frizzell that stated:

> "You are hereby notified that JOHN LAWS has filed a wage claim with the Bureau of Labor and Industries alleging:
>
> "Unpaid statutory minimum wages of $2,355.60 at the rate of $8.40 per hour from September 21, 2009 to November 24, 2009.
>
> "IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address.
>
> "IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation which supports your position, as well as payment of any amount which you concede is owed the claimant to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.
>
> "If your response to the claim is not received on or before January 14, 2010, the Bureau may initiate action to collect these wages in addition to

penalty wages, plus costs and attorney fees."

30) Respondents have not paid any money to Claimant since Claimant's last day of work.

31) Penalty wages are computed as follows for Claimant, in accordance with ORS 652.150: $8.40 per hour x 8 hours x 30 days = $2,016.

32) ORS 653.055 civil penalties are computed as follows for Claimant: in accordance with ORS 652.150 and ORS 653.055: $8.40 per hour x 8 hours x 30 days = $2,016.

33) The Agency offered Claimant's September, October, and November 2009 Verizon cell phone bills into evidence and they were all received as Exhibit A-10. The bills show the purported origination and destination of each call, the calling and receiving numbers, and the time of day each call was made. Because of an unresolved controversy about whether the stated origination and destination of each call are the actual geographic locations the calls were made to or from, the forum gives no weight to the stated origination and destination of the calls listed on the bills. However, the forum has relied on numbers and times of calls between Claimant and Callahan to help determine days that Claimant did or did not work.

CREDIBILITY FINDINGS

34) Doug McCall and Bernadette Yap-Sam were credible witnesses and the forum has credited their entire testimony.

35) Tyana Frizzell is the daughter of M. and L. Frizzell. She testified that in September, October, and November 2009 she lived with her parents and arrived home from work at noon. She also testified that she never saw Claimant paint buoys or lash up crab pots, that he never worked at the Frizzell house after 4 p.m., and that it gets dark after 4 p.m. in October. The 4 p.m. statement was identical to the testimony of M. Frizzell and L. Frizzell and was offered to prove that Claimant could not have worked after 4 p.m. because it was dark. Due to her familial bias and her testimony about the 4 p.m. hour of darkness in October that contradicts credible documentary evidence to the contrary, the forum has only credited her testimony that was corroborated by other credible evidence.

36) Shawn Callahan's testimony was riddled with internal inconsistencies. Although not currently employed by M. Frizzell, Callahan demonstrated a bias towards Respondents by repeatedly volunteering additional information that he perceived would be favorable to them in response to the Frizzell's direct examination. His testimony on direct examination was remarkably specific as to dates that he worked, considering that he appeared to be testifying solely from memory. In contrast, when cross examined about the same dates, he stated in a five-minute time span: "It's hard to

remember that far back"; ""It's hard to remember all of these"; "It's hard to remember dates"; and "It's just kind of hard to remember because I know we took a lot of days also off for deer and elk season." In addition, his testimony on direct examination about Exhibit R-17, and his handwritten statement describing the dates and hours he and Claimant worked contradicted many of his prior statements on direct examination about the same dates.

In contrast to the more credible testimony of McCall, who testified that only 87 crab pots had been repaired by October 16 and that he worked on crab gear in October, Callahan testified that 167 crab pots had been repaired by September 9. He testified, as did M. Frizzell, that M. Frizzell would not let anyone work alone on crab pots due to safety issues but contradicted that testimony by claiming he worked alone on crab gear on October 26, October 30, and November 10. Callahan also testified that he rode to work with Claimant because his driver's license had been suspended. This raises the additional question of how Callahan could have worked alone when he did not testify to any other means of getting to work except by writing with Claimant.

Callahan testified that he and Claimant never started work at 8 a.m., the time they were scheduled to start, that Claimant often picked him up at 9:30 a.m., that they never did any work for the first 1½ hours they were at the boat, and that they had 1-1½ hour lunches at McDonald's three or four times a week, and that they never worked after 3:30 p.m. If the forum believes this testimony, it must conclude that Claimant and Callahan could not have worked more than 3½-4 hours in a typical day. In contrast, Callahan's written record of hours, which he also testified was accurate, shows that he worked "4-5" or "5-6" hours with Claimant on 11 different days. Considering this contradiction and other testimony by Callahan that he and Claimant only worked on crab gear during four separate weeks[2] that respectively totaled two, three, four, and five days in duration, the forum views this as another demonstration of Callahan's bias. This bias was further shown by undisputed evidence that Callahan was one of M. Frizzell's hunting partners in the fall of 2009.

In conclusion, the forum has only credited Callahan's testimony when it was corroborated by other credible evidence.

37) Mark Frizzell testified that most of the crab gear work was done while Claimant was fishing for tuna in the *Intrepid*. In an earlier signed, written statement, he stated that "when John Law started crab gear on October 26, 2009[,] the gear was almost done[.] [T]hey had 130 crab pots to do out of 300 crab pots." This was in marked contrast to McCall's credible testimony that

[2] The forum bases this calculation on a Monday-Sunday work week.

213 crab pots remained to be done when he was let go on October 16, 2009. Like his daughter, M. Frizzell also testified that it gets dark around "4:30-5 p.m." in October to prove that no outdoor crab work could be done after that time due to the absence of light to work in. Again, this contradicts credible evidence provided by the Agency showing that on sunset occurred at between 6:58 p.m. and 6:08 p.m. in Newport in October 2009. M. Frizzell's written statement also states that when Claimant did work, M. Frizzell "always give him money for food [and] gas or my wife made them lunch." This contradicts Callahan's testimony that he and Claimant usually ate at McDonald's. M. Frizzell also testified that he hired Claimant in the "sixth or seventh" month in 2009, which contradicts his written statement that he hired Claimant on August 22, 2009. Finally, the forum credits M. Frizzell's disagreement with the hours Claimant claims to have worked. However, it discredits his testimony that Claimant was paid in draws for all the crab preparation work he performed based on M. Frizzell's failure to keep any records of the hours Claimant worked and because of the unreliability of L. Frizzell's record of crew member draws in November 2009. In conclusion, the forum has only credited M. Frizzell's testimony concerning the amount Claimant was paid and the hours he worked when it was supported by other credible testimony. The forum also treats M. Frizzell's written statement that Claimant worked five hours whenever he worked as an admission against interest to support the conclusion that Claimant worked a minimum of five hours each day that Callahan testified that he and Claimant worked together.

38) Launa Frizzell's testimony about her role in M. Frizzell's fishing operation was credible. She did not witness Claimant's work and did not testify as to the hours he worked. Her testimony concerning the draws that she paid out to Claimant was not credible because she provided no written receipts and because it shows cash draws paid out to Claimant on dates he did not work[3] and to Callahan on two dates he testified he was either setting up for elk hunting or elk hunting.[4]

39) Tamera Ranes, Claimant's live-in partner for the last six years, was called as a witness by the Agency to provide evidence of the hours and dates worked by Claimant and to authenticate copies of pages from the 2008-2009 planner she and Claimant shared that were offered and received as part of Exhibit A-1. She testified that she accurately wrote down Claimant's hours worked on a daily, contemporaneous basis in the daily planner they shared based on information given to her by Claimant and that the copies in Exhibit A-1 were accurate copies.

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[3] November 2, November 12, and November 16.

[4] November 12 and November 16.

Ranes's credibility hinges primarily on this testimony.

After the hearing, the ALJ requested that the Agency submit the original planner and the Agency responded by having Claimant send it directly to the ALJ. After inspecting the original planner, the forum concludes that, while many of the dates and some of the hours in the planner are correct, the entries showing Claimant's dates and hours worked were not made contemporaneously and are not completely accurate. The forum bases this conclusion on the following observations: (1) The first entry in the planner is on January 23, 2009, and the only dates in the planner that show hours worked per day by Claimant are the days corresponding to his wage claim, whereas there are entries before and after Claimant's employment with Respondent that refer to work on other boats; (2) Why would Claimant keep a contemporaneous record of his hours when he was expecting to be paid based on a percentage of the catch and had no way of anticipating he would be fired before the crab season started when he did not keep a similar record with his other fishing employment that paid him on a percentage of the catch basis? (3) Several of the entries in the original planner do not match the exhibits, leaving the ALJ to conclude that Claimant or Ranes either deliberately excluded some entries when making copies for the hearing or changed them after the hearing; (4) The entries in the planner related to Claimant's dates and hours worked for Respondent are all written the same style and appear to be written with the same pen, whereas other entries on those days related to paying bills through November 10, 2009, are written with a different pen in a different colored ink. Based on these observations, the forum has only credited Ranes's testimony concerning the dates and hours worked by Claimant when it was corroborated by other credible evidence.

40) Claimant's testimony was only partly credible because of his demeanor, of internal inconsistencies, the issues with his planner described in the previous Finding of Fact – The Merits, contradictions with credible documentary evidence, and his lack of specificity as to actual work he performed on any given day.

First, Claimant's demeanor. On direct examination, Claimant was relaxed and responded confidently and directly to questions. On cross examination, as soon as M. Frizzell and L. Frizzell began grilling him about his hours worked and confronted him with some contradictory evidence, his demeanor underwent a dramatic transformation. Almost immediately, he became noticeably disturbed and flustered and his confident testimony on direct examination became uncertain and hesitant.

Second, internal inconsistencies in Claimant's testimony. Despite undisputed evidence, including Claimant's own testimony,

that Respondent only has 300 crab pots and a permit for 300 crab pots, Claimant testified that he worked on 500 crab pots for M. Frizzell and offered no explanation for this discrepancy.[5] On direct and redirect examination, Claimant testified that he worked on "chew bags." Earlier, he told the Agency investigator that he had worked on chew bags. On cross-examination he testified that he did not recall working on chew bags.

Third, a conflict with credible documentary evidence. Claimant testified he was fired on November 24, the day Respondent loaded crab gear. However, an uncontroverted receipt from the Port of Newport provided by Respondent shows that Respondent loaded crab gear on November 23 between 9:30 a.m. and 1:00 p.m.

Finally, Claimant testified that he had little independent recollection as to what work he did for M. Frizzell on any specific day during the wage claim period. Instead, he testified that the nearly 300 total work hours noted by Ranes in their shared planner was an accurate record of the dates and hours he worked on crab gear for M. Frizzell. Based on the entire record, the forum has determined that this record is only partly accurate and that Claimant either purposely omitted several entries in copying it to be part of Exhibit A-1 or added them after the hearing before submitting the original planner to the ALJ. Either way, this casts a shadow on Claimant's credibility.

In conclusion, the forum has credited Claimant's testimony regarding the amount of draws he received in its entirety, but only credited his testimony as to the dates and hours he worked on crab gear based on the methodology set in out the section of the Opinion entitled "Amount and Extent of Hours Worked."

ULTIMATE FINDINGS OF FACT

1) At all times material herein, M. Frizzell was a commercial fisherman who owned the fishing vessel *Intrepid* and used it to catch crab and fish in the Pacific Ocean off the coasts of Oregon and Washington. M. Frizzell lived in Newport, Oregon, and docked the *Intrepid* in Newport when it was not on a fishing trip. At all times material herein, M. Frizzell was an Oregon employer who suffered or permitted one or more employees to work, including Claimant.

2) At all times material herein, L. Frizzell was married to M. Frizzell. She acted as M. Frizzell's bookkeeper, wrote out checks, and processed accounts receivable for M. Frizzell.

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[5] His relevant testimony on this subject on direct examination was:

Q: "To prepare for the 2009 crabbing season, how many pots did you work on?"

A: "If you look at it that way, about 500 pots because I was told when we got down to the yard that there was about 80 to 100 pots all ready to go."

3) M. Frizzell hired Claimant in the summer of 2009 to skipper the *Intrepid* while it was fishing for tuna and to work as a deck hand during the crab harvest. M. Frizzell agreed to pay Claimant 12 percent of the crab catch.

4) From September 22 to November 23, 2009, Claimant worked 137 hours on crab-related jobs for M. Frizzell. Calculated at Oregon's 2009 statutory minimum wage of $8.40 per hour, Claimant earned $1,150.80 in gross wages.

5) Claimant was paid no wages for his crab-related work but received $497 in draws in October and November 2009 from M. Frizzell with the intent that they would be deducted from his crab harvest checks.

6) M. Frizzell fired Claimant on November 23, 2009.

7) After being fired, Claimant showed up for work on November 24, 2009, and worked for at least an hour without M. Frizzell's knowledge or authorization.

8) The 2009 crab season in Oregon began on December 1, 2009, and lasted five months. M. Frizzell and Callahan fished for crab in the *Intrepid*. Claimant was not paid a percentage of the *Intrepid's* crab harvest or any money other than the $497 in draws he received in October and November 2009, leaving $653.80 in unpaid, due and owing wages as of Claimant's last day of work.

9) On December 30, 2009, the Agency mailed a document entitled "Notice of Wage Claim" to M. Frizzell that notified Frizzell of Claimant's wage claim and asked that Frizzell submit a check for either the amount of wages sought in the wage claim or the amount that Frizzell conceded was due.

10) Respondents have not paid any money to Claimant since Claimant's last day of work.

11) Penalty wages are computed as follows for Claimant, in accordance with ORS 652.150: $8.40 per hour x 8 hours x 30 days = $2,016.

12) ORS 653.055 civil penalties are computed as follows for Claimant: in accordance with ORS 652.150 and ORS 653.055: $8.40 per hour x 8 hours x 30 days = $2,016.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent M. Frizzell was an Oregon employer who suffered or permitted Claimant to work in Oregon and Claimant was Respondent's employee, subject to the provisions of ORS 652.110 to 652.200, ORS 652.310 to 652.405, and ORS 653.010 to 653.055.

2) At all times material herein, Respondent L. Frizzell was not an Oregon employer and Claimant was not her employee. The Agency's Order of Determination is hereby dismissed as to Respondent L. Frizzell.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 652.310 to 652.405.

4) Respondent M. Frizzell violated ORS 652.140(1) by failing to pay to Claimant all wages earned and unpaid not later than the end of Respondent's work day on November 24, 2009. Respondent M. Frizzell owes Claimant $653.80 in unpaid, due, and owing wages related to work Claimant performed on crab gear.

5) Respondent M. Frizzell willfully failed to pay Claimant all wages due and owing related to work Claimant performed on crab gear and owes $2,016 in penalty wages to Claimant. ORS 652.150.

6) Respondent M. Frizzell paid Claimant less than the wages to which he was entitled under ORS 653.010 to 653.261 by failing to pay him Oregon's statutory minimum wage for all hours worked related to work Claimant performed on crab gear and is liable to pay $2,016 in civil penalties to Claimant. ORS 653.055(1)(b).

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

OPINION

CLAIMANT'S WAGE CLAIM

To establish Claimant's wage claim, the Agency must prove the following elements by a preponderance of the evidence: 1) Respondents employed Claimant; 2) The pay rate upon which Respondents and Claimant agreed, if other than the minimum wage; 3) Claimant performed work for which he was not properly compensated; and 4) The amount and extent of work Claimant performed for Respondents. *In the Matter of Creative Carpenters Corporation, 29 BOLI 271, 277 (2007).*

CLAIMANT WAS EMPLOYED BY RESPONDENT M. FRIZZELL

In this case, the Agency named both M. Frizzell and L. Frizzell as Respondents. In their respective answers, both Frizzells allege that Claimant was self-employed and that they did not owe Claimant any wages because he did not earn any wages. The forum treats these pleadings as a denial that Respondents employed Claimant and an affirmative assertion that Claimant was an independent contractor. The Agency has the burden of proving that one or both Respondents were Claimant's employer. *See In the Matter of 82nd Street Mall, Inc.,* 30 BOLI 140, 142 (2009) (the agency must prove the elements of its prima facie case, which includes respondent's employment of a wage claimant, in order to prevail). Respondents bear the burden of proving that Claimant was an independent contractor. *In the Matter of Gary Lee Lucas,* 26 BOLI 198, 210 (2005).

Based on the pleadings, the forum must conduct a two-step analysis before concluding

whether the Agency has established, by a preponderance of the evidence, the first element of its prima facie case. The first step is to determine whether one or both Respondents are potentially liable if the forum finds that Claimant was not an independent contractor. The second step is to determine whether Respondents have proved, by a preponderance of the evidence, that Claimant was an independent contractor.

A. Are one or both Respondents potentially liable as employers?

To answer this question, the forum looks at the ownership and operation of the Frizzell fishing business. There is no evidence that the business was a limited liability company or corporation or another form of business entity created by statute. The business was not registered with the Corporation Division and there was no assumed business name. This leaves only two possibilities -- either the business was an individual proprietorship owned by either M. Frizzell or L. Frizzell or the Frizzells were partners.

The business in question involves the fishing and crab harvesting operation conducted aboard the vessel *Intrepid* while at sea and the necessary work performed prior to and subsequent to the actual fishing and crab harvesting. Undisputed evidence established that M. Frizzell owns the *Intrepid*, hires crew members and other persons to do piece work in preparation for the crab season and negotiates pay rates with them, determines the work performed by the persons he hires, and supervises them. Undisputed evidence further established that L. Frizzell's only connections with the business were: (1) She was M. Frizzell's bookkeeper; (2) She was married to M. Frizzell; and (3) She signed the checks for the business's accounts payable and her name was printed on the checks immediately below M. Frizzell's name.

M. Frizzell's ownership of the *Intrepid* and supervision of its operations establishes that he was an owner of the business and is potentially liable as an employer. L. Frizzell's potential liability, if any, must arise from a partnership interest.

A partnership is never presumed and the agency bears the burden of proof to show that co-named respondents were partners. *In the Matter of John Steensland,* 29 BOLI 235, 263 (2007). Under ORS 67.055(1), "the association of two or more persons to carry on as co-owners a business for profit creates a partnership, whether or not the persons intend to create a partnership." ORS 67.055(4) provides:

> "In determining whether a partnership is created, the following rules apply:
>
> "(a) Factors indicating that persons have created a partnership include:
>
> "(A) Their receipt of or right to receive a share of profits of the business;

"(B) Their expression of an intent to be partners in the business;

"(C) Their participation or right to participate in control of the business;

"(D) Their sharing or agreeing to share losses of the business or liability for claims by third parties against the business; and

"(E) Their contributing or agreeing to contribute money or property to the business.

"* * * * *

"(c) The sharing of gross returns does not by itself create a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived."

See In the Matter of Captain Hooks, LLP, 27 BOLI 211, 225 (2007). The only evidence in the record support the conclusion that a partnership existed is the undisputed facts that Respondents are married and both of their names appear on the checks used to pay Claimant. This is insufficient to establish a partnership and the forum concludes that the business was an individual proprietorship owned and operated by M. Frizzell hereafter "Respondent").[6]

B. <u>Claimant was not an independent contractor.</u>

The forum's determination of whether or not Claimant was an independent contractor focuses only on the specific work at issue in this wage claim. The Agency concedes that Claimant was paid in full based on Claimant's agreement with Respondent for tuna fishing. The work at issue is the work that Claimant performed to prepare the *Intrepid* and Respondent's crab gear for the 2009-2010 crab harvest that did not involve any participation in the actual crab harvest. Claimant's

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[6] *See In the Matter of Bubbajohn Howard Washington,* 21 BOLI 91, 100 (2000) (when there was no evidence presented that a co-respondent participated in the decision to hire claimant; that she directed claimant's work in any way; that she shared in any profits or liability from respondent's business; or that she controlled the operation of the business, other than taking money from customers, the forum concluded that the co-respondent was not a partner). *Compare In the Matter of Richard Ilg,* 11 BOLI 230, 233, 237, 239 (1993) (two respondents, a father and son, were partners when (1) they filed for an assumed business name together as parties in interest; (2) they operated as a partnership; (3) both had signatory authority on the business bank accounts; and (4) both assigned and supervised the work of the claimants); *In the Matter of Flavors Northwest,* 11 BOLI 215, 224, 228-29 (1993) (two respondents, a husband and wife, were partners when they were co-registrants of an assumed business name; the public viewed the wife as a co-owner; the claimants viewed her as a co-owner and operator of the business with her husband; and she had an active role in obtaining applications and other documents, keeping records, and preparing payrolls for the business).

tuna work was a different kind of work performed under a different agreement for a different percentage of the catch.

This forum applies an "economic reality" test to distinguish an employee from an independent contractor under Oregon's minimum wage and wage collection laws. *In the Matter of Forestry Action Committee,* 30 BOLI 63, 75-76 (2008). 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.

Id.

The facts relevant to the determination of whether Respondent was Claimant's employer can be categorized as follows:

1. <u>The degree of control exercised by Respondent.</u>

Although there is a dispute over the number of hours that Claimant actually worked, Respondent testified that he was the boss and told Claimant what to do. Claimant credibly testified that Respondent set his work hours. Respondent testified that he had the right to set Claimant's hours and to tell Claimant when he could not work[7] as well as when he should work. This evidence indicates an employment relationship.

2. <u>The extent of the relative investments of Claimant and Respondent.</u>

Respondent owned the *Intrepid* and there was no evidence that Claimant made any financial investment in Respondent's business. His only job-related expense was the gas he bought for his truck so he could drive to work from his home in Toledo.[8] Respondent provided all the tools used by Claimant in his work. All of Claimant's work related to crab gear was done at Respondent's house, on the *Intrepid* while it was docked, or at the Port of Newport "crab yard" where Respondent stored his crab pots. This evidence indicates an employment relationship

3. <u>The degree to which the Claimant's opportunity for profit and loss was determined by Respondent.</u>

Because Claimant had no investment in Respondent's

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[7] Specifically, Respondent testified that he told Claimant not to work while Respondent was elk hunting.

[8] The forum regards the expense of commuting to work as a normal cost in most employment relationships.

business, he could not suffer a monetary loss. He had no opportunity to earn more money during the crab season by working harder or more skillfully because he was not paid by a percentage of the catch due to his premature termination. Although he was hired at an agreed rate of pay -- 12 percent of the catch for the crab harvest – his actual pay bore no relationship to this agreed rate and the only money received during the crab season was $257 in draws, including the cans he returned for deposit. This indicates an employment relationship.

4. <u>The skill and initiative required in performing the job.</u>

Claimant was an experienced commercial fisherman. However, the only work he performed for Respondent was sanding and painting the *Intrepid*, repairing crab pots, drilling baiters, and painting buoys. The only tool Claimant used to repair crab pots was a pair of pliers. Painting buoys required the use of a paint brush and drilling holes in baiters required the use of a drill. There was no evidence that these tasks required any special training or skills. This indicates an employment relationship.

5. <u>The permanency of the relationship.</u>

The expected duration of Claimant's employment with Respondent was until the end of the crab season, which lasted from December 1, 2009, until the end of April 2010. Claimant's work related to Respondent's crab harvest, which even Respondent agrees began no later than October 26, 2009, would have extended for six months had he not been fired. An anticipated end date to employment, in and of itself, does not indicate either an independent contractor or an employment relationship, as the forum focuses on the anticipated duration of the employment. Based on prior final orders, the forum concludes that the anticipated six-month duration of Claimant's employment indicates an employment relationship.[9]

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[9] *See In the Matter of Forestry Action Committee,* 30 BOLI 63, 76 (2008) (Impermanence of a particular job alone, when claimant's tenure with respondent was limited to six months by the terms of respondent's contract with a funding agency, did not create an independent contractor relationship); *In the Matter of Triple A Construction, LLC,* 23 BOLI 79, 93 (2002) (When claimants were laborers hired for a short term remodeling project to perform a variety of tasks that did not require them to possess a high degree of initiative, judgment, foresight, or any special skills, the forum held that the impermanence of a particular job alone does not create an independent contractor relationship). *Compare In the Matter of Laura M. Jaap, 30 BOLI 110, 124-25 (2009), appeal pending* (When claimants were hired to perform specific repair and remodeling work on respondent's daughter's house, with the option of performing limited repair work on respondent's house when the work on the daughter's house was complete; the work on the daughter's house was nearly completed in a few days less than one month; and the scope of work at respondent's house was even

Based on this analysis of the five factors involved in the "economic reality" test, the forum concludes that Claimant was Respondent's employee, not an independent contractor. However, the analysis does not stop here because of an additional twist to Respondent's affirmative defense that is unique to the commercial fishing industry and is independent of the five factors in the economic reality test. Summarized, Respondent argues Claimant is an independent contractor because industry tradition and IRS rules define Claimant's relationship with Respondent as self-employment[10] and Claimant agreed to be self-employed. Therefore, since Claimant was an independent contractor who did not participate in the crab harvest, the only activity that could have generated income for him under his agreement with Respondent, Claimant was not entitled to any compensation. Additional facts that are relevant to this defense include the following:

- Although Claimant worked on other fishing boats before and after his work for Respondent, there is no evidence that he engaged in any other gainful employment while he worked for Respondent.
- Respondent and Claimant did not enter into a written employment contract.
- Claimant was expected to pay for his own groceries while harvesting crab at sea on the *Intrepid*.
- Crew members on commercial fishing boats are traditionally considered to be self-employed when they receive no cash pay other than the share of the boat's catch.
- Respondent gave Claimant an IRS Form 1099-MISC for 2009.
- Oregon State University publishes a bulletin stating that the IRS considers crewmen on fishing boats to be self-employed if they are an officer or crew member normally has a crew of fewer than 10 people, they received no cash pay other than a share of the boat's catch, and their share depends on the amount of the catch.

The forum first addresses Respondent's contention that Claimant agreed to be "self-employed." It is undisputed that there was no written employment agreement between Claimant and

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more limited, the forum concluded that the facts were indicative of an independent contractor relationship between respondent and claimants, even though there was no evidence that claimants worked for anyone else while they worked at respondent's daughter's house); *In the Matter of Gary Lee Lucas,* 26 BOLI 198, 212 (2005) (On a construction job, when claimants testified that respondent told them only that there might be other projects in the future, the forum concluded that was insufficient evidence from which to conclude that respondent hired them for an indefinite period of time).

[10] Throughout the contested case hearing process, Respondent used the terms "self-employed" and "self-employment" to refer to Claimant's alleged independent contractor status.

Respondent and that crew members on commercial fishing boats are traditionally considered to be self-employed when they receive no cash pay other than the share of the boat's catch. Claimant testified that he believed he fell into this category of crew member.[11] As to the actual agreement between Respondent and Claimant, the only explicit agreement was that Claimant would be paid a specific percentage of the crab harvest. The conditions upon which that rate of pay was contingent, *e.g.* preparing the crab gear and harvesting the crab from the *Intrepid* -- were apparently assumed by Claimant and Respondent based on industry tradition, as there was no testimony that those conditions were discussed. An agreement for a percentage of the catch is a possible element of self-employment. It can just easily be viewed as an agreed rate of pay between an employer and employee. The only issue it conclusively resolves is that Claimant and Respondent agreed on a method of compensation other than statutory minimum wage. By itself, the percentage of the catch agreement between Claimant and Respondent does not establish an independent contractor relationship. The forum further notes that even if Claimant and Respondent had entered into a specific agreement denoting Claimant as an independent contractor, this fact alone would not require the forum to conclude that Claimant was an independent contractor during the wage claim period.[12]

The forum next looks at whether industry tradition or IRS rules make Claimant an independent contractor as a matter of law or otherwise exempt Respondent from paying Claimant the minimum wage. There is no provision in Oregon law that defines crew members on commercial fishing boats as independent contractors. Likewise, there is no exception in Oregon law for industry tradition that exempts owners of commercial fishing boats from paying the statutory minimum wage to crew members on their boats.[13] Even assuming that the

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[11] *But c.f. In the Matter of Ann L. Swanger,* 19 BOLI 42, 55 (1999) (Intent is not a controlling factor in determining whether an employment relationship exists).

[12] *See, e.g., Forestry Action Committee* at 75 (Even if respondent had produced a contract with claimant's signature, an "independent contractor agreement" is not controlling when determining whether a worker is an independent contractor, as the forum looks at the totality of the circumstances to determine the actual working relationship. Similarly, it does not matter if a worker agrees, orally or in writing, to work as an independent contractor, as intent does not control whether an employment relationship exists.)

[13] *C.f. In the Matter of Debbie Frampton,* 19 BOLI 27, 38 (1999) (general practice in the horse industry of paying employees a flat rate for cleaning horse stalls is not a defense to a wage claim when that practice results in the employee being paid less than the minimum wage).

Oregon State University's ("OSU") representation of IRS rules for crew members is accurate,[14] IRS rules do not preempt the Commissioner's authority to determine whether a wage claimant is an independent contractor. Even if they did, the IRS's purported rules would arguably not apply here because (1) Claimant received cash draws from Respondent that bore no percentage relationship to the share of the catch, and (2) Claimant did not receive an actual share of the catch.

The Agency argues that a crew member on a commercial fishing boat is guaranteed the minimum wage in the same manner as a commissioned salesperson is guaranteed minimum wage if the commission on sales is less than the minimum wage. The forum need not decide that general point. Rather, the forum only needs to decide whether Claimant, a person hired as a crew member on a commercial fishing boat who agreed to be paid a percentage of the catch, who performed work preparing for the catch but was fired before having an opportunity to participate in the catch, and who received draws but no share of the catch, is or is not an independent contractor and is or is not entitled to minimum wage for the work he did in preparation for the catch.

Conclusion

Based on the application of the economic reality test, the forum concludes Claimant was an employee who Respondent suffered or permitted to work and that Respondent was required to pay him Oregon's 2009 minimum wage for all hours worked preparing for Respondent's crab harvest. Industry tradition and IRS rules do not override this conclusion.

