

BOLI ORDERS

Final Orders Issued By The Commissioner
Of The Oregon Bureau of Labor and Industries

VOLUME 5

Cited: 5 BOLI

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BOLI ORDERS

TABLE OF CONTENTS

Introductory Note	iv
Table of Final Orders	v
BOLI Final Orders	1

INTRODUCTORY NOTE

This fifth volume of BOLI ORDERS contains all of the Final Orders of the Commissioner of the Oregon Bureau of Labor and Industries that were issued between May 6, 1985, and December 11, 1986.

Each Final Order is reported in full text under the official title of the order. Preceding each Final Order is a synopsis, which provides immediate identification of the subject matter of the case and of the primary rulings contained in the order. In the caption of each case the charged party is referred to as the "Respondent." Within the body of some cases the charged party is referred to as the "Employer," the "Contractor," or the "Applicant."

A complete table of the Final Orders in this volume begins on page v. For each Final Order the table shows the page at which the order begins in this volume.

The Bureau of Labor and Industries Digest of Final Orders contains an outline of classifications for BOLI ORDERS. Case holdings and points of Wage and Hour and of Civil Rights law are arranged under classification numbers. The Digest contains a table of the Final Orders and a subject index for the complete set of BOLI ORDERS volumes.

TABLE OF FINAL ORDERS

In the Matter of	5 BOLI
Arnold, Edward (1986)	204
Belinsky, Jorrion (1985)	1
Burke, Michael (1985)	47
Country Auction (1986)	256
Cowdrey, John (1986)	291
Farbee, Art (1986)	268
KBOY Radio Station (1986)	94
Lucille's Hair Care (1985)	13
Miller, Cheryl (1986)	175
Niquette, Richard (1986)	53
Nixon, Marion (1986)	82
Owen, John (1986)	121
P. Miller and Sons Contractors, Inc. (1986)	149
Paauwe, Jon (1986)	168
Pannell, Booker (1986)	228
Short, Lois (1986)	277
Solis, Jose (1986)	180
3 Son Loggers, Inc. (1986)	65
Tracton, Mark (1986)	129
Tracton, Mark (1986)	159
Vankeirsbilck, Fred (1986)	90
Willamette Electric Products Company, Inc. (1985) .	32
Wilson, Judith (1986)	219
Wood, Sheila (1986)	240

**In the Matter of
JORRION BELINSKY,
Respondent.**

Case Number 14-83
Final Order of the Commissioner
Mary Wendy Roberts
Issued May 6, 1985.

SYNOPSIS

Three wage claimants quit with wages due. Respondent admitted his obligation, failed to pay the wages due within 48 hours (or ever), and made no showing of financial inability to pay. Following a default hearing (Respondent failed to appear after receiving the notice of hearing), the Commissioner awarded to the respective claimants \$367 in wages and \$1,102 in penalty wages; \$320 in wages and \$1,200 in penalty wages; and \$150 in wages and \$750 in penalty wages, together with appropriate legal interest on each amount. The Commissioner held that the notice of hearing and the proposed order need to be served on the Respondent by only regular US mail sent to the Respondent's last known address. ORS 652.140; 652.150; 183.464; OAR 839-01-015(1) and (4); 839-01-040; 839-01-045(1).

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was first conducted on May 9, 1984, in Room 221 of the Federal Office Building, 211 East 7th Avenue, Eugene,

Oregon. Due to a question about adequacy of notice, the hearing was conducted de novo, in its entirety, on June 29, 1984, in the South Meeting Room of Harris Hall in the Lane County Courthouse, 125 East 8th Street, Eugene, Oregon. Any reference to the hearing hereinafter concerns just the June 29, 1984, hearing, unless it states otherwise. The Bureau of Labor and Industries (hereinafter the Agency) was represented at hearing by Steve Baker, Compliance Specialist of the Wage and Hour Division of the Agency, and after hearing by Frank Mussell, Assistant Attorney General of the Department of Justice of the State of Oregon. Jorrion Belinsky, the Employer, did not appear at the hearing, either in person or through a representative. Claimants Denise L. Adams and Carolyn Spector were present at the hearing; Claimant Judith K. Grossman was unable to be present.

The agency called as witnesses Claimants Adams and Spector and Compliance Specialist Baker. Not being present, the Employer presented no evidence.

Having fully considered the entire record in the matter, I, Mary Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

**FINDINGS OF FACT –
PROCEDURAL**

1) On November 19, 1981, Denise L. Adams filed with the Wage and Hour Division of the Agency a wage claim which alleged that Jorrion Belinsky (hereinafter the Employer) was her former employer, and that the

Employer had failed to pay wages due to her.

2) On November 19, 1981, Claimant Adams assigned in trust to the Commissioner of the Agency all wages due her from the Employer.

3) On November 19, 1981, Judith K. Grossman filed with the Wage and Hour Division of the Agency a wage claim alleging that the Employer was her former employer and that the Employer had failed to pay wages due to her.

4) On November 19, 1981, Claimant Grossman assigned all wages due her from the Employer to the Commissioner of the Agency in trust for Claimant Grossman.

5) On November 25, 1981, Carolyn Spector filed with the Wage and Hour Division of the Agency a wage claim which alleged that the Employer was her former employer and that the Employer had failed to pay wages due to her.

6) On November 25, 1981, Claimant Spector assigned in trust to the Commissioner of the Agency all wages due her from the Employer.

7) The Agency assigned Compliance Specialist Steve Baker of the Wage and Hour Division to handle the above-described claims for the Agency, and Mr. Baker did that until adjournment of the hearing in this matter.

8) On November 20, 1981, for Claimants Adams and Grossman, and on November 27, 1981, for Claimant Spector, and again for all the Claimants on December 10, 1981, the Agency sent the Employer a notice of each of the above-described wage

claims. Each notice included a demand for payment of the wages due.

On December 21, 1981, the Agency received a letter from Robert Miller, an attorney representing the Employer, which acknowledged the Employer's awareness of the Claimants' wage claims and stated that the Employer "does not deny that he owes the sums demanded and will pay those debts as soon as possible." Mr. Miller asked that the December 21, 1981, deadline for full payment of the claims given in the Agency's above described December 10, 1981, demand letters be extended for a reasonable time. Mr. Miller cited the Employer's "mental and emotional breakdown" as the cause of his failure to pay the wages he owed the Claimants.

In response to Mr. Miller's request, the Agency gave the Employer through January 11, 1982, to pay in full the wages he owed the Claimants.

9) Thereafter, the Agency heard nothing from the Employer until December 12, 1983, (see Procedural Finding of Fact 16 below), and the Claimants' wage claims have remained unpaid.

10) On April 30, May 2, and May 4, 1982, Claimants Grossman, Spector, and Adams, respectively, authorized the Agency to seek collection of their wage claims through the administrative proceedings provided for in ORS 652.330 and 652.332.

11) On May 17, 1982, the Commissioner of the Agency issued an Order of Determination, which found that the Employer owed:

a) Claimant Adams \$367.50 in unpaid wages for work she had

performed, and \$1,102.00 in penalty wages, plus interest on both of those sums;

b) Claimant Grossman \$320.00 in unpaid wages for work she had performed, and \$1,200.00 in penalty wages, plus interest on both of those sums; and,

c) Claimant Spector \$150.00 in unpaid wages for work she had performed, and \$1,125.00 in penalty wages, plus interest on both of those sums.

The Order of Determination directed the Employer to pay these amounts to the Commissioner of the Agency.

12) On or about May 26, 1982, this Order of Determination was served on each Claimant.

13) The Agency transmitted the Order of Determination to the Employer by sending it through certified US mail to the Employer's last known address. On or about June 17, 1982, the US Postal Service returned the Employer's Order of Determination to the Agency marked "unclaimed." On or about June 23, 1982, the Marion County Sheriff's Office attempted to serve the Order of Determination on the Employer personally but was unsuccessful because the Employer had moved from his last known address.

14) On August 9, 1982, the Commissioner of the Agency dismissed this proceeding against the Employer because the Agency had not been able to determine the Employer's whereabouts and deliver to him the Order of Determination.

15) At some time between the August 9, 1982, dismissal and November 15, 1983, the Claimants supplied

the Agency with a new address for the Employer. In response, on November 15, 1983, the Commissioner of the Agency issued a second Order of Determination against the Employer, which made findings and a directive identical to those in the above-described May 17, 1982, Order of Determination. This Order of Determination was personally served on the Employer on November 29, 1983.

16) On or about December 12, 1983, the Employer filed with the Agency a request for a hearing in this matter and an answer to the November 15, 1983, Order of Determination. In this answer's computation of the wages the Employer owed the Claimants, the Employer cited as each Claimant's rate of pay a figure less than the rate cited in the Order of Determination; cited a starting date of employment for Claimant Grossman which differed from the date on the Order of Determination; cited an ending date of employment for Claimant Spector which differed from the date on the Order of Determination; and cited lesser total amounts of wages due Claimants Grossman and Adams than those on the Order of Determination. Nevertheless, the answer implicitly admitted that the Employer owed all the Claimants wages for work they performed during the second half of October 1981, and admitted that the Employer owed Claimant Spector the wages cited on the Order of Determination. The answer also affirmatively alleged that the Employer was financially unable to pay the wages due the Claimants, citing financial difficulties which, according to the Employer, had forced him in March 1982 to close the

business for which the Claimants had worked. Finally, the answer stated that the Employer would not be represented by counsel at the hearing.

17) On February 7, 1983, the forum transmitted to the Employer and each Claimant a Notice of the Time and Place of the first hearing in this matter by certified US mail, return receipt requested, to the last known address of each of them. Claimants Adams and Spector received these notices. Claimant Grossman did not, as she had moved and the forum had no record of her new address. However, Claimants Adams and Spector made Claimant Grossman aware of the contents of this Notice before the hearing to which it pertained occurred.

18) The first hearing in this matter was held on May 9, 1984, as scheduled. Because neither the Employer nor any representative of the Employer appeared at that hearing, it was conducted as a default proceeding, as provided in ORS 183.415(6).

19) After the conclusion of the May 9, 1984, hearing, the Hearings Unit of the forum notified the Presiding Officer that it did not possess a return receipt showing that the Employer had received the Notice of the Time and Place of the May 9, 1984, hearing. Accordingly, to insure that the Employer had received timely notice of the hearing in this matter, the Presiding Officer directed the Hearings Unit to schedule a second hearing for this matter, to be held after the Hearings Unit had proof that the Employer had received notice of the time and place of that hearing.

20) On May 30, 1984, the forum sent by certified US mail, return receipt requested, a Notice of the Time and

Place of a second hearing to the Employer and each Claimant. The Claimants had supplied a current address for the Employer, which was more recent than the one to which the Notice of the first hearing had been sent, and the May 30, 1984, Notice was sent to this more recent address. On June 8, 1984, the forum received from the US Postal Service a return receipt for the Notice to the Employer dated June 2, 1984, and bearing what purports to be the Employer's signature in the space labeled "I have received the...(May 30, 1984) Notice." Consequently, the forum concluded that the Employer had received that Notice, and the second hearing was held.

Thereafter, on or about July 5, 1984, the Agency received back the envelope enclosing the May 30, 1984, Notice to the Employer, marked "unclaimed." However, the posting of this notice by certified US mail, return receipt requested, to the Employer's last known address, and the prompt return of a signed return receipt therefor, certainly shows service, and the forum therefore need not speculate on the reason for or import of the return of the Notice one month after the return of the signed receipt for it. (See the Opinion below.) Consequently, the forum concludes that the Notice of the Time and Place of the second hearing was duly served on the Employer. This Notice was also duly served on each Claimant.

21) The entire record in this matter was created at the hearing de novo, which took place on June 29, 1984, as scheduled. Neither the first hearing nor the record created at it was considered by the forum for any purpose

herein other than explaining the procedural history of this matter.

22) Before the commencement of the hearing, the Employer and each Claimant received from this forum a copy of "Information Relating to Civil Rights or Wage and Hour Contested Case Hearings." The two Claimants present at the hearing stated that they had read a copy of this exhibit, had no questions about it, and were satisfied that they understood it.

23) Because neither the Employer nor any representative of him appeared at the June 29, 1984, hearing, it was conducted as a default proceeding as provided in ORS 183.415(6).

24) On September 11, 1984, the forum received a letter concerning this matter from Assistant Attorney General Mussell, written on behalf of the Agency. The forum admitted this letter into the record and transmitted a copy thereof to the Employer.

25) The forum issued a Proposed Order in this matter on November 12, 1984. Through the local sheriff's office, the forum tried to personally serve it on the Employer at his last known address. However, in two attempts, the sheriff was unable to make personal delivery and was informed that the Employer had moved and left no forwarding address. On March 28, 1984, the forum transmitted the Proposed Order to the Employer by depositing it in regular, first class US mail to the Employer's last known address. As explained in the Opinion below, this accomplished whatever service of the Proposed Order may be required herein.

26) The forum has admitted into the record administrative documents relating to service of the Proposed Order. A copy of this exhibit has been transmitted to the Employer.

27) Exceptions to the Proposed Order could have been filed within twenty days of the date of service of the Proposed Order. OAR 839-01-040(2). Following the guidance of ORCP 10C, in the case of service by mail, this forum added three days to the latter twenty day period in calculating the due date for exceptions. Consequently, exceptions to this Proposed Order were due by April 30, 1984. The forum received no exceptions to the Proposed Order by (or since) that date.

28) On or about December 27, 1984, the forum received another letter concerning this matter from Mr. Mussell, written on behalf of the Agency. The forum has admitted this letter into the record and transmitted a copy of it to the Employer.

FINDINGS OF FACT - THE MERITS

1) During times material herein, the Employer practiced as a chiropractic physician. In this business, the Employer employed one or more persons in the State of Oregon.

Claimants Adams and Spector

2) The Employer employed Claimant Adams in the Employer's above-described business from August 15, 1981, through October 28, 1981. Claimant Adams worked as the Employer's receptionist and bookkeeper and assisted the Employer with his patients. As bookkeeper, Claimant Adams knew the rate of pay for each of the Employer's employees.

3) The Employer employed Claimant Spector in the Employer's above-described business from August 15, 1981, through October 31, 1981. Claimant Spector worked as the Employer's office manager throughout that time, managing his business and assisting with patient physiotherapy.

4) The Employer paid Claimants Adams and Spector, at the rate of \$4.00 per hour, for all work they performed for him through October 14, 1981.

6) From the start of her employment with the Employer through October 14, 1981, Claimant Adams worked on an "as needed" basis. The number of hours she worked each week steadily increased during this time until October 15, 1981, when she began working on a full-time basis.

7) Throughout her employment with the Employer, Claimant Spector worked for him whenever she was available. (During the school year, she also worked as a substitute teacher.)

8) From October 15, 1981, through October 28, 1981, Claimant Adams worked at least 73.5 hours for the Employer, during ten work days, at the rate of \$5.00 per hour, earning total gross wages of \$367.50. To date, the Employer has paid her nothing for this work.

9) From October 15, 1981, through October 31, 1981, Claimant Spector worked a total of thirty hours for the Employer, during approximately six work days, at the rate of \$5.00 per hour, earning total gross wages of \$150.00. To date, the Employer has paid her nothing for this work.

Claimant Grossman

10) The Employer employed Claimant Grossman in the Employer's above-described business from October 19, 1981, through October 28, 1981. During this employment, Claimant Grossman worked full-time, filling in for Claimant Adams or Spector when either of them was occupied or absent. Most of Claimant Grossman's work time was spent doing reception, book-keeping, and typing work. She worked the same hours and in the same room, for the most part, as Claimant Adams.

11) When he hired Claimant Grossman, the Employer orally agreed to pay her at the rate of \$5.00 per hour for work she performed.

