

**BRAD AVAKIAN**  
COMMISSIONER



**CHRISTIE HAMMOND**  
DEPUTY COMMISSIONER

**BUREAU OF LABOR AND INDUSTRIES**

**BEFORE THE COMMISSIONER  
OF THE BUREAU OF LABOR AND INDUSTRIES  
OF THE STATE OF OREGON**

In the Matter of:

**AUTOTEAM LLC, GLOBAL AUTO  
MOTORS, LLC and DRIVE CREDIT  
LLC,**

Respondents.

Case No. **01-15**

FINDINGS OF FACT  
ULTIMATE FINDINGS OF FACT  
CONCLUSIONS OF LAW  
OPINION  
ORDER

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**SYNOPSIS**

Although credible evidence established that Respondent Autoteam employed Claimant, the evidence was not sufficiently reliable to support the number of work hours claimed or whether the Claimant was paid for all hours worked. Based on the lack of evidence establishing that Respondents failed to pay Claimant for all wages owed, the Amended Order of Determination alleging unpaid wages, penalty wages and civil penalties was dismissed. ORS 652.140; ORS 652.150; ORS 653.055; ORS 652.025.

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The above-entitled case came on regularly for hearing before Kari Furnanz, 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 13, 2015, in the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Suite 1045, Portland, Oregon.

1 The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by  
2 administrative prosecutor Adriana Ortega, an employee of the Agency. Wage claimant  
3 James Cleary ("Claimant") did not appear to testify and the Agency offered no  
4 explanation for his absence. Autoteam LLC, Global Auto Motors, LLC, and Drive Credit  
5 LLC ("Respondents"), were represented by their attorney, Richard Franklin. Chris  
6 Turner, identified as the "principal" for Autoteam LLC was also present.

7 The Agency called BOLI Wage and Hour Compliance Specialist Bernadette Yap-  
8 Sam as a witness (by telephone). Respondents called Autoteam owner Chris Turner as  
9 a witness (in person).

10 The forum received into evidence:

- 11 a) Administrative exhibits X-1 through X-9;  
12 b) Agency exhibits A-1 through A-22, A-24 through A-31, and A-34; and  
13 c) Respondents' exhibit R-2.  
14

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

19 **FINDINGS OF FACT – PROCEDURAL**

20 1) On April 4, 2014, Claimant filed a wage claim and assignment of wages  
21 with the Agency. (Testimony of Yap-Sam, Ex. A-1)

22 2) On June 13, 2014, the Agency issued Order of Determination ("OOD") No.  
23 14-0972 based on the wage claim filed by Claimant and the Agency's investigation. In  
24 pertinent part, the OOD alleged that:  
25

- 1 • Claimant was employed by and performed work for "Autoteam LLC  
2 and Global Auto Motors LLC and Drive Credit LLC \*\*\* ('Employers')"  
3 from March 14, 2014, through March 22, 2014, at the rate of not less  
4 than \$9.10 per hour.
- 5 • Claimant earned a total of \$728.00 and was paid \$200.00 for his work  
6 and is owed \$528.00 in unpaid, due and owing wages.
- 7 • Employers willfully failed to pay these wages and owe Claimant  
8 \$2,184.00 in penalty wages under ORS 652.140 and ORS 652.150.
- 9 • Employers paid Claimant less than the wages to which he was entitled  
10 and are therefore also liable to Claimant for civil penalties in the  
11 amount of \$2,184.00 pursuant to ORS 653.055(1)(b).

12 (Ex. X-1a)

13 3) On June 19, 2014, Respondents' attorney filed an answer and request for  
14 hearing on behalf of all Respondents. Respondents admitted that Claimant was  
15 employed by Autoteam, but asserted that Claimant "was paid in full in cash," and,  
16 therefore, was not entitled to unpaid wages, penalty wages, or civil penalties.  
17 Respondents denied that Claimant was employed by Global Auto Motors and Drive  
18 Credit. (Ex. X-1b)

19 4) On September 25, 2014, BOLI's Contested Case Coordinator issued a  
20 Notice of Hearing to Respondents, the Agency, and Claimant setting the time and place  
21 of hearing for 9:00 a.m. on January 13, 2015, at BOLI's Portland office. Together with  
22 the Notice of Hearing, the forum sent a copy of the Order of Determination, a multi-  
23 language warning notice, a document entitled "Summary of Contested Case Rights and  
24 Procedures" containing the information required by ORS 183.413, a document entitled  
25 "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. (Exs. X-2, X-2a –  
X-2e)