THE PAY RATE TO WHICH RESPONDENT AND CLAIMANT AGREED, IF OTHER THAN MINIMUM WAGE

Claimant testified that Respondent agreed to pay him 14 percent of the crab catch; Respondent testified that the agreement was 12 percent. The exact percentage that Claimant and Respondent agreed to is immaterial because the Agency is not seeking to recover unpaid wages based on an agreed rate, but on the 2009 Oregon statutory minimum wage of $8.40 per hour. When there is an agreed rate of pay between an employer and employee but there is no way of determining that rate because of a failure of proof, the minimum wage becomes the applicable wage rate by default.[15] By anal-

[14] Respondent only offered OSU's publication purporting to summarize IRS rules into evidence, not the actual rules. Based on the forum's conclusion that those rules do not control the outcome in this case, the forum declines to engage in the legal research necessary to determine if the OSU summary is an accurate reprint of those rules.

[15] *See In the Matter of TCS Global*, 24 BOLI 246, 258 (2003) (In the absence of evidence that claimant was entitled to the same pay rate - $10.00 per

ogy, when there is an undisputed agreed rate of pay between an employer and employee consisting of a set percentage of a future unknown amount (proceeds from Respondent's crab harvest) contingent upon the employee's participation in a work activity (Claimant being aboard the *Intrepid* while it harvested crab) but that contingency is unsatisfied, the minimum wage becomes the applicable wage rate by default. Accordingly, the forum concludes that Claimant was entitled to be paid Oregon's 2009 statutory minimum wage of $8.40 per hour.

hour - that respondent agreed to pay him for his flagging and pilot car work, the forum concluded that claimant was entitled to receive the applicable minimum wage rate for each hour he worked as a dispatcher). *See also In the Matter of Elisha, Inc.,* 25 BOLI 125, 150 (2004), *affirmed without opinion, Elisha, Inc. v. Bureau of Labor and Industries,* 198 Or App 285, 108 P3d 1219 (2005) (When the forum found there was no evidence showing that the wage claimants agreed to a "package deal" that included a 2.5 percent commission for all of the guests they checked in, plus free use of an apartment adjoining the motel office, paid utilities, including cable television and local telephone calls, and free use of respondent's laundry facilities, the forum concluded that the wages owed to the wage claimants should be computed at the minimum wage rate, including overtime).

CLAIMANT PERFORMED WORK FOR WHICH HE WAS NOT PROPERLY COMPENSATED

A. Amount Claimant was paid.

To determine whether Claimant performed work for which he was not properly compensated, the forum must calculate how much Claimant was actually paid and compare that sum with the amount he earned. Claimant's pay falls into three categories – the draws he received while working on crab gear, the money he received from returning cans that Respondent gave him, and his "tuna draw."[16]

First, the crab draws. Claimant contends that he only received $240 in cash or check draws while he worked on crab gear, whereas Respondent contends that Claimant was paid $475. Respondent's argument is based on L. Frizzell's November 2009 calendar of draws for *Intrepid* crew members and Callahan's testimony. The forum finds Claimant more credible than Respondent for several reasons. First, Launa Frizzell testified that her November 2009 calendar of draws for *Intrepid* crew members was accurate. Second, Callahan testified that he and Claimant received draws at the same time in November for the same amounts and that they each received $475. If this is true, then L. Frizzell's calendar cannot be accurate, because it only shows $170 in draws received by Callahan. The

[16] *See* Finding of Fact #9 – The Merits.

calendar also shows that Claimant received draws on two days that Respondent claims Claimant did not work and that Callahan got two of his three draws on days Callahan and Respondent claim that Callahan did not work. It shows that Claimant got draws on seven different days, and that Callahan only received draws on two of those days, two of which – November 12 and 16 -- Callahan testified that he and Claimant did not work together. Finally, it shows that Callahan and Claimant received the same amount of draw on only one day, November 20. In addition, Respondent produced no receipts for the alleged cash draws. Based on these contradictions and Respondent's failure to produce records, the forum credits Claimant's testimony that he only received $240 in cash or checks for crab draws.

Second, the amount of money Claimant received by returning cans given to him by Respondent and getting a refund on the deposit for those cans. Claimant testified he received $17; Respondent testified there was "probably" $35 worth of cans. Respondent produced no records to support the $35 figure. The forum finds Claimant's testimony to be more credible than Respondent's and concludes that the value of the cans was $17.

Third, the forum must consider whether the undisputed $240 "tuna draw" should be considered as an offset in calculating how much Claimant was paid. Claimant and Respondent agree that the "tuna draw" represented groceries purchased by Respondent for Claimant's benefit during the tuna season and that crew members, including Claimant, were expected to pay for their own groceries. They disagree on whether it should be considered an offset against any money Claimant earned during the crab season. Claimant testified that Respondent "forgave" the debt at the end of the tuna season, whereas Respondent maintains that he told Claimant that he would take the $240 out of Claimant's first crab check. The forum believes Respondent's version for two reasons – it is consistent with industry practice and Claimant's expectation, and because Respondent anticipated giving Claimant a crab check from which he could have deducted the $240. Consequently, the forum considers the $240 "tuna draw" as an offset against any wages due from Respondent to Claimant.[17]

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[17] *See, e.g., In the Matter of Mario Pedroza,* 13 BOLI 220, 225, 231 (1994) (An employer was entitled to a setoff against wages owed to claimant for an overpayment of accrued vacation benefits); *In the Matter of Kenny Anderson,* 12 BOLI 275, 282 (1994) (When respondent gave claimant gasoline on two occasions and claimant agreed to allow a setoff for the fair market value of the gas from his wages due, the forum reduced the amount of wages due by that setoff); *In the Matter of Sheila Wood,* 5 BOLI 240, 251 (1986) (When a claimant received goods and services pursuant to a wage agreement and claimant admitted she received said goods and

In conclusion, the forum finds that Respondent paid $497 to Claimant relative to his wage claim.

B. Hours worked by Claimant.

If the forum accepts Respondent's version of the events, it must conclude that Claimant worked a bare minimum of 75 hours. This is based on Respondent's testimony that Claimant began crab work on October 26, 2009, Respondent's written statement that "[w]hen he [Claimant] did work they only work[ed] 5 hours a day" on days that they (Claimant and Callahan) worked, and Callahan's oral and written testimony about the dates Claimant worked. It assumes Claimant worked five hours on each of the following 15 dates: October 26, 27, 28, 29, 31, and November 1, 4, 5, 7, 8, 9, 20, 21, 22, and 23, 2009. Calculated at minimum wage based on Respondent's version of events, Claimant earned $630 in gross wages for working 75 hours (75 hours x $8.40 = $630). Based on Respondent's version of the advance, Claimant was not paid for almost 16 hours of work ($630 - $497 = $133 ÷ $8.40 = 15.8). However, the forum does not accept Respondent's version of hours worked by Claimant. Instead, the forum has concluded that Claimant worked 137 hours on crab-related jobs for Respondent, earning $1,150.80 in gross wages (137 hours x $8.40 = $1,150.80). The forum has not credited Claimant for any hours worked on November 24, 2009, the day after he was fired. To be liable as an employer for hours worked by an individual that are unpaid, the employer must "suffer or permit" that individual to work. ORS 653.010(2). While the plain meaning of "to permit" requires a more positive action than "to suffer," both terms imply much less positive action than required by the common law test for determining an employment relationship. To "permit" something to happen does not require an affirmative act, but only a decision to allow it to happen. To "suffer" something to happen is even broader and means to tolerate or fail to prevent it from happening. Thus, a business may be liable under the provisions of ORS chapter 653 if it knows or has reason to know a worker was performing work in that business and could have prevented it from occurring or continuing. *In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration,* 25 BOLI 12, 38-39 (2003), a*ffirmed without opinion*, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004). In this case, there is no evidence that Respondent knew or had reason to know that Claimant was performing work after he was fired and could have prevented it from occurring or continuing. Consequently, Respondent is not required to pay Claimant for any

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services as compensation for work performed, the forum held that said compensation constituted a lawful setoff against the wages due to claimant).

hours Claimant worked on November 24, 2009, and the forum need not resolve the issue of how many hours Claimant worked that day.[18]

C. Conclusion.

Whether the forum accepts Respondent's or Claimant's version of events, both lead to the conclusion that Claimant was not paid for all hours worked.

AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT

Claimant, Respondent, and Callahan were the only witnesses who had any direct knowledge of the hours Claimant worked. All were less than credible. There are two written records – the record Ranes created in the planner she and Claimant used and Callahan's 2010 written statement noting the hours he and Claimant worked. Neither can be credited in its entirety because the credibility problems noted in the Findings of Fact – The Merits. There is also Respondent's written statement that Claimant and Callahan worked five hours when they worked together. Finally, Respondent kept no record of Claimant's hours, claiming he had no responsibility to do so because Claimant was not an employee.

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." *In the Matter of Kilmore Enterprises,* 26 BOLI 111, 122 (2004). A claimant's credible testimony may be sufficient evidence to show the amount of hours worked by the claimant and amount owed. *Id.* at 123. Here, Claimant's testimony was only partly credible. However, taken as a whole, there is sufficient credible evidence in the record for the forum to formulate a methodology from which "a just and reasonable inference may be drawn" as to the hours worked by Claimant. That methodology consists of the following:

i If Claimant testified that he worked on a given day, but Callahan disagreed, and Claimant or Callahan telephoned one another before 8:00 a.m., the forum has credited Claimant as working that day.[19]

[18] *Compare In the Matter of William Presley,* 25 BOLI 56, 69 (2004), *affirmed Presley v. Bureau of Labor and Industries,* 200 Or App 113, 112 P3d 485 (2005) (When respondent was aware of the work claimant performed and there was no evidence respondent ever told claimant to leave respondent's car lot or not to perform a particular job, the forum found that respondent "suffered or permitted" claimant to work and thereby "employed" claimant).

[19] There was credible evidence that the only telephone calls between Claimant and Callahan at this time of day were related to Claimant giving Callahan a ride to work and there was no evidence that Callahan had any way to get to work unless Claimant picked him up.

- If Callahan and Claimant agreed that Claimant worked on a given day after October 26, Claimant was either credited with five hours[20] or Callahan's maximum estimate of hours worked, whichever is greater, unless Callahan's testimony contradicted Callahan's written statement, in which case the forum has credited Claimant's estimate of hours worked.
- If Claimant stated in his planner that he did not work on a given day but Respondent or Callahan testified that Claimant did work on that day, Claimant was credited with five hours worked or Callahan's maximum estimate of hours worked, whichever is greater.
- If Claimant testified that he worked on a given day and Callahan disagreed, Claimant was not credited with any hours worked if there were no telephone calls between Callahan and Claimant that day.
- Based on McCall's testimony that it takes a day or more to clean up the *Intrepid* after a tuna fishing trip, the forum has subtracted 16 hours from Claimant's claim of hours worked because Claimant was paid for those hours from his tuna draws related to tuna fishing trips.
- On three dates – September 21, September 22, and September 23 -- when Callahan's testimony on direct and cross examination was contradictory regarding the number of hours that Claimant worked, the forum has credited Claimant's version of the number of hours he worked.
- The forum subtracted .5 hours for Claimant's lunch on October 19, 21 and 22.

The application of this methodology results in the record of hours worked that is set out in Findings of Fact ## 8 & 15 -- The Merits. In total, Claimant worked 137 hours, earning $1,150.80. He was paid only $497.00 and is owed $653.80 in gross unpaid, due, and owing wages.

CLAIMANT IS OWED PENALTY WAGES

The forum may award penalty wages when a respondent's failure to pay wages 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. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

The Agency established by a preponderance of the evidence that Claimant was an employee who was entitled to be paid Oregon's statutory minimum wage of $8.40 per hour, that Respondent

[20] This is based on Respondent's written statement that Claimant started work on October 26 and worked five hours on days that Claimant worked.

set Claimant's work hours and was aware of them, that Respondent fired Claimant and did not pay him for all hours worked, and that the Agency made a written demand for Claimant's unpaid wages and Respondent made no payment in response. It is an employer's duty to keep an accurate record of the hours worked by its employees. ORS 653.045; *In the Matter of Norma Amazola,* 18 BOLI 209, 218 (1999). The fact that Respondent kept no record of Claimant's hours worked does not allow him to evade his responsibility for penalty wages, nor does his failed defense that Claimant was an independent contractor.[21] There is no evidence that Respondent acted other than voluntarily and as a free agent in underpaying Claimant and the forum concludes that Respondent acted willfully in failing to pay Claimant his wages and is liable for penalty wages under ORS 652.150.

ORS 652.150(1) and (2) provide, in pertinent part:

> "(1) Except as provided in subsections (2) and (3) of this section, if an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 * * *, then, as a penalty for the nonpayment, the wages or compensation of the employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced. However:
>
> "(a) In no case shall the penalty wages or compensation continued for more than 30 days from the due date; * * *
>
> "(2) If the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation unless the employer fails to pay the full amount of the employee's unpaid wages or compensation within 12 days after receiving the written notice. If the employee or a person on behalf of the employee fails to send the written notice, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation. * * *"

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 on December 30, 2009. The Agency's Order of Determination, issued on May 19, 2010, repeated this demand.[22] Respon-

[21] *See, e.g., In the Matter of Bukovina Express, Inc.,* 27 BOLI 184, 203 (2006) (a respondent's ignorance or misunderstanding of the law does not exempt that respondent from a determination that it willfully failed to pay wages earned and owed.)

[22] *See In the Matter of Petworks LLC,* 30 BOLI 35, 47 (2008) (Agency's Order of Determination constitutes a written notice of nonpayment of wages under ORS 652.150).

dent failed to pay the full amount of Claimant's unpaid wages within 12 days after receiving the written notices and has still not paid them. Consequently, the forum assesses 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). Using this equation, penalty wages for Claimant equal $2,016.00 ($8.40 per hour x eight hours x 30 days).

CLAIMANT IS OWED CIVIL PENALTIES UNDER ORS 653.055

The Agency also seeks civil penalties of $2,016 under ORS 653.055(1)(b). That statute provides that an employer who pays an employee less than the applicable minimum wage is liable to the employee for civil penalties that are computed in the same manner as penalty wages under ORS 652.150. *Cornier v. Paul Tulacz, DVM PC*, 176 Or App 245 (2001). A *per se* violation 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 Allen Belcher,* 31 BOLI 1, 10 (2009). Claimant's wage rate was the minimum wage. He was not paid all wages earned, due, and owing after he was fired, and there is no applicable statutory exception. Consequently, Claimant is entitled to an ORS 653.055 civil penalty in the amount of $2,016.

RESPONDENT'S EXCEPTIONS

Respondent's exceptions to the Proposed Order are summarized below:

1. Respondent gave Claimant $235.00 in draws that were not credited to Respondent by the ALJ in the Proposed Order.

2. The ALJ credited Claimant with 28.5 hours work related to crab gear that were tuna-related.

3. The ALJ ordered Respondent to pay "26.555%" of the amount sought by the Agency in the Order of Determination and it is not right that Respondent should have to pay penalty wages and civil penalties when Claimant "falsely claimed all these hours against us and we were forced to defend ourselves."

4. It was unnecessary to have a police officer at the hearing. The only reason a police officer was requested was to damage Respondent's credibility.

5. The Proposed Order stated that Claimant was not represented by counsel, whereas Mr. Nakada, the Agency case presenter, was present at hearing and all the questions asked on Claimant's behalf were asked by Mr. Nakada.

The forum rejects Exceptions 1 and 2 because they reflect conclusions that are not supported by a preponderance of evidence. In contrast, the forum's Findings of Fact related to Respondent's exceptions -- ## 8 and 23 – are supported by a preponderance of credible evidence in the record.

Exception 3 asks that the penalty wages and civil penalties be dismissed because Claimant did not prevail on the entirety of his claim, based in large part on his credibility issues. The forum denies Respondent's exception. An award of penalty wages and ORS 653.055 civil penalties is not contingent on a claimant prevailing on the entirety of his or her claim. Under Oregon law, Claimant is entitled to penalty wages so long as Respondent willfully failed to pay him all wages earned, due, and owing, and an ORS 653.055 civil penalty so long as he worked any hours for Respondent for which he was not paid the minimum wage.

Exception 4 objects to the presence of a police officer at the hearing. An officer was present at all times during the hearing for security purposes, but that fact was not considered in any way in the forum's evaluation of the credibility of Mark or Launa Frizzell or any of their witnesses.

Exception 5 objects to a statement in the Proposed Order that Claimant was not represented by counsel, inasmuch as Mr. Nakada, the Agency case presenter, presented Claimant's case and Claimant only appeared as a witness. The term "counsel," as used in this forum, means "an attorney who is in good standing with the Oregon State Bar * * *." OAR 839-050—0020(10). As Mr. Nakada is not attorney, the language in the Proposed Order properly reflected that fact.

ORDER

NOW, THEREFORE, as authorized by ORS 652.140(1), ORS 652.150, ORS 653.055, and ORS 652.332, and as payment of the unpaid wages, penalty wages, and civil penalties, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **MARK A. FRIZZELL** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Claimant in the amount of FOUR THOUSAND SIX HUNDRED AND EIGHTY FIVE DOLLARS AND EIGHTY CENTS ($4,685.80), less appropriate lawful deductions, representing $653.80 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from December 1, 2009, until paid; $2,016.00 in penalty wages, plus interest at the legal rate on that sum from January 1, 2010, until paid; and a civil penalty of $2,016.00, plus interest at the legal rate on that sum from January 1, 2010, until paid.

In the Matter of

COMPUTER PRODUCTS UNLIMITED, INC.,

Case Nos. 37-10 & 53-10

Final Order of Commissioner Brad Avakian

Issued June 8, 2011

SYNOPSIS

Respondent employed four wage Claimants as commissioned salespersons between October 2008 and January 2009. All four Claimants worked straight time and overtime hours. Respondent paid $420 to one Claimant, $100 to a second Claimant, and nothing to the other Claimants. Calculated at the minimum wage, the two Claimants who were paid nothing earned $850.69 and $2,877.60, respectively, leaving those amounts in unpaid, due, and owing wages. The Claimant who was paid $420 earned $3,388.14, leaving $2,968.14 in unpaid, due and owing wages. The Claimant who was paid $100 earned $1,956.01, leaving $1,856.01 in unpaid, due, and owing wages. Respondent was ordered to pay Claimants their unpaid, due, and owing wages. Respondent's failure to pay the wages was willful, and Respondent was ordered to pay Claimants $1,908, $1,908, $1,922.40, and $1,932, respectively, in penalty wages. Respondent was also ordered to pay $1,908, $1,908, $1,922.40, and $1,932, respectively, in civil penalties based on Respondent's failure to pay minimum and overtime wages to Claimants. ORS 652.140(2), ORS 652.150, ORS 653.055, ORS 653.261, OAR 839-020-0030.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 12, 2011, at the Eugene office of the Oregon Bureau of Labor and Industries, located at 1400 Executive Parkway, Suite 1400, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Patrick Plaza, an employee of the Agency. Wage claimants Aaron Becker, Amanda Hatton, and Scott Norris were present throughout the hearing and were not represented by counsel. Claimant Michael VanDyck did not attend the hearing. Respondent Computer Products Unlimited, Inc. did not appear at hearing and was held in default.

The Agency called the following witnesses: Claimants Becker, Hatton, Norris and Bureau of Labor and Industries ("BOLI") Wage and Hour Division compliance specialist Bernadette Yap-Sam.

The forum received into evidence:

a) Administrative exhibits X-1 through X-11 (submitted or generated prior to hearing); and

b) Agency exhibits A-1 through A-41 (submitted prior to hearing) and A-42 (submitted at hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On December 16, 2008, Claimant VanDyck ("VanDyck") filed a wage claim with the Agency alleging that Computer Products Unlimited, Inc. ("CPUI" or "Respondent") had employed him and failed to pay wages earned and due to him. At the same time, VanDyck assigned to the Commissioner of BOLI, in trust for himself, all wages due from Respondent.

2) On January 23, 2009, Hatton filed a wage claim with the Agency alleging that Respondent had employed her and failed to pay wages earned and due to her. At the same time, Hatton assigned to the Commissioner of BOLI, in trust for herself, all wages due from Respondent.

3) On February 17, 2009, Becker filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him. At the same time, Becker assigned to the Commissioner of BOLI, in trust for himself, all wages due from Respondent.

4) On February 5, 2009, Norris filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him. At the same time, Claimant Norris assigned to the Commissioner of BOLI, in trust for himself, all wages due from Respondent.

5) On June 10, 2009, the Agency issued Order of Determination No. 08-3791 based on the wage claims filed by Becker, Hatton, and VanDyck, and the Agency's investigation. With respect to each Claimant, the Order alleged the following:

Claimant Becker

- Respondent employed Becker from November 30, 2008, to January 13, 2009, at the wage rates of $7.95 per hour in 2008 and $8.40 per hour in 2009;
- Becker worked 164 straight time and 17 overtime hours in 2008 and 52 straight time hours and .5 overtime hours in 2009, earning $1,947.53;
- Respondent has only paid Becker $100.00, leaving a balance due and owing of $1,847.53 in unpaid wages, plus interest thereon at the legal rate per annum from February 1, 2009, until paid.

- Respondent willfully failed to pay these wages and owes Becker $1932.00 in penalty wages, with interest thereon at the legal rate per annum from March 1, 2009, until paid;
- Respondent paid Becker less than the wages to which he was entitled under ORS 653.010 to 653.261 and is liable to Becker for $1,932.00 in civil penalties pursuant to ORS 653.055(1)(b), with interest thereon at the legal rate per annum from March 1, 2009, until paid.

Claimant Hatton

- Respondent employed Hatton from October 28, 2008, to January 13, 2009, at the wage rates of $7.95 per hour in 2008 and $8.40 per hour in 2009;
- Hatton worked 342 straight time and 16 overtime hours in 2008 and 56 straight time hours in 2009, earning $3,380.18;
- Respondent has only paid Hatton $420.00, leaving a balance due and owing of $2,960.18 in unpaid wages, plus interest thereon at the legal rate per annum from February 1, 2009, until paid.
- Respondent willfully failed to pay these wages and owes Hatton $1,922.40 in penalty wages, with interest thereon at the legal rate per annum from March 1, 2009, until paid;
- Respondent paid Hatton less than the wages to which she was entitled under ORS 653.010 to 653.261 and is liable to Hatton for $1,922.40 in civil penalties pursuant to ORS 653.055(1)(b), with interest thereon at the legal rate per annum from March 1, 2009, until paid.

Claimant VanDyck

- Respondent employed VanDyck from October 12, 2008, to October 29, 2008, at the wage rate of $7.95 per hour;
- Hatton worked 96.5 straight time and 7 overtime hours in 2008, earning $850.69;
- Respondent has paid VanDyck nothing, leaving a balance due and owing of $850.69 in unpaid wages, plus interest thereon at the legal rate per annum from December 1, 2008, until paid.
- Respondent willfully failed to pay these wages and owes VanDyck $1,908.00 in penalty wages, with interest thereon at the legal rate per annum from January 1, 2009, until paid;
- Respondent paid VanDyck less than the wages to which he was entitled under ORS 653.010 to 653.261 and is liable to VanDyck for $1,908.00 in civil penalties pursuant to ORS 653.055(1)(b), with interest thereon at the legal rate per annum from

January 1, 2009, until paid.

3) On August 6, 2009, Respondent filed an answer and request for hearing through John Bujak, its authorized representative, in which Respondent denied every factual allegation in the Order of Determination and alleged as an "Affirmative Defense" that Claimants Becker, Hatton, and VanDyck were never employees of Respondent.

5) On November 6, 2009, the Agency issued Order of Determination No. 09-0409 based on the wage claim filed by Norris and the Agency's investigation. The Order alleged the following:

- Respondent employed Claimant Norris from November 1, 2008, through December 13, 2008, at the wage rate of $7.95 per hour;
- Norris worked 324.75 hours, 77.25 of which were overtime hours, earning $2,899.22;
- Respondent has paid Norris nothing, leaving a balance due and owing of $2,899.22 in unpaid wages, plus interest thereon at the legal rate per annum from January 1, 2009, until paid.
- Respondent willfully failed to pay these wages and owes Norris $1,908.00 in penalty wages, with interest thereon at the legal rate per annum from February 1, 2009, until paid;
- Respondent paid Norris less than the wages to which he was entitled under ORS 653.010 to 653.261 and is liable to Norris for $1,908.00 in civil penalties pursuant to ORS 653.055(1)(b), with interest thereon at the legal rate per annum from February 1, 2009, until paid.

6) On November 23, 2009, Respondent filed an answer and request for hearing through John Bujak, its authorized representative, in which Respondent denied every factual allegation in the Order of Determination and alleged as an "Affirmative Defense" that Norris was never an employee of Respondent.

7) On July 28, 2010, the Hearings Unit issued two Notices of Hearing, one for each Order of Determination, to Respondent, the Agency, and Claimants setting the time and place of hearing for 9:00 a.m. on October 28, 2010, at BOLI's Eugene office.

8) On July 29, 2010, the Agency moved to consolidate the cases for hearing on the grounds that all four wage claims involved claimants who worked for the same employer, doing the same work, and all alleged unpaid wages in the same general period of time. Respondent did not object and the ALJ granted the agency's motion on the grounds that they involved common questions of law and fact.

9) On October 25, 2010, Respondent moved for a postponement based on emergency medical treatment required by Mr. Bujak's wife that could not be put off. The Agency did not object and the ALJ reset the hearing to begin on May 3, 2011. On

November 2, 2010, the ALJ reset the hearing to begin on April 12, 2011.

10) Respondent did not make an appearance at the hearing and did not notify the Agency or the ALJ that it would not appear at the time and place set for hearing. The ALJ waited until 9:30 a.m., then declared Respondent in default and commenced the hearing.

11) On April 21, 2011, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Computer Products Unlimited, Inc. was an Idaho general business corporation and an employer that employed one or more persons, including Claimants VanDyck, Becker, Hatton, and Norris, in Eugene, Oregon.

2) In October, November, and December 2008 and January 2009 Respondent operated a kiosk in the Valley River Center ("VRC") shopping mall in Eugene Oregon. Respondent's primary business was selling Clear Wire internet services. While Claimants were employed by Respondent, a sign on the hunting above Respondent's kiosk identified Respondent's business as "Computer Products Unlimited, Inc."

3) Respondent's kiosk at VRC was managed by Christopher Fish ("Fish") during the Claimants' employment. Fish was supervised by David Hunter ("Hunter"), Respondent's CEO, who worked out of Boise, Idaho. Fish was present at the kiosk during much of Claimants' employment.

4) There was no evidence that Respondent had an established workweek during the wage claim periods.

5) VanDyck was interviewed and hired by Fish on October 12, 2008, the same day that he started work. He was hired to work on a commission basis and was trained by Fish and Hunter. His last work day was October 29, 2008. His job was selling Internet services and educating potential customers about Respondent's products.

6) At the beginning of his employment, VanDyck was asked to and completed and a two-page application for work, along with a resume that listed several cook's jobs as his only prior work experience. The words "COMPUTER PRODUCTS UNLIMITED" and "Authorized Representative of clear wireless broadband" were printed across the top of the application, with the words "Contractor Application" printed directly underneath CPUI's logo. VanDyck was also asked to sign a Mutual Non-Disclosure Agreement, a Non-Competition Agreement and a Confidential Disclosure Agreement. The only parties to all three agreements

were VanDyck and Respondent, with David Hunter being the signatory for Respondent as its "President and CEO."

7) VanDyck made no financial investment in Respondent's business. Fish set VanDyck's work hours. VanDyck's last day of work for Respondent was October 29, 2008. He worked the following dates and hours during his employment with Respondent:

Wk Ending[1]	Total Hrs	ST[2] Hours	OT[3] Hrs
10/18/08	32.5	32.5	0
10/25/08	47	40	7
11/1/08	24	24	0

8) In total, VanDyck worked 96.5 straight time hours and 7 overtime hours for Respondent. Computed at Oregon's 2008 minimum wage of $7.95 per hour, VanDyck earned $850.69 (96.5 hours x $7.95 = $767.18; 7 hours x $11.93 = $83.51; $767.18 + $83.51 = $850.69). VanDyck was paid nothing, leaving **$850.69** in due and owing wages.

9) Penalty wages are computed as follows for VanDyck, in accordance with ORS 652.150: $7.95 per hour x 8 hours x 30 days = **$1,908.00**.

10) ORS 653.055 civil penalties are computed as follows for VanDyck, in accordance with ORS 652.150 and ORS 653.055: $7.95 per hour x 8 hours x 30 days = **$1,908.00.**

11) Hatton learned of the job with Respondent from a posting on Craig's List for a sales representative position in a VRC kiosk. She responded to the advertisement and met Fish the next day for an interview. At the end of the interview, Fish told Hatton that he would talk to "his boss" and see if she could start work the next day. Subsequently, Fish told her she was hired and that she would be paid on a commission basis. Her job duties were to sell internet services and educate potential customers about Respondent's products. She started work on Tuesday, October 28, 2008. Fish was her immediate supervisor and Hunter was Fish's boss.

12) Prior to working for Respondent, Hatton worked as a pool cleaner and she had no prior experience selling Internet services.

13) At the beginning of her employment, Hatton was given the same two-page application for work as VanDyck and she completed and submitted it. She and Hunter also signed a Mutual Non-Disclosure Agreement, a Non-Competition Agreement and a Confidential Disclosure Agreement.

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[1] Because there was no evidence that Respondent had an established workweek, the forum has computed overtime hours based on a workweek that began on October 12, a Sunday, the first day of the week that VanDyck worked and the first day within the scope of his wage claim. *See, e.g., In the Matter of MAM Properties, LLC,* 28 BOLI 172, 188-89 (2007).