12) From October 19, 1981, through October 28, 1981, Claimant Grossman worked a total of 64 hours for the Employer, during eight work days, at the rate of \$5.00 per hour, earning total gross wages of \$320.00. To date, the Employer has paid her nothing for this work.

13) During the pay period from October 15 through October 31, 1981, the Claimants were the Employer's only employees.

14) During all times material herein, the employees kept their work time record for the Employer and calculated their own paycheck amounts each pay period. The Employer never disputed or adjusted downward these time records or paycheck amounts. Although the Employer sometimes paid his employees several days late, after stalling and forcing them to ask for their wages, the Employer never maintained that he did this because he was

unable to pay them. The paychecks the Employer issued had no stubs.

15) On October 28, 1981, while away from his office, the Employer was taken into custody and committed to a state mental institution. The Claimants, who were all working at the Employer's office that day, learned of this occurrence immediately.

16) Claimants Adams and Grossman worked for the Employer for the rest of October 28, 1981, trying to cancel existing patient appointments. Thereafter, having voluntarily terminated their employment at the close of business on October 28, 1981, neither of them worked again for the Employer.

17) From the time she learned of the Employer's commitment on October 28, 1981, through at least part of October 31, 1981, Claimant Spector did what was necessary to close the Employer's office, fulfilling her responsibilities as his office manager. She voluntarily terminated her employment when she finished working on October 31, 1981, and she has not since worked for the Employer.

18) None of the Claimants had a contract with the Employer for a definite period of employment.

19) On the instructions of law enforcement authorities and/or the Employer's attorney, the Claimants did not take anything from the Employer's office when they terminated their employment, including records to verify their work time or wages due. Claimants Adams and Spector did copy some figures from the Employer's work time and wage records, and their fig-

ures are shown on exhibits in the record.

20) The Employer was released from his commitment one to three weeks after October 28, 1981. Soon, if not immediately, thereafter, the Employer resumed his chiropractic practice.

Before his release from commitment, the Employer telephoned Claimants Adams and Spector, asking them to return to work for him and promising them that he would pay them the wages he owed them as soon as he was released. (There is no evidence as to whether the Employer made the same request of and promise to Claimant Grossman.) In response, Claimant Spector and Claimant Adams declined to return to work for the Employer and made clear to him that they wanted to be paid the wages he owed them.

After the Employer was released from his commitment, Claimant Adams telephoned him every day for two weeks and asked to be paid the wages the Employer owed her. In response, the Employer told her that he would pay her "tomorrow." Claimant Spector made similar demands by telephone, and Claimant Grossman also asked the Employer to pay her the wages he owed her.

After the Employer had resumed his practice, Claimants Spector and Adams went to his office and asked him to pay them their wages. The Employer acknowledged that he owed them the wages they demanded and told them they had no right to ask to be paid then, and that he would pay them when he was ready.

At no time during the interchanges with the Claimants described in this Finding did the Employer argue about whether he owed the wages demanded or about the amount of the wages he owed, and the Employer never told the Claimants he could not afford to pay these wages.

21) As of October 28, 1981, the Employer's chiropractic practice was flourishing economically and growing rapidly. The Employer had a continuing paying clientele, which brought in referrals and completely filled his October 1981 appointment schedule. In response to the growth of his practice, the Employer had made Claimant Adams a full-time employee and hired Claimant Grossman to work full-time, both as of October 15, 1981. At the same time, the Employer had raised his staff's rate of pay 25 percent, to \$5.00 per hour. At that time, because of his prosperity, the Employer also had promised his staff another pay raise, to \$6.00 per hour, in early 1982.

The Employer's financial prosperity was also manifested in his October 1981 acquisition of office furniture and other appointments, as well as uniforms for his staff and new business clothing for himself. The Employer drove an expensive automobile between July 1981 and (at least) the Spring of 1984 and, in November or December of 1981, visited Claimant Spector in a limousine (in an effort to persuade her to return to his employ).

In November or December of 1981, the Employer was able to pay wages to at least two of the people he employed after he resumed his practice subsequent to his release from commitment.

ULTIMATE FINDINGS OF FACT

1) During times specified in Ultimate Finding of Fact 3 below, the Claimants were three individuals who (other than as copartners or independent contractors of the Employer) rendered personal services to the Employer, wholly in the State of Oregon. The Employer agreed to pay the Claimants at a fixed rate for these services, based upon the time they spent performing them.

2) During times specified in Ultimate Findings of Fact 3 below, the Employer was a person who in the State of Oregon directly engaged the personal services of two or more employees, in the operation of his practice as a chiropractic physician.

3) In his above-mentioned business, the Employer employed as office employees Claimant Adams from August 15, 1981, through October 28, 1981; Claimant Spector from August 15, 1981, through October 31, 1981; and Claimant Grossman from October 19, 1981, through October 28, 1981. At no time material herein did any of the Claimants have a contract for a definite period of employment with the Employer.

4) For the services they rendered in their above-described employment by the Employer between October 15, 1981, and October 31, 1981, the Claimants earned the following total gross wages:

Claimant Adams: \$367.50 (during ten days of work)

Claimant Grossman: \$320.00 (during eight days of work)

Claimant Spector: \$150.00 (during approximately six days of work)

The Employer has not paid any of the Claimants any of these wages.

5) Due to the Employer's commitment to a mental institution on October 28, 1981, and the resulting (temporary) cessation of his practice, Claimants Adams and Grossman voluntarily terminated their employment with the Employer at the close of business on October 28, 1981. For the same reason, after closing the Employer's office in her capacity as office manager, Claimant Spector voluntarily terminated her employment with the Employer on October 31, 1981. Each Claimant gave less than 48 hours notice of her intention to voluntarily terminate her employment.

6) Before his release from commitment one to three weeks after October 28, 1981, the Employer was aware that he owed Claimants Adams and Spector the above-cited wages. By no later than the time he received the notice of wage claims dated November 20, 1981, the Employer was aware that he owed Claimant Grossman the above-cited wages. The Employer willfully failed to pay any of these wages to any of the Claimants.

7) The Employer has not shown that he was financially unable to pay the above-described wages he owed the Claimants at the time they accrued (or at any later time). A preponderance of the evidence on the record indicates, and so this forum finds, that the Employer was capable of paying those wages at the time they accrued.

8) Claimant Adams's average daily rate of pay during the period for which she had not been paid wages by the Employer was \$36.75. Claimant Grossman's average daily rate of pay

for the same period was \$40.00, and Claimant Spector's was \$25.00. (These amounts were calculated by dividing the total wages earned during this time period by the number of days each Claimant worked during the same period.)

CONCLUSIONS OF LAW

1) During times material herein, the Employer was an employer, and the Claimants were his 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 the persons herein.

3) During their employment by the Employer between October 15, 1981, and October 31, 1981, Claimant Adams earned total gross wages of \$367.50, Claimant Grossman earned total gross wages of \$320.00, and Claimant Spector earned total gross wages of \$150.00. These earned wages were unpaid when Claimants quit their employment with the Employer (Claimants Adams and Grossman on October 28, 1981, and Claimant Spector on October 31, 1981).

4) The above-cited total gross wages became due and payable 48 hours after the Claimants quit their employment with the Employer. The Employer's failure to pay the Claimants these wages when they became due and payable constitutes a violation of ORS 652.140.

5) In accordance with the mandate of ORS 652.150, because the Employer willfully failed to pay the above-

cited wages to Claimants as provided in ORS 652.140, and because the Employer has not shown that he was financially unable to pay those wages at the time they accrued, the wages of each Claimant continued at the average daily rates cited in Ultimate Finding of Fact 8 above from the due date thereof for thirty days (the maximum period for such accrual), as penalties for the Employer's nonpayment of the Claimants' earned, due, and payable wages.

These penalty wages total \$1,102.50 for Claimant Adams, \$1,200.00 for Claimant Grossman, and \$750.00 for Claimant Spector. (These sums were computed by multiplying each Claimant's average daily rate of pay at termination by thirty days.)

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 and must order the Employer to pay the Claimants the above-cited earned, unpaid, due, and payable wages and the above-cited sums in penalty wages, plus interest on those wages and penalty wages.

OPINION

Neither the Employer nor any representative of him appeared at the hearing of this matter. In fact, a response by the Employer's attorney to notices of the instant wage claims, and the Employer's answer to the Order of Determination, are the Employer's only contributions to the record herein. These exhibits contradict each other in significant part and consist merely of unsubstantiated assertions. Having therefore offered no evidence at all in

support of the only defenses he has raised (which are contained in the answer), the Employer has defaulted in this matter.

In a default situation, the task of this forum is to determine if the Agency has made a prima facie case on the record that the Employer has violated the law. ORS 183.415(6). In this matter, the evidence on the record shows that the Employer owes earned, unpaid, due, and payable wages to each Claimant in the amounts specified above, and that the Employer has incurred penalty wages for his willful failure to pay those wages. This evidence is not only uncontroverted, but complete, credible, and persuasive, and the best evidence available given the Employer's failure to appear, and it clearly constitutes a prima facie case that the Employer has violated ORS 652.140.

Although this forum has made findings based upon the Agency's evidence of the Employer's financial ability to pay the Claimants, and has concluded that the Employer was capable of paying their wages, this forum emphatically notes that it is the Employer's burden to show any financial inability to pay, not the Agency's burden to show the Employer's financial ability to pay the Claimants' wages. ORS 652.150 and 183.450(2).

Service

The Agency originally apprised the Employer of the instant wage claims by sending him notices of those claims. Through his attorney, the Employer acknowledged receipt of these notices and responded thereto. Since that time, it has been difficult for first the Agency, and then the forum, to cause pleadings, orders, and notices

concerning this matter to actually be delivered to the Employer, because the Employer has moved without notifying the Agency or the forum of his whereabouts, and possibly at least once has rejected service by certified mail. In fact, the Agency dismissed its original Order of Determination (which, as the document initiating this administrative proceeding (OAR 839-01-015(1)), is the equivalent of a "complaint" herein) because it could not locate the Employer in order to deliver that Order to him personally or by certified mail. Ultimately, the Agency did locate and personally serve upon the Employer the operative Order of Determination, thereby establishing jurisdiction over him for his administrative proceeding.

After receiving that Order of Determination, the Employer filed an answer and requested a hearing on the Order. Accordingly, the forum set such a hearing and sent a notice of its time and place to the Employer's last known address by certified US mail, return receipt requested. When, after that hearing, the forum realized that it did not have a return receipt from the Employer for that mailing, the forum decided to hold the hearing over again, to insure that the Employer actually received timely notice of the contested case hearing. The forum received a return receipt for the notice of the time and place of the second hearing, which the forum had sent by certified US mail to the Employer's last known address, with what purports to be the Employer's signature as receiver. Accordingly, the forum presumed that the Employer had received that notice, and it held the second hearing.

Applicable law enunciates no requirements for the manner of transmitting a notice of the time and place for hearing to a respondent if that respondent has already been personally served with the "complaint" which initiated the proceeding. However, OAR 839-01-015(4) provides that any party filing a document with the forum must serve it on its adversary by depositing it in regular US mail. It is logical to presume, therefore, that absent any provision requiring more, once the document initiating a proceeding has been personally served on a respondent, the forum can serve its notice of the time and place of hearing on that respondent by regular US mail. The forum's depositing of a hearing notice in certified US mail, return receipt requested, to the Employer's last known address, plus subsequent return of that receipt signed by the Employer, certainly accomplished service of that notice by mail. The fact that, after the second hearing and one month after the forum had received the signed return receipt for the Employer's notice of that hearing, the forum received back that notice in an envelope marked "unclaimed" does not change the latter conclusion.

The forum utilized two means to serve the Proposed Order on the Employer: personal service and transmission by regular US mail to the Employer's last known address. Personal service was unsuccessful: the Los Angeles County Sheriff's Department returned the Proposed Order to the forum because the sheriff was unable to make personal delivery at the Employer's last known address.

Has this forum met the requirement of ORS 183.464 and OAR 839-01-040 that a Proposed Order be "served" on the Employer, a party to this contested case hearing? Service, as that term is used in this statute and rule, is not defined or described. However, OAR 839-01-045(1) requires that a Final Order in a contested case be served "personally or by regular US mail." It is logical that requirements for serving a Proposed, i.e., tentative, Order are no more stringent than requirements for serving a Final, i.e., enforceable, Order. Consequently, this forum has concluded that it could have accomplished service of the Proposed Order herein personally or by regular US mail. This conclusion is also supported by ORCP 9, the Oregon law concerning service or orders of a judicial forum, the other forum for wage claims such as those herein. Part A of ORCP 9 indicates that no service of an order of a judicial forum need be made at all to a party in default for failure to appear. Part A also provides, in pertinent part, that when service of an order is required, it shall be made by delivering a copy of the order to a party or by mailing it to the party's last known address, and that service by mail is complete upon mailing. It is logical that requirements for serving a Proposed Order of an administrative forum such as this are no more stringent than the (latter) requirements for serving a (final) order of a judicial forum. Consequently, given the Employer's default herein by failing to appear at hearing, it may be unnecessary for the forum to serve the Proposed Order on the Employer. However, even if such service is required, where, as herein, the original "complaint" has been personally

served upon the responding party, depositing the Proposed Order in regular US mail to the last known address of that responding party certainly accomplishes the services required by ORS 183.464 and OAR 839-01-040. Accordingly, the Proposed Order herein was duly served on the Employer, as may have been required by the latter statute and rule.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Jomion Belinsky to pay to the Bureau of Labor and Industries the following sums:

1) In trust for Denise L. Adams, the sum of ONE THOUSAND FOUR HUNDRED SEVENTY DOLLARS (\$1,470.00), (representing \$367.50 earned, unpaid, due, and payable wages, and \$1,102.50 in penalty wages) plus interest at the rate of nine percent per year, for the period from November 1, 1981, until paid on \$367.50, and for the period from December 1, 1981, until paid on \$1,102.50;

2) In trust for Judith K. Grossman, the sum of ONE THOUSAND FIVE HUNDRED TWENTY DOLLARS (\$1,520.00), (representing \$320.00 in earned, unpaid, due, and payable wages and \$1,200.00 in penalty wages) plus interest at the rate of nine percent per year, for the period from November 1, 1981, until paid on \$320.00, and for the period from December 1, 1981, until paid on \$1,200.00;

3) In trust for Carolyn Spector, the sum of NINE HUNDRED DOLLARS

(\$900.00), (representing \$150.00 in earned, unpaid, due, and payable wages and \$750.00 in penalty wages) plus interest at the rate of nine percent per year, for the period from December 1, 1981, until paid on \$150.00, and for the period from January 1, 1982, until paid on \$750.00.

**In the Matter of
Lucille Ogden, dba
LUCILLE'S HAIR CARE,
Respondent.**

Case Number 26-81

On Remand from the Oregon Supreme Court, Amended Final Order of the Commissioner

Mary Wendy Roberts

Issued August 14, 1985.

SYNOPSIS

Respondent considered Complainant, a 30-year-old experienced hairstylist, too young to service Respondent's elderly clientele, and hired a 49-year-old applicant. Rejecting Respondent's allegation that Complainant was unavailable to work on weekends, the Commissioner found that Respondent's refusal to hire Complainant was due to her age, which was an unlawful employment practice. In fashioning a remedy, the Commissioner computed the average daily earnings of Respondent's other hairstylist employees at times material and awarded lost wages

at that rate for the time Complainant would have worked, less both her actual and potential earnings elsewhere, for a total of \$12,780, plus interest. The Oregon Court of Appeals affirmed the Commissioner's Final Order, *In the Matter of Lucille's Hair Care*, 3 BOLI 286 (1983), but reduced the wage loss award. *Ogden v. Bureau of Labor*, 68 Or App 235, 682 P2d 802 (1984). The Oregon Supreme Court reinstated the compensation award and remanded the Order to the Commissioner for recalculation of interest. *Ogden v. Bureau of Labor*, 299 Or 98, 699 P2d 189 (1985). ORS 659.030(1)(a); 659.050.