1           5)     On October 6, 2014, the ALJ ordered the Agency and Respondents each  
2 to submit a case summary including: lists of all persons to be called as witnesses;  
3 identification and copies of all documents to be offered into evidence; and a brief  
4 statement of the elements of the claim, a statement of any agreed or stipulated facts,  
5 and any wage and penalty calculations (for the Agency only). The ALJ ordered the  
6 participants to submit case summaries by December 30, 2014, and notified them of the  
7 possible sanctions for failure to comply with the case summary order. (Ex. X-3)

8           6)     Respondents filed a case summary on December 17, 2014. The Agency  
9 filed a case summary on December 30, 2014. (Exs. X-5, X-6)

10          7)     On January 5, 2014, the ALJ issued an Interim Order that stated:

11           "On December 31, 2015, BOLI's Contested Case Coordinator notified me  
12 and the Agency's administrative prosecutor by email that she had received  
13 a copy of a return receipt postcard from the USPS with reference to a new  
14 charging document -- specifically, an amended Order of Determination  
15 that was apparently issued in this case. A copy of an amended Order of  
16 Determination was not provided to me, nor is it contained in the Contested  
17 Case Coordinator's file.

18           "Given the rapidly approaching hearing date of January 13, 2015, the  
19 Agency is hereby ordered to immediately provide a copy of any amended  
20 Order of Determination to the Contested Case Coordinator and to me, with  
21 a copy to Respondent's counsel."

22 (Ex. X-7)

23          8)     On January 6, 2015, the Agency filed an Amended OOD that was signed  
24 on December 19, 2014, amending its original OOD as follows:

- 25           • Global Auto Motors and Drive Credit are each a successor employer.
- The general business operations of Global Auto Motors are so similar to Autoteam that they indicate a common identity. Both are in the business of selling used motor vehicles, have the same address as their principal place of business, and there was no lapse in time between Autoteam's cessation of operations and Global Auto Motors initiation of operations. Both had the same individual employed as

1 manager and responsible for hiring and firing employees. Global Auto  
2 Motors offers the same services offered by Autoteam: the sale of used  
3 motor vehicles.

- 4 • The general business operations of Drive Credit are so similar to  
5 Autoteam that they indicate a common identity. Both are in the  
6 business of selling used motor vehicles. Both conduct business on  
7 contiguous parcels of land and share an entrance to the properties.  
8 The period of time between Autoteam's cessation of operations (March  
9 22, 2014) and Drive Credit's initiation of operations (April 2014) was  
10 brief. Both had the same individual employed as manager and  
11 responsible for hiring and firing employees. Drive Credit offers the  
12 same services offered by Autoteam: the sale of used motor vehicles.
- 13 • Autoteam and the successor employers are jointly and severally liable  
14 for the full amount of alleged unpaid wages and interest.

15 The Amended OOD stated that the Respondents must either pay the full amount of the  
16 wage claim, penalty wages and civil penalties, or present a written request for a  
17 contested case hearing within 20 days of receipt of the OOD. (Ex. X-8)

18 9) The Agency submitted an amended case summary on January 9, 2015,  
19 which added an additional exhibit – A-35, comprised of a copy of the Amended OOD  
20 and a copy of a return mail receipt directed to "Rick Franklin, P.O. Box 2187, Gresham,  
21 OR 97030." The return mail receipt bears an unreadable signature on the back of the  
22 receipt in the Box B "Received by" section, and in the "Date of Delivery" section there is  
23 a handwritten notation of "12/27/14." The front of the receipt bears a copy of a mailing  
24 label addressed to BOLI's Contested Case Coordinator, and also contains the following  
25 handwritten notation "#01-15, AO, Amended OOD." Additionally, the front of the return  
mail receipt bears a stamp indicating it was postmarked December 27, 2014, in  
Portland, Oregon. (Agency Amended Case Summary; Ex. A-35)

10) At the commencement of the hearing, the ALJ asked Respondents'  
attorney, Richard Franklin, if he had received the amended case summary with attached  
Exhibit A-35 (the Amended OOD). Mr. Franklin indicated he had received the Amended