[2] ST = straight time hours

[3] OT = overtime hours

14) Hatton made no financial investment in Respondent's business. She was required to work from Respondent's kiosk and Fish set her work hours. She initially kept her pool cleaning job when she started work for Respondent, but was fired from that job because she spent too much time working for Respondent. Hunter, who visited Respondent's VRC kiosk two or three times a month, instructed her how to sell, what to say to potential customers, how to position herself in the kiosk, and told her she was to have at least three advertising fliers in her hand at all times to hand out to potential customers. She could not hire anyone to help her and was hired for an unspecified period of time. Hatton's last day of work was January 13, 2009. On January 14, 2009, Hunter told her not to come back to work. She worked the following dates and hours during her employment with Respondent:

Wk Ending[4]	Total Hrs	ST Hrs	OT Hrs
11/3/08	26	26	0
11/10/08	41	40	1
11/17/08	41	40	1
11/24/08	41	40	1
12/1/08	43	40	3
12/8/08	30	30	0
12/15/08	41	40	1
12/22/08	51	40	11
12/29/08	39	39	0
1/5/09	22	22	0
1/12/09	31	31	0
1/19/09	8	8	0

15) In total, Hatton worked 340 straight time hours and 18 overtime hours for Respondent in 2008[5] and 56 straight time hours in 2009. Computed at Oregon's 2008 minimum wage of $7.95 per hour, Hatton earned $2,917.74 in 2008 (340 hours x $7.95 = $2,703.00; 18 hours x $11.93 = $214.74; $2,703.00 + $214.74= $2,917.74). Hatton earned an additional $470.40 in 2009 (56 hours x $8.40 = $470.40). In total, she earned $3,388.14. Fish paid her $100 and Hunter paid her $320, leaving **$2,968.14** in due and owing wages.

16) Penalty wages are computed as follows for Hatton, in accordance with ORS 652.150: 358 hours x $7.95 = $2,846.10, 56 hours x $8.40 = $470.40; $2,846.10 + $470.40 = $3,316.50; $3,316.50 ÷ 414 hours = $8.01; $8.01 per hour x 8 hours x 30 days = **$1,922.40**.

17) ORS 653.055 civil penalties are calculated in the same manner as ORS 652.150 penalty wages and equal **$1,922.40.**

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[4] Because there was no evidence that Respondent had an established workweek, the forum has computed overtime hours based on a workweek that began on October 2, a Tuesday, the first day of the week that Hatton worked and the first day within the scope of her wage claim.

[5] During the week ending January 5, 2009, Hatton worked 5 hours on December 31, 8 hours on January 3, 3 hours on January 4, and 6 hours on January 5.

18) Becker learned of a job opening with Respondent from Hatton, who told him that Respondent was hiring. On November 28, 2008, Becker was interviewed , at Respondent's VCR kiosk by Fish, who identified himself as Respondent's manager. At the end of the interview, Fish told Becker that he was hired. Becker filled out the same paperwork as VanDyck and Hatton, and Fish said he would fax the paperwork to his boss in Boise. Becker started work on Sunday, November 30, 2008. His job duties were to sell internet services and educate potential customers about Respondent's products. Fish, his immediate supervisor, told him he would be paid on a commission basis.

19) Prior to working for Respondent, Becker had no prior experience selling internet services.

20) Becker made no financial investment in Respondent's business. When Respondent hired him, he had been unemployed for "3-4 weeks" and he had no other source of income while he worked for Respondent. He was required to work from Respondent's kiosk and Fish set his work hours. Becker was taught Respondent's guidelines and standards and had to follow those guidelines and standards in performing his job duties. He could not hire anyone to help him and was hired for an unspecified period of time. Becker's last day of work was January 11, 2009. On January 14, 2009, Hunter told him not to come back to work. Becker worked the following dates and hours during his employment with Respondent:

Wk Ending[6]	Total Hrs	ST Hrs	OT Hrs
12/6/08	36	36	0
12/13/08	44	40	4
12/20/08	53	40	13
12/27/08	33	33	0
1/3/09	41	40	1[7]
1/10/09	22	22	0
1/17/09	4	4	0

21) In total, Becker worked 164 straight time hours and 17 overtime hours for Respondent in 2008[8] and 52 straight time hours and one overtime hour in 2009. Computed at Oregon's 2008 minimum wage of $7.95 per hour, Becker earned $1,506.61 in 2008 (164 hours x $7.95 = $1,303.80; 17 hours x $11.93 = $202.81; $1,303.80 + $202.81 = $1,506.61). Becker earned an additional $449.40 in 2009 (52 hours x $8.40 = $436.80, 1 hour x $12.60 = $12.60, $436.80 +

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[6] Because there was no evidence that Respondent had an established workweek, the forum has computed overtime hours based on a workweek that began on November 30, a Sunday, the first day of the week that Becker worked and the first day within the scope of his wage claim.

[7] Overtime hour worked on January 3, 2009.

[8] During the week ending January 3, 2009, Becker worked 7 hours on December 28, 8 hours on December 30, 8 hours on January 1, 10 hours on January 2, and 8 hours on January 3.

$12.60 = $449.40). In total, he earned $1,956.01. He was paid $100.00, leaving **$1,856.01** in due and owing wages.

22) Penalty wages are computed as follows for Becker, in accordance with ORS 652.150: 181 hours x $7.95 = $1,438.95, 53 hours x $8.40 = $445.20; $1,438.95 + $445.20 = $1,884.15; $1,884.15 ÷ 234 hours = $8.05; $8.05 per hour x 8 hours x 30 days = **$1,932.00**.

23) ORS 653.055 civil penalties for Becker are calculated in the same manner as ORS 652.150 penalty wages and equal **$1,932.00**.

24) Norris learned of a job opening with Respondent from a posting on Craig's List for a sales representative position in a kiosk inside VRC. He responded by email to the advertisement on October 31, 2008, and was telephoned by Fish, who interviewed and hired him that same day. During the interview, Fish identified himself as "the manager here." Fish, his immediate supervisor, told him he would be paid on a commission basis. His first day of work was November 1, 2008, and his job throughout his employment with Respondent was selling internet services and educating potential customers about Respondent's products.

25) A "couple of days" after Norris started work, Fish asked him to complete the same employment application, Mutual Non-Disclosure Agreement, a Non-Competition Agreement and Confidential Disclosure Agreement that VanDyck, Hatton, and Becker completed. As with the others, the only parties to all three agreements were VanDyck and Respondent, with David Hunter being the signatory for Respondent as its "President and CEO."

26) Norris made no financial investment in Respondent's business. Fish set Norris's work hours. Norris was taught Respondent's guidelines and standards and had to follow those guidelines and standards in performing his job duties. While working, Norris was not allowed to leave the kiosk and on one occasion Hunter berated him for 20 minutes for taking a break to go to the bathroom. Norris's last day of work for Respondent was December 13, 2008, when he was fired. He worked the following dates and hours during his employment with Respondent:

Wk Ending[9]	Total Hrs	ST Hrs	OT Hrs
11/7/08	41.09	40	1.09
11/14/08	44.83	40	4.83
11/21/08	46.66	40	6.66
11/28/08	55.42	40	15.42
12/5/08	61.58	40	21.58
12/12/08	64.75	40	24.75
12/19/08	10.42	10.42	0

[9] Because there was no evidence that Respondent had an established workweek, the forum has computed overtime hours based on a workweek that began on November 1, a Saturday, the first day of the week that Norris worked and the first day within the scope of his wage claim.

27) In total, Norris worked 250.42 straight time hours and 74.33 overtime hours for Respondent. Computed at Oregon's 2008 minimum wage of $7.95 per hour, Norris earned $2,877.60 (250.42 hours x $7.95 = $1,990.84; 74.33 hours x $11.93 = $886.76; $1,990.84 + $886.76 = $2,877.60). Norris was paid nothing, leaving **$2,877.60** in due and owing wages.

28) Penalty wages are computed as follows for Norris, in accordance with ORS 652.150: $7.95 per hour x 8 hours x 30 days = **$1,908.00**.

29) ORS 653.055 civil penalties for Norris are calculated in the same manner as ORS 652.150 penalty wages and equal **$1,908.00.**

30) There is no evidence in the record that Respondent kept track of any of the hours worked by Claimants.

31) On January 14, 2009, the Agency mailed a document entitled "Notice of Wage Claim" to Respondent that stated:

> "You are hereby notified that MICHAEL JEFFREY VANDYKE has filed a wage claim with the Bureau of Labor and Industries alleging:
>
> "Unpaid statutory minimum and overtime wages of $822.82 at the rate of $7.95 per hour from October 12, 2008 to October 29, 2008.
>
> "IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address.
>
> "IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation which supports your position, as well as payment of any amount which you concede is owed the claimant to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.
>
> "If your response to the claim is not received on or before April 2, 2009, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

32) On March 9, 2009, the Agency mailed a document entitled "Notice of Wage Claim" to Respondent that stated:

> "You are hereby notified that AARON WILLIAM BECKER has filed a wage claim with the Bureau of Labor and Industries alleging:
>
> "Unpaid statutory minimum and overtime wages of $2,078.56 at the rates of $7.95 per hour and $8.40 per hour from November 30, 2008 to January 11, 2009.
>
> "IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable

check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address.

"IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation which supports your position, as well as payment of any amount which you concede is owed the claimant to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.

"If your response to the claim is not received on or before March 23, 2009, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

33) On March 19, 2009, the Agency mailed a document entitled "Notice of Wage Claim" to Respondent that stated:

"You are hereby notified that AMANDA CLAIRE HATTON has filed a wage claim with the Bureau of Labor and Industries alleging:

"Unpaid statutory minimum and overtime wages of $3,443.70 at the rates of $7.95 per hour and $8.40 per hour from October 28, 2008 to January 13, 2009.

"IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address.

"IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation which supports your position, as well as payment of any amount which you concede is owed the claimant to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.

"If your response to the claim is not received on or before April 2, 2009, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

34) On July 14, 2009, the Agency mailed a document entitled "Notice of Wage Claim" to Respondent that stated:

"You are hereby notified that SCOTT A NORRIS has filed a wage claim with the Bureau of Labor and Industries alleging:

"Unpaid statutory minimum and overtime wages of $1,811.11 at the rate of $7.95 per hour from November 1, 2008 to December 13, 2008.

"IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable

to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address.

"IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation which supports your position, as well as payment of any amount which you concede is owed the claimant to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.

"If your response to the claim is not received on or before July 28, 2009, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

35) As of the date of hearing, Respondent had not paid any additional money to the Claimants.

36) In 2008, Oregon's minimum wage in 2008 was $7.95 per hour. In 2009, it was $8.40 per hour.

37) All the witnesses were credible.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Computer Products Unlimited, Inc. was an Idaho general business corporation and an employer that employed one or more persons, including Claimants VanDyck, Hatton, Becker, and Norris, in Eugene, Oregon.

2) VanDyck was employed by Respondent from October 12 through October 29, 2008, as a salesperson. VanDyck worked 96.5 straight time hours and 7 overtime hours for Respondent. Computed at Oregon's 2008 minimum wage of $7.95 per hour, VanDyck earned $850.69 and was paid nothing, leaving **$850.69** in due and owing wages.

3) Hatton was employed by Respondent from October 28, 2008, until January 13, 2009, as a salesperson. Hatton worked 340 straight time hours and 18 overtime hours for Respondent in 2008 and 56 straight time hours in 2009. Computed at Oregon's 2008 minimum wage of $7.95 per hour and Oregon's 2009 minimum wage of $8.40 per hour, Hatton earned $2,917.74 in 2008 and $470.40 in 2009, for total earnings of $3,388.14. She was only paid $420, leaving **$2,968.14** in due and owing wages.

4) Becker was employed by Respondent from November 30, 2008, October 28, 2008, until January 11, 2009, as a salesperson. Becker worked 164 straight time hours and 17 overtime hours for Respondent in 2008 and 52 straight time hours and one overtime hour in 2009. Computed at Oregon's 2008 minimum wage of $7.95 per hour and $8.40 per hour in 2009, Becker earned $1,506.61 in 2008 and $449.40 in 2009, for total earnings of $1,956.01. He was paid nothing, leaving **$1,856.01** in due and owing wages.

5) Norris was employed by Respondent from November 1 through December 13, 2008, as a salesperson. He worked 250.42 straight time hours and 74.33 overtime hours for Respondent. Computed at Oregon's 2008 minimum wage of $7.95 per hour, Norris earned $2,877.60 (250.42 hours x $7.95 = $1,990.84; 74.33 hours x $11.93 = $886.76; $1,990.84 + $886.76 = $2,877.60). He was not paid anything, leaving **$2,877.60** in due and owing wages.

6) The Agency sent a letter entitled "Notice of Wage Claim" to Respondent after receiving each Claimant's wage claim that informed Respondent that a wage claim had been filed, the amount of the wage claim, and demanded payment of the unpaid wages. As of the date of hearing, Respondent had not paid any additional money to the Claimants.

7) Penalty wages are computed as follows for VanDyck, in accordance with ORS 652.150: $7.95 per hour x 8 hours x 30 days = **$1,908.00**. ORS 653.055 civil penalties are computed as follows for VanDyck, in accordance with ORS 652.150 and ORS 653.055: $7.95 per hour x 8 hours x 30 days = **$1,908.00.**

8) Penalty wages are computed as follows for Hatton, in accordance with ORS 652.150: 358 hours x $7.95 = $2,846.10, 56 hours x $8.40 = $470.40; $2,846.10 + $470.40 = $3,316.50; $3,316.50 ÷ 414 hours = $8.01; $8.01 per hour x 8 hours x 30 days = **$1,922.40**. ORS 653.055 civil penalties are calculated in the same manner as ORS 652.150 penalty wages and equal **$1,922.40.**

9) Penalty wages are computed as follows for Becker, in accordance with ORS 652.150: 181 hours x $7.95 = $1,438.95, 53 hours x $8.40 = $445.20; $1,438.95 + $445.20 = $1,884.15; $1,884.15 ÷ 234 hours = $8.05; $8.05 per hour x 8 hours x 30 days = **$1,932.00**. ORS 653.055 civil penalties for Becker are calculated in the same manner as ORS 652.150 penalty wages and equal **$1,932.00**.

10) Penalty wages are computed as follows for Norris, in accordance with ORS 652.150: $7.95 per hour x 8 hours x 30 days = **$1,908.00**. ORS 653.055 civil penalties for Norris are calculated in the same manner as ORS 652.150 penalty wages and equal **$1,908.00.**

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Computer Products Unlimited Inc. was an employer that directly engaged the personal services of Claimants VanDyck, Hatton, Becker, and Norris in Oregon and suffered or permitted Claimants to work and Claimants were Respondent's employees, subject to the provisions of ORS 652.110 to 652.200 and ORS 652.310 to 652.405.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 652.310 to 652.405.

3) Respondent violated ORS 652.140(2) by failing to pay to VanDyck all wages earned and unpaid not later than after five days, excluding Saturdays, Sundays and holidays, after October 29, 2008, VanDyck's last work day. Respondent owes VanDyck **$850.69** in unpaid, due, and owing wages.

4) Respondent violated ORS 652.140(1) by failing to pay to Hatton all wages earned and unpaid not later than the end of Respondent's work day on January 15, 2009. Respondent owes Hatton **$2,968.14** in unpaid, due, and owing wages.

5) Respondent violated ORS 652.140(1) by failing to pay to Becker all wages earned and unpaid not later than the end of Respondent's work day on January 15, 2009. Respondent owes Becker **$1,856.01** in unpaid, due, and owing wages.

6) Respondent violated ORS 652.140(1) by failing to pay to Norris all wages earned and unpaid not later than the end of Respondent's work day on December 14, 2008. Respondent owes Claimant **$2,877.60** in unpaid, due, and owing wages.

7) Respondent willfully failed to pay Claimants VanDyck, Hatton, Becker, and Norris all wages due and owing for work that Claimants performed for Respondent and owes penalty wages to Claimants in the following amounts -- VanDyck: **$1,908.00**; Hatton: **$1,922.40**; Becker: **$1,932.00**; Norris: **$1,908.00**. ORS 652.150.

8) Respondent paid VanDyck, Hatton, Becker, and Norris less than the wages to which they were entitled under ORS 653.010 to 653.261 by failing to pay them Oregon's statutory minimum wage and overtime for all hours worked and is liable to pay civil penalties to Claimants in the following amounts -- VanDyck: **$1,908.00**; Hatton: **$1,922.40**; Becker: **$1,932.00**; Norris: **$1,908.00**. ORS 653.055(1)(b).

OPINION

CLAIMANTS' WAGE CLAIMS

To establish Claimants' wage claims, the Agency must prove the following elements by a preponderance of the evidence: 1) Respondent employed Claimants; 2) The pay rate upon which Respondent and Claimants agreed, if other than the minimum wage; 3) Claimants performed work for which they were not properly compensated; and 4) The amount and extent of work Claimants performed for Respondent. *In the Matter of Sue Dana,* 28 BOLI 22, 29 (2006). In a default case, the forum may consider any unsworn and unsubstantiated assertions contained in a respondent's answer, but those assertions are overcome whenever they are contradicted by other credible evidence in the record. *In the Matter of Sehat Entertainment, Inc.,* 30 BOLI 170, 181 (2009).

CLAIMANTS WERE EMPLOYED BY RESPONDENT

Respondent asserted in its answers and requests for hearing that Claimants "were never employees of CPUI." To be liable as an employer for unpaid hours worked by an individual, the employer must "suffer or permit" that individual to work. ORS 653.010(2). While the plain meaning of "to permit" requires a more positive action than "to suffer," both terms imply much less positive action than required by the common law test for determining an employment relationship. To "permit" something to happen does not require an affirmative act, but only a decision to allow it to happen. To "suffer" something to happen is even broader and means to tolerate or fail to prevent it from happening. Thus, a business may be liable under the provisions of ORS chapter 653 if it knows or has reason to know a worker was performing work in that business and could have prevented it from occurring or continuing. *In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration,* 25 BOLI 12, 38-39 (2003), a*ffirmed without opinion*, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004). In this case, the Agency presented credible evidence that Respondent operated a kiosk in a shopping mall in Eugene, that Fish was Respondent's manager and hired all four Claimants, that Fish set Claimants' work schedule and unilaterally set their commission rate of pay, that Fish and Hunter trained Claimants and controlled their work and working conditions, that all four Claimants performed regular work for Respondent at the kiosk, and that Respondent fired three of the Claimants.[10] Although VanDyck did not appear at hearing to testify, the Agency submitted and authenticated his signed and dated wage claim, his application for employment with Respondent, a typed interview with Yap-Sam in which VanDyck described his employment, and a statement from Fish in which Fish acknowledged retaining VanDyck's services to work at Respondent's VRC kiosk. This evidence proves that Respondent employed Claimants and satisfies the first element of the Agency's prima facie case.

At hearing, the Agency presented considerable evidence to rebut Respondent's claim, made during the investigation, that Claimants were independent contractors. The forum does not address this issue because "independent contractor" is an affirmative defense in wage claim cases[11] and Respondent did not plead it as a defense in its answers and requests for hearing.[12]

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[10] There was no evidence presented as to why VanDyck left Respondent's employment.

[11] *See, e.g., In the Matter of Gary Lee Lucas,* 26 BOLI 198, 210 (2005) (The defense of independent contractor is an affirmative one that a respondent has the burden of proving).

[12] *See* OAR 839-050-0130 ("failure of a party to raise an affirmative defense

Respondent's "affirmative defense" that Claimants "were never employees of CPUI" is merely a denial of the first element of the Agency's prima facie case, and not an affirmative assertion that Claimants were 'independent contractors." Respondent's denial is overcome by credible evidence presented by the Agency.

CLAIMANTS WERE ENTITLED TO BE PAID THE MINIMUM WAGE

All four Claimants credibly testified that Fish told them that they would be paid on a commission basis. ORS 653.035(2) governs employee's wages when employees are paid on commission. It provides:

> "(2) Employers may include commission payments to employees as part of the applicable minimum wage for any pay period in which the combined wage and commission earnings of the employee will comply with ORS 653.010 to 653.261. In any pay period where the combined wage and commission payments to the employee do not add up to the applicable minimum wage under ORS 653.010 to 653.261, the employer shall pay the minimum rate as prescribed in ORS 653.010 to 653.261."

Under ORS 653.035(2), all the Claimants were entitled to receive at least the minimum wage, and Respondent, in turn, was entitled to offset the minimum wage by any commissions paid out to the Claimants.

CLAIMANTS PERFORMED WORK FOR WHICH THEY WERE NOT PROPERLY COMPENSATED

Hatton was paid $420, which was only enough to compensate her for 52.8 hours of work, calculated at $7.95 per hour. Becker was paid $100, which was only enough to compensate him for 12.6 hours of work, again calculated at $7.95 per hour. VanDyck and Norris were paid nothing. The Agency proved by a preponderance of the evidence that Hatton and Becker worked far more than 52.8 and 12.6 hours, and that VanDyck and Norris performed work. This satisfies the third element of the Agency's prima facie case with respect to all four Claimants.

AMOUNT AND EXTENT OF WORK CLAIMANTS PERFORMED FOR RESPONDENT

The final element of the Agency's case requires proof of the amount and extent of work performed by Claimants. When the forum concludes that an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. *In the Matter of 82nd Street Mall, Inc.,* 30 BOLI 140, 147-48 (2009). In this case, there is no evidence that Respondent ever maintained any records showing the hours that Claimants worked. When the employer pro-

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in the answer is a waiver of such defense").

duces no records, the forum may rely on evidence produced by the Agency from which "a just and reasonable inference may be drawn." *Id.* A claimant's credible testimony may be sufficient evidence to show the amount of hours worked by the claimant and amount owed. *Id.*

At hearing, Hatton, Becker, and Norris credibly testified as to the dates and hours that they worked, and the forum has credited that testimony in its entirety. VanDyck did not appear at hearing to testify. In support of his case, the Agency submitted and authenticated VanDyck's signed wage claim form and assignment of wages, which included a calendar on which he handwrote the dates and hours that he worked during his wage claim period. In addition, the Agency offered a copy of VanDyck's application for employment with Respondent, the typed notes of an interview that Yap-Sam conducted with VanDyck in which he told Yap-Sam that he maintained a record of his hours, and a signed statement from Fish in which Fish stated that VanDyck was one of the "assistants" whom he "contracted/hired" to work at the Respondent's kiosk at the VRC mall. Finally, Hatton testified that she worked at least one day with VanDyck. Based on this corroborating evidence, the forum accepts VanDyck's calendar of hours worked as a credible record of the amount and extent of work he performed.

The Agency proved by a preponderance of the evidence that Claimants worked the following hours: VanDyck -- 96.5; Hatton – 414; Becker – 233; and Norris – 324.75, on the dates shown in Findings of Fact ## 7, 14, 20, and 26 – The Merits. Relying on the computations shown in those same Findings, the forum concludes that the following unpaid and due wages are owed to the Claimants: VanDyck -- $850.69; Hatton -- $2,968.14; Becker -- $1,856.01; and Norris -- $2,877.60.

CLAIMANTS ARE OWED PENALTY WAGES

The forum may award penalty wages when a respondent's failure to pay wages 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. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

The Agency established by a preponderance of the evidence that Claimants were entitled to be paid Oregon's minimum wage and that Respondent's manager Fish set Claimants' work hours and worked at the VRC kiosk some of the time and was thereby aware of the hours that Claimants worked. It is an employer's duty to keep an accurate record of the hours worked by its employees. ORS 653.045; *In the Matter of Tina*

Davidson, 16 BOLI 141, 148 (1997). The fact that Respondent may have kept no record of Claimants' hours worked because Respondent considered that Claimants were contractors does not allow Respondent to evade its responsibility for penalty wages.[13] In conclusion, there is no evidence that Respondent acted other than voluntarily and as a free agent in underpaying Claimants. Respondent acted willfully in failing to pay Claimants their wages and is liable for penalty wages under ORS 652.150.

ORS 652.150(1) and (2) provide, in pertinent part:

> "(1) Except as provided in subsections (2) and (3) of this section, if an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 * * *, then, as a penalty for the nonpayment, the wages or compensation of the employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced.
>
> "(2) If the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation unless the employer fails to pay the full amount of the employee's unpaid wages or compensation within 12 days after receiving the written notice. If the employee or a person on behalf of the employee fails to send the written notice, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation. * * *"

The Agency provided documentary and testimonial evidence that its investigative staff made the written demand for Claimants' wages contemplated in ORS 652.150(2) after each Claimant filed his or her wage claim. The Agency's Orders of Determination, issued on June 10 and November 6, 2009, repeated the demands.[14] Respondent failed to pay the full amount of each Claimant's unpaid wages within 12 days after receiving the written notices and has still not paid them. Consequently, the forum assesses 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). Using this formula, penalty wages for Claimants are: VanDyck: $1,908.00; Hatton: $1,922.40; Becker: $1,932.00; Norris: $1,908.00.

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[13] *See, e.g., In the Matter of Bukovina Express, Inc.,* 27 BOLI 184, 203 (2006) (a respondent's ignorance or misunderstanding of the law does not exempt that respondent from a determination that it willfully failed to pay wages earned and owed.)

[14] *See MAM* at 190 fn. 7 (2007) (the Agency's Order of Determination constitutes a written notice of nonpayment of wages).

ORS 653.055 CIVIL PENALTIES

In its Order of Determination, the Agency alleged that Claimants are each entitled to a civil penalty under ORS 653.055(1)(b) based on Respondent's failure to pay Claimants "the wages to which [each] Claimant was entitled under ORS 653.010 to 653.261." ORS 653.055(1)(b) provides that the forum may award civil penalties to an employee when the employer pays less than the wages to which the employee is entitled under ORS 653.010 to 653.261, computed in the same fashion as ORS 652.150 penalty wages. This includes unpaid minimum or overtime wages. *82nd Street Mall,* 30 BOLI 150*; In the Matter of Sehat Entertainment,* 30 BOLI 170, 183 (2009). "Willfulness" is not an element. *In the Matter of Captain Hooks, LLP,* 27 BOLI 21, 225 (2006).

The Agency established by a preponderance of the evidence that all four Claimants worked both straight time and overtime hours. Respondent's failure to pay any wages whatsoever to VanDyck or Norris leaves no doubt that they were not paid minimum wage or overtime. In 2008 alone, Hatton earned $2,917.74 for her straight time hours and $214.74 for her overtime hours. The $420 that she was paid, applied to her 2008 straight time hours, only compensates her for a small part of those wages, leaving the rest of her accrued straight time and all of her overtime wages for 2008 unpaid. In 2008 alone, Becker earned $1,506.61 for his straight time hours and $202.81 for his overtime hours. Like Hatton, the $100 that he was paid, applied to his 2008 straight time hours, only compensates him for a small part of those wages, leaving the rest of his accrued straight time and all of his overtime wages for 2008 unpaid. All four Claimants are entitled to ORS 653.055(1)(b) civil penalties based on Respondent's failure to pay them the minimum wage or overtime wages for the hours that they worked.

The forum assesses ORS 653.055(1)(b) civil penalties based on the formula set out in ORS 652.150(1) (hourly rate x eight hours per day x 30 days). Using this formula, Respondent is liable to pay the following civil penalties to Claimants: VanDyck: $1,908.00; Hatton: $1,922.40; Becker: $1,932.00; Norris: $1,908.00.

ORDER

NOW, THEREFORE, as authorized by ORS 652.140(2), ORS 652.150, ORS 653.055, ORS 653.261, and ORS 652.332, and as payment of the unpaid wages, penalty wages, and civil penalties, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **COMPUTER PRODUCTS UNLIMITED, INC.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Michael Jeffrey VanDyck in the amount of FOUR THOUSAND SIX HUNDRED SIXTY-SIX DOLLARS AND SIXTY-NINE CENTS ($4,666.69), less appropriate lawful deductions, representing $850.69 in gross earned, unpaid, due and payable wages; $1,908.00 in penalty wages; and $1,908.00 as a civil penalty; plus interest at the legal rate on the sum of $850.69 from December 1, 2008, until paid, and interest at the legal rate on the sum of $3,816.00 from January 1, 2009, until paid.

(2) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Amanda Claire Hatton in the amount of SIX THOUSAND EIGHT HUNDRED TWELVE AND NINETY-FOUR CENTS ($6,812.94), less appropriate lawful deductions, representing $2,968.14 in gross earned, unpaid, due and payable wages; $1,922.40 in penalty wages; and $1,922.40 as a civil penalty; plus interest at the legal rate on the sum of $2,968.14 from February 1, 2009, until paid, and interest at the legal rate on the sum of $3,844.80 from March 1, 2009, until paid.

(3) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Aaron William Becker in the amount of FIVE THOUSAND SEVEN HUNDRED TWENTY DOLLARS AND ONE CENT ($5,820.01), less appropriate lawful deductions, representing $1,856.01 in gross earned, unpaid, due and payable wages; $1,932.00 in penalty wages; and $1,932.00 as a civil penalty; plus interest at the legal rate on the sum of $1,956.01.00 from February 1, 2009, until paid, and interest at the legal rate on the sum of $3,864.00 from March 1, 2009, until paid.

(4) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Scott A. Norris in the amount of SIX THOUSAND SIX HUNDRED NINETY-THREE DOLLARS AND SIXTY CENTS ($6,693.60), less appropriate lawful deductions, representing $2,877.60 in gross earned, unpaid, due and payable wages; $1,908.00 in penalty wages; and $1,908.00 as a civil penalty; plus interest at the legal rate on the

sum of $2,877.60 from January 1, 2009, until paid, and interest at the legal rate on the sum of $3,816.00 from February 1, 2009, until paid.

In the Matter of

HORIZON TECHNOLOGIES, LLC

Case No. 67-10

Final Order of Commissioner Brad Avakian

Issued June 24, 2011

SYNOPSIS

Claimant worked from August 2007 through December 2008 performing home-based internet sales of Respondent's product, and was only paid $33 when Respondent went out of business. The Agency sought to recover $21,725.92 in unpaid wages on behalf of Claimant. The Agency also sought to recover funds that were paid to Claimant from the Wage Security Fund, plus a 25 percent penalty on those funds. Based on evidence presented by the Agency that showed Claimant was not employed by Respondent, the forum concluded that the Agency did not establish a prima facie case and dismissed the Agency's Order of Determination. ORS 652.140(2), ORS 652.150, ORS 653.025, ORS 653.055, ORS 652.414, ORS 653.261, OAR 839-020-0030.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 25, 2011, at the office of the Oregon Employment Department at 846 SE Pine Street, Roseburg, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Chet Nakada, an employee of the Agency. Wage claimant Larry Kilburn ("Claimant") was present throughout the hearing and was not represented by counsel. Respondent Horizon Technologies, LLC did not make an appearance at the hearing and was held in default.