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on July 15, 1982, in Room 311 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries was represented by Robert D. Bulkeley, Jr., Assistant Attorney General. Respondent Lucille Ogden was represented by Charles C. Erwin, Attorney at Law. Complainant Rebecca Miller was present. The Agency called Complainant and Respondent, and Respondent called herself, as witnesses.

The Proposed Order of the Presiding Officer was issued on October 6, 1982. The order of the Commissioner in this matter was issued on April 4, 1983. Respondent appealed that order to the Oregon Court of Appeals, and on May 9, 1984, the court affirmed the order except for the amount of money to be paid to Complainant. *Ogden v.*

Bureau of Labor, 68 Or App 235, 682 P2d 802 (1984). On petitions by both the Agency and Respondent, the Oregon Supreme Court allowed review. On April 30, 1985, the court reversed the decision of the Court of Appeals and remanded the matter to the Commissioner for recalculation of interest. *Ogden v. Bureau of Labor*, 299 Or 98, 699 P2d 189 (1985).

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

FINDINGS OF FACT – PROCEDURAL

1) On May 7, 1979, Rebecca Miller filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that Respondent had discriminated against her in connection with her potential employment by Respondent because of Complainant's age.

2) Before the commencement of the hearing in this matter, Complainant received from this forum a copy of "Information Relating to Civil Rights or Wage and Hour Contested Case Hearings," and stated that she had no questions about it. Before the commencement of the hearing, Respondent received from this forum a copy of "Information Relating to Civil Rights or Wage and Hour Contested Case Hearings," and stated that she had no questions about it.

3) At hearing, Respondent asked the forum to amend the Specific Charges, deleting and inserting certain

matter. The Agency agreed to these amendments, and the forum made them.

4) At the end of the hearing, Respondent asked the forum to mark, admit and seal the Bureau's investigative file for this matter, in order to make it available to the Court of Appeals, should that court review this forum's denial of Respondent's Motion to Compell (sic) . . . (Complainant) to respond to (certain) Questions relating to information in that file. In the absence of any significant objection by the Agency, and because the Agency stated that it did not need this file during the pendency of this matter, the forum granted Respondent's request and admitted the Bureau's investigative file for the limited purpose requested. The file was sealed immediately after it was submitted to the forum and has not been examined by this forum.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent, a person, owned and managed the operation of Lucille's Hair Care, a beauty salon. In that business, Respondent, in the State of Oregon, engaged or utilized the personal service of one or more employees, reserving the right to control the means by which the service was performed.

2) At all times material herein, Lucille's Hair Care was located in the bottom floor of Terwilliger Plaza, a retirement home situated at 2545 S.W. Terwilliger Boulevard, Portland, Oregon. Most, but not all, of the clients of Respondent's salon were residents of Terwilliger Plaza. The average age of the salon's clients was eighty to ninety-five years.

3) Respondent's date of birth is September 2, 1897.

4) Respondent purchased Lucille's Hair Care about ten years before the date of the hearing.

5) On November 1, 1978, Respondent employed the following people as beauticians in her salon. Respondent did not work as a beautician in her salon.

a. Genevieve Huserik. Ms. Huserik worked at the salon when Respondent purchased it, and Respondent has employed her since that time. During November 1978, Ms. Huserik started a leave of absence from work due to her health. She returned to work for Respondent on November 5, 1979. During those periods of 1979 and 1980 when she was working for Respondent, Ms. Huserik worked four days per week. At the time of the hearing, Ms. Huserik's age was in the "fifties," and she had about thirty years of experience as a beautician.

b. Lucille Lienan. Ms. Lienan worked at the salon when Respondent had purchased it, and Respondent employed her thereafter until October 27, 1979, when Ms. Lienan was discharged as "unloyal." During all time material before her discharge, Ms. Lienan worked for Respondent one day per week. Ms. Lienan was born on January 22, 1922. At the time Ms. Lienan left Respondent's employ, she had "lots of experience" as a beautician.

c. Hope Miller. Respondent hired Ms. Miller on January 16, 1977, and has employed her since that time. Throughout this employment, Ms. Miller has worked three days per

week. Ms. Miller was born on June 19, 1932. Before working for Respondent, Ms. Miller owned a beauty salon for many years and had been in the beauty business "a good many years."

d. Frances Navarra. Ms. Navarra began working for Respondent on December 18, 1974, and has worked for her since that time. At all times material herein, she worked for Respondent three days per week. Ms. Navarra's date of birth is August 27, 1918. Before working for Respondent, Ms. Navarra owned her own beauty salon for many years.

e. Anita Polani. Ms. Polani began working for Respondent on May 29, 1976, and has worked for her since that date. At all times material herein, she worked for Respondent three days per week. Ms. Polani's date of birth is July 26, 1924. Before working for Respondent, Ms. Polani had "a lot of experience" working as beautician in Italy.

f. Elsie Lund. Ms. Lund retired from her employment with Respondent on November 25, 1978. She had worked five days per week for Respondent. When she retired, she was "in her fifties."

6) Late in November 1978, in order to replace her only full-time beauticians (Ms. Lund, who was retiring, and Ms. Huserik, who was starting her leave of absence), Respondent sought two beauticians to each work for her five days per week, including Saturdays. Respondent publicized these openings in an advertisement in *The Oregonian*, a Portland newspaper, which was the same as the advertisement set out in Finding of Fact 7 below.

To fill one of her openings, Respondent hired Jeannie MacNair, who began working for her on November 28, 1978. Ms. MacNair's date of birth is October 14, 1929. Respondent terminated Ms. MacNair on February 10, 1979, for "not coming to work." During her employment for Respondent, Ms. MacNair was scheduled to work five days per week. (Testimony of Respondent)

7) In order to replace Ms. MacNair, and because Respondent had not yet been able to fill the opening caused by Ms. Huserik's leave of absence, Respondent placed the following advertisement in the "Help Wanted" section of The Oregonian:

"BEAUTICIAN: must have exper Full or part time for retirement home. 222-5910 or 236-2387"

This advertisement appeared on Tuesday, February 3, 1979.

8) In Respondent's February 1979 recruiting, as in her recruiting in November 1978, Respondent was seeking two people to each work as beauticians for her five days per week, including Saturdays. She wanted "good hairdresser(s)" who could "take care of the clients as they came in and get along with them." She was seeking employees who could lift her aged and incapacitated clients and deal with their special needs. Respondent wanted people who would be able to "understand elderly people (and) be kind and considerate and helpful" to

Complainant, and to a lesser extent Respondent, used "Beautician", "Hairstylist", "Hairdresser", and "Cosmetologist", synonymously in describing Complainant's qualifications and the position at issue. To avoid confusion, this forum used "beautician" throughout this order, except where quoting a witness who used a synonym.

them in every way possible. The styling services the new beauticians would have to perform would be mainly shampoos and sets, finger waves, marcelling, and permanent waving.

9) During her February 1979 selection process, Respondent determined whether an applicant had the qualifications she was seeking by talking with the applicant. Respondent considered what the applicant told her (his or her "word"), his or her "age" (how old he/she was), and his or her "experience." Respondent did not take written applications or seek references.

10) On or about the morning of February 13, 1979, Complainant saw Respondent's advertisement. At the time, Complainant was thirty years old. As a licensed beautician, she wanted to find work in that field. She preferred to work with elderly clients.

For two to four weeks before she saw Respondent's advertisement, Complainant had looked for available work in the "Help Wanted" sections of local newspapers regularly. By February 1979, she was also visiting salons personally, looking for beautician work. Her search was limited to Oregon, because she did not have a beautician's license elsewhere. Complainant was seeking full-time employment. By full-time, Complainant meant five days per week, including Saturdays.

Complainant did not find any work for which she wanted to or did apply until she saw Respondent's

advertisement. Because that advertisement described exactly the kind of work Complainant wanted, she responded to it immediately, by telephone.

11) When Complainant telephoned one of the numbers listed in Respondent's advertisement, she talked with Respondent. Complainant explained that she was "calling about the ad in the paper for a beautician" and asked Respondent if the job were still available. Respondent said "yes." Respondent asked Complainant her age. (This was the first question Respondent asked Complainant.) Complainant informed Respondent that she was thirty years old. Complainant asked Respondent what difference her age made and told Respondent that she had experience, that she was a beautician, and that she wanted to come in and talk with Respondent, to at least tell Respondent what her experience was. Respondent hesitated and then made an appointment to meet Complainant at Respondent's salon at 2 p.m. that day.

12) When she went to her interview with Respondent, Complainant had the following work experience relating to Respondent's job vacancy.

a) Off and on for a total of eight years between ages 13 and 25, Complainant had worked in nursing homes and hospital geriatric units. She had started as a cook and dishwasher and then worked as a nurse's aide and directly with patients, attending to their personal needs. Her patients were in various stages of ambulation.

b) For 2¼ years, between approximately April 1976 and July 1978, Complainant worked as a beautician at King

Hair Styling Salon in Portland. That salon's clientele was elderly, as the salon catered to residents of a hotel at which many retired persons lived, and the salon was located in a building whose other tenants were for the most part elderly people. Most of Complainant's clients were elderly, and many were crippled, several confined to wheelchairs. Some were older than eighty years. Some were men. Complainant obtained her Oregon beautician's license one month before starting work at this salon, and it was her first employment as a beautician. She earned sixty percent of her receipts at this salon, the standard rate of compensation for a beautician in Oregon at the time. Her total 1978 earnings for this employment were \$4016.74.

Complainant resigned her employment at King Hair Styling Salon to prepare to get married. She did not seek work from the time she resigned through December 1978, because it was not economically necessary, she did not have a Washington beautician's license, and she knew the beauty business was "slow" in her area. Complainant started to look for work in January 1979, when it became economically necessary for her to work. By this time her former position at King had been filled.

c) In 1978, Complainant worked for one day at Agnes's Beauty Salon. She earned \$46.80 in that employment.

d) Complainant occasionally cared for and did the hair of her aunt, who was wheelchair-bound.

13) Complainant arrived at Terwilliger Plaza for her interview with

Respondent about one-half hour early. She went to Respondent's salon, introduced herself, and said that she was there to apply for the beautician vacancy. She and Respondent sat down and began talking.

During the first part of the interview, Respondent asked Complainant if she were the "30 year old." When Complainant said "yes," Respondent noted this in the top right hand corner of a piece of paper. Respondent warned Complainant that the job could be very difficult because it involved elderly people, a great many of whom needed to be lifted and otherwise helped in moving. Complainant described her experience and qualifications noted in Finding of Fact 12 above, and told Respondent that she really enjoyed the elderly and considered herself very capable of doing Respondent's job. Respondent asked Complainant where she lived, and when Complainant told her that she lived in Vancouver, Washington, Respondent wrote this on the above-mentioned piece of paper and asked Complainant if that weren't too far away. Complainant told her that the distance would pose no problem. Throughout the interview, Complainant evidenced her strong desire to work in Respondent's salon. At the end of the interview, Respondent told Complainant she would "call" Complainant.

14) During either the telephone conversation or the interview between Complainant and Respondent, Respondent commented, in response to Complainant's statement of her age, that "that (Complainant's age) was "pretty" (or "awfully") "young."

15) At all times material herein, Complainant has preferred to work

with elderly people. She regards them as her "babies," and enjoys working them, particularly as a beautician. The kind of beautician services which elderly women prefer (especially shampoos and sets and finger waves) are Complainant's specialties. Complainant does not enjoy doing the "far out" styles which "young" people sometimes want. Complainant regards the elderly as a "piece of history," kind, and abused.

16) At all times material herein, Complainant's elderly clients have liked her. She has never had one "leave" her. She has always had "repeat" beautician business from her elderly clients, which she attributes to her showing concern for their well-being, loving them, and treating them with love. Complainant goes out of her way to do things for her elderly clients. In her employment as a beautician at the time of the hearing, most of Complainant's clients are elderly people who come to her once or twice each week for her professional services.

17) At all times material herein, Respondent paid her beautician employees weekly, at the sixty percent rate described in Finding of Fact 12 above. At the time of Complainant's application, Complainant assumed that if Respondent employed her, Respondent would pay her at this rate, which was acceptable to Complainant.

18) After her interview with Respondent, Complainant went directly to her aunt's house to do her aunt's hair. Complainant was visibly upset. When her aunt asked why, Complainant told her that she had just applied for a job and that the employer kept insisting that she was too young.

Subsequently, Complainant's cousin, then an employee of the Agency, sent Complainant the documents necessary to make the instant complaint.

19) In response to her February 1979 newspaper advertisement, Respondent was contacted by eight to ten potential applicants. She interviewed about seven of them. Except for Complainant and a person named Irene Bynum, the interviewees were "in their teens or twenties." Only Complainant and Ms. Bynum remained interested in the job after Respondent explained that the clientele was elderly.

20) Respondent never called Complainant after the interview. Several days after it, Complainant telephoned Respondent, identified herself, and asked about Respondent's vacancy. Respondent told her that the position had been filled.

21) During Complainant's above-described contacts with Respondent, Respondent did not express interest in Complainant's experience or qualifications. Respondent gave Complainant the strong impression that Respondent was not interested in listening to or considering her because she was too young to work effectively with Respondent's clients.

22) Sometime after Complainant's last telephone call to Respondent, and possibly as late as July 1979, Complainant visited Respondent. There is no other evidence on record concerning this visit.

23) Respondent hired Ms. Bynum, who began working for Respondent on about Monday, February 19, 1979. Ms. Bynum could work for only two days per week for Respondent,

Saturday and Tuesday. At the time Respondent hired her, Ms. Bynum operated a beauty salon by herself and had twenty years of experience in the beauty business. Ms. Bynum was still employed by Respondent as of the date of hearing, and she has continued to work just two days per week throughout that employment. Ms. Bynum was born on October 14, 1929.

24) Respondent asserts that she hired Ms. Bynum because she could not find an applicant who would work five days per week. Respondent asserts that Complainant would not work five days per week or on Saturdays. Respondent maintains that it was solely Complainant's alleged refusal to work full-time or on Saturdays which caused Respondent not to hire Complainant. Respondent asserts that Complainant's age had nothing to do with her decision not to hire Complainant.

25) Complainant did not refuse to work for Respondent full-time or on Saturdays. In fact, Complainant wanted to work full-time, because her husband was not working regularly. She expected and was willing to work Saturdays, because it is standard for barbers and beauticians to do so.

26) Ms. Bynum brought no clients with her when she started working for Respondent. Like each beautician starting work at Respondent's salon, she had to build up her own clientele, her repeat customers, over time. Despite this, her average daily earnings from February 19, 1979, through December 31, 1979, were the third highest of Respondent's six beauticians during that time. With one exception many years ago, none of

Respondent's beauticians have had any difficulty building up their own clientele.

27) Respondent apparently did not seek any more beauticians after she hired Ms. Bynum. Sometime after that hiring, Respondent reduced the operation of her salon from six to five days per week.

28) From February 19, 1970, through November 6, 1980, the beautician's working at Respondent's salon were Ms. Navarra, Ms. Miller, Ms. Polani, and Ms. Bynum. In addition, Ms. Lienan worked there until October 27, 1979, and Ms. Huserik worked there again as of November 5, 1979.

29) Complainant has been a resident of the State of Washington continually since January 28, 1978. From the time Respondent rejected Complainant until December 24, 1981, Complainant did not seek employment as a beautician in Washington because she was not licensed in that state. Because she was licensed in Oregon, Complainant could have obtained, during times material, her Washington license through reciprocity, by paying a \$50.00 fee. She did not have this amount of money until late 1981.