1 OOD and that his signature was in the Box B "Received by" section of the return mail  
2 receipt. He could not recall the date when he had received the document, as he had  
3 not been to the post office to pick up mail for a period of time during the Christmas  
4 holidays. He stated that he needed additional time on behalf of his clients to respond to  
5 the revised allegations in the Amended OOD and to arrange for additional witnesses  
6 and exhibits to address the successor liability allegations, and requested a  
7 postponement of the hearing. Ms. Ortega objected to the request to postpone the  
8 hearing, but agreed that Respondents were entitled to additional time to respond to the  
9 Amended OOD. The ALJ ruled that Respondents could have an extension until  
10 January 20, 2015, to respond to the Amended OOD. The ALJ denied, in part,  
11 Respondents' request to postpone the hearing, and ruled that the hearing would  
12 proceed as scheduled as to the liability of Respondent Autoteam. However, the hearing  
13 would be postponed as to the successor liability allegations against the other two  
14 Respondents and would be reconvened at a later date to address those issues.  
15 (Hearing Record)

16 11) Claimant James Cleary was not at the hearing. No explanation as to the  
17 reason for his absence was provided. (Hearing Record)

18 12) The Agency and Respondents stipulated to the follow facts:

- 19
- Claimant was employed by Autoteam as a used car salesman.
  - Claimant was to be paid the greater of commission or minimum wage.
  - Claimant was employed for "at least the period March 14, 2014 to  
20 March 21, 2014."  
21

22 (Stipulation of Participants).

23 13) Both sides were given the opportunity to present witness testimony and  
24 evidence on the issue of liability for unpaid wages, penalty wages and civil penalties  
25 and the record on those issues was closed. (Entire Record)

1           14) At the conclusion of the hearing, Mr. Franklin requested that the ALJ first  
2 issue a ruling on liability as to unpaid wages and then re-convene the hearing, if  
3 necessary, to rule on the successor employer allegations, thereby avoiding a potential  
4 second hearing. Ms. Ortega agreed that Mr. Franklin's proposal "makes sense" and  
5 she had no objections to the proposal. (Entire Record)

6           15) Following the hearing, the ALJ issued an Interim Order on January 14,  
7 2015, that stated:

8           "During the hearing for this matter held on January 14, 2015,  
9 Respondents' counsel requested additional time to file a response to  
10 address the allegations raised in the Amended Order of Determination  
11 ("AOOD"). Administrative Prosecutor Adriana Ortega indicated that she  
12 did not object to Respondents' request to address the revisions to the  
Agency's allegations. Therefore, Respondents may have until January 20,  
2015, to file a response to address the amended allegations raised in the  
AOOD."

13 Footnote 1 in the Interim Order further stated:

14           "In the event the hearing is reconvened to address the successor in  
15 interest allegations raised in the AOOD and an answer to the AOOD has  
16 not been filed by the above deadline, then Respondents' answer to the  
original Order of Determination will be deemed its answer to the AOOD.  
839-050-0140(2)(b)."

17 (Ex. X-10)

18           16) On January 19, 2015, Respondents filed an amended case summary  
19 listing additional witnesses. The amended case summary also included a "Legal Memo"  
20 arguing that, "[t]he agency's failure to produce [Claimant] Mr. Cleary to testify and be  
21 cross-examined under oath or affirmation, should be absolutely fatal to its case against  
22 the employer." (Ex. X-11)

23           17) The Agency filed a Motion to Disregard Respondent's amended case  
24 summary on January 29, 2015, stating that it was untimely because the Interim Order of  
25

1 October 6, 2014, required case summaries to be filed no later than December 30, 2014.

2 Respondents did not file a response to the Agency's motion. (Ex. X-12)

3 18) The ALJ issued an Interim Order on February 23, 2015, granting the  
4 Agency's motion with respect to the "Legal Memo" liability argument, and denying the  
5 motion to the extent the amended case summary listed new witnesses to discuss the  
6 successor in interest theory raised in the AOOD. (Ex. X-13)

7 19) The ALJ issued a proposed order on March 2, 2015, that notified the  
8 participants they were entitled to file exceptions to the proposed order within ten days of  
9 its issuance. Neither the Agency nor Respondents filed any exceptions.