The Agency called the following witnesses: Claimant Kilburn; BOLI Wage and Hour Division compliance specialist Margaret Pargeter (telephonic); Heather Garcia, Claimant's daughter; and Raul Garcia, Claimant's son-in-law (telephonic).

The forum received into evidence:

a) Administrative exhibits X-1 through X-8 (submitted prior to hearing) and X-9 (submitted at hearing at the ALJ's request);

b) Agency exhibits A-1 through A-12 (submitted prior to hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On March 19, 2009, Claimant filed a wage claim with the Agency alleging that Horizon Technologies, LLC had employed him from August 20, 2007, to December 31, 2008, and failed to pay wages earned and due to him. At the same time, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent. On August 27, 2009, Claimant signed and dated a BOLI form entitled "Wage Security Fund Assignment of Wages."

2) On August 25, 2009, the Agency issued Order of Determination number 09-0942 based on the wage claim filed by Claimant and the Agency's investigation. The Order named Horizon Technologies, L.L.C. as Claimant's employer and alleged, in pertinent part:

- Respondent employed Claimant from August 20, 2007, to December 31, 2008.
- Claimant worked a total of 2,746.75 hours, of which 744 were hours worked at the rate of $7.80 per hour, 1,994 were hours worked at the rate of $7.95 per hour, 4.25 were hours worked over 40 in a workweek at a rate of $11.70 per hour, and 4.5 were hours worked over 40 in a work week at the rate of $11.93 per hour;
- During the wage claim period, Claimant earned a total of $21,758.92, of which only $3,300.00 has been paid, leaving $18,458.91 in unpaid, due and owing wages;
- Respondent willfully failed to pay these wages and owes Claimant $1,908.00 in penalty wages;
- Respondent paid Claimant less than the wages to which he was entitled under ORS 653.025 and OAR 839-020-0010 and ORS 653.261(1) and OAR 839-020-0030 and is liable to the Claimant for civil penalties under ORS 653.055(1)(b) in the amount of $1,908.00.

3) On October 2, 2009, Respondent filed an answer and request for hearing through its authorized representative, Michael Angel. In its answer, Respondent denied that it ever employed Claimant and affirmatively alleged that Claimant was an "Independent Business Owner selling our GPS devices."

4) On January 12, 2010, the Agency issued Amended Order of Determination No. 09-0942 in which it amended the original Order of Determination to allege that Claimant had only been paid $33.00, leaving $21,725.92 in unpaid, due and owing wages; and to allege that $2,416.80 of the unpaid wages was eligible for payment from the Wage Security Fund ("WSF"), that BOLI paid this amount to the Claimant, and that BOLI's Commissioner is entitled by ORS 652.414(3) to recover this amount, plus a penalty of 25%, or $604.20.

5) On January 19, 2010,[1] Respondent filed an answer and request for hearing through its authorized representative, Michael Angel. In its answer, Respondent denied that it ever employed Claimant and affirmatively alleged that Claimant bought an independent business distributorship and was his own business owner.

6) On November 8, 2010, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimant setting the time and place of hearing for 10:00 a.m. on January 25, 2011, at the Roseburg office of the Oregon Employment Department.

7) Respondent did not make an appearance at the hearing and did not notify the Agency or the ALJ that it would not appear at the time and place set for hearing. The ALJ waited until 10:30 a.m., then declared Respondent in default and commenced the hearing.

8) The ALJ issued a proposed order on March 9, 2011, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On April 18, 2011, the Agency filed exceptions. Those exceptions are discussed at length in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Horizon Technologies, L.L.C. was an Arizona limited liability company whose registered agent and manager was Michael Angel. Respondent conducted its business out of Arizona and has never been registered to do business in Oregon.

2) Respondent sold a product called "Millennium Plus" ("MP") that integrated Global Positioning System ("GPS") and cellular technology and enabled clients to communicate with a vehicle at any time of the day or night, nearly anywhere in the world, using a computer with Internet access and a browser. MP included a GPS and a choice of service plans that allowed clients to choose from dif-

[1] Respondent's answer and request for hearing is dated January 19, 2009, but the forum concludes for two reasons that Respondent misdated it — (1) BOLI date stamped it as received on January 25, 2010; and (2) The answer and request was filed in response to BOLI's Amended Order of Determination, which was issued on January 12, 2010.

ferent specific monitoring "actions" that Respondent would perform each month per client vehicle.[2]

3) Claimant, who had recently been laid off from his job, learned of Respondent's business through "direct mail" that he received from Respondent that described Respondent's business and a business opportunity reselling its product. Claimant, who was very experienced in motor vehicle repair and motor vehicle computers, researched Respondent's company and its product and concluded it had "great possibilities," with a definite potential of making a good income.[3]

4) Claimant contacted Respondent, talked with one of Respondent's representatives, and decided he wanted to sell MP for Respondent, viewing it as a way to earn the money he needed to start his own towing and repair business. Respondent required Claimant to make an initial investment of $1,500 to purchase a "welcome package." Claimant made this payment by credit card over the phone. Claimant understood that he would be paid on a commission basis and was told his commission would be the amount he sold the MP's GPS units for that was "over and above" the minimum pricing schedule that Respondent set for its MP GPS units. Although Respondent recommended certain resale prices based on the volume of units sold in a transaction, Claimant was free to sell the MP GPS unit at any price above Respondent's minimum pricing schedule. When clients ordered an MP GPS, they also selected and ordered a service plan. The service plans had fixed prices that Claimant could not negotiate, and he did not receive a commission on their sale.

5) Once Claimant paid for the "welcome" package, Respondent sent Claimant a "Reseller's Handbook" and designated a company representative, described in the "Reseller's Handbook" as "a coach to guide you through your business venture,"[4] whom Claimant was supposed to contact on a regular basis. During the wage claim period, Claimant communicated at least once a week by email and telephone with a "coach" who was located in Arizona.

6) Claimant and Respondent did not enter into a signed written agreement and Claimant signed no documents concerning their business relationship. Claimant

[2] For example, an "action" included such things as locating a vehicle, determining if a vehicle being driven was speeding, or disabling the vehicle's starter. Without a service plan, Respondent's GPS was essentially useless, the functional equivalent of a cell phone without a service provider.

[3] In Claimant's own words, he believed Respondent's product would be the best product to hit [the market] since cell phones" and hoped to get in the "ground floor" of the business.

[4] *See* Finding of Fact #7—The Merits.

did not complete an employment application, a W-4, or an I-9.

7) The "welcome package" that Respondent provided to Claimant consisted of the following:

- A 74-page "Reseller's Handbook" that included, among other things, a detailed description of MP, "Terms and Conditions for Business and Consumer Membership," marketing information and materials, pricing information, and the amount of commission Claimant would receive for each sale;
- Sample fliers and glossy "trifolds" to be used for advertising purposes;
- Sample business cards; and
- A GPS unit for Claimant's car.

8) A section of the "Reseller's Handbook" was entitled "Terms and Conditions for Business and Consumer Membership." Among other things, it provided:

"* * * You understand that you are an Independent Business Owner (IBO) and Reseller of our products."

"* * * * *

"COMPENSATION. You shall be compensated for any products that you are authorized to market on our behalf and for which we receive a valid order, payment of the product and which is not returned to us. Compensation will be according to the Commission Payment Schedule contained later in this Agreement. * * *"

"PRICING. Under this Agreement, you agree to market any and all products according to the Volume Pricing Schedule. You may negotiate prices with any person or any business entity however, you may not market the products lower [sic] than the price that you pay to us. You may not negotiate prices for services such as monitoring plans. We recommend that you follow the guidelines provided in the Volume Pricing Schedule."

"* * * * *

"ADVERTISING. You may conduct business and product advertising in any manner acceptable by law and approved by us. Failure to have us approve advertising prior to its use in any literature, signage, business cards, or other medium may be cause for immediate termination of this Agreement. * * *"

" * * * * *

"TERMS OF AGREEMENT. This Agreement shall commence on the earliest of the following dates; the date on which construction is begun on your Web site, or the date you sign and return the Authorization form, or the date of your DEFAULT ACCEPTANCE and shall remain in force for a term of one year and will be automatically extended for

additional one year terms unless, written notice of non-renewal is issued by either party thirty days (30) prior to the expiration date of any annual contract term. * * *"

"TERMINATION OF AGREEMENT. Termination of this agreement may occur if you fail to maintain your membership in the IBO/Reseller Program, or for failure to remit your Web hosting fee, or failure to pay any other outstanding unpaid balance due us for more than thirty days. We may terminate this agreement for your non-payment or any other event of default of this Agreement. * * *"

9) To market MP, Respondent suggested that Claimant start his own website and have Respondent host it on Respondent's servers for a fee of $25 per month. After receiving the "Reseller's Handbook," Claimant did construct his own website as he prepared to market MP, naming it "*Findvehicle.net*." Throughout the wage claim period, he paid Respondent $25 a month to host his website. All orders that were generated through Claimant's website and any payments made for orders generated to Claimant's website were processed by Respondent. Claimant understood that Respondent would notify him of all sales generated through his website and send him a commission from the sale.

10) Claimant marketed MP for Respondent from August 20, 2007, through December 31, 2008 (the "wage claim period"). He performed all of his work at his home.

11) When Claimant began marketing MP for Respondent, he spent approximately $1,200 to purchase a new computer and printer that he used to market MP during the wage claim period.

12) During the wage claim period, Claimant paid approximately $1,000 per month advertising MP for Respondent, most of it to Google for internet marketing. Claimant initiated and paid for his own advertising, but was required to get approval for the content of that advertising from Respondent's representative or risk termination of his business relationship with Respondent. Claimant also ordered and paid for 2,000 glossy trifold advertising brochures that were created and printed by Respondent.

13) Claimant ordered and paid for 1,000 business cards that he used while marketing MP for Respondent.

14) Claimant used his personal cell phone to market MP for Respondent and paid his own cell phone bills.

15) Respondent did not reimburse Claimant for any of his business expenses and Claimant did not expect to be reimbursed.

16) Other than his own business expenses, Claimant made no other investment in Respondent's business.

17) During the wage claim period, Claimant told his daughter

and son-in-law that there was a possibility he could employ them to further his business, and that there might be a commission involved if they ever sold product for him.

18) Claimant set his own work hours during the wage claim period and worked an average of eight hours a day, five days a week.

19) Claimant had no other gainful employment during the wage claim period and lived off his savings during that time.

20) During the wage claim period, Claimant worked a total of 2,746.8 hours that were devoted to marketing MP for Respondent, including the following hours worked over 40 in a given workweek:

- 3.75 hours during a workweek beginning September 3, 2007, and ending September 9, 2007;
- .5 hours during a workweek beginning September 24, 2007, and ending September 30, 2007;
- .5 hours during a workweek beginning May 26, 2008, and ending June 1, 2008
- 4 hours during a workweek beginning August 11, 2008, and ending August 17, 2008.

21) Claimant frequently asked his "coach" for payment of the commissions he believed he had earned. Claimant had no access to the records of his sales and has no record of the commissions he earned because Respondent did not provide those records.

22) During the wage claim period, Respondent sent Claimant one check for $33 without disclosing the reason for the check. Claimant received no other payments from Respondent.

23) Claimant stopped trying to market MP for Respondent after December 31, 2008, when he became unable to contact Respondent by telephone. Respondent's website "went down" shortly afterwards and Respondent is no longer in business.

24) Claimant worked without being paid for such a long time because he had "so much money invested in it that I couldn't tell myself to stop until something happened."

25) Oregon's statutory minimum wage in 2007 was $7.80 per hour; in 2008 it was $7.95 per hour.

26) Claimant's total work hours set out in Finding of Fact #20 – The Merits, when multiplied by the applicable minimum wage and associated overtime wage rates, yields the sum of $21,750.91.

27) On March 27, 2009, the Agency mailed a document entitled "Notice of Wage Claim" to Respondent that stated:

"You are hereby notified that "LARRY WAYNE KILBURN has filed a wage claim with the Bureau of Labor and Industries alleging:

"Unpaid wages and overtime of $21,720.00 at the rate of $8.00 per hour from August 20, 2007 to December 31, 2008.

"IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address.

"IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation which supports your position, as well as payment of any amount which you concede is owed the claimant to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.

"If your response to the claim is not received on or before April 10, 2009, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

28) Margaret Pargeter, Wage and Hour Division Compliance Specialist, was assigned to investigate Claimant's wage claim. She conducted an investigation and made a determination that Claimant's claim was valid based on the evidence provided to her. She also determined that Respondent had gone out of business at the end of 2008, that Respondent lacked sufficient assets to pay a wage claim, and that Claimant's wage claim could not otherwise be fully and promptly paid. She then calculated that Claimant was eligible for a WSF payment of $2,607.60 in gross wages and caused a check in the net amount of $2,408.12 to be issued to Claimant from the WSF.

29) All the witnesses were credible.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Horizon Technologies LLC was an Arizona limited liability company whose registered agent and manager was Michael Angel. Respondent's business involved selling and servicing a product called "Millennium Plus" ("MP") that integrated GPS and cellular technology and was used with motor vehicles. MP consisted of a GPS and a service plan.

2) Claimant, who is very experienced in motor vehicle repair and computers, received a mailing from Respondent that described Respondent's business and a business opportunity reselling MP, its product. Claimant contacted Respondent after researching Respondent's company and MP and decided he wanted to market Respondent's MP product.

3) Claimant was required to make an initial investment of $1,500 to purchase a "welcome

package" from Respondent that included a "Reseller's Handbook," sample advertising materials, and a GPS unit for Claimant's car. The "Reseller's Handbook" contained a clause stating that its "Terms and Conditions" went into effect as soon as Claimant began construction on his website. After receiving the "Reseller's Handbook," Claimant constructed a website and paid Respondent $25 a month to host it.

4) Claimant marketed MP for Respondent from August 20, 2007, through December 31, 2008. During this time, he spent $15,000 to $20,000 for equipment, supplies, and advertising to market MP for Respondent from his home. Respondent did not pay for any of Claimant's business expenses.

5) Although Claimant was required to sell Respondent's GPS units for a minimum set price, he was free to sell the units for any amount over that price. Respondent told him that his commission would be the amount he sold the product for that was over and above Respondent's minimum set price. He was not allowed to negotiate prices for Respondent's service plans and did not receive a commission for service plan sales.

6) Claimant stayed in contact with Respondent via a weekly email or telephone call that he made to his business "coach" in Arizona whom he considered to be his supervisor.

7) Respondent retained the authority to approve the content of Claimant's advertising; Claimant's failure to obtain that approval could be cause for termination of the business relationship. Otherwise, Claimant unilaterally determined the means and methods he used to market Respondent's product.

8) Respondent did not reimburse Claimant for any of his business expenses and Claimant did not expect to be reimbursed. On one occasion, Respondent sent Claimant a check for $33 but did not disclose the reason for the check. Claimant received no other payments from Respondent.

9) Claimant set his own work schedule and worked an average of eight hours a day, five days a week during the wage claim period and worked a total of 2,746.8 hours, including 8.75 overtime hours. He performed all his work from his home.

10) Respondent went out of business at the end of 2008.

11) BOLI's Wage and Hour Division investigated Claimant's wage claim and determined that Claimant's claim was valid based on the evidence provided, that Respondent had gone out of business at the end of 2008, that Respondent lacked sufficient assets to pay a wage claim, and that Claimant's wage claim could not otherwise be fully and promptly paid. The Wage and Hour Division also calculated that Claimant was eligible for a WSF payment of $2,607.60 in gross wages and

caused a check in the net amount of $2,408.12 to be issued to Claimant from the WSF.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent did not employ Claimant. ORS 652.310, 653.010.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 652.330, 652.332.

3) Because Respondent did not employ Claimant and Claimant was not Respondent's employee, Claimant did not earn any wages and Respondent did not violate ORS 652.140(2) by failing to pay wages to Claimant in a timely manner.

4) Respondent did not willfully fail to pay Claimant all wages due and owing and does not owe penalty wages to Claimant. ORS 652.150.

5) Respondent did not fail to pay Claimant overtime wages and is not liable for civil penalties under ORS 653.055(1)(b).

6) Respondent is not liable to repay the WSF the wages paid out to Claimant by the WSF or an associated penalty. ORS 652.414.

7) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to dismiss the wage claims filed by Claimant Kilburn and the Agency's claim for reimbursement of the WSF. ORS 652.332, ORS 652.414.

OPINION

THE AGENCY'S EXCEPTIONS

The Agency's exceptions can be summarized as follows:

1. Respondent's defense that Claimant was an "Independent Business Owner selling our GPS devices" should not be construed as raising the affirmative defense of independent contractor because the words "independent contractor" were not specifically mentioned.

2. It is Respondent's burden to prove the affirmative defense of independent contractor. Respondent defaulted by not appearing at hearing and presented no evidence in support of that defense, and it is not the Agency's burden to disprove that defense.

3. The Agency presented a prima facie case. Instead of focusing on that, the ALJ "jumped immediately into applying and analyzing the independent contractor elements to the facts." When the Agency presents a prima facie case in a default case, the forum need not consider Respondent's unsubstantiated independent contractor defense.

4. The ALJ improperly applied the rebuttable presumption standard used by the commissioner in WSF cases.

5. The Proposed Findings of Fact – The Merits do not support a conclusion that Claimant was an independent contractor.

The forum incorporates a discussion of each of these exceptions in the body of this Opinion. The forum also points out that the Agency did not contest the accuracy of the Proposed Findings of Fact – The Merits, except to argue that the forum should infer the extent of Respondent's business investment relative to Claimant's investment.

CLAIMANT'S WAGE CLAIM

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 Village Café, Inc., 30 BOLI 80, 88 (2008).* The Agency's prima facie case consists of the following elements: 1) Respondent employed Claimant; 2) The pay rate upon which Respondent and Claimant agreed, if other than minimum wage; 3) Claimant performed work for which he was not properly compensated; and 4) The amount and extent of work Claimant performed for Respondent. *In the Matter of 82nd Street Mall, Inc.,* 30 BOLI 140, 142 (2009). In a default case, the forum may consider any unsworn and unsubstantiated assertions contained in a respondent's answer, but those assertions are overcome whenever they are contradicted by other credible evidence in the record. *In the Matter of Sehat Entertainment, Inc.,* 30 BOLI 170, 181 (2009).

RESPONDENT DID NOT EMPLOY CLAIMANT

A. Introduction

The Agency seeks unpaid straight time and overtime wages for Claimant under ORS 653.025 and 653.261, calculated at the state minimum wage in effect in 2007 and 2008. Accordingly, the forum applies the definitions contained in ORS 653.010(2) and (3) to determine if Respondent employed Claimant. In pertinent part, those definitions read:

> "(2) 'Employ' includes to suffer or permit to work * * *.
>
> "(3) 'Employer' means any person who employs another person."

Read together, these two provisions mean that Respondent was Claimant's employer if it suffered or permitted Claimant to work.

Federal and state case law do not provide specific guidance for applying the broad definition of "employ." *In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration,* 25 BOLI 12, 38 (2003), *affirmed without opinion, Ochoa v. Bureau of Labor and Industries,* 196 Or App 639, 103 P3d 1212 (2004). The Agency's administrative rules add no clarification, as they do not define "employ" and merely state that "Employer" has the same meaning as that in ORS 653.010(3). OAR 839-020-0004(16).

Prior BOLI Final Orders have relied on the facts in each case to determine whether or not a respondent "employed" a wage claimant as defined in ORS 653.010(2) and have never formulated a specific test to determine if someone has been "suffer[ed] or permit[ted] to work." Unless the respondent has raised an independent contractor defense or the defense that someone else was the claimant's employer,[5] prior Final Orders generally contain a summary statement in their Opinion concluding that the respondent employed the claimant.[6] In most cases, this is because claimant's employment is admitted in the respondent's answer and the respondent has requested a contested case hearing to contest the amount of wages claimed and accompanying penalty wages.[7] In cases in which a respondent has raised an independent contractor defense, the forum's consistent approach has been to evaluate the merits of the defense and, in the vast majority of case, reject the defense and then simply conclude that the respondent employed claimant.[8]

The only case in which the forum has found any in-depth discussion of the meaning of "suffer or permit to work" is in *Ochoa,* a non-wage claim case in which the Agency alleged wage and hour recordkeeping and farm labor contractor violations and the issue of employment only arose because Respondent contended its workers were independent contractors and it was therefore not liable for the record keeping violations related to records that employers are required to create and maintain. *Id.* at 16. After finding that federal and state law contained no guidance on the specific meaning of "employ" as defined in ORS 653.010(2), the forum adopted the analytical approach used by the authors of

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[5] *See, e.g. In the Matter of Paul Andrew Flagg,* 25 BOLI 1, 9-10 (2003) (respondent, who employed claimant to do construction work on a private home, alleged that the homeowner was the actual employer who employed both respondent and claimant).

[6] *See, e.g., In the Matter of Sehat Entertainment, Inc.,* 30 BOLI 170, 181 (2009) ("Credible evidence controverted Respondents' unsworn claim in their answer that they did not employ Claimant");

[7] *See, e.g. In the Matter of Tailor Made Fencing & Decking, Inc.,* 30 BOLI 151, 152, 156 (2009); *In the Matter of J. Guadalupe Campuzano-Cazares*, 30 BOLI 48, 59 (2008).

[8] *See, e.g., In the Matter of Alphabet House,* 24 BOLI 262, 278 (2003) ("All these factors point the forum to the conclusion that Claimant was an employee, not an independent contractor"); *In the Matter of Triple A Construction, LLC*, 23 BOLI 79, 93 (2002) ("The forum is obliged to look at the totality of the circumstances when determining whether a worker is an independent contractor. In this case, the evidence as a whole reveals the actual relationship between Claimants and Respondent and the forum finds the Claimants were Respondent's employees").

an article examining the history of the FLSA, holding that when the work is encompassed within the overall business of the alleged employer, and the business owner supplies the capital and the work is unskilled, a business has suffered or permitted the work to be performed. *Id* at 40. The forum then determined that Respondent's workers -- who were employed by Respondent in his nursery and agreed to perform the unskilled labor of harvesting cones for Respondent to avoid a summer layoff, who were expected to return to the nursery after the cone harvest, and who invested no capital -- were suffered or permitted to work for Respondent. *Id.* *Ochoa* is not applicable to this case because the facts are so different.

B. Should Respondent's Independent Contractor Defense Be Considered?

In its exceptions, the Agency asserts that the forum should not consider Respondent's independent contractor defense for two reasons. First, because Respondent did not use the specific term "independent contractor" in its answer. Second, because it is Respondent's burden to prove the affirmative defense of independent contractor. Therefore, when Respondent defaulted by not appearing at hearing and presented no evidence in support of that defense, the Agency was only required to present a prima facie case and was not required to disprove an independent contractor defense that Respondent did not support with any evidence.

1. Respondent did not use the term "independent contractor" in its answer.

In its answer and request for hearing, Respondent, which appeared *pro se* in filing its answer through an authorized representative, averred that Claimant was not owed any wages because he was an "Independent Business Owner selling our GPS devices." In response to the Agency's Amended Order of Determination, Respondent denied it ever employed Claimant and affirmatively alleged that Claimant "bought an independent business distributorship" and "was his own business owner." The Agency argues that the forum should not construe this language as raising the affirmative defense of independent contractor. The forum disagrees, taking guidance from ORCP 12, which states:

> "**A. Liberal construction**. All pleadings shall be liberally construed with a view of substantial justice between the parties.
>
> "**B. Disregard of error or defect not affecting substantial right.** The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party."

Applying this standard, the forum concludes that Respondent raised the affirmative defense of inde-

pendent contractor in its original answer and its response to the Agency's Amended Order of Determination by its use of the language quoted earlier in this paragraph.

2. Respondent should not prevail because of its default.

The Agency's second argument implies that, even if Respondent raised an independent contractor defense, Respondent could not prevail once it defaulted and presented no evidence to support that pleading. Although not entirely clear, the Agency's reasoning seems to be that since it is Respondent's burden to prove the affirmative defense of independent contractor by a preponderance of the evidence, Respondent cannot prevail if it presents no evidence. The Agency is correct in its assertion that it is Respondent's burden to prove its independent contractor defense by a preponderance of the evidence. *In the Matter of Gary Lee Lucas,* 26 BOLI 198, 210 (2005). It is also correct that the forum's responsibility in a default case is to determine whether the Agency has established a prima facie case supporting the allegations of the charging document. *See, e.g., In the Matter of Keith Testerman,* 20 BOLI 112, 126 (2000). However, it is incorrect in its argument that the forum must ignore any evidence in a default case not presented by Respondent that tends to prove Respondent's affirmative defense of independent contractor.

The first element of the Agency's prima facie case is to establish that Respondent employed Claimant. Respondent's independent contractor defense is directly related to the issue of whether or not Respondent employed Claimant, as reflected in numerous Final Orders in which the forum evaluated a respondent's independent contractor defense, rejected it, and summarily concluded without further analysis that the claimant was employed by the respondent.[9] Respondents have raised an independent contractor defense in their answers in 40 prior BOLI contested case proceedings that resulted in Final Orders. With one exception,[10] the forum evaluated the merits of that defense in determining whether or not the respondent(s) employed the claimant(s). Included in that number are all eight default cases in which the respondent raised an independent contractor defense in its answer but did not appear at hearing.[11] In the majority of those

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[9] *See* footnote 8, *supra*.

[10] *See* the forum's discussion of *In the Matter of Okechi Village & Health Center, Inc.,* 27 BOLI 156 (2006), *infra*.

[11] *See In the Matter of Richard Panek,* 4 BOLI 218 (1984); *In the Matter of Kevin McGrew,* 8 BOLI 251 (1990); *In the Matter of Rainbow Auto Parts & Dismantlers,* 10 BOLI 66 (1991); *In the Matter of R.L. Chapman Ent. Ltd.,* 17 BOLI 277 (1999); *In the Matter of Leslie Elmer DeHart,* 18 BOLI 199 (1999); *In the Matter of Stan Lynch,* 23 BOLI 34 (2002); *In the Matter of*

cases, the respondent's independent contractor defense was the very first issue addressed by the forum in its evaluation of the Agency's prima facie case.

Ultimately, the Agency's argument rests on the premise that it proved its prima facie case. If that were so, the forum would still evaluate Respondent's independent contractor defense, but the result would necessarily be different,[12] as proving the first element of the Agency's prima facie case – that Respondent employed Claimant -- necessarily proves that Claimant was not an independent contractor. Likewise, evidence that establishes by a preponderance of the evidence that Claimant was an independent contractor necessarily proves that Respondent did not employ Claimant. Although the burdens of proof for these two propositions respectively rest on the Agency and Respondent, it is immaterial who presents the evidence on which the forum relies for its conclusion. If Respondent pleads the defense of independent contractor and there is evidence in the record that is probative of that defense, the forum has no alternative but to consider that evidence, and it has consistently done so in the past. Consequently, the forum must consider and evaluate Respondent's independent contractor defense in light of any evidence in the record that has a tendency to prove or disprove that defense. In a default case, the respondent is not present to make any objections and the Agency has complete control over what evidence it chooses to present. When the Agency presents evidence that tends to defeat one or more elements of its prima facie case, the forum must consider that evidence.

The Agency also argues that the Final Order in the case of *In the Matter of Okechi Village & Health Center, Inc.,* 27 BOLI 156 (2006) supports its contention that the forum need not consider a defaulting respondent's independent contractor defense. In *Okechi*, the Agency sought unpaid straight time and overtime wages for two claimants. In its answer and request for hearing, the respondent admitted that it employed both claimants for all straight time hours, but claimed that "all hours worked by claimants in excess of forty hours per week were covered by the independent contractor agreement between claimants and [Respondent]." In its Opinion, the forum acknowledged that the respondent had raised the independent contractor defense quoted above, but did not apply an "economic reality" test to evaluate the strength of respondent's defense, stating that:

> "Respondent's unsubstantiated assertions are overcome by Claimants' credible testimony that there was no such agreement and that their overtime hours were an extension of

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Procom Services, Inc., 24 BOLI 238 (2003); *In the Matter of Ryan Allen Hite,* 31 BOLI 10 (2009).

[12] *See* footnote 8, *supra*.

> their caregiver duties for Respondent and remain unpaid to date."

Okechi can be distinguished from this case in three important respects. First, the *Okechi* respondent conceded that it employed claimants for the straight time portion of their hours and it was undisputed that claimants performed the same work during their overtime hours. Second, claimants credibly testified that there was no independent contractor agreement and there was no evidence to the contrary, apart from respondent's bare assertion in its answer.[13] Third, nothing in the Final Order indicates that there was any substantive evidence in the record, apart from respondent's statement in its answer, supporting respondent's independent contractor defense. In contrast, here Respondent denied it employed Claimant, the Agency produced a "Reseller's Handbook" that defined the business relationship between Claimant and Respondent and that went into effect when Claimant began construction of his website, and Claimant testified extensively concerning his capital investment and the other factors that have led the forum to conclude he was an independent contractor.

In conclusion, the forum rejects the Agency's contention that it is inappropriate to consider Respondent's independent contractor defense because of Respondent's default and proceeds to evaluate that defense based on the evidence presented at hearing.