30) After Respondent told Complainant that Respondent's vacancy was filled, Complainant resumed looking for work. She inquired or applied for work at several beauty salons. The first work she obtained was at The Townhouse (beauty salon). She worked there as a beautician for about two days, earning no more than \$49.00. Complainant left her employment at The Townhouse to begin working as a beautician full-time at The

Airliner Beauty Salon. The day after her last day of work at The Townhouse, on or before March 28, 1979, Complainant stated work at The Airliner. She worked there for about one month. Her pay rate was \$100.00 per week or sixty percent of her receipts, whichever was greater. Her total compensation from The Airliner was \$433.05. Complainant left her employment at The Airliner voluntarily, because there was insufficient clientele. (The Airliner had hired Complainant to fill a vacancy which did not materialize.)

31) Immediately after leaving her employment at The Airliner Complainant found, and on April 28, 1979, began, full-time work as a beautician at Ann's Honeycomb Beauty Salon. She worked there for approximately eight months, until the last part of December 1979. Complainant's compensation at Ann's was sixty percent of her receipts. She earned a total of \$2021.74 at Ann's. At times during her employment at Ann's, clients were scarce, and sometimes they were non-existent. Complainant took "off" a "couple of times." Although she did not consider her work at Ann's entirely suitable, Complainant continued working there because, despite her inquiries about other employment, she had found no other work. Complainant left Ann's when the salon was sold and the new owner began catering to clients who wanted some hair styles which Complainant did not know how to execute.

32) Complainant worked five days per week, including Saturdays, at both the Airliner and Ann's Honeycomb Beauty Salons. She has always

worked Saturdays when she has worked as a beautician.

33) At any time during her employment at The Airliner or at Ann's, Complainant would have quit that work to go to work at Respondent's salon. This is because Complainant believed that Respondent had more of a clientele, and therefore offered more secure and stable employment than the Airliner or Ann's, and because Respondent's salon catered to the elderly. Complainant assumed that Respondent's work was more stable because of its location close to many barely ambulatory clients, and because Complainant reasoned that Respondent must have had more clients than she could handle or she would not have been seeking another beautician.

34) After approximately six weeks of recovering from an injury following her employment at Ann's, Complainant began to look for work. She could not find beautician work which she enjoyed and wanted; most of the salons she visited catered to a "young" clientele who wanted contemporary styles which Complainant could do but did not enjoy doing. Complainant did find employment as a nurse's assistant at Hazel Dell Care Center, a nursing home in Vancouver, Washington. Complainant's work schedule at Hazel Dell was erratic; she worked between one and five days a week, including weekends. During this employment, Complainant made herself available for work at all times. She earned \$3.10 per hour.

Complainant does not remember when she started or ended her employment at Hazel Dell or whether there was a period of unemployment

after she stopped working at Hazel Dell. She only knows, and this forum finds, that she was employed there on July 4, 1980. Complainant's total compensation at Hazel Dell was \$987.11. Complainant left her employment there because she heard that a job would be available at AM-PM Mini Market, and because she thought she would be able to afford obtaining her Washington beautician's license. Complainant would have left her employment at Hazel Dell at any time in order to work in Respondent's salon.

35) On November 6, 1980, after she had terminated her employment at Hazel Dell Care Center, Complainant began working at AM-PM (St. John's) Mini Market in Vancouver, Washington. Complainant earned \$4.00 per hour in this employment. She would not have left AM-PM Mini Market to work for Respondent, because she enjoyed the Mini Market work, it was very close to her home, and she was preparing to get her Washington beautician's license. Complainant worked on Saturdays and holidays at AM-PM Mini Market.

36) The parties agree, and this forum finds, that the last possible date on which any back pay damages can accrue was November 6, 1980, the starting day of Complainant's employment at AM-PM Mini Market.

37) Respondent's beauticians worked the following total days and earned the following total amounts between approximately February 18, 1979, and December 31, 1979:

Employee	Total Earnings	Total Days Worked
Lienan	\$2352.90	32 wks @ 1 day per week = 32 days

Bynum	\$3800.80	45 wks @ 2 days per week =	90
Miller	\$4846.80	43 wks @ 3 days per week =	129
Navarra	\$7047.00	44 wks @ 3 days per week =	132
Polani	\$5177.60	44 wks @ 3 days per week =	132
Huserik	\$268.40	8 wks @ 4 days per week =	32
TOTALS	\$23,493.50		547 days

The average daily wage Respondent paid its beauticians during this time was \$42.95, the above total earnings divided by the above total days worked.

38) Respondent's beauticians worked the following total days and earned the following total amounts between approximately February 16, 1980, and November 1, 1980:

Employee	Total Earned	Total Days Worked
Bynum	\$3294.80	37 wks @ 2 days per week = 74
Miller	\$3963.26	36 wks @ 3 days per week = 108
Navarra	\$5889.10	37 wks @ 3 days per week = 111
Polani	\$3937.80	33 wks @ 3 days per week = 99
Huserik	\$3102.98	34 wks @ 4 days per week = 136
TOTAL	\$20,187.92	528 days

The average daily wage Respondent paid its beauticians during this time was \$38.23, the above total earnings divided by the above total days worked.

39) Although both Complainant and Respondent were at times factually inconsistent in their testimony, and Complainant was evasive at times, this forum finds the testimony of

Complainant overall, more credible than that of Respondent. Complainant offered a plausible explanation for most of her inconsistency, and her evasiveness seemed to be a response to feeling threatened by Respondent's counsel rather than an indication of untruthfulness. On the other hand, Respondent's testimony was inconsistent much more often than was that of Complainant, and Respondent's inconsistencies concerned facts which were essential to Respondent's defense in this matter. Furthermore, Respondent offered no explanation for her inconsistencies which did not itself impeach the accuracy of her testimony in pertinent parts. For these reasons, this forum has given more weight to Complainant's testimony than to that of Respondent, where they differ.

Where either Complainant or Respondent gave testimony which was inconsistent with other testimony of the same person, if there was no testimony by another witness on point and no other evidence which could resolve the inconsistency, this forum has adopted whichever version of the inconsistent testimony was least favorable to the position of the person who offered it.

ULTIMATE FINDINGS OF FACT

1) On February 13, 1979, an advertisement placed by Respondent in a Portland, Oregon, newspaper sought a "full or part time" beautician with "experience," "for a retirement home" beauty salon which Respondent owned and operated. Actually, Respondent was seeking two full-time beauticians who would work on Saturdays.

2) On February 13, 1979, Complainant was thirty years old and a

licensed beautician who had experience working with elderly persons both as a beautician and in other types of employment. She was also unemployed.

3) Complainant was qualified for the position for which Respondent sought applicants in her February 13, 1979, advertisement.

4) On or about February 13, 1979, Complainant saw Respondent's advertisement. Because she was looking for work as a beautician and preferred to work with elderly clients, Complainant answered Respondent's advertisement immediately. Complainant talked with Respondent about Respondent's openings, first by telephone and later in person. Respondent's first query of Complainant was what was Complainant's age. In response to Complainant's answer, Respondent voiced her concern that Complainant was, in effect, too young to work with the elderly people who composed all of the clientele at Respondent's salon. Respondent labeled Complainant in terms of her age and had such strong misgivings about Complainant's age that she did not express interest in Complainant's experience or qualifications during her two encounters with Complainant.

5) At the time Complainant answered Respondent's advertisement the youngest of Respondent's four beauticians was 46 years old.

6) Complainant and Irene Bynum were the only two applicants for Respondent's openings who remained interested in them after being interviewed by Respondent. Ms. Bynum was 49 years old at the time. In evaluating the qualifications of Complainant

and Ms. Bynum, Respondent considered three factors, one of which was the age of each of them. Respondent hired Ms. Bynum. Respondent did not hire or consider hiring Complainant.

7) Respondent maintains that the only reason she did not hire Complainant was Complainant's alleged refusal to work for her full time or on Saturdays. In fact, Complainant wanted full-time work and expected (and was willing) to work on Saturdays. Ms. Bynum on the other hand, was available to work only two days per week, Tuesday and Saturday.

8) Respondent did not hire or consider hiring Complainant for employment because of Complainant's age.

9) Between February 13, 1979, and approximately January 1, 1980, and between approximately February 12, 1980, and November 6, 1980, Complainant remained ready and willing to work as a beautician in Respondent's salon.

10) Ms. Bynum started working for Respondent on or about February 19, 1979.

11) For the following reasons, this forum finds that had Complainant worked as a beautician for Respondent five days per week from February 19, 1979, to December 31, 1979, and then from February 12, 1980, to November 6, 1980, she would have earned at least as much as the average daily wage Respondent's beauticians received during those periods:

a) Respondent's salon was very proximate to many barely ambulatory clients and potential clients.

b) Complainant has been very successful in her beautician work with elderly clients.

c) Ms. Bynum earned relatively high wages immediately after beginning her employment with Respondent, even though she started out with no clientele of her own.

d) There is no evidence that the fact that Complainant had less experience as a beautician than Respondent's beauticians had would have affected Complainant's earning in Respondent's employ.

12) Between February 18, 1979, and December 31, 1979, Respondent's beauticians earned an average of \$42.95 per working day. If Complainant had worked for Respondent five days per week during the 45 weeks and one day between February 19, 1979, and December 31, 1979, she would have worked 223 days. (This assumes that she would not have worked on July 4, Thanksgiving or Christmas day.) At the wage of \$42.95 per working day, Complainant would have earned a total of \$9577.85 during this time.

In fact, Complainant earned a total of \$2503.79 between February 19, 1979, and December 31, 1979, or \$7074.06 less than she would have earned at Respondent's employ.

13) At the end of 1979, Complainant left her employment at Ann's Honeycomb Beauty Salon. She departed after a change of ownership, before she had obtained other work and without trying to continue there, serving her existing clientele and learning how to execute the styles requested by some

of the new clients to which the new owner catered.

14) Between approximately January 1, 1980, and February 12, 1980, Complainant was not able to work as a beautician because of an injury.

15) After about February 12, 1980, when Complainant began looking for work, she did not apply for some available work in her field for which she was qualified, because she preferred not to do the type of hairstyles involved.

16) Between February 16, 1980, and November 1, 1980, Respondent's beauticians earned an average of \$38.23 per working day. If Complainant had worked for Respondent five days per week during the 38 weeks and two days between February 12 and November 6, 1980, she would have worked 191 days. (This assumes she would not have worked on July 4.) At the wage of \$38.23 per working day, Complainant would have earned a total of \$7301.93.

In fact, had Complainant continued her employment at Ann's Honeycomb Beauty Salon and earned at exactly the same rate as she had earned during her employment there over the last eight months of 1979, she would have earned \$2232.34, or \$5069.59 less than she would have earned in Respondent employ.

17) The difference between what Complainant would have earned in Respondent's employ from February 19, 1979, to November 6, 1980, and (a) what she actually earned from February 19, 1979, to December 31, 1979, plus (b) what she would have earned at Ann's Honeycomb Beauty Salon

from February 12, 1980, to November 6, 1980, is \$12,143.65.

18) On November 6, 1980, Complainant found alternate work which ended the accrual of any back pay award herein.

19) This forum finds the testimony of Complainant more credible overall than that of Respondent. For that reason, where Complainant's testimony differs from Respondent's testimony, this forum has given more weight to Complainant's testimony.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110.

2) Before the commencement of the contested case hearing, this forum complied with ORS 183.413 by informing Respondent and Complainant of the matters described in ORS 183.413(2)(a) through (i).

3) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter herein.

4) Respondent committed an unlawful employment practice in violation of ORS 659.030(1)(a) by refusing to hire Complainant, an individual 18 years of age or older and under 65 years of age, because of Complainant's age.

5) Because Complainant was not able to work as a beautician between approximately January 1, 1980, and February 12, 1980, she cannot accrue back pay damages herein for that period of time.

6) Complainant's failure to continue working at Ann's Honeycomb Beauty

Salon and her failure to thereafter apply for available work in her field for which she was qualified each constitute a failure to exercise reasonable diligence to mitigate back pay damages which accrued between February 12, 1980, and November 6, 1980.

7) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Complainant under the facts and circumstances of this record, and the sum of money awarded as damages is an appropriate exercise of that authority.

OPINION

1. Respondent's Affirmative Defenses

In paragraphs II, III, IV, and V of her answer to the Specific Charges, Respondent stated certain affirmative defenses. This Order does not mention those defenses, because the form explicitly rejected each of them in its May 11, 1982 Ruling on Respondent's Motion to Dismiss and for Partial Dismissal.

As an additional affirmative defense, Respondent alleges that the Commissioner has failed, refused, and neglected to engage in the "conciliation (sic) specifically outlined in ORS 659.050." There is no substantial evidence that this allegation is accurate. Even if it were, the Legislature's use of the verb "may" throughout ORS 659.050 makes it clear that this statute permits but does not require the Commissioner to cause steps to be taken to effect settlement of a civil rights complaint. Accordingly, this defense fails.

2. Liability

The issues concerning liability herein are factual. Respondent and Complainant offered conflicting testimony as to why Respondent did not hire or consider hiring Complainant. Respondent maintained that she did not hire Complainant solely because Complainant told her that she would not work full time or on Saturdays. Complainant denied making this statement, and insisted that in fact she wanted to work full time and expected to work Saturdays. Complainant contended that Respondent told her that she was "pretty" or "awfully" young to work for Respondent, and gave her the definite impression that Complainant's age disqualified her from consideration for Respondent's openings.

Both Respondent and Complainant offered inconsistent testimony during these proceedings. For example, Complainant gave different testimony as to the dates of her employment at The Townhouse, and the injury which incapacitated her after her employment at Ann's Honeycomb Beauty Salon. Complainant explained these inconsistencies by stating that while she remembers names, people, and conversations, she also has difficulty remembering dates and information requiring her to recall dates. Complainant was also evasive about her tip income, her pay records, and her employment at Hazel Dell Care Center. This forum attributes this evasiveness to Complainant's aggressively protective (and sometimes hostile) response to the insistent probing of Respondent's counsel, whom she obviously perceived as an adversary in every

sense of the word, rather than to a lack of thoughtfulness.

Respondent's testimony was fraught with factual inconsistencies, many of which concerned the bases of her key factual positions herein. For instance, Respondent testified that Irene Bynum was the only employee she hired during her ten years as owner of her beauty salon, while her records show that in fact she has hired at least four employees during that time. She confused the hiring process she carried out in November 1978 with that which occurred in February 1979. She repeatedly contended that Genevieve Huserik had returned to work by the time Respondent did the February 1979 hiring at issue, while her own records show that Ms. Huserik did not return until nine months later. Respondent testified at various times that her salon changed from being open six to five days per week in February 1979, in November 1979, and sometime in 1980. She testified in her deposition that she had beauticians at her salon during times material who were aged "in their thirties," when her later testimony and her records reflect that her youngest beautician at those times was in her late forties. Respondent testified that when Complainant applied for work, Respondent needed and sought two new employees to each work five days per week, including Saturdays. The only applicants who remained interested in Respondent's positions after interviewing with Respondent were Complainant, whom Respondent says would not work full time or on Saturdays, and Irene Bynum, who would work two days per week, including Saturdays.

Respondent could offer no explanation as to why she had not hired Ms. Bynum and Complainant, who together would have filled the equivalent of one of the full-time openings (including Saturdays) which Respondent had. Respondent also did not explain why her advertisement solicited full- or part-time applicants, if she were only going to consider full-time applicants.