#### 10 **FINDINGS OF FACT – THE MERITS**

11 1) At all times material herein, Respondent Autoteam was an Oregon  
12 corporation that conducted a used car sales business with its principal place of business  
13 on 6850 SE 82<sup>nd</sup> Ave. in Portland, Oregon. Chris Turner managed the business. (Ex.  
14 A-31, Testimony of Turner)

15 2) Claimant was employed by Autoteam as a used car salesman. (Ex. X-1b,  
16 p. 2; Testimony of Turner)

17 3) Claimant was to be paid the greater of commission or minimum wage.  
18 (Stipulation of Participants)

19 4) Claimant was hired on March 14, 2014, by Chris Turner and Eddie Estoy.  
20 Typically, when a person is hired, they begin work the next day. He worked at least  
21 until March 21, 2014. (Agency Case Summary, ¶ 8; Entire Record; Testimony of  
22 Turner)  
23  
24  
25

1 5) Autoteam issued a Monday – Friday work schedule listing Claimant as  
2 “Jay.” He was scheduled to be “off” Monday, March 17, 2014,<sup>1</sup> and Tuesday, March 18,  
3 2014, and was scheduled to work the following hours:

<u>Date</u>	<u>Scheduled Hours</u>
4 Wednesday, March 19, 2014	“9-8pm”
5 Thursday, March 20, 2014	“11-8pm”
6 Friday, March 21, 2014	“11am-8pm”
7 Saturday, March 22, 2014	“Bell” <sup>2</sup> (10-8pm)
8 Sunday, March 23, 2014	“10-7pm”

8 (Testimony of Turner; Ex. A-1, p. 6)

9 6) Claimant was frequently “missing” or away from the worksite during his  
10 scheduled shifts. Respondent did not keep a record of the hours actually worked by  
11 Claimant. (Testimony of Turner)

12 7) Claimant worked an undetermined number of hours between March 14  
13 and March 21 or 22, 2014.<sup>3</sup>

14 8) Claimant was paid \$200 with a handwritten check signed by Eddie Estoy  
15 issued from the “Autoteam LLC Expenses Account” on March 20, 2014, and \$400 in  
16 cash from Chris Turner on his last day of work after Claimant complained that he was  
17 not sufficiently paid. Turner considered the \$400 cash payment to be an overpayment.  
18 (Ex. A-31; Testimony of Turner)

19  
20  
21  
22 <sup>1</sup> The forum takes judicial notice of the fact that March 17, 2014, was the first Monday  
after Claimant's hire date of March 14, 2014.

23 <sup>2</sup> Chris Turner credibly testified that “Bell” meant that a salesperson was scheduled to  
24 work from “open to close” and that the hours of the business on Saturday were 10 am to  
8 pm.

25 <sup>3</sup> The forum's reasons for concluding that “Claimant worked an undetermined number of  
hours” are set forth in detail in the Opinion.

1 9) Claimant was terminated from his position on March 21 or 22, 2014. (Ex.  
2 A-1, p. 1; Agency Case Summary, ¶ 8; Testimony of Turner)

3 10) On April 4, 2014, Claimant filed a Wage Claim Form stating that he earned  
4 \$773.50 in wages and was paid only \$200, leaving a balance owing of \$573.50. With  
5 his wage claim form, Claimant submitted two documents regarding the number of hours  
6 he worked: (1) BOLI's WH-127 form with his handwritten notations as to his hours  
7 worked; and (2) a copy of a work schedule for one week with assigned shifts.  
8 (Testimony of Yap-Sam; Ex. A-1, pp. 1-4, 6)

9 11) The BOLI WH-127 calendar form submitted by Claimant had handwritten  
10 entries with the following work hours:

11	Friday	3-14-14	9-8
12	Saturday	3-15-14	9-8
13	Sunday	3-16-14	10-7
14	Monday	3-17-14	10-2/4-8
15	Tuesday	3-18-14	11-7
16	Wednesday	3-19-14	9-6
	Thursday	3-20-14	11-8
	Friday	3-21-14	11-8
	Saturday	3-22-14	9-3

17 (Ex. A-1, p. 4)

18 12) Compliance Specialist Bernadette Yap-Sam was assigned to investigate  
19 Claimant's claim. (Testimony of Yap-Sam; Ex. A-15, p. 1)

20 13) On May 1, 2014, in a response to an email from Ms. Yap-Sam requesting  
21 legible copies of any records regarding Claimant's employment, Claimant sent an email  
22 to Ms. Yap-Sam with an attachment containing a handwritten list of the hours he  
23 claimed he worked. The hours listed were the same as those written on his BOLI WH-  
24 127 form, except were written in a list format on a blank piece of paper. (Ex. A-5, p. 2)  
25