C. Application Of Respondent's Independent Contractor Defense

This forum applies an "economic reality" test to distinguish an employee from an independent contractor under Oregon's minimum wage and wage collection laws, with the touchstone being the "economic reality" of the relationship.[14] Restated, the forum considers whether "the alleged employee, as a matter of economic reality, is economically dependent upon the business to which [the employee] renders [his] services." *In the Matter of Geoffroy Enterprises, Inc.,* 15 BOLI 148, 164 (1996) (*adopting* FLSA test used by 5th Circuit Court of Appeals in *Circle C Investments, Inc.,* 998 F2d 324, 327 (5th Cir

[13] As the forum has stated previously, even if there had been an independent contractor agreement, this fact alone would be insufficient to establish, as a matter of law, that claimants were independent contractors. *See, e.g., In the Matter of Forestry Action Committee,* 30 BOLI 63, 75 (2008). *See also Alphabet House* at 278 ("Although Claimant may have signed an 'independent contractor' agreement, this fact alone does not control the outcome of this case, as the forum looks at the totality of the circumstances in determining whether a wage claimant was an employee or an independent contractor").

[14] *See Boucher v. Shaw,* 572 F3d 1087, 1091 (9th Cir. 2009) (*citing Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28 (1961).*

1993)). The "economic reality" test has five elements:

> (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.

Id. See also In the Matter of Orion Driftboat and Watercraft Company, 26 BOLI 137, 146 (2005); *In the Matter of Kilmore Enterprise*s, 26 BOLI 111,120-21 (2004); *In the Matter of William Presley,* 25 BOLI 56 (2004), *affirmed*, *Presley v. Bureau of Labor and Industries,* 200 Or App 113, 117, 112 P3d 485 (2005) (in reviewing the commissioner's final order in which respondent's primary argument was that claimant was an independent contractor, the court, after noting that respondent did not object to the commissioner's use of the "economic reality" test, applied the same five element test and did not question whether it was the appropriate test to apply).

Before evaluating the merits of Respondent's independent contractor defense, the forum notes that employers have raised this defense many times and the forum has rejected it on all but one occasion. *See In the Matter of Kilmore Enterprises, Inc.,* 26 BOLI 111, 120-122 (2004) (claimant found to have performed part of his work as an employee for respondent and subsequent work for the same respondent as an independent contractor). However, this is the first time the defense has been raised in the context of a business enterprise involving home-based internet sales. The forum emphasizes that the holding in this case turns on its particular facts and should not be construed as controlling in all wage claim cases involving home-based internet sales in which the affirmative defense of independent contractor is raised.

DEGREE OF CONTROL

Respondent set the minimum price for its product, reserved the right to approve the content of Claimant's advertising, required Claimant to pay $25 a month to maintain a website that Respondent hosted on its servers, and controlled the means by which Claimant's clients paid for the product. Claimant's clients also paid Respondent directly, with Respondent promising to then pay a commission to Claimant.

Claimant determined the hours that he worked, the amount of commission he was supposed to earn on sales of Respondent's GPS units,[15] the means and methods by which he marketed Respondent's product, the amount he spent on marketing, the location from which he worked, and the equipment he used to market

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[15] *See* Finding of Fact #4 – The Merits.

Respondent's product. He maintained contact with Respondent through weekly emails or telephone calls to a "coach" in Arizona.

This evidence, by itself, does not affirmatively indicate either an employment or independent contractor relationship.[16]

The Agency disagrees with this analysis and argues that this evidence shows Respondent exercised significant control over Claimant and requires the conclusion that this element affirmatively shows that Claimant was not an independent contractor. The fo-

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[16] *Compare In the Matter of Laura M. Jaap*, 30 BOLI 110, 125 (2009) (When respondent was present to direct work and perform work herself at least three days a week except during one week when her agent directed work in her absence; claimants performed the work that respondent and her agent instructed them to perform; claimants credibly testified that respondent and her agent directed their work and there was no more specific evidence concerning the extent of supervision by respondent; the forum concluded that the degree of control exercised by respondent was indicative of an employer-employee relationship); *Forestry Action Committee* at 76 (claimant who was required to comply with another person's instructions about when, where and how to perform services was an employee); *In the Matter of Gary Lee Lucas*, 26 BOLI 198, 210 (2005) (When claimants and respondent worked almost identical schedules, one claimant rode to and from work with respondent, and respondent told claimants how he wanted the work performed, the degree of control exercised by respondent indicated that claimants were employees, not independent contractors); *In the Matter of Rodrigo Ayala Ochoa*, revised final order on reconsideration, 25 BOLI 12, 42-43 (2003), affirmed without opinion, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004) (Based on the totality of the circumstances regarding degree of control -- respondent controlled the presence of workers who harvested cones for its business on the work site, as well as the workers' payroll, and the daily working conditions, i.e., lodging and transportation, this indicated an employer-employee relationship); *In the Matter of Triple A Construction, LLC*, 23 BOLI 79, 92 (2002) (When respondent hired claimants on a per job basis, but claimants had no control over how they approached each assigned project, the forum found they were hired as day laborers to perform work in accordance with respondent's instructions and, as such, were working at the direction and under the total control of respondent, indicating an employee-employer relationship.) But *cf. In the Matter of Kilmore Enterprises*, 26 BOLI 111, 121 (2004) (When respondent did not supervise or control claimant's work schedule or pay rate on a commercial painting job, claimant acknowledged that he was on his "own time" when he worked on the paint job and that he chose to work full eight hour days rather than the shorter work schedule respondent dictated on residential projects; claimant admitted that he, not respondent, determined the rate he would "charge" to do the work; and the record as a whole that showed respondent asked for and accepted claimant's "bid" on the commercial painting job, claimant's degree of control was indicative of an independent contractor relationship).

rum affirms its earlier conclusion about the legal significance of these facts and rejects the Agency's exception.

EXTENT OF RELATIVE INVESTMENTS

In contrast to prior wage claim cases in which an alleged employer asserted an independent contractor defense, this is the first wage claim case to come before the forum in which a claimant actually made a substantial financial investment related to the work performed. Claimant testified that he invested $15,000 to $20,000 in the business during the wage claim period. This investment was not to buy stock or any ownership interest in Respondent, but to provide Claimant the means by which to market Respondent's product and earn potential income for Claimant. Claimant's investments included a computer and printer, monthly web site expense, cell phone bill, advertising expense to purchase brochures from Respondent and advertise through Google, business cards, and a $1,500 startup fee to purchase a "welcome package" and a membership in Respondent's "Reseller's" program. There is no evidence that Respondent paid for any service or product it provided to Claimant to assist him in marketing MP. Rather, Claimant paid for everything.

In its exceptions, the Agency argues that the forum's analysis is flawed:

> "While it is true that Claimant used his own funds for equipment and supplies to work, the costs borne by the Claimant were items customarily provided by an employer to its sales employees (business cards, advertising brochures, website maintenance) and were paid to the Respondent. Missing, because Respondent provided no information in the record and was not present or available to the Forum at the hearing, is a discussion of the relative investments of the Claimant and Respondent. Presumably, the Respondent had business expenditures related to the purchase of GPS units, the actual servicing of the service plans, the leasing of business space, the costs of utilities, the maintenance of its website, the printing of advertising materials, etc. In other words, the Respondent's investment in the business venture likely far exceeded that of the Claimant."

The Agency's exception asks the forum to speculate about the extent of Respondent's business expenditures and draw a legal conclusion in support of the Agency based on that speculation. The forum declines to engage in such speculation, given the absence of any substantive evidence whatsoever to support the assumptions the Agency asks to forum to make. Ironically, the Agency's argument that the "costs borne by the Claimant were items customarily provided by an employer to its sales employees (business cards, advertising brochures, website maintenance)"

lends support to the forum's conclusion that Claimant was not Respondent's employee.

The investments required of and made by Claimant in hope of making a profit indicate an independent contractor relationship.

DEGREE TO WHICH CLAIMANT'S OPPORTUNITY FOR PROFIT AND LOSS WAS DETERMINED BY RESPONDENT

Aside from *Kilmore*, this is the first wage claim case to come before the forum involving an independent contractor defense in which a claimant has actually had an opportunity to make a profit or suffer a loss. All previous cases except *Kilmore* have involved a claimant or claimants who worked for minimum wage,[17] an agreed rate of pay[18] or piece rate[19] who had no opportunity to earn money other than an agreed rate of pay or piece rate, and who had no cash or equity invested in the work that they performed, other than their own labor. In *Kilmore*, a claimant was initially employed by respondent and paid at the fixed hourly rate of $12 per hour. Subsequently, the claimant obtained a contractor's license, stopped working for respondent at a fixed hourly wage, and performed work for respondent at a flat rate proposed by claimant during the time that claimant was starting his own contracting business. The Commissioner held that claimant was an independent contractor when he performed work at the flat rate he proposed. In pertinent part, the Commissioner stated:

> "* * * when Respondent accepted Claimant's bid to perform the job for $1,500 on his own time, the opportunity for profit and loss shifted to Claimant who had to depend on his own initiative, judgment, and foresight to complete the job in a manner that would result in such a profit."

Kilmore at 120-122.

In this case, there was no agreed-upon rate of pay and Claimant's potential income was directly dependent upon his investment of time and money. Respondent's Reseller's Handbook spelled out Claimant's potential commission profit as the difference between the price at which Claimant sold Respondent's MP GPS units and Respondent's minimum product price. It also required Claimant to make an initial capital investment of $1,500 and to pay all of his own marketing expenses, which ultimately

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[17] *See, e.g. In the Matter of Adesina Adeniji,* 25 BOLI 162 (2004); *In the Matter of William Presley,* 25 BOLI 56 (2004), *affirmed*, *Presley v. Bureau of Labor and Industries,* 200 Or App 113, 112 P3d 485 (2005).

[18] *See, e.g. Laura Jaap* at 110; *Forestry Action Committee* at 77.

[19] *Cf. Rodrigo Ayala Ochoa* at 43-44 (in a farm labor contractor case in which a respondent contended that cone pickers who worked on a piece rate basis were independent contractors, not employees for whom respondent had to provide itemized pay statements, the forum determined that the pickers were employees).

amounted to as much as $20,000. Although Respondent recommended specific prices depending on the number of GPS units sold to a customer, Claimant was free to sell Respondent's MP GPS units -- with the exception of servicing plans for which he received no commission -- at any price he chose, so long as it exceeded Respondent's minimum pricing schedule. Accordingly, had Respondent paid Claimant according to the "Terms and Conditions for Business and Consumer Membership," the only limit on the amount of money that Claimant could have made was the number of successful MP GPS sales he could generate and the prices he charged, less the money he invested in marketing MP. The difference between Claimant's investment and the amount of commission he earned and would have received, had Respondent paid him, reflected his profit or loss. Respondent's failure to pay him any commissions to which he was entitled[20] does not lead to the conclusion that Respondent controlled his opportunity for profit and loss.

The degree to which Claimant determined his own opportunity for profit and loss indicates an independent contractor relationship.

In its exceptions, the Agency contends that the forum's conclusion is mistaken for two reasons. First, because Claimant's potential earnings, like those of "any commissioned sales employee's wages," were dependent on "the number or items sold and the price of the products sold." Additionally, "Claimant's commission was really an amount added to the sales price established by the Respondent – he had to sell the GPS units for more than the Respondent's minimum price – as opposed to a percentage of the total price." Second, based on the fact that Claimant was paid almost nothing, the Agency posits:

> "that this renders moot the entire exercise of analyzing the 'opportunity' for profit and loss in this situation. And it also must be said that the 'economic realities' for Claimant are sadly clear and very unfortunate. The Respondent negated any opportunity for profit that might have existed in its scheme, as portrayed in its materials, by failing to pay Claimant anything at all. A 'potential' opportunity for profit cannot be recognized when the employer's own actions sabotaged it. Because of this difference in the theory of the arrangement and the de facto result, Respondent should not be allowed to benefit from this element of the independent contractor test."

The forum finds the Agency's first argument confusing and gives it no weight. The Agency's second argument sets out pathos as a reason for not applying this element of the economic reality test.

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[20] The forum has no way of knowing the amount of commission that Claimant should have been paid. *See* Finding of Fact #21 – The Merits.

The forum rejects this argument. The forum is a forum of law, not a court of equity. Even if it wanted to do so, it is not free to ignore its own legal precedent in order to rectify a "sadly clear and very unfortunate situation" in a particular case.

SKILL AND INITIATIVE REQUIRED OF CLAIMANT IN PERFORMING THE WORK

Respondent marketed a product that integrated GPS and cellular technology and enabled clients to communicate with a vehicle at any time of the day or night, nearly anywhere in the world, using a computer with Internet access and a browser, with the only limitation being the type of service plan purchased by the client. Claimant testified that he was attracted to Respondent's business because of his extensive prior experience and skills involving computers and their use in motor vehicles and what he perceived to be a very high income potential.[21] While there was no evidence that a person lacking skills and experience in these areas could not have successfully marketed Respondent's product, it is also apparent that Claimant believed his technical expertise gave him an edge. As for marketing skills, there was no evidence presented as to whether Claimant had any prior marketing education or experience.

Respondent did not regulate or limit Claimant's initiative by requiring him to work a set number of hours or set schedule, and there is no evidence that Respondent monitored Claimant's work hours or working conditions in any way whatsoever. Respondent imposed no mandatory sales techniques and did not restrict Claimant's sales efforts to a specified group of customers. Aside from reserving the right to approve the content, Respondent did not limit Claimant's advertising in any way. The responsibility of generating and closing sales that would lead to commission income for Claimant was completely in his hands. While Respondent's Reseller's Handbook contained numerous suggestions about how Claimant might successfully market MP, Claimant had complete discretion regarding the amount of physical and intellectual energy, financial investment, and time he used to market MP. So long as he sold MP for more than Respondent's minimum price, Claimant was free to charge whatever price he could negotiate with clients. In sum, his opportunity to earn income was completely dependent on his own initiative.

The forum concludes that the initiative required of and exercised by Claimant indicates an independent contractor relationship.

In contrast, prior cases in which the Commissioner has held that no independent contractor relationship existed between claimants and a respondent have all found that no particular degree of skill or initiative was required to

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[21] *See* footnote 3, *supra*.

perform the work for which the claimants were hired.[22]

The Agency excepts to the forum's conclusion, asserting that the facts cited above require a conclusion that Claimant was not an independent contractor, focusing on Claimant's lack of prior marketing skills and virtually ignoring the initiative exercised by Claimant. The forum rejects the Agency's exception.

PERMANENCY OF RELATIONSHIP

The "Terms and Conditions for Business and Consumer Membership" found in Respondent's "Reseller's Handbook" provide that when the stated terms were met, the "Agreement" was to remain in force for one year and would be automatically extended for additional one-year terms unless either party submitted written notice of non-renewal 30 days prior to the expiration date of any annual contract term.[23] Respondent retained the right to unilaterally terminate the "Agreement" for failure "to maintain membership in the IBO/Reseller Program, or for failure to remit Web hosting fee, or failure to pay any other outstanding unpaid balance due us for more than thirty days."[24] The Handbook also

[22] *See Gary Lee Lucas* at 211-12 (When the skill and initiative required of claimants was that of an ordinary framer and they worked alongside and took directions from respondent, did not bid on the job, did no design work associated with the job, and there was no evidence that they did any work independently, the forum found these facts indicated that claimants were employees, not independent contractors); *Ochoa* at 44 (When the amount of money workers earned somewhat depended upon the efficiency of their work, but the skill required was limited to their ability to bend over and pick up cones and the initiative required for picking cones was no more than that required of any other piecework, the forum found that cone picking did not reach the level of an enterprise for which success depends on the initiative, judgment or foresight of the typical independent contractor); *Triple A Construction, LLC* at 93 (When claimants had the skills necessary to wield hammers and saws and had previous experience working for respondent on similar jobs, but had not attended any trade schools or taken any classes in construction and did not have a CCB license, the forum concluded that claimants possessed no special skills or talents that would have made them likely to be independent contractors while working for respondent).

[23] Again, the forum points out that an independent contractor agreement, whether written or verbal, does not control the employment relationship between a respondent and a claimant, as the forum looks at the totality of the circumstances to determine whether a wage claimant was an employee or independent contractor. *See* footnote 13, *supra*.

[24] In referencing the language of the "Terms and Conditions," the forum does not determine whether an agreement or contract existed between Claimant and Respondent. Rather, the language is referenced in order to set out the terms and conditions communicated by Respondent regarding the relationship with those designated as "Independent Business

states that the permanency of the relationship could be as brief as 30 days, or a period of years if Respondent and Claimant continued to renew.

The potential longevity of the relationship between Respondent and Claimant weighs in favor of employee status.

CONCLUSION

As a practical matter, Claimant was economically dependent on his sales of Respondent's MP during the wage claim period, in that he had no other source of potential income and performed no other gainful employment. However, the forum's application of its "economic reality" test shows that three of the five elements of the "economic reality" test indicate that Claimant was an independent contractor, one element indicates neither, and only one -- permanency of the relationship – indicates an employment relationship. In this context, the "economic reality" of this case is that Claimant's relationship with Respondent was that of an entrepreneur who invested his time and money in a business venture in hopes of making a substantial profit on his substantial investment through sales commissions -- not that of an employee who was entitled to a guaranteed minimum wage under ORS 653.025 and 653.035(2). Accordingly, the forum concludes that Respondent did not employ Claimant and the Agency did not prove the first element of its prima facie case. Therefore, Claimant cannot prevail on his wage claim.[25] The

Owner (IBO) and Reseller of our products."

[25] *Compare Presley, 200 Or App 113, at 117-18* (Court held that claimant, whom respondent argued was an independent contractor, was an employee under the forum's "economic reality" test based on the following: respondent exercised control primarily by assigning duties and determining the hours during which his business was open; claimant had no financial investment in respondent's business; claimant exercised some control over his "profit" to the extent his remuneration was derived from commissions, but a good deal of his pay came in the form of wages; the bulk of his tasks – ferrying, washing, detailing, and selling used cars – required little if any skill and initiative; claimant was hired for an unspecified, indefinite term; and claimant exercised some small degree of self-determination in that he could take extended breaks for lunch and personal matters and attempt to sell his home and his father's vehicles); *Perri v. Certified Languages International, LLC,* 187 Or App 76, 82-83, 66 P3d 531 (2003) (Under both the common law "right to control" and FLSA "economic reality" tests, court concluded that defendant was not entitled to summary judgment concluding that plaintiff, a telephone operator who worked at home, was an independent contractor based on the following facts: defendant had the right to hire and fire plaintiff and set her rate and method of compensation; defendant exercised control over the manner in which plaintiff performed her work and selected the pool of interpreters whom plaintiff could assign to customers; defendant furnished telephone lines and interpreter lists to plaintiff, which

forum rejects the Agency's exception that the facts summarized in its discussion of the five elements of the "economic reality" independent contractor test establish, as a matter of law, that Respondent employed Claimant.

WAGE SECURITY FUND REIMBURSEMENT

In cases involving payouts from the WSF, when (1) there is credible evidence that a determination on the validity of the claim was made; (2) there is credible evidence as to the means by which that determination was made; and (3) the Agency has paid out money from the WSF and seeks to recover that money, there is a rebuttable presumption that the Agency's determination is valid for the sums actually paid out. *In the Matter of Blachana, LLC,* 30 BOLI 197, 219 (2009), *appeal pending*. *See also Sehat Entertainment* at 182; *In the Matter of Robert J. Thomas,* 30 BOLI 160, 167 (2009). The Agency's compliance specialist credibly testified that she investigated the claim, concluded it was valid based on the evidence presented to her, and that her recommendation led to the WSF payout. These facts create the rebuttable presumption described above.

This presumption is rebutted by the forum's conclusion that the Agency did not prove the first element of its prima facie case – that Respondent employed Claimant. Since Claimant was not employed by Respondent, Respondent had no statutory obligation to pay him wages and owes Claimant no wages. The

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appeared to be the sum of physical resources required to do her work; defendant controlled plaintiff's work schedule; and defendant determined plaintiff's working conditions by limiting other activities that she could perform while working for defendant); *In the Matter of Procom Services, Inc.,* 24 BOLI 238, 244 (2003) (Claimant, who performed telemarketing sales for respondent, was an employee, not an independent contractor, when respondent directed claimant's work and supplied all of the equipment necessary to perform the work; claimant had no investment in respondent's business; claimant had no opportunity to earn a profit or suffer a loss, as respondent agreed to pay her a specific wage or commission and she had no investment other than her time; the job required no training and claimant was only allowed to call persons on her call list and was provided sales scripts that she was required to use; claimant was hired for an indefinite period of time; and no one else employed claimant during the relevant period); *In the Matter of Ann L. Swanger,* 19 BOLI 27, 36-37 (1999) (Claimant, who sold cars for respondents, was an employee, not an independent contractor when claimant had no means of attracting a higher volume of customers to respondents' car lot to increase his potential sales commissions; claimant had no investment in respondents' business; the skill and initiative required of claimant was no more than that required of other commission-paying jobs; claimant was selling cars on respondents' lot approximately 60% of the time that the lot was open; and there was no reliable evidence that claimant earned money by any other means except for a few cars he sold for another person).

WSF exists to compensate eligible "employees[s]" for "earned and unpaid wages" when "the employer against whom the claim was filed has ceased doing business and is without sufficient assets to pay the wage claim and the wage claim cannot otherwise be fully and promptly paid[.]" ORS 652.414(1). Claimant did not earn any wages because he was not employed by Respondent. Since there are no "earned and unpaid" wages, the forum cannot order Respondent to repay the WSF the wages paid out to Claimant or the 25 per cent penalty sought by the Agency.

In its exceptions, the Agency argues that the forum improperly applied the presumption. Specifically, the Agency contends:

> "In this case the Forum determined that the Compliance Specialist testified credibly to the three necessary points of the rebuttable presumption standard. However, the Forum found that the Respondent's unsworn and unsupported defense overcame the presumption. This casts troubling doubt on the strength and validity of the presumption in future cases, even those where no meaningful defense is offered.
>
> "Here Respondent prevailed even though it did not produce any evidence or assertions of any kind other than a handful of unsworn words denying Claimant was Respondent's employee, asserting Claimant was an 'Independent Business Owner' and Claimant 'bought an Independent Business Distributorship' and requesting a hearing which Respondent did not attend."

The forum rejects the Agency's exception. The Agency's statement that Respondent's defense was "unsupported" is inaccurate. As pointed out earlier, Respondent's defense was supported by a preponderance of the evidence – albeit evidence that was elicited and provided by the Agency.[26]

ORDER

NOW, THEREFORE, as Respondent has been found not to owe Claimant Larry Kilburn wages, the Commissioner of the Bureau of Labor and Industries hereby orders that Amended Order of Determination #09-0942 seeking unpaid wages, ORS 652.150 penalty wages, and ORS 653.055(1)(b) civil penalties on behalf of Claimant Kilburn, along with recovery of funds paid from the Wage Security Fund to Kilburn and a 25 per cent penalty on those funds, be and is hereby dismissed.

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[26] This is not the first default case in which the Agency established the WSF rebuttable presumption and then presented evidence to rebut it. *See In the Matter of Carl Odoms,* 27 BOLI 232, 240 (2006) (forum disallowed recovery of Agency's total WSF payout when Agency witness testified that she did not work as many hours as the Agency used in calculating her WSF reimbursement payout).

In the Matter of
LETTY LEE SESHER

Case No. 02-11

Final Order of Commissioner Brad Avakian
Issued August 30, 2011

SYNOPSIS

Respondent employed Claimant as a care provider in 2009 at Respondent's adult foster care home. Claimant was only paid $25.00 for eleven 12 hour overnight shifts that she worked and was entitled to be paid $8.40 per hour, Oregon's minimum wage, plus any applicable overtime, for all the work she performed on overnight shifts. In total, Claimant worked 302.25 hours, including 15 overtime hours. Claimant was underpaid by $896.80 and Respondent was ordered to pay Claimant that amount as unpaid, due, and owing wages. Respondent's failure to pay the wages was willful, and she was ordered to pay Claimant $2,016.00 in penalty wages. Respondent was also ordered to pay $2,016.00 in civil penalties based on her failure to pay the minimum wage or overtime wages to Claimant. ORS 652.140(2), ORS 652.150, ORS 653.055, ORS 653.261, OAR 839-020-0030.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 28, 2011, at the Oregon State Employment Department, located at 119 N. Oakdale, Medford, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Patrick Plaza, an employee of the Agency. Wage claimant Amanda Lehrmann (Claimant) was present throughout the hearing and was not represented by counsel. Respondent Letty Sesher ("Respondent") did not appear at the hearing and was held in default.

The Agency called the following witnesses: Claimant; BOLI Wage and Hour Division compliance specialist Margaret Pargeter (telephonic); and Karen Kahl, Oregon Adult Foster Home supervisor.

The forum received into evidence:

a) Administrative exhibits X-1 through X-10 (submitted or generated prior to hearing); and

b) Agency exhibits A-1 through A-19 (submitted prior to hearing).

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries,

hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On July 28, 2009, Claimant filed a wage claim with the Agency alleging that Letty Sesher had employed her and failed to pay wages earned and due to her. At the same time, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for herself, all wages due from Respondent.

2) On January 19, 2010, the Agency issued Order of Determination No. 09-2269 based on the wage claim filed by Claimant and the Agency's investigation. In pertinent part, the Order alleged that:

- Respondent employed Claimant from May 8, 2009 through July 13, 2009 ("the wage claim period") at the regular rate of $8.40 per hour;
- Claimant worked a total of 325.5 hours, including 16 overtime hours, earning $2,799.30;
- Respondent only paid Claimant $910.20, leaving a balance due and owing of $1,889.10 in unpaid wages, plus interest thereon at the legal rate per annum from August 1, 2009, until paid;
- Respondent willfully failed to pay these wages and owes Claimant $2,016.00 in penalty wages, with interest thereon at the legal rate per annum from September 1, 2009, until paid;
- Respondent paid Claimant less than the wages to which she was entitled under ORS 653.010 to 653.261 and is liable to Claimant for $2,016.00 in civil penalties pursuant to ORS 653.055(1)(b), with interest thereon at the legal rate per annum from January 1, 2009, until paid.

3) On March 4, 2010, Respondent filed an answer and request for hearing in which she stated that:

- The order was "unfair and unjust";
- She did not operate the facility at which Claimant was employed at the time of Claimant's alleged employment;
- She had turned over operation of the facility to Adam Boatsman, her grandson, who hired and fired all staff and was responsible for payroll in 2009.

4) On April 13, 2011, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimant setting the time and place of hearing for 9:00 a.m. on June 28, 2011, at the Medford office of the Oregon Employment Department.

5) On May 31, 2011, the Agency filed a motion to amend the Order of Determination to reduce the amount of the unpaid wages sought from $1,889.10 to $873.50. On June 2, 2011, the ALJ granted the Agency's motion.

6) On June 3, 2011, the Agency filed a motion in which it asked the forum to take judicial notice of ORS 443.725(2) and 443.735(3)(e), both statutes relating to licensing and compliance in adult foster care homes in Oregon. The ALJ granted the Agency's motion at the outset of the hearing.

7) Respondent did not make an appearance at the hearing and did not notify the Agency or the ALJ that she would not appear at the time and place set for hearing. The ALJ waited until 9:30 p.m., then declared Respondent in default and commenced the hearing.

8) The ALJ issued a proposed order on July 25, 2011, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent owned and operated an adult foster care home ("Respondent's facility") located at 9975 Monument Drive in Grants Pass, Oregon.

2) Persons who operate an adult foster care home in Oregon must be licensed by the Oregon Department of Human Services. Respondent was initially licensed to operate an adult foster care home in 1990. Her Class II license was renewed effective June 4, 2008, with an expiration date of June 3, 2009.[1] Respondent's Class II license entitled her to take up to three residents who require "full assistance" into her facility.

3) Although Respondent applied for license renewal, her license had not yet been renewed and expired on June 3, 2009. However, under Oregon law, she was allowed to continue operating her business while her renewal application was pending and did so through the end of July 2009.

4) Claimant was referred to Respondent by the Oregon Employment Department Workforce Program. At Respondent's facility, she was given an employment application that she completed and returned. Subsequently she underwent and passed a criminal history check by the Grants Pass Senior Disability Services Office. A week later, Adam Boatsman called Claimant to come in for an interview. Boatsman, who is Respondent's grandson and also worked at Respondent's facility, told Claimant that he was helping his grandmother. Boatsman interviewed and hired Claimant and told her that she would be paid the minimum wage of $8.40 per hour.

5) Claimant began working for Respondent as a care provider on March 20, 2009, and worked through July 13, 2009. Boatsman was her supervisor and set her work schedule. Claimant was

[1] No evidence was presented to show Respondent's licensing history between 1990 and 2008.

paid for all hours worked through May 7, 2009.

6) During Claimant's employment with Respondent, Respondent's workweek began on Monday and ended on Sunday.

7) From May 8, 2009 through July 13, 2009, Claimant worked the following dates and hours for Respondent:

Workweek	**Hours**
5/4-10	12.5[2]
5/11-17	49[3]
5/18-24	35.5[4]
5/25-31	17.5
6/1-7	17.5
6/8-14	18
6/15-21	20
6/22-28	44[5]
6/29-7/5	34.25[6]
7/6-12	42[7]
7/13	12[8]

[2] Only includes hours worked after May 7, as the Order of Determination only alleges that Claimant was not paid for all hours worked beginning May 8.

[3] Includes two x 12 hour shifts.

[4] Includes one x 12 hour shift.

[5] Includes two x 12 hour shifts.

[6] Includes two x 12 hour shifts.

[7] Includes three x 12 hour shifts.

[8] Includes one x 12 hour shift that started on July 12.

In total, she worked 302.25 hours in this time period, including 15 overtime hours.

8) Claimant completed a timecard each week that she worked for Respondent. On each of three timecards covering the weeks of May 4-10, 11-17, and 18-24, she wrote in one shift of "12 hrs." Boatsman crossed out "12 hrs" and wrote "$25" after each crossed-out entry.

9) During the wage claim period, Claimant worked overnight on 11 different shifts, each time working a 12 hour shift, for a total of 132 hours. She was paid $25.00 in cash for each of those shifts. She was paid $8.40 per hour for the other 170.25 hours that she worked and received no extra pay for her overtime hours. In total, she was paid $1,705.10.