Because Respondent's inconsistencies eroded her credibility concerning even the key facts herein, and because she offered no rehabilitating explanation for those inconsistencies, this forum does not believe that her testimony is as accurate as that of Complainant, especially where it differs from that of Complainant. In particular, this forum disbelieves that Complainant refused to work full time or on Saturdays. Complainant worked on Saturdays in every beautician job she had before, and has had since, applying to Respondent. She needed to work full time because of her husband's lack of employment. It would make absolutely no sense to conclude that Complainant refused to work full time or Saturdays on a job she particularly wanted. Moreover, it would make no sense to conclude that Respondent did not hire Complainant because Complainant could only work part time, when Respondent had advertised for full- or part-time beauticians, and when, even at part time, Complainant offered Respondent the only way Respondent had to fill the equivalent of even one full-time slot. For these reasons, this forum does not believe that Respondent did not hire Complainant because Complainant refused to work full time or on Saturdays.

This forum also does not believe Respondent's contention that Ms. Lienan, rather than Respondent, spoke with Complainant when Complainant answered Respondent's advertisement by telephone. In her May 18, 1982, deposition, Respondent stated that she did not remember talking with Complainant at all over the telephone, but she admitted at hearing that she had talked to Complainant once by telephone before their interview. Also, Respondent did not call Ms. Lienan to corroborate Respondent's contention that Ms. Lienan rather than Respondent talked with Complainant, even though Ms. Lienan, "a very good friend" of Respondent was available to testify. This forum concludes that it was Respondent who talked with Complainant on the telephone and, therefore, that it was Respondent who voiced, during that call or in the subsequent interview, misgivings about the appropriateness of Complainant's age for her openings.

Respondent clearly testified in both her deposition and at hearing that she considers "age" in making hiring decisions. Respondent obviously had at least misgivings about Complainant's age and its appropriateness for her jobs. Respondent's opening form of identifying Complainant when Complainant appeared for her interview evidenced that Respondent already had labeled Complainant in terms of Complainant's age. Respondent was not interested in Complainant's qualifications for her openings. Furthermore, Respondent herself has not alleged any reason other than Complainant's alleged refusal to work full time or on Saturdays for not considering or hiring

Complainant. Respondent admitted that Complainant was qualified to do the work, and did not testify that she hired Ms. Bynum because she was more qualified than Complainant. Most of Respondent's beautician work force was aged at least fifty years, and there is no evidence that she had ever employed a beautician aged less than forty-six years. For these reasons, and because this forum does not believe the only reason that Respondent offered for not hiring or considering hiring Complainant, this forum concludes that Complainant's age did in fact cause Respondent not to hire or consider hiring Complainant.

3. Damages

As in all matters brought under ORS 659.030, Respondent has the burden of establishing facts mitigating the damages awardable to Complainant. In this case, the question relating to mitigation is whether Complainant failed to exercise reasonable diligence to mitigate her damages (a) by leaving her employment at Ann's Honeycomb Beauty Salon at the end of December 1979, and/or (b) by thereafter failing to apply for certain work available in her field.

Complainant first testified that she stopped working at Ann's when its owner sold the salon and took Complainant off the payroll, putting complainant out of work. Complainant later testified that she left Ann's cause the new owner catered to black clients, whose hair Complainant did not know how to do (at least the "fancy braiding and beads"). From Complainant's last testimony on this subject, this forum has concluded that Complainant's departure from Ann's was by her own

choice, because of her lack of knowledge as to how to execute some styles requested by some customers. Given the fact that Complainant knew, from her continuous job inquiries while working at Ann's, that she had no other work to go to, this forum finds that Complainant's apparent failure to even try to continue working at Ann's after its change of ownership (at least until she had obtained other work), i.e., her failure to try to keep the clients she already had and work with new clientele, even if it meant learning some new hairstyling techniques, a failure to exercise reasonable diligence to mitigate her back pay damages herein.

For about six weeks after Complainant left Ann's salon, or from approximately January 1, 1980, through February 12, 1980, she was not able to work as a beautician. Thereafter, Complainant remained unemployed for some amount of time. Even though the pertinent time period occurred only about two years before the hearing, Complainant was unable to inform the forum as to how long she was unemployed, when she obtained her next job, how long she had her next job, or how many days per week she worked at her new job. She testified simply that she knew that she had her next job, as a nurse's aide at Hazel Dell Care Center, on July 4, 1980, that it paid her \$3.10 per hour, that it was at least sometimes part-time work, that she earned a total of \$987.11 at Hazel Dell, and that she started her subsequent employment on November 6, 1980. From this information, the forum deduces that Complainant worked, during the 38.3 week period between February 12, 1980, and November 6,

1980, approximately 318 hours, or the equivalent of eight weeks of full-time work. The total wages of \$987.11, which she earned during the 38.3 weeks she was available for work between January 1, 1980, and November 6, 1980, are much less than the total wages she earned during any equivalent period of time since at least 1977 during which Complainant was looking for work or employed.

Complainant testified that she accepted her 1980 nursing home employment because she could not find work which she enjoyed and wanted in the beauty vocation. She elaborated by stating that most of the salons at which she considered applying catered to a "younger" group and were more "competitive" with the "far out styles" which weren't her "cup of tea," even though she could do them. This forum infers from this testimony that Complainant chose not to and did not apply for available work in her field because that work involved, in part, types of hairstyling which she was qualified to, do but which she preferred not to do. This choice also constitutes a failure to exercise reasonable diligence to mitigate Complainant's back pay damages herein.

Complainant's total lack of information concerning most pertinent facts about her employment and unemployment between February 12, 1980, and November 6, 1980, and her relatively small earnings during this period are not necessary to, but do buttress, the conclusion in the last sentence of the previous paragraph. This forum assumes that Complainant would have been more willing to at least try to supply information about such recent

times if it would have been advantageous to her to do so. Although it is Respondent's burden to present evidence of any failure to mitigate back pay damages, Complainant is probably the only, and certainly the best, source of evidence concerning her own efforts to mitigate. Where a complainant is totally unresponsive to questions which a respondent asks concerning mitigation, and where that complainant could reasonably be expected to be able to supply some answers to such questions, this forum must infer that the answers, if given, would not have furthered the complainant's claim.

For all the reasons explained above, Complainant's departure from employment at Ann's Honeycomb Beauty Salon and her failure to thereafter apply for available work in her field for which she was qualified each constitute a failure by Complainant to exercise reasonable diligence to mitigate her back pay damages during 1980. Accordingly, this forum has reduced Complainant's back pay damages accrued between January 1, 1980, and November 6, 1980, by an amount equivalent to what she would have earned had she remained at Ann's Honeycomb Beauty Salon and earned at a rate equal to the rate at which she earned at Ann's during 1979.

During the six week period at the beginning of 1980 that Complainant could not work as a beautician, she would have earned nothing at Ann's. During the eight months between February 12 and October 12, 1980, Complainant could have earned \$2021.74, the amount she earned at Ann's during

the last eight months of 1979. During the period between October 12 and November 6, 1980, Complainant would have earned 5/6 of \$252.72, her average monthly salary at Ann's during 1979, or \$210.60. Between January 1, 1980, and November 6, 1980, therefore, Complainant would have earned at least \$2232.24 had she remained at Ann's. There is no evidence on the record that with reasonable diligence Complainant would have earned more than this sum at Ann's or at any other place of employment which had work available for which Complainant was qualified. Because \$2232.34 is more than the \$987.11 which Complainant actually earned between January 1, 1980, and November 6, 1980, \$2232.34, rather than \$987.11, has been deducted from the amount Complainant would have earned in Respondent's employ during 1980, in computing Complainant's 1980 back pay damages.

4. Interest on Damages

As the April 4, 1983, Order of this forum in the matter reflects, it is the practice of this forum to compute and compound interest on an award of lost wages annually, from the date of the respondent's unlawful practice to the date the respondent pays the award. In this matter, since the evidence and findings concerning lost wages are organized by calendar year, interest normally would be computed and

compounded as of (a) each December 31 between February 19, 1979, and the date Respondent complies with paragraph one of this order, and (b) as of the date of that compliance.

However, in reviewing this order, the Oregon Supreme Court directed this forum, in effect, to assess interest on only those lost wages which have actually accrued as of the start of each computation period. *Ogden v. Bureau of Labor*, 299 Or 98, 105, 699 P2d 189 (1985). The record herein does not reveal, with reasonable exactness, when during 1979 Complainant earned the \$2503.79 in wages she received in 1979. This information is necessary to compute when during 1979 Complainant lost the wages she lost in 1979. Absent that information, therefore, the first December 31 interest computation date is December 31, 1980 (rather than December 31, 1979), because interest on the wages lost in 1979 cannot begin to accrue until January 1, 1980. By that date, \$7074.00 in lost wages had accrued, and another \$5069.59 in lost wages accrued during 1980. Accordingly, interest on the award of lost wages herein has been and shall be calculated in the following manner: (See Table at the end of this order.)

Total interest accrued between January 1, 1980, and December 31, 1984, is, therefore, \$5896.82. Interest accruing between January 1, 1985,

The record and findings disclose only that Complainant earned no more than \$49.00 plus \$433.05 between February 19, 1979, and about April 28, 1979, and \$2021.74 between April 28, 1979, and December 31, 1979. However, because sometimes clients were non-existent and because Complainant took time "off" a "couple of times" during the latter period, this forum cannot ascertain at what rate Complainant earned the total of \$2021.74 during that time. (See Findings of Fact 30 and 31 above.)

and the date Respondent complies with paragraph one of this Order shall be computed and compounded at the legal rate of interest as of each December 31 during that period and as of the date of compliance, whichever is/are applicable.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, as well as to protect the lawful interests of others similarly situated, Respondent is hereby ordered to:

1) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries a certified check payable to the BUREAU OF LABOR

AND INDUSTRIES in trust for REBECCA MILLER in the amount of:

a) TWELVE THOUSAND TWO HUNDRED THIRTY-SIX DOLLARS AND FIFTY-ONE CENTS (\$12,236.51), representing wages Complainant lost because of Respondent's unlawful employment practice set out above, plus

b) FIVE THOUSAND EIGHT HUNDRED NINETY-SIX DOLLARS AND EIGHTY-TWO CENTS (\$5,896.82), representing interest on lost wages at the annual rate of 9 percent accrued between January 1, 1980, and December 31, 1984, computed and compounded annually as described in Section 4 of the Opinion of this Order, plus

TABLE

A. Accrual Period	B. Principal at Start Of Period	C. Annual Interest Rate	D. Interest Accruing During Period	E. Principal Accruing During Period	F. Total Principal and Interest Accrued at End of Period (Cols. B, D, + E)
01-01-80 to 12-31-80	\$ 7,074.06	9%	\$ 636.67	\$ 5,069.59	\$12,780.32
01-01-81 to 12-31-81	\$12,780.32	9%	\$ 1,150.23	\$0.00	\$13,930.35
01-01-82 to 12-31-82	\$13,930.35	9%	\$ 1,253.75	\$0.00	\$15,184.30
01-01-83 to 12-31-83	\$15,184.30	9%	\$ 1,366.59	\$0.00	\$16,550.89
01-01-84 to 12-31-84	\$16,550.89	9%	\$ 1,489.58	\$0.00	\$18,040.47
01-01-85 to Compliance	\$18,040.47	Applicable Legal Rate	To be Accrued as of the Date of Compliance	\$0.00	To be Computed as of the Date of Compliance

c) Interest on lost wages, at the legal rate, accrued between January 1, 1984, and the date Respondent complies with this paragraph, to be computed and compounded annually as described in Section 4 of the opinion of this Order.

2) Cease and desist from discriminating against any prospective employee on the basis of that person's age.

**In the Matter of
WILLAMETTE ELECTRIC
PRODUCTS COMPANY, INC.,
Respondent.**

Case Number 01-84
Final Order of the Commissioner
Mary Wendy Roberts
Issued November 12, 1985.

SYNOPSIS

Respondent's refusal to return Complainant to work following an on-the-job injury was due to Complainant's failure to follow instructions, and his insensitive and bigoted comments to and about Asian and Hispanic co-workers, and not because he utilized the workers' compensation system. The Commissioner found that Complainant was discharged for cause, and Respondent's subsequent refusal to reinstate him after he reinstated his workers' compensation claim was not

unlawful. The Commissioner held that: 1) ORS 659.095 does not require Specific Charges to be filed within one year after the filing of an administrative complaint if, within that time, the Agency issues an administrative determination; and, 2) a discharge after an on-the-job injury will not defeat a claim for reinstatement under ORS 659.415 unless the discharge is for cause. Because Respondent did not engage in any unlawful practice, the Commissioner dismissed the complaint and the Specific Charges. ORS 659.040; 659.095; 659.410; 659.415.

The above-entitled contested case came on regularly for hearing before Diana E. Godwin, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing commenced on October 16, 1984, and concluded on October 17, 1984, in Room 311 of the State Office Building, 1400 S.W. Fifth Avenue Portland, Oregon. The Bureau of Labor and Industries was represented by Betty Smith, Assistant Attorney General. Respondent Willamette Electric Products Company, Inc. was represented by Gerald P. Pullen, Attorney at Law. Elliott N. Quinn, part owner and production supervisor of Respondent, was present as the representative of Respondent. The Agency called as witnesses Complainant Raymond L. Freeman; Mr. Quinn; Andy Morales and Delbert Riehl, employees of Respondent; James McCann, Complainant's son-in-law and a former employee of Respondent; and David Cottrell, a former employee of Respondent. Respondent called as witnesses

Mr. Quinn; Denver Hendrix, Ronald Bradley, Deborah Welch, Robert P. Sullivan, and Bona Tek, employees of Respondent; and Mr. Morales.

Having fully considered the entire record in this matter, I, Mary Roberts, Commissioner of the Bureau of Labor and Industries, make the following Rulings Upon Motions, Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

RULINGS UPON MOTIONS

At the beginning of the hearing, Respondent requested a ruling as to whether the entire investigative file in this matter, compiled by the Civil Rights Division (CRD) of the Agency, was discoverable. In this regard, Respondent had also subpoenaed a CRD employee and wished to examine her on the contents of the file. However, during the course of the hearing Respondent determined that neither disclosure of the entire file nor examination of the CRD employee was necessary to its case, and therefore, no ruling on the issue was necessary.

The Respondent also moved, at the beginning and at the conclusion of the hearing, that the case against Respondent be dismissed on two grounds. The Respondent's first argument was that the Commissioner lacked jurisdiction in that the Agency failed to either issue a private right of action notice or to prepare Specific Charges within one year from the filing of the Complaint. Respondent contended that either the Specific Charges must be filed within one year from the date of the complaint or a notice must be issued advising Complainant of his right to file a civil action pursuant to

ORS 659.095. Respondent further moved for dismissal of the Agency's claim of a violation of ORS 659.415 on the grounds that an employee who has been terminated and makes a claim of discrimination under ORS 659.410, cannot also make a claim against an employer under ORS 659.415 for failure to reinstate. A ruling on these motions was reserved for this Order.

1) The Respondent's Motion to Dismiss for lack of jurisdiction is denied for the following reasons:

ORS 659.040 requires that in order for the Commissioner to obtain jurisdiction over a claim of an alleged unlawful employment practice, a complainant must file a verified complaint in writing with the Bureau of Labor and Industries no later than one year after the alleged unlawful employment practice, or the Attorney General or Commissioner herself may make, sign, and file such complaint. Under this statute the Commissioner must notify the employer or other person against whom the complaint is made within 30 days of the filing of the complaint. This notice must include the date, place, and circumstances of the alleged unlawful practice. Under OAR 839-03-005(4) such notice must give the complainant's name, identify the protected class basis of the complaint, state how the employer's alleged actions harmed complainant, and why complainant believes that his/her protected class was the basis for the employer's action. This notice gives an employer named as a respondent sufficient notice to conduct any investigation needed, preserve evidence, and contact any witnesses necessary to defend the complaint.