1           14) Respondent's attorney, Richard Franklin, informed Ms. Yap-Sam by email  
2 correspondence on May 28, 2014, that Claimant "has been paid in full," and that he  
3 "was a very short term employee of Autoteam and paid in cash." On October 14, 2014,  
4 Mr. Franklin clarified by email that a check was tendered to Claimant, and that he was  
5 also "tendered \*\*\* \$400 cash at the time he was terminated." (Ex. A-28, p. 1)

6           15) Ms. Yap-Sam was a credible witness in describing the Agency's  
7 investigation, and the documents and information she received from the Claimant and  
8 Respondents. However, she did not have firsthand knowledge of the hours worked by  
9 Claimant and relied entirely on the information he submitted. (Testimony of Yap-Sam)

10           16) Mr. Turner was a credible witness, with one exception. Mr. Turner had an  
11 inherent bias as the owner of Respondent Autoteam and his admission that he was not  
12 always present at the worksite when Claimant was scheduled to work suggested that he  
13 exaggerated the amount of time Claimant was away from the worksite. Specifically, I  
14 find his testimony that Claimant did not show up "three-fourths" of the time and worked  
15 a maximum of 24-25 hours to be essentially a guess based on Mr. Turner's lack of  
16 ability to consistently observe the work site. Accordingly, I have credited Mr. Turner's  
17 testimony that Claimant was often away from the worksite at times he was scheduled to  
18 work, but decline to adopt Mr. Turner's recitation as to the *amount* of time Claimant  
19 worked. (Testimony of Turner; Observation of ALJ)

20           17) The Agency also initially intended to call Janet Frye to testify as a witness.  
21 Respondents objected on the grounds that Janet Frye was not identified as a witness  
22 on the Agency's case summary. The Agency stated the witness was not listed due to  
23 an oversight, and that the witness would discuss the contents of Exhibit A-34. After  
24  
25

1 Exhibit A-34 was admitted into evidence, the Agency withdrew the request to offer  
2 testimony from Janet Frye. (Entire Record)

3 18) Additionally, the Agency indicated it intended to call Ashley and Ryan  
4 Osban as witnesses. After further discussion on the record, the Agency indicated that  
5 these witnesses would be discussing the successor in interest theory and requested  
6 that their testimony be reserved in the event the hearing was later re-convened to  
7 address the successor in interest allegations. (Entire Record)

### 8 **ULTIMATE FINDINGS OF FACT**

9 1) At all material times, Respondent Autoteam employed one or more  
10 persons to perform work in Oregon.

11 2) There is insufficient evidence to determine whether Respondents Global  
12 or Direct employed Claimant.

13 3) In 2014, the state minimum wage was \$9.10.

14 4) Respondent Autoteam paid Claimant a total of \$600.

15 5) There is insufficient reliable evidence to determine the number of hours  
16 Claimant worked for Autoteam or whether he was paid for all hours worked.

17 6) There is insufficient evidence to conclude that Respondents are liable for  
18 unpaid wages to Claimant.

### 19 **CONCLUSIONS OF LAW**

20 1) At all times material herein, Respondent Autoteam was an Oregon  
21 employer that employed Claimant and was subject to the provisions of ORS 652.110 to  
22 652.332.

23 2) The Commissioner of the Bureau of Labor and Industries has jurisdiction  
24 over the subject matter and Respondents herein. ORS 652.310 to 652.405.

25 3) Respondents are not liable for unpaid wages to Claimant.

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

3 5) Respondents are not liable for civil penalties under ORS 653.055 for the  
4 alleged failure to pay Claimant all the wages due at the end of his employment. ORS  
5 653.055.

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

## 9 **OPINION**

### 10 **INTRODUCTION**

11 In a wage claim case, the Agency must first establish a prima facie case  
12 supporting the allegations of its OOD in order to prevail. *In the Matter of Letty Lee*  
13 *Sesher*, 31 BOLI 255, 261 (2011). In this case, the elements of the Agency's prima  
14 facie case are: 1) Respondents employed Claimant; 2) The pay rate upon which  
15 Respondents and Claimant agreed, if other than the minimum wage; 3) The amount and  
16 extent of work Claimant performed for Respondents; and 4) Claimant performed work  
17 for which he was not properly compensated. *See, e.g., In the Matter of Dan Thomas*  
18 *Construction, Inc.*, 32 BOLI 174, 180 (2013).  
19

### 20 **CLAIMANT WAS EMPLOYED BY RESPONDENT AUTOTEAM**

21 The parties stipulated that Claimant was employed by Respondent Autoteam.  
22 This element of the prima facie case is satisfied as to Autoteam.