10) During the wage claim period, Claimant earned a total of $2,601.90 (302.25 hours x $8.40 = $2,538.90; 15 overtime hours x $8.40 x .5 = $63.00; $2,538.90 + $63.00 = $2,601.90).

11) Claimant quit Respondent's employment because Boatsman would not pay her more than $25.00 for her 12 hour shifts.

12) In total, Respondent owes Claimant $896.80 in unpaid, due and owing wages ($2,601.90 - $1,705.10 = $896.80).

13) Respondent has not paid any additional wages to Claimant since Claimant quit.

14) On July 31, 2009, the Agency mailed a document entitled "Notice of Wage Claim" to

Respondent at Respondent's facility that stated:

> "You are hereby notified that AMANDA K. LEHRMANN has filed a wage claim with the Bureau of Labor and Industries alleging:
>
> "Unpaid statutory minimum wages of $850.60 at the rate of $8.40 per hour from May 8, 2009 to July 13, 2009.
>
> "IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address.
>
> "IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation which supports your position, as well as payment of any amount which you concede is owed the claimant to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.
>
> "If your response to the claim is not received on or before August 14, 2009, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

15) On July 31, 2009, Boatsman was licensed to operate a Class I adult foster home, effective August 10, 2009. His Class I license was the equivalent of a "beginner's" license and authorized him to take residents who require "assistance in 3-4 activities of daily living" into his facility.

16) On October 5, 2009, Pargeter sent a letter to Respondent in which she summarized Claimant's wage claim, enclosed copies of the records that Claimant provided to the Agency to support her wage claim, and asked Respondent to "take one of the following actions by October 15, 2009:

> "1. Submit to me a check payable to Amanda Lehrmann in the gross $1,889.10, along with a statement of lawful deductions, if any.
>
> "2. Submit to the evidence Ms. Lehrmann did not work the hours claimed, or that she has been paid.
>
> "3. Submit evidence computations are incorrect."

Respondent did not respond to this inquiry and never sent any records to Pargeter.

17) Penalty wages are computed as follows for Claimant, in accordance with ORS 652.150: $8.40 per hour x 8 hours x 30 days = $2,016.00.

18) ORS 653.055 civil penalties are computed as follows for Claimant, in accordance with ORS 652.150 and ORS 653.055: $8.40 per hour x 8 hours x 30 days = $2,016.00.

19) All the witnesses were credible.

ULTIMATE FINDINGS OF FACT

1) At all times during the wage claim period, Respondent was licensed to operate and operated an adult foster care home in Grants Pass, Oregon.

2) Adam Boatsman, acting as an agent for Respondent, hired Claimant to work as a caregiver for Respondent in March 2009 at the statutory minimum wage of $8.40 per hour.

3) Claimant worked for Respondent from March 20, 2009, through July 13, 2009. She was paid for all hours worked through May 7, 2009.

4) From May 8 through July 13, 2009, Claimant worked a total of 302.25 hours, including 15 overtime hours. She worked overnight on 11 different shifts, each time working a 12 hour shift, for a total of 132 hours. She was paid $25.00 in cash for each of those shifts. She was paid $8.40 per hour for the other 170.25 hours that she worked. In total, Claimant was paid $1,705.10 for her work during the wage claim period. She earned a total of $2,601.90 during the wage claim period, leaving unpaid, due and owing wages of $896.80.

5) Claimant quit Respondent's employ on July 14, 2009, because Respondent would not pay her more than $25.00 for her overnight shifts.

6) On July 31, 2009, the Agency mailed a notice to Respondent that notified Respondent of Claimant's wage claim and demanded that Respondent pay the unpaid, due, and owing wages if the claim was correct. Respondent has not paid any additional wages to Claimant and still owes Claimant $896.80.

7) Penalty wages are computed as follows for Claimant, in accordance with ORS 652.150: $8.40 per hour x 8 hours x 30 days = $2,016.00.

8) ORS 653.055 civil penalties are computed as follows for Claimant, in accordance with ORS 652.150 and ORS 653.055: $8.40 per hour x 8 hours x 30 days = $2,016.00.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Letty Lee Sesher was an Oregon employer who suffered or permitted Claimant to work in Grants Pass, Oregon, and Claimant was Respondent's employee, subject to the provisions of ORS 652.110 to 652.200, ORS 652.310 to 652.405, and ORS 653.010 to 653.055.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 652.310 to 652.405.

3) Respondent violated ORS 652.140(2) by failing to pay to Claimant all wages earned and unpaid not later than five days, excluding Saturdays, Sundays and holidays, after Claimant quit Respondent's employment. Respondent owes Claimant $896.90 in unpaid, due, and owing wages.

4) Respondent willfully failed to pay Claimant all wages due and owing and owes $2,016.00 in penalty wages to Claimant. ORS 652.150.

5) Respondent paid Claimant less than the wages to which she was entitled under ORS 653.010 to 653.261 by failing to pay her Oregon's minimum wage, as well as overtime wages for all hours worked over 40 in a given workweek and is liable to pay civil penalties to Claimant in the amount of $2,016.00. ORS 653.055(1)(b).

6) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent Letty Lee Sesher to pay Claimant her earned, unpaid, due and payable wages, penalty wages, and civil penalties, plus interest, on all sums until paid. ORS 652.332.

OPINION

CLAIMANT'S WAGE CLAIM

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 Village Café, Inc., 30 BOLI 80, 88 (2008).* Since 1998,[9] the forum has held that the Agency's prima facie case consists of the following elements: 1) Respondent employed Claimant; 2) The pay rate upon which Respondent and Claimant agreed, if other than minimum wage; 3) Claimant performed work for which she was not properly compensated; and 4) The amount and extent of work Claimant performed for Respondent. *See, e.g. In the Matter of 82nd Street Mall, Inc.,* 30 BOLI 140, 142 (2009). In this case, the forum follows its longstanding precedent but changes the traditional order in which the elements are analyzed so that it determines the "amount and extent of work" before deciding whether Claimant "performed work for which she was not properly compensated." This change, which makes no difference in the outcome, is based on the forum's recognition that: (1) Logically, it makes more sense to determine how much work someone performed *before* analyzing whether they were properly paid for all work performed; and (2) In terms of judicial efficiency, deciding whether someone was properly paid for all work performed *before* deciding how much work that person performed has often been an unnecessarily time-consuming experience for the forum.

The forum notes that it may consider any unsworn and unsubstantiated assertions contained in a respondent's answer in a default case, but those assertions are overcome whenever they are contradicted by other credible evidence in the record. *In the*

[9] The elements of the Agency's prima facie case in a wage claim were first set out in the case of *In the Matter of Catalogfinder, Inc.,* 18 BOLI 242, 260 (1999).

Matter of Sehat Entertainment, Inc., 30 BOLI 170, 181 (2009).

CLAIMANT WAS EMPLOYED BY RESPONDENT

ORS 653.010 defines "employ" as "to suffer or permit to work * * *." In this case, the Agency established the following relevant facts through the credible testimony of Claimant, Kahl, and Pargeter:

1. Respondent was licensed to operate and operated an adult foster care home in Grants Pass, Oregon, throughout the wage claim period;
2. Claimant was referred to Respondent's adult foster care home by the Oregon Employment Department Workforce Program for a job opening as a care provider;
3. Respondent's grandson Boatsman, who worked at Respondent's adult foster care home, hired Claimant, set her work hours, and paid her;
4. Boatsman was not licensed to operate an adult foster care home until August 10, 2009.

Based on these facts, the forum concludes that Respondent, not Boatsman, "suffer[ed] or permit[ted]" Claimant to work and was Claimant's employer.

THE PAY RATE TO WHICH RESPONDENT AND CLAIMANT AGREED

The Agency alleged, and the forum finds that Respondent and Claimant agreed to the statutory minimum wage rate of $8.40 per hour. Although Respondent only paid Claimant $25.00 for her 12 hour overnight shifts, Claimant was legally entitled to be paid $8.40 per hour for her work on those shifts.[10] Claimant's overtime rate for hours worked over 40 in a given workweek is calculated by multiplying $8.40/hr. x 1.5 = $12.60/hr. OAR 839-020-0030(1).

AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT

Respondent produced no records to dispute Claimant's version of the hours that she 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." *In the Matter of Kilmore Enterprises,* 26 BOLI 111, 122 (2004). A claimant's credible testimony may be sufficient evidence to show the amount of hours worked by the claimant and amount owed. *Id.* at 123.

At hearing, the Agency produced Claimant's time cards for the wage claim period that showed the hours she worked **except** for her 12 hour overnight shifts. Only three of those overnight shifts, all in May when she first worked those shifts, were written on her time cards. Each was crossed out and the figure

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[10] *See In the Matter of Toni Kuchar,* 23 BOLI 265, 274 (2002) (ORS 653.025 prohibits employers from paying employees less than the minimum wage for each hour of work time).

"$25" written in next to it. Claimant credibly testified that she did not write down all 11 overnight shifts that she worked on her time cards because Boatsman, her supervisor, told her not to write them down. Claimant also credibly testified that Boatsman did the noted editing on her timecards. The Agency produced Claimant's handwritten calendar of hours worked that Claimant submitted with her wage claim showing the dates she worked all 11 overnight shifts, and Claimant credibly testified that this record was accurate. Relying on these records and Claimant's credible testimony, the forum concludes that Claimant worked a total of 302.25 hours in the wage claim period, including 15 overtime hours.

CLAIMANT PERFORMED WORK FOR WHICH SHE WAS NOT PROPERLY COMPENSATED

Claimant was properly compensated at the rate of $8.40 per hour for all the work she performed except for the eleven 12 hour overtime shifts that she worked. Calculated at her straight time wage rate, Claimant earned $100.80 for each 12 hour overtime shift ($8.40 x 12 = $100.80). Instead of $100.80, she was paid $25.00 in cash for each of those shifts, constituting an underpayment of at least $75.80 for each shift, not counting any applicable overtime. This undisputed underpayment completes the proof required by the Agency to satisfy its prima facie case.

CONCLUSION

In total, Claimant earned $2,601.90 during the wage claim period and is owed $896.80 ($2,601.90 in wages earned *minus* $1,705.10 in wages paid). The forum notes that this remedy exceeds the $873.50 in unpaid wages alleged to be due and owing in the Agency's amendment to its Order of Determination. In prior cases, the forum has held that the commissioner has the authority to award unpaid wages exceeding those sought in the Agency's Order of Determination when they are awarded as compensation for statutory wage violations alleged in the charging document. *See, e.g., In the Matter of Westland Resources, Inc.,* 23 BOLI 276, 286 (2002). The unpaid wages owed to Claimant in this case were earned within the wage claim period alleged in the Order of Determination and are awarded as compensation for violations of ORS 653.025 and ORS 653.261 that were alleged in the Order of Determination. Accordingly, the forum awards $896.80, the full amount of unpaid wages proved by the Agency at hearing.

CLAIMANT IS OWED PENALTY WAGES

The forum may award penalty wages when a respondent's failure to pay wages 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. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

The Agency presented credible evidence that: (1) Claimant and Respondent agreed Claimant would work for $8.40 per hour; (2) Respondent, through Boatsman, her agent and Claimant's supervisor, set Claimant's work hours and was aware of them; (3) Boatsman altered three of Claimant's time cards to cross out the "12 hrs" she had written and write "$25" next to the crossed-out hours; and (4) Claimant quit after Boatsman paid her $25.00 in cash for each of her 12 hour overtime shifts instead of $8.40 per hour. There is no evidence that Boatsman, Respondent's agent, acted other than voluntarily and as a free agent in underpaying Claimant and the forum concludes that Respondent acted willfully in failing to pay Claimant her wages and is liable for penalty wages under ORS 652.150.

ORS 652.150(1) and (2) provide, in pertinent part:

> "(1) Except as provided in subsections (2) and (3) of this section, if an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 * * *, then, as a penalty for the nonpayment, the wages or compensation of the employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced.
>
> "(2) If the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation unless the employer fails to pay the full amount of the employee's unpaid wages or compensation within 12 days after receiving the written notice. If the employee or a person on behalf of the employee fails to send the written notice, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation. * * *"

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 on July 31 and October 5, 2009. The Agency's Order of Determination, issued on January 19, 2010, repeated this demand. Respondent failed to pay the full amount of Claimant's unpaid wages within 12 days after receiving the written notices and has still not paid them. Consequently, the forum assesses 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 Claimant equal $2,016.00 ($8.40 per hour x eight hours x 30 days).

ORS 653.055 CIVIL PENALTIES

In its Order of Determination, the Agency alleged that Claimant

is entitled to a civil penalty under ORS 653.055(1)(b) based on Respondent's failure to pay Claimant "the wages to which [Claimant] was entitled under ORS 653.010 to 653.261." ORS 653.055(1)(b) provides that the forum may award civil penalties to an employee when the employer pays less than the wages to which the employee is entitled under ORS 653.010 to 653.261, computed in the same fashion as ORS 652.150 penalty wages. This includes unpaid minimum and overtime wages. *82nd Street Mall,* 30 BOLI 150*; In the Matter of Sehat Entertainment,* 30 BOLI 170, 183 (2009). "Willfulness" is not an element. *In the Matter of Captain Hooks, LLP,* 27 BOLI 21, 225 (2006). A *per se* violation 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 Allen Belcher,* 31 BOLI 1, 10 (2009). The Agency proved that Claimant was entitled to Oregon's minimum wage, that Claimant worked 15 overtime hours, and that Claimant is owed $896.80 in unpaid, due and owing wages. She earned a total of $189 in overtime wages (15 hours x $12.60 = $189.00). Subtracting Claimant's earned overtime wages from her unpaid, due and owing wages yields the sum $707.80, the amount of her unpaid straight time wages based on Oregon's minimum wage. No statutory exception applies that exempts Respondent from the requirement to pay Claimant Oregon's minimum wage. From these calculations, the forum concludes that Claimant was not paid the minimum wage for all hours worked and was not paid for her overtime hours. Accordingly, she is entitled to ORS 653.055(1)(b) civil penalties based on Respondent's failure to pay her the minimum wage and applicable overtime wages for all hours that she worked.

The forum assesses ORS 653.055(1)(b) civil penalties based on the formula set out in ORS 652.150(1) (hourly rate x eight hours per day x 30 days). Using this formula, Respondent is liable to pay a civil penalty to Claimant in the amount of $2,016.00 ($8.40 per hour x eight hours x 30 days).

ORDER

NOW, THEREFORE, as authorized by ORS 652.140(2), ORS 652.150, ORS 653.055, ORS 653.261, and ORS 652.332, and as payment of the unpaid wages, penalty wages, and civil penalties, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **LETTY LEE SESHER** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Amanda Lehrmann in the amount of FOUR THOUSAND NINE HUNDRED TWENTY-

EIGHT DOLLARS AND EIGHTY CENTS ($4,928.80), less appropriate lawful deductions, representing $896.80 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from August 1, 2009, until paid; $2,016.00 in penalty wages, plus interest at the legal rate on that sum from September 1, 2009, until paid; and civil penalties of $2,016.00, plus interest at the legal rate on that sum from September 1, 2009, until paid.

In the Matter of

LETTY LEE SESHER aka Letty Lee Shapiro fdba Letty's Adult Foster Care Home

Case No. 02-11

Amended Final Order of Commissioner Brad Avakian

Issued September 21, 2011

[Editor's note: The Commissioner issued an Amended Order in case No. 02-11 on September 21, 2011, to change the Respondent named in the caption from "Letty Lee Sesher" to "Letty Lee Sesher aka Letty Lee Shapiro fdba Letty's Adult Foster Care Home," the same name that appeared in the caption to the Agency's Order of Determination, and to modify the "Order" to include Respondent's additional name. Two Procedural Findings of Fact were also added or amended to reflect these changes. No other changes were made. The amended and new Procedural Findings of Fact and amended "Order" are reprinted in their entirety below.

FINDINGS OF FACT – PROCEDURAL

2) On January 19, 2010, the Agency issued Order of Determination No. 09-2269 based on the wage claim filed by Claimant and the Agency's investigation. The Order of Determination named Letty Lee Sesher aka Letty Lee Shapiro fdba Letty's Adult Foster Care Home as the Respondent. In pertinent part, the Order alleged that:

- Respondent employed Claimant from May 8, 2009 through July 13, 2009 ("the wage claim period") at the regular rate of $8.40 per hour;
- Claimant worked a total of 325.5 hours, including 16 overtime hours, earning $2,799.30;
- Respondent only paid Claimant $910.20, leaving a balance due and owing of $1,889.10 in unpaid wages, plus interest thereon at the legal rate per annum from August 1, 2009, until paid;
- Respondent willfully failed to pay these wages and owes Claimant $2,016.00 in penalty wages, with interest thereon at the legal rate per annum from September 1, 2009, until paid;
- Respondent paid Claimant less than the wages to

which she was entitled under ORS 653.010 to 653.261 and is liable to Claimant for $2,016.00 in civil penalties pursuant to ORS 653.055(1)(b), with interest thereon at the legal rate per annum from January 1, 2009, until paid.

* * * * *

9) The Commissioner issued a Final Order on August 30, 2011, that named Letty Lee Sesher as the Respondent. This Amended Final Order is being issued to add "aka Letty Lee Shapiro" to Respondent's name so that it is identical to Respondent's name in the Order of Determination.

* * * * *

ORDER

NOW, THEREFORE, as authorized by ORS 652.140(2), ORS 652.150, ORS 653.055, ORS 653.261, and ORS 652.332, and as payment of the unpaid wages, penalty wages, and civil penalties, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **LETTY LEE SESHER** aka Letty Lee Shapiro to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Amanda Lehrmann in the amount of FOUR THOUSAND NINE HUNDRED TWENTY-EIGHT DOLLARS AND EIGHTY CENTS ($4,928.80), less appropriate lawful deductions, representing $896.80 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from August 1, 2009, until paid; $2,016.00 in penalty wages, plus interest at the legal rate on that sum from September 1, 2009, until paid; and civil penalties of $2,016.00, plus interest at the legal rate on that sum from September 1, 2009, until paid.

In the Matter of

Petition for Declaratory Ruling

International Association of Fire Fighters, Local 3564, Petitioner

and

City of Grants Pass, Intervenor

Case No. 84-11

Declaratory Ruling by Commissioner Brad Avakian

Issued January 13, 2012

SYNOPSIS

The International Association of Firefighters, Local 3564 ("IAFF") filed a petition for a declaratory ruling on behalf of its members who were employed by the City of Grants Pass ("City") to determine whether the City is required to include authorized vacation and sick leave time when computing overtime wages for the IAFF's

firefighters, as required by ORS 652.080. The Commissioner ruled that the City was required to include authorized vacation and sick leave time when computing overtime wages for the IAFF's firefighters, as required by ORS 652.080.

———————

The above-entitled case came on regularly for hearing before Administrative Law Judge Alan McCullough, designated as Presiding Officer ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held in writing.

Petitioner, the International Association of Firefighters, Local 3564 ("IAFF"), was represented by Sarah K. Drescher, attorney at law. Intervenor, the City of Grants Pass ("City"), was represented by Bruce Bischof, attorney at law. The Bureau of Labor and Industries ("BOLI" or "the Agency") made an appearance and was represented by case presenter Chet Nakada, an employee of the Agency.

HISTORY OF THE CASE

On June 28, 2011, the IAFF filed a petition for a declaratory ruling on the issue of whether or not the City is required to include vacation and sick leave in calculating overtime pay for firefighters. The IAFF alleged that the City currently does not include vacation and sick leave in calculating overtime pay for firefighters. On July 29, 2011, the Commissioner responded, stating that he had reviewed the petition and planned to issue a ruling on it. On August 9, 2011, the City filed a petition to intervene. On August 15, 2011, the Commissioner instructed the City to file an amended petition that addressed all the provisions in OAR 137-002-0025. On August 19, 2011, the City filed an amended petition to intervene that was granted by the Commissioner on September 8, 2011.

On September 28, 2011, the Commissioner issued a Notice of Hearing that set a hearing date of November 2, 2011, and appointed the ALJ to be the Presiding Officer in the proceeding.

On October 6, 2011, the ALJ conducted a telephonic prehearing conference with the attorneys for the IAFF and the City. During the course of the conference, the IAFF and the City orally agreed to stipulate to three facts that the ALJ, the IAFF's attorney, and the City's attorney considered necessary to resolve the legal issue in this case – whether a City is required to include vacation and sick leave in calculating overtime pay for its firefighters who are members of the IAFF. Those facts are set out in the section of this Ruling entitled Findings of Fact.

The IAFF and City both asked if the hearing could be conducted in writing as an alternative to driving to Eugene, anticipating that their oral argument at the hearing would differ little in substance from the written briefs that they planned to submit prior to the hearing. The City also requested

that written briefs be simultaneously filed on November 9, 2011, instead of November 2, 2011, the date set for hearing. The IAFF had no objection. The ALJ granted both requests.

On October 8 and October 10, 2011, respectively, the City and IAFF stipulated in writing to the facts set out in the Findings of Fact.

In an interim order issued on October 12, 2011, the ALJ confirmed the rulings made during the October 6 prehearing conference and ordered the IAFF and the City to file their written briefs on November 9, 2011. The ALJ also ruled that the Agency could elect to file a statement of Agency policy, a written brief by its counsel, or both, on that same date. The ALJ ordered the IAFF, the City, and the Agency to address the following issues, based on the stipulated facts:

> 1. Is the City of Grants Pass required to include vacation and sick leave time when calculating overtime wages for firefighters employed by Intervenor, as set forth in ORS 652.080?
>
> 2. Does ORS 653.269(5)(b) exempt the City of Grants Pass from complying with ORS 652.070 and 652.080?

On November 8, 2011, the City asked for an extension until November 14, 2011, to submit briefs. The IAFF did not object and the ALJ granted the City's request. On November 14, 2011, the IAFF and the City filed written briefs and the Agency filed a statement of Agency policy.

IAFF OBJECTIONS TO THE CITY'S WRITTEN BRIEF AND ATTACHED EXHIBITS

On November 18, 2011, the IAFF filed a written objection to the City's enclosure of and reference to documents related to the legislative history of the statutes at issue in its written brief. The IAFF based its objection on two grounds. First, the City's reference to these documents included facts not stipulated to by the City and IAFF, in contravention of OAR 839-050-0280(1), which states that the ALJ is bound by any prehearing stipulation of facts, whether made orally or in writing. Second, the City's inclusion of the exhibits and any argument related to that evidence constitutes introduction of new evidence and violated the "ALJ's order, [OAR 137-002-0040(2)] and the stipulated fact agreement between the parties."

In the forum's view, the "facts" referred to in OAR 839-050-0280(1), as applied to this declaratory ruling, consist of any substantive facts related to the actual payment or nonpayment of overtime wages to the IAFF firefighters by the City. As an example, the terms of the collective bargaining agreement are a substantive fact. Therefore, any history related to collective bargaining between the City and IAFF constitutes a substantive fact and will not be considered by the forum in this ruling. In contrast, legislative history related to adop-

tion or amendment of the statutes at issue is neither a non-stipulated fact nor "other evidence" that is subject to exclusion. As discussed in the section of this Declaratory Ruling entitled "Opinion - Reasons Relied Upon in Support of Proposed Ruling," the forum is required to consider legislative history when it is offered by a party as an aid to interpreting a statute and does so in this ruling, giving it appropriate weight. However, the forum does not consider any substantive facts as defined earlier in this paragraph or argument related to such facts that were not among the stipulated facts set out in the Findings of Fact.

PROPOSED DECLARATORY RULING & INTERVENOR'S REQUEST FOR ORAL ARGUMENT

On December 5, 2011, the ALJ issued a Proposed Declaratory Ruling that contained the following proposed Declaratory Ruling:

> "ORS 653.269(5)(b) does not exempt the City of Grants Pass from complying with ORS 652.070 and 652.080. The City of Grants Pass is required to include authorized vacation and sick leave time when computing overtime wages for the IAFF firefighters it employs, as set forth in ORS 652.080."

The Proposed Declaratory Ruling stated that Petitioner, Intervenor, and the Agency had the right to present oral argument to the Commissioner before the Commissioner issued a Declaratory Ruling, and that such request must be made in writing and filed within 10 days of the issuance of the Proposed Declaratory Ruling.

On December 9, 2011, Intervenor, through counsel Bruce Bischof, timely requested oral argument before the Commissioner. Petitioner and the Agency did not request oral argument. On December 27, 2011, the ALJ issued an interim order setting the time, date, and location for oral argument at 10:30 a.m., January 18, 2012, at the Workers' Compensation Board, Salem Oregon. The interim order also noted that oral argument did not include presentation of any additional exhibits were not part of the record to date.

On January 9, 2012, Intervenor, through counsel Bischof, filed written notification with the Commissioner stating that Intervenor "does not seek oral argument in this matter." Intervenor also notified the Commissioner that Intervenor would be represented "[f]rom this point forward" by Gregory A. Chaimov, attorney at law.

On January 12, 2012, the ALJ telephoned Ms. Drescher and Mr. Bischof and gave them official notice that oral argument was cancelled.

FINDINGS OF FACT

1. The City of Grants Pass ("City") is an incorporated city in Oregon that employs four or more firefighters on a full-time basis in a

regularly organized fire department.

2. All firefighters employed by the City are members of the International Association of Fire Fighters, Local 3564 ("IAFF"). The City and IAFF are parties to a collective bargaining agreement ("CBA").

3. The City calculates overtime pay to firefighters based on the language of Article V of the CBA ("Hours and Overtime"), which is attached to and incorporated into these stipulated facts as Exhibit A.

4. Exhibit A contains the following language:

"ARTICLE V - HOURS AND OVERTIME

"5.1 Workweek. Regular Shift Employees: The work week for regular shift employees, to the extent consistent with the operating requirements of the public safety department fire services, and recognizing the necessity for continuous service by such department throughout the week, shall consist of an average of 56 hours as scheduled by the department director or other responsible authority and such scheduling shall be consistent with the scheduling method presently being used. There shall be a five-day 8-hour-per-day work schedule, between Monday and Saturday, for personnel assigned to fire prevention. Employees assigned to prevention will be subject to reassignment to a 56-hour shift with fourteen day's notice.

"The fire prevention assignment may rotate every 2 years with 60 days notice.

"Employees assigned to fire prevention shall receive assignment pay at the rate of 5% of their base hourly wage for all hours worked in the assignment.

"Employees assigned to fire prevention, or the City, may request in writing a meeting to negotiate a four day, 10 hour schedule. Such meeting shall take place within 30 days of the request.

"5.2 56 Hour Work Shift Normal Workday. Regular Shift Employees: The work shift for regular shift employees shall be 24 hours in length. (For the purpose of computing overtime, the 24-hour long day shall be used). Except for emergencies and cleanup and maintenance required following an emergency to maintain the operational readiness of the Fire Services, employees will not normally be required to work in excess of 9 hours, inclusive of meal periods, during any 24 hour work shift, such nine hour "normal workday" shall be scheduled with regular starting and quitting times so far as this is consistent with the operating needs of the department. In no instances will the 'normal workday' nor work in excess of the 'normal work-

day' be utilized by the City for disciplinary purposes.

"5.3 Regular Hours. Regular Shift Employees: In the case of shift employees the hours of the shift shall be consecutive including rest periods and meal periods.

"5.4 40 Hour Work Shift. Each regular shift employee shall be scheduled to work on a regular shift, and each employee shall have regular starting and quitting times. This shall apply with the following exception: Those employees whose special assignment requires a flexible work schedule. These will include firefighters serving in Prevention. Their work shift will be flexible within a 40-hour week. Therefore, for the purpose of overtime, these employees shall work a 40-hour week, and overtime shall be paid after 40 hours in a 7-day period and not after 8 hours in a 24-hour period.

"5.5 Meal Periods. Regular Shift Employees: In the case of shift employees, meal periods shall be granted during each shift. To the extent consistent with the operating needs of the Fire Services, each meal period will be scheduled in a manner consistent with the operating requirements of the division.

"5.6 Rest Periods. Regular Shift Employees: In the case of shift employees, a rest period of 15 minutes shall be permitted for all employees during each half of the normal workday. Rest periods shall be scheduled in accordance with the operating requirements of the department.

"5.7 Holiday Routine. Employees working on named holidays as defined in Section 6.1, shall be required to respond to calls and to perform maintenance, clean up, and scheduled duties. Upon completion of the above, employees will be on 'holiday routine' and shall be allowed free time in the same manner as time outside the nine (9) 'normal workday'.

"5.8 Overtime. The City shall have the right to assign overtime work as required in the manner deemed to be the most advantageous and consistent with the requirements of municipal service and public interest.

"Shift employees who work hours annexed consecutively to the end of the work shift shall receive overtime pay in thirty minute increments for hold over purposes.

"Regular Shift Employees: Shift employees shall be compensated at the rate of 1½ times their respective 56 hour per week regular hourly rate as set forth in Exhibit 'A' for overtime work under the following conditions:

"1. All time worked as a Firefighter or Fire Corporal in

excess of the regularly scheduled work shift for that employee (e.g., in excess of 24 hours in any one workday).

"2. All time worked as a Firefighter or Fire Corporal in excess of 204 hours in a 27 calendar day for 24-hour duty schedule fire service non-exempt employees.

"3. Forty-Hour Employees: Overtime for 40-hour employees shall be time worked (1) in excess of 8 hours for a specific job class in a workday for employees working five 8 hour shifts, or (2) in excess of 10 hours for a specific job class in a workday for employees working four 10 hour shifts, and (3) in excess of 40 hours in any work week.

"4. Employees assigned to on-call fire prevention shall be paid $100.00 a month in addition to overtime and callback earned.

"5.9 No Pyramiding. In no event shall any employee compensation be received twice for the same hours.