In the matter at issue here, the Complaint was filed with the Civil Rights Division of the Bureau on October 2, 1980, for unlawful employment practices alleged to have occurred on or about July 3, 1980, or, in the alternative, on September 29, 1980. Respondent was notified of the complaint the day after it was filed (verbal stipulation of the parties) and approximately three months after the first alleged unlawful action by the Respondent. Thus, the Commissioner obtained jurisdiction over the matter, and the notice requirements of ORS 659.040 were fulfilled.

Respondent argued, however, that the Commissioner had lost jurisdiction over this matter for the reason that the Bureau has one year to either file specific charges or issue what is termed a "private right of action notice." Respondent based this argument on the provisions of ORS 659.095, which set forth the following requirements:

"If within one year following the filing of a complaint pursuant to ORS 659.040(1) or 659.045(1) except a complaint alleging violations of ORS 30.670 to 30.685, the Commissioner has been unable to obtain a conciliation agreement with a respondent, or has not caused to be prepared and attempted to serve the specific charges referred to in ORS 659.060(1), the Commissioner shall so notify the complainant in writing and within 90 days after the date of mailing of such notice, the complainant may file a civil suit as provided in ORS 659.121."

The facts indicate that the Complainant filed a complaint with the Civil Rights Division of the Bureau of Labor

and Industries on October 2, 1980. On October 2, 1981, within the one year period, the private right of action notice was issued. Specific Charges were then filed on July 11, 1984. Thus there was compliance with the requirements of ORS 659.095; that is, since no conciliation agreement had been obtained or specific charges filed within the one year period following the filing of the complaint, the private right of action notice was issued on October 2, 1981.

There is no statute prescribing when the Specific Charges must be issued. There is likewise no statute or administrative rule that establishes any definite time limitation within which the specific charges must be issued. In *Clackamas Co. Fire District v. Bureau of Labor and Industries*, 50 Or App 337, 624 P2d 141 (1981), the Oregon Court of Appeals approved a delay of over five years between the filing of the complaint with the Civil Rights Division and the filing of the formal charges. The Specific Charges herein were filed on July 11, 1984, and were thus filed in substantially less time.

It is clear then that jurisdiction is not lost where the Specific Charges are not filed within a year from the filing of the Complaint provided that the private right of action notice is issued, as it was in this case, in a timely manner. The Agency noted at the hearing, as should be noted here, that the Commissioner may lose jurisdiction where the Administrative Determination is not issued, as provided in ORS 659.095, within the one year period following the filing of the complaint with the Civil Rights Division. The Administrative Determination in this case was, in fact,

issued on September 30, 1981, within the required one year period.

The Commissioner did, therefore, have jurisdiction over this matter. For the reasons set forth above, the Respondent's Motion to Dismiss is denied.

2) The Respondent's Motion to Dismiss the Agency's claim of discrimination under ORS 659.415 is denied for the following reasons:

The Supreme Court's recent ruling in *Williams v. Waterway Terminals Co.* 298 Or 506, 693 P2d 1290 (1985), has made clear that ORS 659.415 requires reinstatement of an employee unless the employer terminated the employee for just cause. At the hearing, the Respondent relied upon the earlier Court of Appeals decision in *Williams v. Waterway Terminals Co.*, 69 Or App 388, 686 P2d 441(1984), in support of its motion.

The sequence of events in the instant case bring it under the holding in *Williams*. In *Williams*, the plaintiff employee sustained a compensable injury in September of 1976 and was unable to request reinstatement or return to work until he received his doctor's release on May 12, 1980. The defendant employer had terminated the plaintiff sometime between September of 1976, when he was injured, and September of 1977, and then refused to reinstate him in May 1980. In the matter at issue here, the Complainant sustained a compensable injury in May of 1980, was terminated in July of 1980, and was later separately denied reinstatement in September of 1980, after he had obtained his doctor's release.

The issue in the *Williams* case was whether an injured worker's right to reinstatement under ORS 659.415 survives if the worker is discharged before the worker is medically able to resume work. The Court of Appeals held that the

"discharge (of the injured worker), whether lawful or unlawful, accomplished a complete severance of his employment relationship with defendant and necessarily terminated any reinstatement right that (he) might have had." 69 Or App 388, 392.

The Supreme Court reversed the ruling of the Court of Appeals, however, stating as follows:

"In [*Shaw v. Doyle Milling Co.*, 297 Or 251, 683 P2d 82 (1984)], we recognized the general rule that in absence of a contract or statute to the contrary, an employer may discharge an employee at any time and for any cause. 297 Or at 254. However, we also noted that ORS 659.415 constitutes a statutory exception to the general rule. However, this does not mean that the employer may never lawfully refuse to reinstate an employee who makes a demand for reinstatement pursuant to ORS 659.415(1). As we recognized in *Vaughn v. Pacific Northwest Bell Telephone*, [289 Or 73, 611 P2d 281 (1980)], that statute requires reinstatement unless the employer had just cause to discharge the employee." 298 Or 506, 511.

The Supreme Court went on to state:

"a worker's statutory reinstatement right under ORS 659.415(1) cannot be lost due to fortuitous timing. The right to demand reinstatement survives any interim discharge occurring before the worker is entitled, under the terms of the statute, to assert that statutory right. Otherwise the statutory right embodied in ORS 659.415 could be so readily circumvented in many cases that this could not have been intended in the statutory scheme." 298 Or 506, 512.

On the basis of the interpretation of ORS 659.415 rendered by the Oregon Supreme Court, as set forth in *Williams*, an employee can maintain a claim under this statute for reinstatement. The claim is accurately set forth in the Specific Charges. For these reasons, Respondent's Motion to Dismiss is denied.

FINDINGS OF FACT – PROCEDURAL

1) On October 2, 1980, Complainant Raymond L. Freeman filed a verified Complaint with the Civil Rights Division of the Bureau of Labor and Industries. He alleged therein that he had been discriminated against in connection with his employment in that Respondent fired and refused to reinstate Complainant to his former position of employment, or to work which was available or suitable, after Complainant had sustained an on-the-job injury and had received workers' compensation benefits therefor.

2) Following the filing of the aforementioned verified Complaint, the Civil Rights Division investigated the allegations in the Complaint and determined

that these allegations were supported by substantial evidence.

3) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, and persuasion, but was unsuccessful in these efforts.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Willamette Electric Products Company, Inc., employed more than six persons.

2) Respondent is engaged in the business of rebuilding and reconditioning various parts of automobiles, including electrical starter motors and brakes.

3) Complainant was employed by Respondent on October 3, 1976, rebuilding special starter motors. After the first three or four months on the job, Complainant was transferred to the barrel department. Complainant became foreman of the barrel department six months later and supervised seven other employees. He was in this position for approximately one year. After this time, Complainant was transferred to the Falcon starter department as a foreman where he supervised four employees. In his capacity as foreman, Complainant had responsibility for production only and had no authority to hire or fire personnel.

4) In February of 1977 Complainant began working as a part-time clerk at a Mini Mart grocery store.

5) Respondent employed approximately 100 employees in various jobs, including rebuilding starter motors. Of these 100 employees, eight to ten

were Southeast Asians, two were Hispanics, two were blacks and at least one employee was a South Korean. A number of the Southeast Asian employees were recent immigrants to this country.

6) Employees assigned to work in various departments often worked in close physical proximity to one another. Some joking and name calling went on among the employees, including the supervisors. Certain employees and supervisors used terms such as "gooks" and "boat people." There was no evidence to establish that Mr. Quinn, at that time, was aware of that situation.

7) Although he denied it at the hearing, the greater weight of the testimony was that Complainant often referred to the Southeast Asian employees as "boat people", "gooks", and "chinks." Complainant used these terms with more intensity than the other employees; that is, his use of the terms was "more fierce", and was not, as was the case with the other employees, done in a joking manner. Complainant particularly directed these epithets to one Cambodian employee named Bona Tek. Complainant used, on a daily basis, these names in reference to Mr. Tek and other Southeast Asian employees. Mr. Tek did not like Complainant's use of these names and did therefore ask Complainant to stop. In response, Complainant laughed, but did not cease his use of these names. Another employee, Robert Sullivan, would often overhear these remarks.

8) Andy Morales, Hispanic, began work for Respondent in the fall of 1979 and worked for Respondent until January of 1981 in the barrel department

where he refurbished starters. Mr. Morales worked about 50 to 100 feet away from Complainant in the same general work area. Complainant often referred to Mr. Morales as a "wetback" or "chili pepper." Mr. Morales specifically stated that he did not like the name "chili pepper" being used in reference to him and at one point, challenged Complainant to a fight if he did not cease using these names. After being challenged by Mr. Morales, Complainant did, for a short time only, cease using the epithet; however, he later resumed this conduct. Complainant's use of the term "chili pepper," when addressing Mr. Morales, was incessant and was done to harass him. As a result of this, there was a great deal of hostility between Complainant and Mr. Morales. It should be noted that Jerry Balcom, another employee, would also call Mr. Morales "chili pepper" and "burrito bandit," however, testimony established that his attitude in contrast to Complainant, was friendly and in the nature of joking.

9) As part of his job, Complainant was required to rebuild starter motors that were under warranty. Complainant often failed to repair the warranty starters as required. As a result, other workers were sometimes required to do the warranty work that Complainant failed to complete. On at least one occasion, in the spring of 1980, another employee of Respondent, Deborah Welch, who was in charge of filling and shipping orders for starter motors, specifically requested that Complainant fill a certain number of orders needed for the day's shipment, a task which Complainant failed to perform. Complainant was consequently reprimanded for this

by Mr. Quinn. Mr. Quinn further reprimanded Complainant for the reason that Complainant was not truthful as to why he had failed to do certain tasks regarding the starter motors required by Ms. Welch.

10) Complainant was not well liked by some of his fellow workers. He did occasionally decline to work overtime to assist the other workers. When asked by Mr. Quinn to perform certain tasks, Complainant, when talking to Mr. Quinn directly, would say that he would perform the tasks. However, when Mr. Quinn left the area, Complainant would remark to fellow employees that he had no intention of doing the work ordered by Mr. Quinn.

11) Complainant injured his back in December of 1979 when he slipped and fell at home. As a result, he missed some time from work. Other employees were aware of this earlier injury.

12) During the course of his employment with Respondent from 1976, Complainant received various hourly wage increases. Some of these increases were given to him as a result of being made supervisor over a department. At least one of the raises was due to the fact that Respondent was abolishing its profit sharing plan in favor of higher wages for the workers.

13) On Friday, May 16, 1980, Complainant left work in the afternoon. In so doing, he told Mr. Quinn and several other employees that he had hurt his knee while bending down to pick up some parts. Complainant saw a doctor and obtained a release to return to work on Monday, May 19, 1980. On Thursday, May 22, 1980, Complainant could not go to work due to the pain his

knee was causing him. Complainant filed a workers' compensation claim on May 23, 1980. Complainant did not return to work after May 22, 1980, due to the continued problems with his knee.

14) About May 27, 1980, Mr. Quinn called Complainant to say that Complainant could return to light work duty, which would not require him to stand or put any weight on his knee. Complainant responded that this would not be possible because he was on codeine and was confined to bed. Mr. Quinn called Complainant again a day or two later to discuss the workers' compensation claim filed by Complainant which Respondent had received. Complainant testified that he did not consider these calls "threatening." Shortly after this second telephone call, Mr. Quinn called a third time and talked to Complainant's wife about having Complainant return to work within a few days. Complainant's wife told Mr. Quinn that Complainant was not able to return to work that quickly due to his knee injury. While Mr. Quinn did not suggest that Complainant withdraw his compensation claim, Complainant testified he felt his job was in jeopardy.

15) As a result of conversations which he had with several of his employees concerning Complainant's earlier back injury which he sustained at home, Mr. Quinn indicated on the Workers' and Employers' Report of Occupational Injury or Disease that he doubted that Complainant's injury was an on-the-job injury. He signed and dated the form with this statement on June 10, 1980. Mr. Quinn had previously reported, in a telephone conversation to his workers' compensation insurer, E.B.I. Companies, that he

doubted the validity of Complainant's job injury claim. As a result of this conversation, E.B.I. conducted an investigation into the matter and talked with several employees, including Mr. Riehl, regarding the alleged on-the-job injury.

16) On June 11, 1980, Complainant wrote a letter to E.B.I. Companies in which he stated that he did not hold E.B.I. Companies or Willamette Electric Products, Inc., responsible for his injury of May 16, 1980. It was not disputed that this letter effectively withdrew his workers' compensation claim. Also, in June of 1980, there was a conversation between Complainant and Mr. Quinn in which Complainant told Mr. Quinn that he had withdrawn his workers' compensation claim for the reason that his knee problems were caused by a separate injury to his back. Complainant filed a claim with Blue Cross, his medical insurer, for the costs of the medical care associated with his knee problem. During this time, he used some of his savings to support himself and his family since he was not working.

17) Mr. Riehl was a close personal friend of Complainant as well as a co-worker. Even after Complainant left his employment with Respondent in May of 1980 due to his knee injury, Mr. Riehl spoke to Complainant on a regular basis at his home. In June of 1980, Complainant told Mr. Riehl that he had withdrawn his workers' compensation claim. Complainant stated he had done so because he had learned that muscle problems in his lower back were affecting the nerves in his leg and that it was this that was causing the knee problem. Complainant also told

Mr. Riehl that he had withdrawn his claim because he feared he would lose his job.

18) On July 2, 1980, Complainant talked to Mr. Riehl and told him that he would be coming back to work on Monday, July 7, 1980. Mr. Riehl telephoned Mr. Quinn on either July 2nd or July 3rd, and told Mr. Quinn that Complainant would be returning to work after the 4th of July weekend. Mr. Quinn did not say anything to Mr. Riehl that would indicate that he did not intend to have Complainant return to work.

19) On July 3rd, Mr. Quinn told Mr. Sullivan that Complainant would be returning to work on the following Monday and that Mr. Sullivan would be moving back to the alternator department. At this point Mr. Sullivan urged Mr. Quinn not to allow Complainant to return to work. Mr. Sullivan told Mr. Quinn about the racial slurs that Complainant used toward Mr. Tek and Mr. Morales. Mr. Sullivan also said that, in his opinion, a number of employees, including Mr. Tek and Mr. Morales, were much happier in their jobs since Complainant had not been working for Respondent.

20) Based upon Mr. Sullivan's representations and upon a short conversation with Mr. Tek, Mr. Quinn determined that the racial harassment in which Complainant had been engaged, when combined with Complainant's insubordination on the job, of which Mr. Quinn had previous knowledge, warranted termination of Complainant.

21) Mr. Quinn testified that he had never fired anyone for filing either a valid or false on-the-job injury claim. He testified that he had, on one

occasion, doubted the validity of a claim filed by a previous employee; however, that employee did not return to work. There was no testimony on this issue to the contrary. Mr. Quinn would not have fired Complainant if he had not learned about Complainant's use of racial slurs and his harassment of the other employees. That pattern of behavior by Complainant was the key factor in Mr. Quinn's decision to terminate Complainant. On a prior occasion Mr. Quinn had fired a young man, a high school student, for an incident in which this employee threw a part at a Southeast Asian employee who showed hostility toward Vietnamese persons. On another occasion, Mr. Quinn fired a Cambodian employee for threatening a Vietnamese employee. Before he made the final decision to terminate Complainant, Mr. Quinn spoke with both Mr. Tek and Mr. Morales. Mr. Quinn told Mr. Tek that he was planning to have Complainant return to work after his injury and asked Mr. Tek if Complainant had called him names. Mr. Tek replied that the Complainant had in fact called him names. Mr. Quinn also talked to Mr. Morales, telling Mr. Morales that he was thinking of having Complainant return to work. Mr. Morales was not enthusiastic about this prospect and communicated that to Mr. Quinn, although Mr. Morales did not tell Mr. Quinn at that time about Complainant's use of racial slurs directed at him.