23 The original OOD asserted that Claimant was also employed by Respondents  
24 Global and Drive. Although the Agency amended the OOD to assert that Global and  
25

1 Drive were successor employers,<sup>4</sup> at hearing the Agency asked that it be permitted to  
2 introduce evidence regarding Global and Drive, and their relationship with Autoteam  
3 based on the allegations in the original OOD. However, when a pleading is amended, it  
4 “supersede[s] the original pleading.” See *Rucker v. Rucker*, 257 Or App 544, 552, 307  
5 P3d 498, 503 (2013) (quoting *Balboa Apartments v. Patrick*, 351 Or. 205, 212, 263 P.3d  
6 1011 (2011)) (internal quotation marks omitted). Accordingly, because the Amended  
7 OOD asserts the *successor* employer theory, the allegations in the original OOD  
8 asserting that Global and Drive were the *actual* employers of Claimant are no longer at  
9 issue in this matter.<sup>5</sup> Accordingly, this element of the prima facie case is satisfied only  
10 as to Autoteam.

11  
12 \_\_\_\_\_  
13 <sup>4</sup> As stated earlier, the parties agreed that the “successor employer” theory of liability as  
to Global and Drive would be addressed at a later hearing date, if necessary.

14 <sup>5</sup> Even if the allegations in the original OOD were still at issue, there was insufficient  
15 evidence to establish that Global and Drive employed Claimant. The Agency has the  
16 burden of providing that Global and Drive were employers and that Claimant was an  
17 employee. *In the Matter of Laura M. Japp*, 30 BOLI 110, 125 (2009). Under ORS  
652.310(1), an “employer” is “any person who in this state, directly or through an agent,  
engages personal services of one or more employees . . . .” Under ORS 652.310(2), an  
“employee” is:

18 “any individual who otherwise than as copartner of the employer or as an  
19 independent contractor renders personal services wholly or partly in this  
20 state to an employer who pays or agrees to pay such individual at a fixed  
21 rate, based on the time spent in the performance of such services or on  
the number of operations accomplished, or quantity produced or handled .  
...”

22 The evidence related to Global and Drive consisted of documents from Oregon’s  
23 Secretary of State and the Multnomah County tax assessor in the Agency’s  
24 investigative file. (Ex. X-7 – X-14) Aside from a physical proximity to Autoteam, there is  
25 no evidence in the record as to the relationship between Autoteam and those two  
businesses. There was also no evidence to establish that Claimant performed any  
services for Global or Drive.

1 **THE PAY RATE TO WHICH RESPONDENT AND CLAIMANT AGREED**

2 The parties stipulated the Claimant was to be paid the greater of commission or  
3 minimum wage. At the time of Claimant's employment, minimum wage in Oregon was  
4 \$9.10 per hour. There was no evidence to indicate that Claimant earned a commission.  
5 Accordingly, the forum concludes he was entitled to be paid at \$9.10 per hour.

6 **AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR AUTOTEAM**

7 It is undisputed that Claimant performed some amount of work for Autoteam.  
8 However, although Autoteam acknowledges employing Claimant for a short period of  
9 time, it failed to produce any records showing the hours worked. It is the employer's  
10 duty to maintain an accurate record of an employee's time worked. *See In the Matter of*  
11 *J. Guadalupe Campuzano-Cazares*, 30 BOLI 48, 59 (2008) (citing *In the Matter of Tina*  
12 *Davidson*, 16 BOLI 141, 148 (1997)).