"5.10 Callback. Employees called back to work shall receive overtime pay for hours worked, and if called back shall be credited with not less than 3 hours time. Overtime for the purpose of this section shall be compensated for at 1½ the 56-hour hourly rate, unless the employee works a 40-hour workweek, in which case, overtime will be at the 40-hour rate.

"This section applies only when callback results in hours worked which are not annexed consecutively to one end or the other of the work shift. This section does not apply to schedule overtime (such as meetings and project work), or overtime annexed to the beginning of the shift, or holdover times annexed to the end of the work shift.

"It shall be considered callback if an employee ends the employee's shift and has not been previously required to extend the employee's regular shift as holdover (such as when called back on an alarm or emergency).

"Employees who are scheduled to attend meetings and/or complete project work on their designated days off will be credited with not less than two (2) hours.

"5.11 Distribution of Overtime. The Public Safety director will maintain a procedure for distributing overtime among the employees in as equitable a manner as possible. In distributing overtime, such things as special qualifications and desires the employee(s) shall be considered.

"5.12 Work Schedules. All shift employees, to the extent consistent with operating requirements, shall be scheduled to work a regular work shift, and each shift shall have regular starting and quitting times.

Work schedules showing the employee's shift, workdays, and hours shall be posted for 7 days prior to their effective date. Except for emergency situations and for the duration of the emergency, changes in work schedules shall be posted 3 days prior to the effective date of the change. Failure to comply with the terms of this section shall result in time and one-half pay for all the time worked outside the employee's timely scheduled workweek.

"The existing work schedules (48/96) shall remain in effect for the life of the Agreement.

*The regular rate is that rate which complies with the FLSA. (In the event that an employee elects to be compensated to overtime compensatory time such time shall be applied at 1½ times the greater of the actual time worked or at a minimum number of hours required under Section 5.10. (Callback).

"5.13 Work Changes. Changes by the City and hours of work as set forth in this Article shall be done in accordance with the following procedure: The City shall give the Union 30 days prior written notice, specifying the desired changes. Bargaining in accordance with statutory requirements will then occur.

"5.14 Station Transfer. The City shall pay to any bargaining unit employee, not already on duty, who is required to transfer to a station other than the one in which the employee had been scheduled to work, 30 minutes of overtime per trip to compensate the employee for the time spent in organizing equipment and driving to the new station. The parties here to agree that 30 minutes is a reasonable amount of time for performing the tasks involved in a Station transfer."

STATUTES IN ISSUE

"652.060 Maximum working hours for firefighters.

"(1)(a) No person employed on a full-time basis as a firefighter by any regularly organized fire department maintained by any incorporated city, municipality or fire district and that employs not more than three persons on a full-time basis as firefighters shall be required to be on regular duty with such fire department more than 72 hours a week. However, any affected incorporated city, municipality or fire district shall be deemed to have complied with this paragraph and ORS 652.070 if the hours of regular duty required of firefighters employed by it average not more than 72 hours a week over each quarter of the fiscal year of the employing city, municipality or fire district.

"(1)(b) No person employed on a full-time basis as a firefighter by any regularly organized fire department maintained by any incorporated city, municipality or

fire district and that employs four or more persons on a full-time basis as firefighters shall be required to be on regular duty with such fire department more than 56 hours a week. However, any affected incorporated city, municipality or fire district shall be deemed to have complied with this paragraph and ORS 652.070 if the hours of regular duty required of firefighters employed by it average not more than 56 hours a week over each quarter of the fiscal year of the employing city, municipality or fire district.

"652.070 Overtime pay for firefighters.

"(1) Every affected incorporated city, municipality and fire district shall put into effect and maintain a schedule of working hours required of regularly employed firefighters which shall not be in excess of the average hours established by ORS 652.060, and which shall provide for at least 48 consecutive hours off-duty time in each seven-day period. Any affected incorporated city, municipality or fire district failing so to do shall pay to every regularly employed firefighter as additional pay for every hour of regular duty required of and performed by the firefighter over and above the average hours established by ORS 652.060 a sum equivalent to one and one-half times the regular hourly rate of pay at the time of such default. However, in the case of replacement for any authorized leave, vacation or temporary vacancy, regularly employed firefighters in a department employing four or more persons on a full-time basis as firefighters may elect to work in excess of 56 hours a week at not less than their regular hourly rate of pay.

"(2) Nothing in subsection (1) of this section requires payment of one and one-half times the hourly rate of pay to a volunteer firefighter for hours of duty performed in excess of the average hours established by ORS 652.060.

"652.080 Computing hours on duty for purposes of ORS 652.060 and 652.070.

"In computing the average or total number of hours a week for the purposes of ORS 652.060 and 652.070, authorized vacation or sick leave time shall be considered as time on regular duty.

"653.268 Overtime for labor directly employed by public employers.

"(1) Labor directly employed by any public employer as defined in ORS 243.650 shall be compensated, if budgeted funds for such purpose are available, for overtime worked in excess of 40 hours in any one week, at not less than one and one-half times the regular rate of such employment. If budgeted funds are not available for the payment of overtime, such overtime shall be allowed in compensatory time off at not less than time and a half for employment in excess of 40 hours in any one week.

"(2) Nothing in this section shall prevent a labor organization

under the National Labor Relations Act or ORS 243.650 to 243.782 or other employees from negotiating additional overtime pay requirements with a public employer.

"653.269 Exceptions to ORS 653.268; rules.

"The provisions of ORS 653.268 relating to pay for overtime shall not apply to:

"* * * * *

"(3) Employees of a public employer, as defined in ORS 243.650, who are employed in fire protection * * *.

"* * * * *

"(5) Employees exempted from overtime:

"* * * * *

"(b) By a collective bargaining agreement expressly waiving application of ORS 653.268."

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter. ORS 651.050; ORS 652.060, 652.070, and 652.080.

2) The Commissioner of the Bureau of Labor and Industries has the authority to issue a declaratory ruling in this matter. ORS 651.050; ORS 183.410; OAR 137-002-0010 to 137-002-0060.

3) Petitioner's members' hours of work and the method by which Intervenor is required to calculate overtime pay for Petitioner's members is governed by ORS 652.060, 652.070, and 652.080.

4) Intervenor is required to consider authorized vacation and sick leave time taken by Petitioner's members as time on regular duty and include it when computing overtime wages for firefighters employed by Intervenor. ORS 652.080.

OPINION - REASONS RELIED UPON IN SUPPORT OF RULING

INTRODUCTION

Petitioner ("IAFF") is a labor organization that represents firefighters employed by Intervenor, the City of Grants Pass ("City"). BOLI is the state agency charged with enforcing Oregon's wage and hour laws. The City computes overtime due to Petitioner's members ("firefighters") based on the terms contained in its collective bargaining agreement with the IAFF, rather than the terms in ORS 652.070 and 652.080. According to the statements submitted by the IAFF, the City, and the Agency, (collectively referred to as the "participants") the IAFF filed a complaint with BOLI in January 2011 alleging that the City is violating ORS 652.070 and 652.080 by not including vacation and sick leave taken when computing overtime pay for its firefighters.[1] Through this de-

[1] This is included as background information only, as the validity of any wage claims filed by the IAFF's members is not an issue in this declaratory ruling.

claratory ruling, the IAFF and the City seek to clarify whether the City is obligated to include vacation and sick leave time as set out in ORS 652.070 and 652.080 when computing overtime.

THE PARTICIPANTS' POSITIONS

The IAFF argues that the City is obligated to include vacation and sick leave time in its overtime calculations pursuant to ORS 652.070 and 652.080. In its statement of Agency policy, the Agency supports the IAFF's position, attaching the following three exhibits to its statement of Agency policy: (1) Field Operations Manual, Vol. I – Wage Collection ("Firefighter Overtime"); (2) March 22, 2011, letter from BOLI Wage and Hour Division Compliance Manager Gerhard Taeubel to the City setting out the Agency's position regarding payment of overtime to the City's firefighters; and (3) Pages 41, 42, and 45 from BOLI's 2009 publication "Wage and Hour Laws," published by BOLI's Technical Assistance for Employers Program.

The City argues that it is entitled to compute overtime for firefighters in accordance with the terms of the collective bargaining agreement between the City and IAFF based on the exemption set out in ORS 653.269(5)(b). In support of the arguments set out in its brief, the City provided 13 exhibits to illustrate the legislative history of ORS 652.060, 652.070, 652.080, 653.268, and 653.269. All references to legislative history in this Opinion are drawn from those exhibits.

The participants' arguments differ considerably and are independent of one another because they were simultaneously submitted. Among them, the participants urge a broad canvas of possibilities, covering the gamut from "plain language" to "general statutory maxim," as the proper means of interpreting the statutes at issue in this ruling.

AN OVERVIEW OF THE STATUTES AT ISSUE.

ORS 652.060(1)(b) establishes maximum working hours for firefighters employed by "any regularly organized fire department maintained by an incorporated city * * *that employs four or more persons on a full-time basis as firefighters." ORS 652.070(1) requires that firefighters in this category be paid overtime pay "for every hour of regular duty required of and performed * * * over and above [56 hours a week]" and sets out the conditions under which overtime pay must be paid. ORS 652.080 provides that "authorized vacation or sick leave time shall be considered as time on regular duty" in computing overtime pay. ORS 653.268 regulates overtime pay for "labor directly employed by public employers." ORS 653.269 sets out exceptions to the provisions of ORS 652.268.

THE CITY'S ARGUMENTS

As a prelude to a comprehensive analysis of the statutory schemes at issue, the forum summarizes the City's detailed arguments as to why it should

prevail. In brief, the City contends that ORS 652.070 and 652.080 do not apply to the City and the IAFF because:

(1) ORS 653.268, not ORS 652.080, is the general overtime statute that governs payment of overtime by the City to firefighters. ORS 652.060 and 652.070 "are no longer relevant" because the IAFF's position that firefighters are entitled to be paid overtime based on the provisions of ORS 652.060, 652.070, and ORS 652.080 would cause the Public Employee Collective Bargaining Act to be "distorted by statutes enacted prior to the passage of the * * * (PECBA)"; and

(2) ORS 653.269(5)(b) exempts the City from paying overtime to employees covered "by a collective bargaining agreement expressly waiving application of ORS 653.268." The collective bargaining agreement between the City and IAFF contains language in Sections 5.8 and 5.12 that expressly waives application of ORS 653.268 by providing a different method of computing overtime.

The City bases its first argument on legislative history, Oregon appellate case law, and "[p]artial application of the maxim '*cessant ratione legis, cessat lex*'" – translated in the City's brief as "[w]hen the reason of the law ceases, the law itself also ceases." Its second argument rests on the application of ORS 653.268 and 653.269(5)(b) to the specific language in the collective bargaining agreement.

Alternatively, the City argues that the IAFF has waived any right to have overtime calculated under ORS 652.070 and 652.080 because the IAFF has negotiated contracts "for years" without raising that exception. The forum disregards this argument because it is based on an unstipulated fact. OAR 137-002-0040 provides that "[n]o testimony or other evidence shall be accepted at the hearing." The City's proffered history of negotiation with the IAFF is substantive evidence that falls into the category of "other evidence." Accordingly, the forum does not consider this argument.

APPLICABILITY OF ORS 653.268 & ORS 653.269 – THE CITY'S ARGUMENT

The City argues that the general overtime rule for public employees found in ORS 653.268,[2] not ORS 652.070 and 652.080, governs payment of overtime by the City to firefighters. The City points to the legislative history of those statutes, focusing on the chronological dates of their enactment and comments made to legislative committees, Oregon appellate court cases, and the maxim of statutory interpretation earlier referred to in support its argument. Those arguments are summarized below.

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[2] *Formerly* ORS 279.340.

A. Legislative History.

As stated earlier, ORS 652.080 was enacted in 1959. In 1969, the Legislature amended ORS 652.060 and 652.070 to adopt a 56 hour work week and overtime threshold for firefighters employed by any incorporated city, municipality and fire district employing four or more full-time firefighters. The legislative history provided by the City suggests that this amendment was adopted, at least in part, based on statements before the House Committee on Local Government that local governments were refusing to negotiate maximum hours per work week with firefighters and could not be forced to negotiate, as there "is no compulsory bargaining act for public employees in the state and firemen have no right to strike."[3]

In 1973, the Legislature adopted the Public Employees Collective Bargaining Act ("PECBA"),[4] giving public employees to right to collectively bargain for the first time. According to the City, this newly-acquired power of firefighters to negotiate the substantive terms of their working conditions eliminated the need for the older statutory overtime provisions contained in ORS 652.070 and 652.080 and made them "irrelevant."

B. Oregon Appellate Cases.

The City cites four Oregon appellate cases in support of its position.

The earliest case is *Wagner* v. *Columbia Hospital District*, 259 Or 15, 485 P2d 421 (1971), a pre-PECBA case. An employee alleged she was wrongfully discharged based on her religious convictions that forbade her to join a union when her employer and union conspired to require her to join the union or be fired. The issue was whether she was required to submit her claim to binding arbitration. The City cites *Wagner* for the proposition that "in the 'normal situation,' [modern firefighters] should[] be bound, like any other public employee, by a properly negotiated collective bargaining agreement." Included in the *Wagner* court's discussion of the case is the language: "Also, in the 'normal situation,' individual employees are bound by the terms of labor agreements between employers and the unions who are their representatives, including contract provisions for arbitration." *Id.* at 23. The court went on to hold that plaintiff's submission of her claim to binding arbitration pursuant to the contract between the employer and the union would have been useless and futile and reversed the lower court's decision requiring her to submit her claim to arbitration. *Id.* at 28-29.

The remaining three cases are tendered to support the City's proposition that "Oregon Appellate Courts have repeatedly found that

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[3] Statements of State Sen. Lent and Glen Whallon, Oregon State Fire Fighters Assn., April 23, 1969.

[4] *See* ORS chapter 243.650 to 243.782.

modern firefighters are well-served by the PECBA." In *City of Roseburg* v. *Roseburg City Firefighters, Local No. 1489*, 292 Or 266, 639 P2d 90 (1981), the Supreme Court considered whether the PECBA trumped a "home rule" city ordinance that allowed the city's voters to arbitrate unresolved labor disputes. The court held that the PECBA's provision requiring post-impasse arbitration by a state arbitrator controlled over a conflicting city ordinance. *Id.* at 288. In *International Association of Firefighters, Local 314 v. City of Salem,* 68 Or App 793, 684 P2d 605 (1984), the Court of Appeals considered whether the City of Salem engaged in an unfair labor practice by refusing to bargain collectively over firefighters' safety proposal concerning the minimum number of firefighters on a fire scene. The court held that substantial evidence supported the ERB's determination that a firefighters' proposal relating to the number of firefighters at a fire scene was a mandatory subject of collective bargaining. *Id.* at 799. In *Portland Fire Fighters Association, Local 43, IAFF v. City of Portland,* 305 Or 275, 751 P2d 770 (1988), the Supreme Court considered whether the City of Portland was required to collectively bargain with firefighters regarding a city-initiated change in vacation scheduling policy and held that that collective bargaining was required. *Id.* at 285.

C. <u>General maxim of statutory construction.</u>

The City urges the forum to apply a general maxim of statutory construction -- "*cessant ratione legis, cessat lex*" (translated in the City's brief as "[w]hen the reason of the law ceases, the law itself also ceases") -- to bolster its argument that ORS 652.070 and 652.080 have been superseded by the PECBA and general overtime rule for public employees found in ORS 653.268. This is an extrinsic canon that looks outside the text and context of the statutes at issue. Because this issue can be resolved by a text and context analysis that leaves no uncertainty, the forum may not and does not resort to using this maxim as an interpretive aid. *PGE v. Bureau of Labor and Industries,* 317 Or 606, 610-12, 859 P2d 1143 (1993), *as subsequently modified by State v. Gaines,* 346 Or 160, 164-65, 171-73, 206 P3d 1042 (2009) ("If the legislature's intent remains unclear after examining legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty").

ORS 653.269(5)(B) – THE CITY'S ARGUMENT

The City contends that the terms of the collective bargaining agreement expressly waive application of ORS 653.268 in Sections 5.8 and 5.12. Based on the forum's determination that ORS 653.268 does not apply to the City's computation of overtime for

its firefighters, *infra,* the terms of the collective bargaining agreement regarding payment of overtime are immaterial. Accordingly, the forum engages in no further discussion of whether any terms of the collective bargaining agreement constitute an express waiver of ORS 653.268.

THE CITY MUST FOLLOW THE PROVISIONS OF ORS 652.070 AND 652.080 IN COMPUTING OVERTIME FOR FIREFIGHTERS

Simply put, the question of statutory interpretation before the forum is which statutory scheme -- ORS chapter 652 or ORS chapter 653 -- governs payment of overtime to the IAFF's firefighters. ORS 652.060, 652.070, and 652.080 establish a maximum workweek of 56 hours for firefighters employed "by any incorporated city,[5] require that overtime must be paid for hours worked in a workweek over 56,[6] and additionally require that "authorized vacation or sick leave time" must be included in any overtime computations. The IAFF's firefighters are "firefighters"[7] and the City is an "incorporated city"[8] under the provisions of ORS 652.060 and ORS 652.070. ORS 653.268 sets out the general overtime rule for "labor directly employed by any public employer as defined in ORS 243.650" and requires that overtime be paid for all hours worked over 40 in a workweek "if budgeted funds for such purpose are available" unless an exception in ORS 653.269 applies. The City is a "public employer" as defined in ORS 243.650(20) of the PECBA and the IAFF's firefighters are employed by the City. Although not a stipulated fact, the forum infers from the stipulated facts that the firefighters also perform labor for the City. If ORS 653.268 governs payment of overtime to the firefighters and they fit within one of the cited exceptions, the City is entitled to pay firefighters overtime according to the collective bargaining agreement. If ORS 652.070 and 652.080 govern computation of overtime, the City must compute overtime as required by those statutes.

The forum follows the analytical framework set out by the Oregon Supreme Court in *PGE* and *Gaines* to determine the meaning of the statutes being

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[5] Again, the 56 hour threshold only applies to covered employers who employ four or more firefighters.

[6] *Id.*

[7] ORS 652.050 defines "firefighter," as the term is used in ORS 652.060 and ORS 652.070, as "a person whose principal duties consist of preventing or combating fire or preventing loss of life or property from fire." Article V, Section 5.1 of the collective bargaining agreement refers to "fire prevention," "fire prevention assignment," and "[e]mployees assigned to prevention" in the context of duty assignment. Based on the above, the forum concludes that the IAFF's firefighters fall within the definition of "firefighter" in ORS 652.060 and ORS 652.070.

[8] *See* Finding of Fact #1.

considered and which set of statutes the City must rely on in its computation of overtime to its firefighters. Accordingly, the forum first examines the text and context of the statutes and also considers any pertinent legislative history proffered by the participants. A text and context analysis necessarily includes application of rules of statutory construction set out in ORS chapter 174. The extent of the forum's consideration of any legislative history and the evaluative weight the forum gives to it is for the forum to determine. *Gaines*, at 171-72. *See also* ORS 174.020(3). If the legislature's intent remains unclear after examining text, context, and legislative history, the forum may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty. *Id*. at 164-65, citing *PGE*.

The forum begins by examining ORS 652.060, 652.070, and 652.080. All three statutes exclusively target firefighters and ORS 652.050 defines specific terms that appear in those statutes. Under ORS 652.060(1)(b), an incorporated city that employs four or more firefighters on a full-time basis ("covered employer") may only require those firefighters to be on "regular duty" for 56 hours a week.[9] Once that threshold number of hours has been exceeded, ORS 652.070(1) requires overtime be paid "for every hour of regular duty required of and performed by the firefighter."[10] There are two statutory exceptions, neither of which apply here.

ORS 652.080, enacted ten years earlier in 1959, provides that "[i]n computing the average or total number of hours a week for the purposes of ORS 652.060 and 652.070, authorized vacation or sick leave time *shall* be considered as time on *regular duty*." (emphasis added). As used in ORS 652.080, the forum interprets the term "authorized vacation or sick leave time" to be accrued vacation or sick leave time actually used by firefighters. Such leave time must be considered as time on "regular duty," the type of work designated by the legislature to be counted both in determining hours per week that a covered employer can require firefighters to work and that a covered employer must use to compute overtime. Read in conjunction with ORS 652.060(1)(b) and 652.070(1), the use of the mandatory word "*shall*" in ORS 652.080 leaves the latter statute susceptible to only one interpretation – a covered employer, the City in this case, is required to consider authorized vacation and sick leave taken by firefighters as time on regular duty and include it when computing overtime wages.

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[9] ORS 652.060 was amended in 1969 to establish the 56 hour limit.

[10] ORS 652.070 was amended in 1969 to require overtime pay for regular duty hours over 56 in a workweek for incorporated cities with four or more regularly employed fulltime firefighters.

Based on this conclusion, the forum concludes that the City is obligated to compute and pay overtime wages to the IAFF's firefighters as set out in ORS 652.060, 652.070, and 652.080 *unless* the forum adopts the conclusion urged by the City -- that these statutes no longer apply.

The forum notes that the City offered no legislative history, case law, or other argument to show that the legislature intended a different interpretation than the one cited above at the time it enacted ORS 652.080.

ORS 653.268, in contrast to ORS 652.060, 652.070, and 652.080, is a general overtime statute. As stated earlier, it applies to all "[l]abor directly employed by any public employer as defined in ORS 243.650" and requires that overtime be paid for all hours worked over 40 in a workweek "if budgeted funds for such purpose are available." There is no dispute that the IAFF firefighters are directly employed by the City or that the City is a "public employer" within the meaning of ORS 653.268. ORS 653.269 excepts employees in a number of specific categories from the overtime requirements of ORS 653.268. Among those exceptions are "[e]mployees of a public employer * * * who are employed in fire protection * * * activities"[11] and "[e]mployees exempted from overtime * * * [b]y a collective bargaining agreement expressly waiving application of ORS 653.268."[12] The forum finds that "fire prevention"[13] and "fire protection" have similar meanings.[14] By performing "fire prevention" activities, the IAFF firefighters also engage in "fire protection" activities and thereby fall within the exception in ORS 653.269(3).[15] Based on that exception, the forum concludes that the overtime requirements of ORS 653.268 do not apply to the City and the IAFF firefighters. Having reached this conclusion, the forum need not also determine whether the ex-

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[11] ORS 653.269(3). *See also* OAR 839-020-0210(1)(a), adopted pursuant to ORS 653.269(3), that exempts public employees engaged in "Fire protection activities" from the overtime pay requirements of ORS 653.268.

[12] ORS 653.269(5)(b).

[13] *See fn.* 7.

[14] In the absence of statutory definition for "fire prevention" and "fire protection," the forum assumes the legislature intended to give those words their "plain, natural, and ordinary meaning." *PGE v. Bureau of Labor and Industries,* 317 Or 606, 611, 859 P2d 1143 (1993). In *Webster's Third New Int'l Dictionary* (Unabridged ed 2002), the relevant definition of "prevention" is "**5:** the act of preventing or hindering **:** obstruction or thwarting of action, access, or approach <~prevention of forest fires>." *Id.* at 1798. "Protecting" means "the act of protecting." *Id.* at 1822. "Protect" means **"**to cover or shield from that which would injure, destroy, or detrimentally affect **:** secure or preserve usu. against * * * harm." *Id*.

[15] *See fn.* 7.

ception in ORS 653.269(5)(b) applies based on the specific language in Section 5 of the CBA.

Having concluded that firefighters are not entitled to overtime under ORS 653.268 based on the exemption in ORS 653.269(3), the forum must then conclude that the IAFF's firefighters have no statutory entitlement to overtime pay if it accepts the City's argument that ORS 652.060, 652.070, and 652.080 do not apply to its firefighters.[16] This requires acceptance of the City's premise that the legislature implicitly repealed ORS 652.060, 652.070, and 652.080 by enacting the PECBA, ORS 653.268, and the various exceptions in ORS 653.269. The forum concludes otherwise.

The forum relies on ORS 174.010 and 174.020 to determine if there is an inconsistency between these two statutory schemes and, if so, how to resolve it. Those statutes provide, in pertinent part:

> "**174.010 General rule for construction of statutes.** In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.
>
> "**174.020 Legislative intent; general and particular provisions; consideration of legislative history.** (1)(a) In the construction of a statute, a court shall pursue the intention of the legislature if possible.
>
> "* * * * *
>
> "(2) When a general and particular provision are inconsistent, the latter is paramount to the former so that a particular intent controls a general intent that is inconsistent with the particular intent."

First, the forum determines if the two statutory schemes at issue can be interpreted in a way "as will give effect to all." ORS 174.010. ORS 652.080 was enacted in 1959 to require "authorized vacation and sick leave" to be used in the computation of overtime for firefighters.[17] ORS 652.060 and 652.070 were amended in 1969 to establish a 56 hour maximum workweek for firefighters and require overtime pay for additional hours. No legislative

[16] ORS 653.269(5)(b) exempts employees from the overtime pay requirements of ORS 653.268 if a collective bargaining agreement expressly waives application of ORS 653.268, but does not require that the collective bargaining agreement mandate overtime pay in order for that waiver to be effective.

[17] "Firefighters" refers to those firefighters referenced in the provisions of ORS 652.050, 652.070, ORS 652.080, and 652.080.

history was provided to show what year ORS 653.268 and 653.269 were originally enacted. If the latter statutes were enacted before 1959 and the legislature intended them to govern overtime pay for firefighters, the legislature's enactment of ORS 652.080 in 1959 and amendment of ORS 652.060 and 652.070 in 1969 shows that it changed its mind. If ORS 653.268 and 653.269 were enacted later, then the legislature could have repealed ORS 652.050 through 652.080, had it intended to abrogate firefighters' statutory entitlement to overtime pay. In either event, the forum concludes that the legislature's choice to leave both statutory schemes in place reflects the legislature's intent to create a statutory entitlement for firefighters that is distinct and separate from the general overtime provisions in ORS 653.268, while at the same time maintaining a general overtime statute and an exceptions statute regulating overtime for other categories of public employees.

Assuming, *arguendo*, that there is an inconsistency between the two statutory schemes, the forum would still conclude, based on ORS 174.020, that the City is obligated to pay its firefighters overtime under the provisions of ORS 652.060 through 652.080. As pointed out by the City, ORS 653.268 is a general overtime statute governing labor employed by public employers. In contrast, ORS 652.050 through 652.080 set working hours and establish a method of computing overtime pay for a particular group – firefighters. Based on ORS 174.020, the forum concludes that ORS 652.070 and 652.080 controls overtime pay for firefighters because it refers to a particular group of employees, as opposed to the general group consisting of "labor employed by public employees" whose overtime is regulated by ORS 653.268 and the exceptions contained in ORS 653.269.

The City's argument that ORS 652.050 through 652.080 should not apply because they "are no longer relevant" is really an argument that those statutes have been impliedly repealed by ORS 653.268, 653.269, and the PECBA. The determination that the statutory schemes at issue are consistent, as related to the City's firefighters, makes this issue moot. The forum also notes that none of the four appellate cases cited by the City are on point or controlling and the forum finds no language in *City of Roseburg, City of Salem,* or *City of Portland* stating that "modern firefighters are well-served by the PECBA."

DECLARATORY RULING

ORS 653.269(5)(b) does not exempt the City of Grants Pass from complying with ORS 652.070 and 652.080. The City of Grants Pass is required to include authorized vacation and sick leave time when computing overtime wages for the IAFF firefighters it employs, as set forth in ORS 652.080.

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In the Matter of

J & S MOVING & STORAGE, INC.,

Case No. 68-11

Final Order of Commissioner Brad Avakian

Issued March 19, 2012

SYNOPSIS

Respondent employed Claimant as a truck driver between April 5 and May 1, 2010. Claimant worked for two different agreed rates, $9 per hour and $.25 per mile. Respondent fired him, paying him nothing for his work, and alleged that Claimant had stolen money from Respondent that exceeded the amount of wages due. The Commissioner held that this was not a defense to a wage claim and ordered Respondent to pay Claimant $2,205.75 in unpaid, due and owing wages and $2,160.00 in penalty wages. ORS 652.140(1), ORS 652.150.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 7-8, 2012, at the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Chet Nakada, an employee of the Agency. Wage claimant Pablo Sandoval was present throughout the first day of the hearing and was not represented by counsel. Respondent J & S Moving & Storage, Inc. was represented at hearing by Chang Cho, its authorized representative. Philip Guttman, an Oregon court-certified Spanish language interpreter, and Kasey Yim, an Oregon court registered Korean language interpreter, interpreted the entire hearing.

The Agency called the following witnesses: Claimant Sandoval; BOLI Wage and Hour Division compliance specialist Robert McArthur; Daniel Hinkle, owner of a business located next door to Respondent; and Chang Cho, Respondent's corporation president and authorized representative.

Respondent called Chang Cho and Jaime Pacheco, a former employee of Respondent, as witnesses.

The forum received into evidence:

a) Administrative exhibits X-1 through X-11 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-11 (submitted prior to hearing) and A-12 (submitted at hearing);

c) Respondent exhibits R-1 through R-9 (submitted prior to hearing) and R-10 and R-11 (submitted at hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On October 22, 2010, Claimant filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him. At the same time, Claimant assigned to the Commissioner of BOLI, in trust for himself, all wages due from Respondent.

2) On January 12, 2011, the Agency issued Order of Determination No. 10-2661 ("OOD") based on Claimant's wage claim and the Agency's investigation. The OOD specifically alleged that Claimant worked for Respondent from "April 5, 2010 through May 1, 2010 at the rate of $9.00 per hour and $0.20 per mile, of which no amount has been paid, leaving a balance due and owing $2,360.50," with interest. The OOD further alleged that Respondent willfully failed to pay the wages, that Claimant's daily rate of pay was $101.06, and that Respondent owes Claimant $3,031.77 penalty wages, with interest.