22) Mr. Quinn telephoned Complainant early in the evening on July 3, 1980, and told him that he should not return to work on July 7th, and that his services would no longer be needed. Complainant got extremely agitated,

threatening Mr. Quinn with "seeing him in court" and shouting obscenities at Mr. Quinn.

23) After being terminated, Complainant visited the Civil Rights Division of the Bureau of Labor and Industries. He stated that after his initial contact with the Bureau, he consulted the Workers' Compensation Department in Salem regarding reinstating his on-the-job injury claim that he had withdrawn by his letter to E.B.I. Companies on June 1, 1980. On July 11, 1980, Complainant completed a new Workers' and Employers' Report of Occupational Injury and Disease. He also wrote a letter to E.B.I. Companies, dated July 12, 1980, in which he stated that his earlier letter, requesting that Respondent not be held liable for his injury, was written as a result of pressure from Mr. Quinn, that is, that he had responded to pressure from Mr. Quinn by withdrawing his previous claim. This was done, according to Complainant, so as not to jeopardize his job.

24) On September 25, 1980, Complainant obtained a work release from his doctor indicating that Complainant was eligible to return to work on September 25, 1980. On September 29, 1980, Complainant took the doctor's work release to Mr. Quinn at Respondent's offices. Mr. Quinn accepted it, said he would put it in the office, and would have the office personnel turn it into E.B.I. Complainant did not present the release until September 29, 1980, as that was the first opportunity when Mr. Quinn was available.

25) Complainant retained the services of an attorney to assist him with his new workers' compensation claim.

E.B.I. Companies conducted an investigation into the second claim. In connection with this investigation, an E.B.I. representative interviewed Complainant in the office of Complainant's attorney. On February 25, 1981, the State of Oregon Worker's Compensation Department issued a Determination Order stating that Complainant was entitled to compensation for temporary total disability, as a result of the injury to his knee, from May 23, 1980, through September 24, 1980.

26) At the time of his injury on May 16, 1980, Complainant was earning \$7.50 an hour with Respondent and was scheduled to receive an increase to \$8.00 an hour on June 1, 1980, and to \$8.15 in January of 1981. Complainant did not receive any pension with Respondent, but did receive a life insurance policy as a benefit for which he contributed \$7.00 per month. He had also accrued vacation time for which he received a check after Mr. Quinn told him that his services would no longer be required.

27) Before his termination Complainant had been working from 7:00 a.m. to 3:30 p.m. at Respondent's shop. In February of 1977, Complainant began working part-time as a clerk at the Mini Mart grocery store. He was forced to leave this part-time work after he was injured in May of 1980 because he could not put weight on his knee. After his termination from employment by the Respondent in July of 1980, Complainant began working again part-time at the Mini Mart. Complainant worked full-time at the Mini Mart after he received the doctor's work release on September 25, 1980,

and at least 10 days prior to receiving the release.

23) An estimated 527 of the hours when Complainant was working at Mini Mart, from his termination by Respondent on September 29, 1980, until September 25, 1981, were hours when he otherwise would have been working for Respondent. He was paid \$3.50 an hour by Mini Mart for these hours for a total of \$1844.50. An estimated 421 of the hours worked at Mini Mart from September 26, 1981, to February 28, 1982, were hours when he otherwise would have been working for Respondent. He was paid \$4.75 an hour for these hours for a total of \$1999.75. If Complainant had not been terminated by Respondent, he would have earned \$8.00 per hour for his normal working hours of 7:00 a.m. to 3:30 p.m., from September 29, 1980, until December 31, 1980, and \$8.15 per hour from January 1, 1981, until February 28, 1982, for total projected earnings of \$23,937.33.

29) Complainant received no vacation at Mini Mart, nor did he receive any life insurance benefits. While employed by Respondent, Complainant received medical coverage through Blue Cross. Complainant, however, paid one-half of the cost of this coverage in the amount of \$46.57, and Respondent paid for half through July 31, 1980. When Complainant went back to work at Mini Mart, he made a payment in the amount of \$279.45 to Mini Mart in December of 1980 to reinstate his Blue Cross insurance. Complainant paid all of his medical insurance for a period of time, although he is uncertain regarding how long, and then Mini Mart picked up one-half of the cost of

the monthly premium in the amount of \$58.17. In September of 1981, when Complainant became the manager, Mini Mart paid his medical insurance premium in full each month. On February 28, 1982, Complainant bought the Mini Mart, and his income at that point exceeded the earnings he would have made had he been working for Respondent.

ULTIMATE FINDINGS OF FACT

1) Complainant was employed by Respondent on October 3, 1976, to rebuild special starter motors. Complainant worked from 7:00 a.m. to 3:30 p.m. at Respondent's shop.

2) In February of 1977, Complainant began working part-time as a clerk at a Mini Mart grocery store.

3) Respondent employed approximately 100 employees, approximately eight to ten of whom were Southeast Asians, two were Hispanics, two were blacks, and at least one employee was a South Korean. Complainant worked in close physical proximity to a number of the employees, including the Southeast Asian, Hispanic, and black employees. Some name-calling and joking went on among many of the employees, including the supervisors. Complainant, as well as other employees, referred to Southeast Asian employees as "boat people." However, Complainant also called Southeast Asian employees "gooks" and "chinks."

Complainant mostly directed these epithets to one particular Cambodian employee, who asked Complainant to desist. Complainant did not stop using these names. Complainant also referred to one Hispanic employee by

the derogatory term of "chili pepper." Although Complainant was asked by this employee to desist from using this term, he did not. As a result of these actions by Complainant, some hostility toward him existed on the part of these employees, Mr. Tek and Mr. Morales, respectively.

4) On a number of occasions, Complainant failed to completed his share of the starter motors under warranty that required rebuilding. As a result, other employees were required to make up for Complainant's failure. Mr. Quinn, a part owner and production supervisor for Respondent, reprimanded Complainant on at least one occasion for his dereliction.

5) On Friday, May 16, 1980, Complainant left work complaining of an on-the-job injury to his knee. During the following week, Complainant saw a doctor. While he obtained a release to return to work, he only worked one or two days of that week. On Thursday, May 22, 1980, the pain from Complainant's knee prevented him from going to work. Complainant filed a workers' compensation claim on May 23, 1980, and did not return to work after that date.

6) Around May 27, 1980, Mr. Quinn called Complainant on three separate occasions and asked that Complainant return to work for light duty. At no time did Mr. Quinn suggest that Complainant withdraw his workers' compensation claim.

7) Respondent filed a form, dated June 10, 1980, with its workers' compensation insurance carrier stating that Respondent doubted the validity of Complainant's on-the-job injury claim. The workers' compensation insurance

carrier conducted an investigation. However, before this investigation was completed, Complainant withdrew his claim by letter, signed and dated June 11, 1980. In this letter, Complainant stated that he did not hold Respondent or its workers' compensation insurance carrier responsible for his injury on May 16, 1980. Complainant had also represented to both Mr. Quinn, and to a close friend, Mr. Riehl, that the problems with his knee were caused by a separate problem with his back, and were not the result of an on-the-job injury.

8) On July 2, 1980, Complainant told Mr. Riehl that he would be coming back to work on Monday, July 7, 1980. Mr. Riehl communicated this to Mr. Quinn on either July 2nd or July 3rd. As a result of this conversation, Mr. Quinn informed other employees that Complainant would be returning to work on Monday, July 7, 1980. At this point, Mr. Sullivan urged that Complainant not be allowed to return to work, and informed Mr. Quinn about some of the racial remarks and harassment that Complainant had directed toward the Cambodian and Hispanic employees.

9) Based upon these statements by employees, Mr. Quinn terminated Complainant by telephone on the evening of July 3, 1980. After this telephone conversation, on July 11, 1980, Complainant reinstated his workers' compensation claim.

10) On September 25, 1980, Complainant obtained a doctor's release stating that he was fully able to return to work as of that date. On February 25, 1981, the State of Oregon Workers' Compensation Department issued

a determination order stating that Complainant was entitled to compensation for temporary total disability, for the injury to his knee, from May 23, 1980, through September 24, 1980.

11) After his injury on May 16, 1980, Complainant was unable to work either at Respondent's shop or in his part-time job as a clerk at the Mini Mart grocery store. Complainant resumed working for Mini Mart some time after his termination from employment with Respondent in July of 1980. Sometime in September of 1980, he resumed working at Mini Mart at a salary of \$4.50 an hour. At the time of his injury on May 16, 1980, Complainant had been earning \$7.50 an hour with Respondent, and was scheduled to receive an increase to \$8.00 an hour on June 1, 1980, and to \$8.15 an hour in January of 1981. In September of 1981, Complainant received a salary increase to \$4.75 an hour at the Mini Mart as a result of becoming the manager. He continued at this salary until February 28, 1982, at which time he purchased the Mini Mart, and at that time his income exceeded the earnings he would have made working with Respondent.

12) If Complainant had continued working with Respondent from September 29, 1980, after he received his doctor's work release, until February 28, 1982, when he bought the Mini Mart, he would have earned a total of \$23,937.33. Complainant worked at the Mini Mart during part of the hours when he would have been working for Respondent, and earned a total of \$3844.25 in mitigation wages.

13) While Respondent has doubted the validity of one claim, Respondent

has never fired an employee for filing a claim for workers' compensation.

14) Respondent terminated Complainant for the separate, non-discriminatory reason that Complainant had engaged in racial harassment of other employees, and that his returning to work for Respondent would be detrimental to other employees. In addition to this, Complainant had failed to fill required work orders. Therefore, Complainant was not terminated for the reason that he sustained an on-the-job injury, or that he applied for benefits or invoked or utilized the procedures to obtain workers' compensation benefits, nor was Respondent required to reinstate Complainant.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.110 and 659.400 to 659.435.

2) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and the subject matter related to the alleged violation of ORS 659.410 and 659.415 herein.

3) Respondent did not terminate Complainant because Complainant had applied for benefits or utilized the procedures provided under the workers' compensation laws, but for the separate, non-discriminatory reason of Complainant's racial harassment of other employees and his failure to follow instructions. Respondent did not violate the provisions of ORS 659.410.

4) Respondent did not deny Complainant reinstatement to his former position in violation of his rights under ORS 659.415. In *Williams, supra*, the

court interpreted the provisions of ORS 659.415, and concluded that reinstatement is required unless the employer had just cause to discharge the employee. Respondent herein fired Complainant for just cause, that is, Complainant's racial harassment of other employees and failure to follow instructions.

Thus, ORS 659.415 does not require that Respondent reinstate Complainant. It follows then that Respondent did not violate the provisions of ORS 659.415.

OPINION

There are two issues presented in this matter. The first issue is whether Respondent fired Complainant for the reason that he applied for benefits under the workers' compensation laws and thereby violated ORS 659.410. The second issue is whether Respondent refused to reinstate Complainant in violation of his rights under ORS 659.415. Almost four and a half years have elapsed between the occurrence of the events leading to this case and the date of the hearing. As a result, it has been necessary to take into account faded memories and vague testimony by almost all of the witnesses, particularly with regard to what was said, by whom, and when.

The Agency specifically charged Respondent with violation of both ORS 659.410 and 659.415. Under 659.410, the Agency has the burden of proving that Respondent fired Complainant for the reason that Complainant "applied for benefits or invoked or utilized the procedures" provided for in the workers' compensation statutes. Under 659.415, the Agency must establish that Complainant made demand for

reinstatement, the position was available and reinstatement was denied, subject to the decision rendered by the court in *Williams*.

The Agency failed to meet its burden of proving that Respondent fired Complainant because he utilized the benefits of the workers' compensation statutes. Complainant sustained his injury on May 16, 1980, and, with the exception of a day or two in the following week, was effectively off work because of his injury from that day forward. Respondent did not terminate Complainant at the time of injury. Likewise, Complainant was not terminated after refusing Mr. Quinn's offer to return to light duty work that would not require standing or lifting. Respondent also did not terminate Complainant after Complainant filed a workers' compensation claim on May 23, 1980, even though Mr. Quinn suspected that the injury was not work related and so indicated to Respondent's insurer in writing on June 10, 1980. Moreover, Respondent did not terminate Complainant even after he admitted, both in his letter of June 10, 1980, to Respondent's insurer, and later in a conversation he had with Mr. Quinn, that his injury was not work related.

Respondent has, therefore, established a legitimate, non-discriminatory reason for Complainant's termination; and as such, shown that Complainant was terminated for just cause. Under *Williams*, an employer is not required to reinstate an employee where termination of that employee was for just cause. Therefore, Respondent has not violated ORS 659.415 by denying reinstatement to Complainant.

Respondent was still willing to have Complainant return to work when Mr. Riehl telephoned Mr. Quinn on July 2, 1980, to say that Complainant would be returning to work on the following Monday. If Respondent intended to fire Complainant for applying for workers' compensation benefits, Respondent had the opportunity to do so after Complainant withdrew his claim on June 11, 1980. With no claim pending, Respondent could have concluded, albeit incorrectly, that termination was lawful at that time. Likewise, Respondent had the opportunity to fire Complainant when Mr. Riehl telephoned to say that Complainant would be returning to work. Respondent, however, did not. In fact, Mr. Sullivan testified that Mr. Quinn told him on July 3rd, after Mr. Riehl's telephone call, that Complainant would be returning to work and that he, Mr. Sullivan, would be going back to the alternator department. It was only after Mr. Sullivan told Mr. Quinn about the specific problems regarding Complainant's racial harassment of other employees, and after Mr. Quinn had conducted his own investigation by talking to some of these employees, that the decision was made to terminate Complainant. Mr. Sullivan's testimony on the question of the timing of Mr. Quinn's decision to terminate Complainant was crucial. Mr. Riehl's testimony regarding the timing of the decision was particularly important. Mr. Riehl is a personal friend of Complainant, and he was a rebuttal witness for the Agency in support of Complainant. Yet he testified that when he telephoned Mr. Quinn on July 2nd to advise him that Complainant would be returning to work the following Monday, Mr. Quinn accepted that and said

nothing about opposing Complainant's return to work.

Respondent could not have been motivated to fire Complainant in order to avoid having a claim for workers' compensation benefits filed against it because the claim had already been filed and withdrawn. If Respondent had wanted to retaliate against Complainant for filing the claim, it seems more logical that Respondent would have fired him either while the claim was pending or immediately after the claim was withdrawn. Instead, Complainant himself testified that on May 27, 1980, four days after he filed his claim, Mr. Quinn telephoned him and offered to provide Complainant with light work that did not require him to put any weight on his injured knee. Complainant further testified that nothing said during this telephone conversation could be interpreted as a "threat." It is not logical to conclude that Mr. Quinn would have made the telephone call and the offer of light work in order to provide continuing employment to Complainant if Respondent intended to fire Complainant for filing a claim for benefits under the workers' compensation laws. With knowledge that Complainant could file a claim based on a retaliatory termination, it is likewise illogical to conclude that Respondent could coerce Complainant into withdrawing his compensation claim and then terminating his employment.

The mere fact that no workers' compensation claim is pending at the time an employer terminates an injured employee is not dispositive of a claim of discrimination. As noted in *In the Matter of Pacific Convalescent Foundation, Inc.*, 4 BOLI 174 (1984), an

employer cannot avoid the proscriptions of ORS 659.410 merely by terminating an injured worker immediately after an injury and before a formal claim is filed. Likewise, ORS 659.410 cannot be avoided, as Complainant contends occurred in this matter, by coercing an employee into withdrawing a claim and then firing the employee when the claim no longer exists.