13 When the employer produces no records, the forum may rely on evidence  
14 produced by the Agency from which "a just and reasonable inference may be drawn."  
15 *In the Matter of J & S Moving & Storage, Inc.*, 31 BOLI 286, 296 (2012), citing *In the*  
16 *Matter of Joseph Francis Sanchez*, 29 BOLI 211, 221 (2007). For example, without  
17 contrary evidence, the forum may rely on a credible testimony as to the amount of hours  
18 worked. *See J & S Moving*, 31 BOLI at 296 (relying on Claimant's credible testimony to  
19 conclude that he worked nine hours). Notably, as set forth in greater detail below, the  
20 credible testimony to support a wage claim need not come from the wage claimant  
21 himself, but can be supported with credible testimony from a co-worker or other person  
22 familiar with the hours worked by Claimant. *See In the Matter of Catalogfinder, Inc.*, 18  
23 BOLI 242, 260-64 (1999). Therefore, the fact that Claimant failed to appear at the  
24 hearing, in and of itself, does not warrant an automatic dismissal of the claims.  
25

1           Ultimately, a wage claimant always bears the burden of proving he performed  
2 work for which he was not properly compensated. *J & S Moving*, 31 BOLI at 299. "In  
3 the past, the forum has declined to speculate or draw inferences about wages owed  
4 based on insufficient, unreliable evidence." *Id.*, citing *In the Matter of Burrito Boy, Inc.*,  
5 16 BOLI 1, 12 (1997). *See also J. Guadalupe Campuzano-Cazares*, 30 BOLI at 59-60  
6 (stating that "the forum will not speculate or draw inferences" about the wages owed to  
7 a claimant when there is no credible evidence to support the assertion that the claimant  
8 maintained a daily record of the hours he worked).

9           More specifically, "[t]he forum has historically rejected wage claims in cases  
10 where claimants do not testify at hearing and no witnesses testify to support their claims  
11 of ... unpaid wages." *In the Matter of John Steensland & Pacific Yew Products, LLC*, 29  
12 BOLI 235, 267 (2007). For example, the forum previously rejected claims for unpaid  
13 wages based on two claimants' "unsworn calendars and incomplete tally sheets." *Id.*  
14 Similarly, the forum rejected the claim of a claimant who did not appear at hearing,  
15 noting that "[w]hile hearsay is admissible in administrative hearings, there was no  
16 further evidence to support the hours claimed [on timecards submitted to the Agency] ...  
17 [and] there were no witnesses to confirm Claimant Bermudez's presence or work  
18 efforts." *In the Matter of La Estrelita, Inc.*, 12 BOLI 232, 245 (1994). As well, the forum  
19 rejected 11 wage claims under the following circumstances:

20           "Although it is undisputed that [the 11 wage claimants] all worked  
21 for ICI, they did not appear to testify and there was no testimony either in  
22 an affidavit form or elicited from an Agency witness, that established their  
23 agreed rate of pay or the amount and extent of their work. The only  
24 evidence supporting their claims was the fact that each was clearly  
25 employed by ICI, the information each wrote on their wage claim forms  
stating their tenure of employment and salary or wage rate, the calendar  
of hours worked each completed at the time they filed their wage claims,  
and Compliance Specialist Sheppard's testimony."

1 *Catalogfinder*, 18 BOLI at 260-61 (1999). After conducting an "extensive review" of final  
2 orders in wage claims, the forum noted that it "has universally relied on credible  
3 testimony and documentation from claimants or witnesses to the claimants' employment  
4 to establish the nature and extent of work performed in wage claim cases." *Id.* at 260-  
5 64. Because there was no testimony from either Claimant or any other credible witness  
6 to support the hours he claimed he worked, this element of the prima facie case has not  
7 been established.

8 **THERE IS INSUFFICIENT EVIDENCE TO CONCLUDE THAT CLAIMANT PERFORMED**  
9 **WORK FOR WHICH HE WAS NOT PROPERLY COMPENSATED**

10  
11 Because there was insufficient evidence to establish the number of hours worked  
12 by Claimant, there is also a lack of evidence as to whether the amounts paid to him  
13 were proper compensation for his hours worked. Therefore, this element of the prima  
14 facie case was also not met.

15 **SUCCESSOR EMPLOYER ALLEGATIONS AGAINST GLOBAL AND DRIVE**

16 Because there is insufficient evidence to support the elements of a prima facie  
17 case, it follows that Global and Drive cannot be liable under the successor employer  
18 theory for any unpaid wages.

19 **ORDER**

20 NOW, THEREFORE, as Respondents have been found not to owe Claimant  
21 James Cleary wages, the Commissioner of the Bureau of Labor and Industries hereby  
22 orders that James Cleary's wage claim against Autoteam LLC, Global Auto Motors,  
23 LLC, and Drive Credit LLC be and is hereby dismissed.  
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DATED this 30 day of March, 2015.



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Brad Avakian, Commissioner  
Bureau of Labor and Industries

ISSUED ON March 31, 2015

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