3) On February 1, 2011, Respondent, through its president Chang Cho, filed an answer in which Respondent admitted that Claimant worked for Respondent "from Jan 2010 to end of April, 2010." The answer also included the following statement:

> "He was my pre-employed for our company, So I did not want to report to small claim. I was waiting for him to return the money with over $2,000. Mr PABLO SANDOVAL when he bring money from client who paid for moving work. I was gonna pay him with it., but he did not returned money from client for moving goods and Mr PABLO SANDOVAL took company's assets with navigation, tools and damaged or misused equipment the value was greater than two thousand dollars."

4) On February 10, 2011, in response to the Agency's notification that Respondent needed to specifically request either a contested case hearing or a court trial, Respondent filed a request for a contested case hearing.

5) On August 12, 2011, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimant stating the time and place of the hearing as February 7, 2012, beginning at 10:00 a.m. and continuing on successive days thereafter until concluded at the office of the Oregon Bureau of Labor and Industries, W. W. Gregg Hearing Room, 1045 State Office Building, 800 NE Oregon St., Portland,

Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445.

6) On January 11, 2012, the ALJ issued an interim order that required Respondent to provide a letter authorizing Chang Cho to appear as its authorized representative at hearing and stated that the forum would disregard any motions, filings, or other communications from Respondent unless they were filed by an attorney or authorized representative.

7) On January 19, 2012, the ALJ was informed that Chang Cho had telephoned Mr. Nakada and stated that he needed a Korean interpreter at the hearing. In response, the ALJ telephoned Cho that same day to confirm that Cho wanted an interpreter. Cho told the ALJ that he planned to testify in Korean and needed an interpreter to translate his testimony and that he also wanted an interpreter to interpret the entire proceedings to him. In addition, Cho told the ALJ that he did not understand everything in the ALJ's interim orders. The ALJ told Cho that all of the orders related to Respondent's case and that it was important for Cho to find someone to explain those orders to him, particularly the case summary order and order requiring Respondent to officially appoint an authorized representative or obtain the services of an attorney.

8) On January 19, 2012, the ALJ issued an amended case summary order and an amended order requiring Respondent to file a letter of authorization for an authorized representative. They differed from the original orders in that they acknowledged Cho's statement that he needed a Korean interpreter and were accompanied by a cover sheet that contained the following statement translated into Korean and six other languages:

> "Warning! Enclosed are important documents concerning your legal rights and responsibilities. You may need to respond to these documents within a limited time. If you do not read English, you should have a qualified person interpret them for you as soon as possible."

9) On January 19, 2012, the ALJ also issued an interim order regarding Respondent's prospective responsibility with regard to payment of a Korean interpreter. In pertinent part, it stated:

> "OAR 839-050-0300(3)(a) requires the ALJ to appoint a qualified interpreter 'whenever it is necessary to interpret the proceedings to a party unable to speak or understand English language or to interpret the testimony of the party unable to speak or understand the

English language.' Accordingly, the forum will appoint a Korean interpreter for this purpose.

"OAR 839-050-0300(3)(b) regulates the payment of ALJ-appointed interpreters. It reads as follows:

> 'No fee will be charged to any person for the appointment of an interpreter to interpret the testimony of a party or witness unable to speak or understand the English language, or to assist the administrative law judge in performing the duties of the administrative law judge. No fee will be charged to a party unable to speak or understand the English language who is unable to pay for the appointment of an interpreter to interpret the proceedings to the party unable to speak or understand the English language. No fee will be charged to any person for the appointment of an interpreter if an appointment is made to determine whether the person is unable to pay or is a person unable to speak or understand the English language.'

"Based on this rule, it is the forum's responsibility to pay the interpreter fees generated while Chang Cho and any other witnesses who are unable to speak or understand the English language are testifying. However, if Respondent J & S Moving & Storage, Inc. wants the entire hearing interpreted from English to Korean, J & S Moving & Storage, Inc. must pay the interpreter fees generated during the parts of the hearing except when Cho or any other witnesses who are unable to speak or understand the English language are testifying ***unless J & S Moving & Storage, Inc. is unable to pay those interpreter fees***. I estimate that those fees may amount to a maximum of $1000, but will be probably be less. If J & S Moving & Storage, Inc. is able to pay those fees, I will likely require J & S Moving & Storage, Inc. to post a bond or cashier's check in that amount prior to hearing to insure that those fees are in fact paid.

"If J & S Moving & Storage, Inc. wants to have the entire proceeding interpreted from English to Korean and believes it is unable to pay the interpreter fees described above, J & S Moving & Storage, Inc. must provide me with a verified statement and other information in writing under oath showing a financial inability to pay for an interpreter. I have the authority to determine whether J & S Moving & Storage, Inc. is unable to pay for an interpreter. No interpreter fee will be charged to J & S Moving & Storage, Inc. if an interpreter is necessary to assist

me in determining whether J & S Moving & Storage, Inc. is unable to pay. OAR 839-050-0300(3)(c)."

10) On January 20, 2012, the Hearings Unit received a case summary filed by Chang Cho. On the same day, Chang Cho, acting as in his capacity as Respondent's president, filed a letter authorizing himself to represent Respondent at the hearing.

11) At the outset of the hearing, the ALJ explained the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing.

12) Throughout the hearing, the entire proceedings were interpreted into Korean for Cho and Respondent's benefit.

13) Respondent offered Exhibit R-12 at hearing, which was a two-page chart showing trip expenses by Respondent's drivers in December 2010 that was not included with Respondent's case summary. The Agency objected to its admission. The ALJ accepted the chart and testimony concerning it as an offer of proof and stated he would rule on its admissibility in the Proposed Order. The Agency's objection is GRANTED on the grounds that Exhibit R-12 is properly part of Respondent's case-in-chief, it has no probative value with regard to the number of hours Claimant worked, the amount of wages Claimant earned, or whether Respondent's failure to pay Claimant the wages he is owed was willful, and Respondent failed to offer a satisfactory reason for including it in Respondent's case summary.

14) After the evidentiary part of the hearing was concluded, the Agency moved to amend its OOD to lower the amount of wages sought to $2,088.90. The Agency's motion was granted.

15) The ALJ issued a proposed order on February 22, 2012, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was an Oregon corporation that conducted a moving and storage business from its principal place of business in Beaverton, Oregon, and Chang Cho was its corporate president and managed the business.

2) Cho hired Claimant to work as a truck driver for Respondent. Claimant drove truck for Respondent during the period extending from early January 2010 through May 1, 2010.

3) Cho agreed to pay Claimant $9 per hour for all of his work except for a trip Claimant took to Los Angeles in late April 2010. For that trip, Cho agreed to pay Claimant $.25 per mile instead of $9 per hour.

4) Claimant was paid for all the work he performed through April 4, 2010.

5) When Claimant reported to work at Respondent's business or returned from a trip, he registered his arrival time on Respondent's time clock. Respondent's time clock often did not work and Claimant handwrote his arrival time on those occasions.

6) Claimant worked the following days and hours per day from April 5 through April 25, 2010:

Date	Hours Worked
April 5	19.0
April 6	6.0
April 7	6.5
April 8	1.5
April 9	10.5
April 11	18.5
April 12	8.5
April 14	21.5
April 15	17.0
April 17	13.5
April 19	8.0
April 20	8.0
April 21	8.0
April 22	8.0
April 23	11.0
April 24	14.0
April 25	9.0
TOTAL:	188.5

6) At $9 per hour, Claimant earned $1,696.50 between April 5 and April 25 (188.5 hours x $9 = $1,696.50).

7) Claimant drove to Los Angeles and back between April 26 and April 29, driving a total of 2,037 miles. He arrived back in Portland at 8 a.m. on April 29. Calculated at $.25 per mile, he earned $509.25 for this trip.

8) Claimant worked an undetermined number of hours on April 29-30 and May 1 driving a truck to Washington and back for Respondent at the agreed rate of $9 per hour.[1]

9) Claimant returned from his trip to Washington late in the afternoon on May 1, Respondent's payday. Upon Claimant's return, Cho demanded the return of credit cards that he had given Claimant to use on the trip and Claimant demanded to be paid his wages. Each refused. Cho fired Claimant and called the police. Claimant gave the cards to the police and the police told Cho they would arrest him if he called again.

10) During Claimant's employment, Respondent paid its employees every two weeks.

11) Claimant earned a total of $2,205.75 in wages between April 5 and May 1, 2010. Respondent did not pay Claimant any wages for the work he performed between April 5 and May 1, 2010, and was aware, through Cho, that Claimant was owed wages for his work during that time period.

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[1] The forum's reasons for concluding that "[c]laimant worked an undetermined number of hours" are set out in detail in the Opinion.

12) On November 1, 2010, the Agency mailed a document entitled "Notice of Wage Claim" to Respondent that stated:

> "You are hereby notified that PABLO SANDOVAL has filed a wage claim with the Bureau of Labor and Industries alleging:
>
> "Unpaid wages and statutory overtime wages of $2,500 at the rate of $9.00 per hour from April 5, 2010 to May 1, 2010.
>
> "IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address.
>
> "IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation which supports your position, as well as payment of any amount which you concede is owed the claimant to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.
>
> "If your response to the claim is not received on or before November 15, 2010, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

13) Chang Cho's testimony was only partly credible. He claimed he did not pay Claimant anything when he fired Claimant because Claimant did not give him the $2,000 plus in checks and cash he collected on his trip to California and Washington. This claim conveniently ignores the fact that he did not pay Claimant any of his earned wages on Respondent's mid-April payday, when no such alleged offset existed. The forum finds Cho's testimony that he gave Claimant $1,000 in cash to take to California implausible, given Cho's testimony about the importance he attached to record-keeping and the fact that he made no record of his payment to Claimant. The forum finds Cho's testimony that Claimant used his own credit cards to pay for all Respondent's expenses on the California trip to be equally implausible, given Cho's claims that he gave Claimant $1,000 in cash to pay for those expenses and that Claimant refused to return the two credit cards Respondent had given him at the end of the trip. The forum has only credited Cho's testimony when it was corroborated by credible documentation or other credible testimony.

14) Claimant's testimony regarding his work hours from April 25 to May 1 was exaggerated and confusing. For example, he testified that on his trip to Los Angeles he drove 51 hours straight from 9 p.m. on April 25 to midnight on April 27, then worked 37 hours straight from 11 a.m. on April 28 until 2 a.m. on April 30. Claimant testified he was able to accomplish this with the aid of energy drinks and coffee. Although this

may have been physically possible, the forum finds it highly improbable in light of Claimant's written and oral testimony that he worked 16 hours on April 31, a nonexistent date. However, the forum has credited Claimant's testimony concerning his hours worked from April 5 through April 25 because Claimant testified credibly as to his work hours and Respondent did not provide any credible evidence, such as Claimant's time cards, to the contrary. The forum has also credited Claimant's testimony regarding his hourly rate of pay of $9 per hour and his claim that he drove 2,037 miles to California and back. Finally, the forum has credited his testimony that Cho agreed to pay him $.25 per mile based on Claimant's credible testimony and Respondent's failure to produce any records to support Cho and Pacheco's testimony that he was paid $.20 per mile.

15) Jaime Pacheco contradicted himself on several key issues during his testimony. When asked when he worked for Respondent, he said it was April in 2010 or 2009 and looked to Cho for assistance with his answer. He also testified that Claimant did not work for Respondent in April 2010. He testified he was present on Claimant's last day of work, which he thought was in April, and that Claimant wasn't fired, contrary to the testimony of both Claimant and Cho. He testified that he was present when the police arrived after he and Claimant returned from Washington, then subsequently testified that he did not talk to the police because he "had left the office." He testified that Claimant was not paid his salary upon their return from Washington, then subsequently testified that he did not know if Claimant was paid. Based on these contradictions, the forum has only credited Pacheco's testimony when it was corroborated by other credible evidence.

16) Robert McArthur was a credible witness and the forum has credited his testimony in its entirety.

17) Daniel Hinkle was a credible witness; however, the forum has only relied on his testimony concerning the immediate circumstances of Claimant's termination.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent was an Oregon corporation. Chang Cho was Respondent's corporate president and his actions are imputed to Respondent.

2) Claimant was employed by Respondent as a truck driver during the wage claim period of April 5 through May 1, 2010.

3) Except for a trip to California between April 26-29, 2010, Claimant was employed at the agreed rate of $9 per hour.

4) Claimant worked 188.5 hours at the agreed rate of $9 per hour during the wage claim period, earning gross wages of $1,696.50.

5) Claimant was employed at the agreed rate of $.25 per mile during his trip to California and drove 2,037 miles, earning $509.25.

6) Claimant was fired at the end of his work day on May 1, 2010, and has not been paid anything for the work he performed for Respondent between April 5 and May 1, 2010.

7) On November 1, 2010, the Agency mailed a notice to Respondent that notified Respondent of Claimant's wage claim and demanded that Respondent pay the unpaid, due, and owing wages if the claim was correct. Respondent has not paid any additional wages to Claimant and still owes Claimant $2,205.75 in unpaid, due and owing wages.

8) Respondent's failure to pay Claimant his unpaid, due and owing wages was willful. Penalty wages are computed as follows for Claimant, in accordance with ORS 652.150: $9 per hour x 8 hours x 30 days = $2,160.00.[2]

[2] The forum has not used the "weighted" formula suggested by the Agency that incorporates the hours worked during Claimant's trip to California and overtime hours because the forum has not found it possible to accurately compute the number of hours Claimant worked during his trip to California or from April 29-May 1. Instead, the forum has relied on Claimant's undisputed agreed rate of pay of $9 per hour for the majority of his employment.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent J & S Moving & Storage, Inc. was an Oregon employer that directly engaged the personal services of one or more employees and Claimant was Respondent's employee, subject to the provisions of ORS 652.110 to 652.200 and ORS 652.310 to 652.405.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 652.310 to 652.405.

3) Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid by the end of the first business day after his discharge. Respondent owes Claimant $2,205.75 in unpaid, due, and owing wages.

4) Respondent willfully failed to pay Claimant all wages due and owing for work that Claimant performed for Respondent and owes $2,160.00 in penalty wages to Claimant. ORS 652.150.

6) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent J & S Moving & Storage, Inc. to pay Claimant his earned, unpaid, due and payable wages and penalty wages, plus interest, on all sums until paid. ORS 652.332.

OPINION

CLAIMANT'S WAGE CLAIMS

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 he was not properly compensated. *In the Matter of Letty Lee Sesher, 31* BOLI 255, 261 (2011).

RESPONDENT EMPLOYED CLAIMANT

Respondent admitted in its answer that it employed Claimant and stipulated to that fact at the hearing.

THE PAY RATE UPON WHICH RESPONDENT AND CLAIMANT AGREED

Respondent and the Agency stipulated that Claimant's agreed rate of pay, except for the trip that Claimant took to Los Angeles, was $9 per hour. Claimant testified that his rate of pay for the Los Angeles trip was $.25 per mile, the same amount that he wrote on his wage claim. In contrast, Cho testified that he agreed to pay $.20 per mile to Claimant, and Pacheco testified that Cho paid him $.20 per mile until he complained, at which time the amount was raised to $.25 per mile. Pacheco did not testify as to the time he made his complaint that resulted in a raise, and neither Respondent nor the Agency provided any records to assist the forum in determining the correct rate per mile. There was no evidence offered to show whether Respondent's payroll records that would presumably show how much per mile was paid to Respondent's drivers at the time of Claimant's employment still exist. Based on Claimant's more credible testimony and the absence of any records to the contrary, the forum concludes that Cho agreed to pay Claimant $.25 per mile for his trip to California.

AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT

April 5-April 23, 2010

The Agency produced Claimant's time cards showing the hours he worked from April 5 through April 17, 2010. Those cards included additional handwritten notes made by Claimant that showed the total hours he worked each day, plus the hours he worked on April 25. Respondent offered a copy of what Cho claimed were Claimant's original time cards for April 5 through 17. Except for Claimant's handwritten notes, they contain no significant differences except for the handwritten note "NOT DRIVE" that appears under the printed time[3] "10 APR 5 5:52 AM" in the block related to hours worked by Claim-

[3] It was undisputed that printed times on Claimant's timecards were printed by Respondent's time clock.

ant on April 5, 2010. There was no testimony about who wrote that note, but does not appear to be Claimant's handwriting. Another printed time -- "10 APR 6 1:08 AM" -- appears in the block related to hours worked by Claimant on April 6, 2010, that corresponds to Claimant's claim that he worked 19 hours on April 5. There are no time cards in evidence showing the hours Claimant worked from April 18 through April 25. Based on Claimant's credible testimony and the time cards that were produced, the forum concludes that Claimant worked the hours shown in Finding of Fact #5 – The Merits from April 5-23, 2010.

April 24, 2010

Claimant claims he worked 23 hours on April 24, 2010. Respondent countered this with an invoice representing work done in Marysville, Washington[4] that shows Claimant moved Benny Byun between 9:16pm and 11:17pm on that day. The forum is skeptical of the 23 hours claimed by Claimant, based largely on his exaggerations about the hours he worked beginning April 24 and continuing through May 1. However, there is no evidence that Claimant did not work straight through April 24 from approximately 9 a.m. until 11 p.m., and Claimant's testimony and documentary evidence provided by Respondent in Exhibits R-7 and R-9 that show Claimant checked out a truck from Penske-Tacoma on Respondent's behalf at 9:07 a.m. on April 24, 2010, and worked until 11:17 p.m. that same day for Byun[5] support that theory. Absent any other evidence to show when Claimant started work that day, the forum credits him with working from 9:07 a.m. to 11:17 p.m., for a total of 14 hours.

April 25

Claimant credibly testified he worked nine hours at the hourly rate of $9 per hour on April 25, 2010, and Respondent has provided no records to the contrary. 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." *In the Matter of Kilmore Enterprises,* 26 BOLI 111, 122 (2004). A claimant's credible testimony may be sufficient evidence to show the amount of hours worked by the claimant and amount owed. *In the Matter of Joseph Francis Sanchez,* 29 BOLI 211, 221 (2007). Lacking contrary evidence, the forum relies on Claimant's credible testimony to conclude that he worked nine hours on April 25, 2010.

April 26-29, 2010

Although Respondent disputes the rate per mile at which Cho agreed to pay Claimant on the California trip that occurred on these dates, Respondent does not

[4] The forum takes judicial notice of the fact that Marysville is approximately 200 miles north of Portland.

[5] Exhibits R-7 and R-9.

dispute that Claimant drove 2,037 miles on that trip. Because Claimant was paid by the mile instead of by the hour, the forum need not determine the number of hours he worked on his California trip.

April 29-May 1, 2010

In Finding of Fact #8 – The Merits, the forum concludes that "Claimant worked an undetermined number of hours on April 29-30 and May 1 driving a truck to Washington and back for Respondent at the agreed rate of $9 per hour." The forum reached this conclusion based on the lack of reliable evidence in the record that would allow the forum to hazard even an approximate guess as to Claimant's work schedule on those three days. There are no contemporary time records to assist the forum. The unreliable evidence is summarized below. In brief, it consists of Claimant's testimony as to the occurrence of an impossible event and his inconsistent and contradictory testimony, illustrated below in the forum's transcription of Claimant's answers to questions asked by the ALJ.

As to the impossible event, Claimant wrote on the calendar that he completed and gave to the Agency when he filed his wage claim that he worked "17" hours on "April 29-30," "16" hours on April 31, and "16" hours on May 1. Claimant also testified that he worked 16 hours on April 31. April 31 does not exist, and the forum takes judicial notice of that fact.

When questioned by the ALJ about his specific schedule those days, Claimant testified to the following:

Questions by ALJ; Answers by Claimant

Q: "Is A-1, page 4, * * * does that accurately show the hours you worked?

A: "Yes.

Q: "Would you please tell me which dates on this schedule you were to be paid by the hour, and then I'm going to ask you which dates you were to be paid by the mile.

A: "From the 4th 'til the 24th it was by the hour.

Q: "So through the 25th was by the hour?

A: "Yes.

Q: "Alright. What about the rest of the time?

A: "By the mile.

Q: "And what dates does that cover? You said you were paid by the hour April 4 through April 25. That leaves April 26 through May 1. From April 26 through May 1, were you paid by the hour on any of those days?

A: "I was paid by the hour and by the mile.

Q: "For April 26 through May 1?

A: "Yes.

Q: "So, April 26th, 27th, and 28th, how many hours did you work on those three days?

A: "I don't remember; I have them written down.

Q: "And your calendar shows that was the LA trip and you drove 2,037 miles? Is that right?

A: "Yes.

Q: "Did you drive to LA and back in those three days?

A: "No, I went to Los Angeles and I was working and I did some deliveries in that area.

Q: "What dates did you come back from LA?

A: "Tuesday at night.

Q: "The 27th?

A: "Yes.

Q: "So, what day did you drive to LA?

A: "Sunday night.

Q: "Do you remember when you arrived in LA?

A: "Monday night with Mr. Cho.

Q: "So then you did work in LA during the day on April 27th?

A: "I went to pick up more freight in Los Angeles and I drove to Willow, California, near Valencia.

Q: "Was that north or south?

A: "South.

Q: "So the night of April 27th you started to drive back from California?

A: "Yes.

Q: "Do you remember about what time you left?

A: "About 7 p.m.

Q: "And do you remember what time you arrived back in Portland?

A: "I arrived Thursday at 8 a.m.

Q: "So that's April 29?

A: "Yes.

Q: "Do you remember about what time you left for LA on April 25, Sunday April 25?

A: "At 9 p.m.

Q: "Had you already worked other hours that day?

A: "Yes, I had worked in Tacoma.

Q: "When you were in LA, did you spend Monday and Tuesday night in a hotel or motel or something?

A: "Just Monday.

Q: "Can you estimate at all for me how many hours you worked between midnight April 25; that's Sunday, and midnight April 28?

A: "The 25th I started around 8 a.m. And until about midnight of Tuesday when we got to the hotel.

Q: "Alright. So you left Portland Sunday night at 9 p.m.?

A: "Yes.

Q: "And you arrived at the motel midnight on Tuesday or Monday?

A: "Tuesday.

Q: "Okay. So were you driving nonstop from 9 o'clock Sunday until midnight Tuesday to LA?

A: "Yes, he obligated me to drive like that.

Q: "So that's 51 hours straight driving?

A: "That's what I drove and worked.

Q: "Okay, your calendar shows that you worked 17 hours on the 29th and the 30th of April?

A: "I worked from Wednesday at 10 o'clock or 11 o'clock in the morning 'til Friday at 2 a.m. I worked and drove. I made a mistake here where I wrote 2300 miles. I made a mistake on the hours.

Q: "Okay, so I've got from your hours worked it's from 9 o'clock April 25th until midnight April 27th. Is that correct?

A: "Yes. Because he wanted to finish the deliveries that we were taking from here down to there.

Q: "And then you worked straight through from 11 a.m. on April 28th until 2 a.m. on Friday, April 30?

A: "Yes. I ended up in Lynnwood, Washington at 2 a.m.

Q: "And your calendar shows that you worked 16 hours on April 31?

A: "Yes.

Q: "Do you remember about what the times of day were that you worked?

A: "Started like at about 9 a.m. And I finished like around 7 or 8. It was 16 hours.

Q: "And then on May 1, you say that you worked 16 hours? Do you remember when you started and when you finished on that day?

A: "It was from the 31st in the afternoon until the 1st in the afternoon.

Q: "I'm a little confused. You had just testified that you worked from 9 a.m. until 7 or 8 p.m. on April 31. What happened after 7 or 8 p.m. on April 31st for the rest of your work?

A: "I had to drive on I-5 South to Tacoma to finish a delivery the following day.

Q: "Well, I guess what I need to know is you wrote on 31st of April and May 1st you worked 16 hours each of those days. Is that correct?

A: "Yes.

Q: "And you said the California trip was supposed to be 25 cents a mile?

A: "Yes.

Q: "Not $9 an hour?

A: "No.

Q: "On this schedule, on A-1, page 4, which dates does that cover?

A: "From the 25th of April to the 29th. Until 8 a.m., and from then he was going to pay me by the hour to Washington until the last day that I worked for him."

A wage claimant always bears the burden of proving he performed work for which he was not properly compensated. *In the Matter of Rubin Honeycutt, 25 BOLI 91, 103 (2003).* In the past, the forum has declined to speculate or draw inferences about wages owed based on insufficient,

unreliable evidence. *In the Matter of Burrito Boy, Inc., 16 BOLI 1, 12 (1997).*[6] Here, although there is no dispute that Claimant worked on April 29, 30, and May 1, the evidence as to the specific hours Claimant worked on April 29, 30, and May 1 is both insufficient and unreliable and Claimant's transcribed testimony is not credible. Consequently, the forum follows its precedent and declines to construct an award of unpaid wages for those three days based on speculation.

CLAIMANT PERFORMED WORK FOR WHICH HE WAS NOT PROPERLY COMPENSATED

Claimant earned $2,205.75 for his 188.5 hours of work between April 5 and April 25, 2010, at the agreed rate of $9 per hour, and at the agreed rate of $.25 per mile for the 2,037 miles he drove. Respondent has paid him nothing, and owes him $2,205.75 in earned, unpaid, due and owing wages.

CONCLUSION

In total, Claimant earned $2,205.75 during the wage claim period. As he was paid nothing, he is owed that entire amount. This remedy exceeds the $2,088.90 in unpaid wages alleged to be due and owing in the Agency's amendment at hearing to its Order of Determination. In prior cases, the forum has held that the commissioner has the authority to award unpaid wages exceeding those sought in the Agency's Order of Determination when they are awarded as compensation for statutory wage violations alleged in the charging document. *See, e.g., In the Matter of Westland Resources, Inc.,* 23 BOLI 276, 286 (2002). The unpaid wages owed to Claimant in this case were earned within the wage claim period alleged in the OOD and are awarded as compensation for a statutory wage violation of ORS 652.140 alleged in the OOD. Accordingly, the forum awards Claimant the sum of $2,205.75, the full amount of unpaid wages proved by the Agency at hearing.

CLAIMANT IS OWED PENALTY WAGES

The forum may award penalty wages when a respondent's failure to pay wages 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. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

The Agency presented credible evidence that: (1) Claimant and Cho agreed that Claimant would work for the usual rate of $9 per

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[6] *See also In the Matter of J. Guadalupe Campuzano-Cazares,* 30 BOLI 48, 59-60 (2008) (When claimant's testimony and the contemporaneous record he claimed to have maintained were not credible, the forum declined to speculate or draw inferences about wages owed to him.)

hour and at the special rate of $.25 per mile on a trip to California; (2) Respondent, through Cho, its agent and Claimant's supervisor, set Claimant's driving schedule and was aware of Claimant's work; (3) Cho did not pay Claimant his earned wages on Respondent's mid-April payday or when he fired Claimant; and (4) Cho fired Claimant after Claimant's last trip, claiming he did not have to pay Claimant because Claimant allegedly stole checks, cash, and equipment from Respondent that exceeded the value of Claimant's earned and unpaid wages. There is no evidence that Cho, Respondent's agent, acted other than voluntarily and as a free agent in not paying Claimant and the forum concludes that Respondent, through Cho, acted willfully in failing to pay Claimant his wages and is liable for penalty wages under ORS 652.150.

ORS 652.150(1) and (2) provide, in pertinent part:

> "(1) Except as provided in subsections (2) and (3) of this section, if an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 * * *, then, as a penalty for the nonpayment, the wages or compensation of the employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced.
>
> "(2) If the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation unless the employer fails to pay the full amount of the employee's unpaid wages or compensation within 12 days after receiving the written notice. If the employee or a person on behalf of the employee fails to send the written notice, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation. * * *"

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 on November 1, 2010. The Agency's OOD, issued on January 12, 2011, repeated this demand. Respondent failed to pay any of Claimant's unpaid wages within 12 days after receiving the written notices and has still not paid them. Consequently, the forum assesses 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 Claimant equal $2,160.00 ($9.00 per hour x eight hours x 30 days).

RESPONDENT'S DEFENSE THAT IT OWES NO WAGES BECAUSE CLAIMANT STOLE FROM RESPONDENT

Respondent admits that it did not pay wages to Claimant during the wage claim period, but contends it was justified in withholding

wages because Claimant stole money and goods from Respondent that exceeded the value of the unpaid wages. As explained more fully below, the forum has not made findings of fact or conclusions of law concerning this issue because it is not a valid defense to Claimant's wage claim.

Oregon wage and hour laws severely limit the circumstances under which an employer may deduct money from an employee's wages. *See* ORS 652.610. An employer may not withhold an employee's wages based on allegations, even if confirmed, that the employee stole money from the employer. *See In the Matter of Robert N. Brown,* 20 BOLI 157, 162-63 (2000). *See also In the Matter of Richard R. Mabe,* 19 BOLI 223, 229 (2000) (the forum held that a respondent who withheld money from an employee's paycheck because the employee allegedly had damaged the respondent's truck owed claimant the withheld amount in unpaid wages because none of the circumstances in ORS 652.610 were applicable). In this case, Respondent was not entitled to withhold Claimant's wages based on Cho's belief that Claimant had stolen from Respondent. That belief, even if formed in good faith, is also not a defense as to whether Respondent's failure to pay wages was "willful" under ORS 652.150.

In short, Respondent's prospective remedy -- if any -- is in civil or criminal court.

ORDER

NOW, THEREFORE, as authorized by ORS 652.140(1), ORS 652.150, and ORS 652.332, and as payment of the unpaid wages and penalty wages, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **J & S MOVING & STORAGE, INC.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Claimant **Pablo Sandoval** in the amount of FOUR THOUSAND THREE HUNDRED SIXTY-FIVE DOLLARS AND SEVENTY-FIVE CENTS ($4,365.75), less appropriate lawful deductions, representing $2,205.75 in gross earned, unpaid, due and payable wages and $2,160.00 in penalty wages; plus interest at the legal rate on the sum of $2,205.75 from June 1, 2010, until paid, and interest at the legal rate on the sum of $2,160.00 from July 1, 2010, until paid.