Complainant's testimony that he withdrew his workers' compensation claim because he felt threatened with the loss of his job if he did not do so was not credible. First, there was no evidence that Respondent had ever fired an employee for making a workers' compensation claim or that Complainant believed that Respondent had ever done this. Thus, there was no reasonable or objective basis for his belief.

Second, according to Complainant, he did not consider the first two telephone calls from Mr. Quinn threatening to the extent that he felt he should withdraw his claim. It was only after the third telephone call, answered by his wife, who did not testify at the hearing, that he decided that his job was in jeopardy. This conclusion by Complainant does not seem credible, in that Complainant admitted that even in the third telephone call Mr. Quinn never suggested that Complainant withdraw his claim.

Third, he told Mr. Riehl in June of 1980 that his knee problems were caused by muscle problems in his lower back affecting the nerves in the leg. Mr. Riehl was a personal friend. That being the case, it is unlikely that Complainant would have told Mr. Riehl that his medical problems were not

work related unless that was true. Mr. Riehl, however, did sign a statement, dated July 20, 1984, and admitted as an exhibit, in which he stated:

"Ray Freeman remarked that he changed his injury claim from job-caused working at Willamette to his personal insurance company because he feared his job would be in jeopardy at Willamette."

This statement by Mr. Riehl is not inconsistent with his other statement that Complainant told him that his injury was not job related. In fact, it is quite plausible to believe that Complainant did withdraw his claim for the reason that he feared his job was in jeopardy. That is, Complainant knew that Mr. Quinn doubted the validity of the claim, and as a result, the insurer was conducting an investigation. Consequently, Complainant may well have believed his job was in jeopardy, not for the reason that he had filed a claim, but rather for the reason that the claim could have been determined to be false. Complainant did in fact withdraw his claim before the investigation was completed. After his termination, Complainant clearly had nothing to lose by attempting to reinstate his injury claim.

There was also testimony in this matter, which was not refuted, and which was accepted and relied upon, that Respondent had never fired an employee for sustaining an on-the-job injury or for invoking the benefits of the workers' compensation laws. Mr. Quinn had doubted the workers' compensation claim of at least one other employee in the past but had not fired that employee. However, Respondent had fired two other employees for engaging in racial harassment. One was

a Caucasian who was hostile toward Southeast Asian employees, and one was a Cambodian employee who was harassing a Vietnamese employee.

Complainant was not credible when he denied having referred to any of the other employees as "gook." There was substantial contradictory testimony by other witnesses that was more credible.

ORDER

NOW, THEREFORE, Respondent not having been found to have engaged in any unlawful practice charged, the Specific Charges and the Complaint filed against Respondent are hereby dismissed according to the provisions of ORS 659.060(3).

In the Matter of
MICHAEL BURKE,
dba Blaze Reforestation,
Respondent.

Case Number 14-84
Final Order of the Commissioner
Mary Wendy Roberts
Issued December 12, 1985.

SYNOPSIS

While he had no farm labor contractor's license, Respondent solicited bids for reforestation work with the U.S. Forest Service, employed workers to complete said work, received remuneration therefor, and failed to apply to become properly licensed, even

when urged to do so by the Agency. The Commissioner found that Respondent acted as a farm labor contractor without a license, and assessed him a civil penalty of \$500. ORS 658.405; 658.410; 658.415(1); 658.453(1)(a); OAR 839-15-510(4)(a).

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on June 26, 1985, in Room 311 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Shelley K. McIntyre, Assistant Attorney General of the Department of Justice of the State of Oregon. Michael Burke, doing business as Blaze Reforestation (hereinafter the Contractor), did not appear at the hearing in person or through a representative. The Agency called as its one witness Christine Hammond, Compliance Specialist Supervisor for the Wage and Hour Division of the Agency.

Having fully considered the entire record in this matter, I, Mary Roberts, make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) By a notice dated April 11, 1984, the Agency informed the Contractor that the Agency intended to assess a civil penalty of \$500 against him. As the basis for this assessment,

the notice cited the Contractor's acting as a farm labor contractor from about November 7, 1983, to at least April 4, 1984, without a valid license issued by the Agency, in violation of ORS 658.410 and ORS 658.415(1). This notice was served on the Contractor on April 13, 1984.

2) By a letter dated April 23, 1984, the Contractor requested a hearing on the Agency's intended action and stated that he intended to represent himself in this matter.

3) By a notice dated February 28, 1985, this forum notified the Contractor and the Agency of the time and place of the hearing and the designated presiding officer. Enclosed with this notice was a document entitled "Information Relating to Civil Rights or Wage and Hour Contested Case Hearings" which contained the information required by ORS 183.413. The notice and its enclosures were served on the Contractor on March 4, 1985.

FINDINGS OF FACT – THE MERITS

1) The Contractor is a natural person who, during all times material herein, owned and operated a business under his own name and under the assumed business name of Blaze Reforestation.

2) On July 11, 1983, the Forest Service of the United States Department of Agriculture issued a solicitation of bids for the hand-piling and covering of slash in the Steamboat Ranger District of the Umpqua National Forest in the State of Oregon. On August 6, 1983, the Contractor made an offer for that project, using an address in Oregon as his business address. On August 24, 1983, the Forest Service

accepted the Contractor's offer and awarded to him contract number 53-04T1-3-169, in the amount of \$20,700 for this project. At the time of the award, the Forest Service advised the Contractor that a farm labor contractor's license from the Agency appeared to be required for this project, and that the Contractor should contact the Agency to verify this requirement and obtain any necessary license.

3) Thereafter, the Contractor employed ten persons as crew members and two as supervisors to perform contract number 53-04T1-3-169.

4) By memoranda dated August 30, 1983, and October 12, 1983, the Forest Service twice apprised the Agency of the acceptance and award. The Forest Service sent a copy of each of these memoranda to the Contractor.

5) On October 21, 1983, the Forest Service issued a solicitation of bids for hand slashing and cutting of brush in the Blue River Ranger District of the Willamette National Forest in the State of Oregon. On November 7, 1983, the Contractor, doing business as Blaze Reforestation, made an offer for that project, using an address in Oregon as his business address. On November 30, 1983, the Forest Service accepted the Contractor's offer and awarded to him contract number 53-04R4-4-4020J, in the amount of \$11,500 for this project.

6) After ascertaining that the Contractor did not have a farm labor contractor's license issued by it, the Agency advised the Contractor, doing business as Blaze Reforestation, by letter dated December 6, 1983, that any person must have such a license

before conducting business as a farm labor contractor in Oregon. The Agency pointed out that bidding or submitting prices on reforestation contract offers constitutes conducting business as a farm labor contractor. The agency asserted that the contractor was engaged in the business of farm labor contracting without being licensed for that activity. Enclosing the forms necessary to apply for a farm labor contractor's license, instructions therefor, and a copy of applicable law, the Agency asked the Contractor to file his completed application and appropriate fee no later than December 16, 1983.

7) On or about December 22, 1983, having received no response from the Contractor to its December 6, 1983, letter, the Agency sent a second letter to the Contractor, doing business as Blaze Reforestation. This letter referred back to the December 6, 1983, letter and application forms, pointed out that the Contractor had not responded thereto, reiterated Oregon farm labor contractor licensing requirements, and warned the Contractor that he could be assessed civil penalties of up to \$2,000 for conducting business as a farm labor contractor without a license. This letter directed the Contractor to submit a completed license application by no later than January 3, 1983 (sic: this year should have been 1984).

8) On or about February 7, 1984, having received no response from the Contractor to its two above-described letters, the Agency sent a letter to the Contractor, doing business as Blaze Reforestation, which referred to those two letters, advised the Contractor that

the Agency had obtained evidence that the Forest Service had awarded him the contract described in Finding of Fact 5 above, and warned the Contractor that the Agency would issue a Notice of Intent to Assess a Civil Penalty against him, unless he was licensed as a farm labor contractor by February 20, 1984. Christine Hammond, Compliance Specialist Supervisor of the Wage and Hour Division of the Agency, signed this letter. It was sent by certified mail, and the Contractor received it on February 8, 1984.

9) On February 24, 1984, the Contractor contacted Ms. Hammond by telephone and told her that he had not realized that he had to be licensed as a farm labor contractor in order to bid on a reforestation contract and that he intended to obtain a license before commencing work on the contract referred to in the Agency's February 7, 1984, letter to him. Ms. Hammond told the Contractor that because the law required him to obtain a license before even submitting a bid, the Agency could not allow him to postpone obtaining his license until he began work on a reforestation contract. The Contractor asked Ms. Hammond to send another license application packet to him, and she did on February 24, 1984.

10) On February 28, 1984, the Forest Service issued a solicitation of bids for the hand cutting and piling of brush in the Oakridge Ranger District of the Willamette National Forest in the State of Oregon. On March 25, 1984, the Contractor, doing business as Blaze Reforestation, made an offer for the project, using an Oregon address as his business address. On April 5, 1984, the Forest Service accepted the

Contractor's offer and awarded to him a contract for this project in the amount of \$13,090. The agency did not learn of this until after April 23, 1984.

11) By this time, the Agency had two separate files concerning the Contractor: one for the Contractor, doing business as Blaze Reforestation, at the one Oregon address, and the other for the Contractor (in his own name) at another Oregon address. Having sent the two form letters described in Findings of Fact 6 and 7 above to the Contractor, doing business as Blaze Reforestation, at the former address, the Agency, on March 29, 1984, and April 9, 1984, sent the same two form letters to the Contractor at the latter address.

12) On June 4, 1984, the Contractor, doing business as Blaze Reforestation, began work on contract number 53-04R4-4-7080JR, the contract described in Finding of Fact 10 above. He employed at least eight people to work on this project. The Contractor completed this project on July 14, 1984, and was remunerated therefor in the total amount of \$13,757.17.

13) At no time material herein has the Contractor had, applied for, or obtained a farm labor contractor's license from the Agency.

14) There is no evidence on the record herein that the Contractor has violated any provision of Oregon farm labor contractor law before times material herein.

ULTIMATE FINDINGS OF FACT

1) Between August 6, 1983, and July 14, 1984, the Contractor, in the State of Oregon:

a) bid or submitted prices on three contract offers to perform work for the United States Forest Service in the reforestation of lands, including but not limited to the clearing, piling, and disposal of brush and slash and other related activities; and

b) for an agreed remuneration or rate of pay, employed workers to perform labor on at least two of the contracts awarded to him as a result of the above-mentioned bids or price submissions.

By these activities the Contractor, a person, acted as a farm labor contractor, as defined by ORS 658.405, between August 6, 1983, and July 14, 1984.

2) Before it issued the Notice of Intent to Assess Civil Penalty upon which this contested case is based, the Agency, by three different written communications (two sent twice) and one telephone conversation with the Contractor, informed the Contractor that he had to have a farm labor contractor's license from the Agency, attempted to assist him in obtaining one, and finally, warned him of the consequences of non-compliance with this requirement. Before the Agency made these efforts, the Forest Service had advised the Contractor through three written communications that this licensing requirement appeared to apply to him.

3) At no time material herein has the Contractor had, applied for, or obtained a valid farm labor contractor's license issued by the Agency. In fact, the Contractor submitted one bid or price on a contract offer and employed workers to perform labor on one reforestation contract after having received the written and telephone

communications from the Agency described in Ultimate Finding of Fact 2 above.

4) There is no evidence on the record that the Contractor has violated any provision of ORS 658.405 to 658.475 before times material herein.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the subject matter and of the person herein.

2) As a person acting as a farm labor contractor in the State of Oregon between August 6, 1983, and July 14, 1984, the Contractor was and is subject to the provisions of ORS 658.405 to 658.475 and ORS 658.991(2) and (3). Accordingly, the Contractor was required by ORS 658.410 and 658.415(1) to obtain a valid farm labor contractor's license from the Agency before he acted as a farm labor contractor in Oregon.

3) During times material herein, the Contractor violated ORS 658.410 and 658.415(1) by acting as a farm labor contractor in Oregon without first (or ever) obtaining a valid farm labor contractor's license from the Agency.

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 has the authority to assess a civil penalty against the Contractor, and the assessment of the sum of money specified in the Order below is an appropriate exercise of that authority.

OPINION**Default Requirements**

Neither the Contractor nor any representative of him appeared at the hearing of this matter. In fact, the Contractor's request for a hearing is the Contractor's only contribution to the record herein. This exhibit contains no factual assertions or evidence concerning this matter. Therefore, having raised no defense at all to the allegations in the Notice of Intent to Assess Civil Penalty, the Contractor has defaulted herein.

In a default situation, the responsibility of this forum is to determine if the agency has made a prima facie case on the record that the Contractor has violated the law. ORS 183.415(6). In this matter, the evidence shows that the Contractor committed certain acts which, under ORS 658.405, constitute acting as a farm labor contractor, that despite the requirement that one so acting must first have obtained a farm labor contractor's license issued by the Agency, and despite the Agency's repeatedly apprising the Contractor of this requirement and attempting to cause him to apply for that license, the Contractor neither applied for nor obtained it. This uncontroverted evidence clearly constitutes a prima facie case that the Contractor has violated ORS 658.410 and 658.415(1).

Civil Penalty

ORS 658.453(1)(a) allows the Commissioner to assess a civil penalty not to exceed \$2000 for each violation by a farm labor contractor who, without a valid license from the Agency, employs a worker. As a farm labor contractor, the Contractor herein

employed workers on at least two different contracts during times material without a valid license from the Agency. The Commissioner is empowered, therefore, to assess a penalty of up to \$4000 against Contractor in this matter.

There is no evidence on the record that the Contractor has violated Oregon farm labor contractor law before the instances found herein. OAR 839-15-510(4)(a) provides that the civil penalty for acting as a farm labor contractor without a valid license will be up to \$500 for the first offense. Although not directly applicable herein, because it was promulgated after times herein material, this rule does offer guidance in determining the civil penalty to be assessed in this matter. In light of this guidance, and because the agency has proposed that the Commissioner assess a civil penalty of \$500 against the Contractor, this forum has determined that assessment of a civil penalty of \$500 against the Contractor is appropriate herein.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, the Contractor is hereby ordered to deliver to the Hearings Unit of the Bureau of Labor and Industries, Room 309, 1400 S.W. Fifth Avenue, Portland, Oregon 97201, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of FIVE HUNDRED DOLLARS (\$500) plus any interest thereon which accrues, computed and compounded annually at the rate of nine per cent, between the date of the issuance of the Final Order, and the date the Contractor complies with the Final Order. This assessment is a civil

penalty against the Contractor for his violation of ORS 658.410 and 658.415(1) found above.

**In the Matter of
RICHARD NIQUETTE,
dba Manning's Cafe, Respondent.**

Case Number 21-84
Final Order of the Commissioner
Mary Wendy Roberts
Issued March 6, 1986.

SYNOPSIS

Respondent discharged Complainant in retaliation for Complainant's attempt to assist a coworker in a fact-finding proceeding before the Bureau of Labor and Industries, in violation of ORS 659.030(1)(f). The Commissioner awarded Complainant back pay, including lost tips, and \$1500 for mental suffering. The Commissioner did not offset unemployment compensation or welfare payments from the back-pay award, as such payments are collateral benefits to an employee and are not intended to reduce an employer's liability for the consequences of unlawful employment practices. ORS 659.030(1)(f).

The above entitled contested case came on regularly for hearing before Diana E. Godwin, designated as Presiding Officer by Mary Roberts,

Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing commenced on September 16, 1985, in Room 221 of the Federal Office Building, 211 East Seventh Avenue, Eugene, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Betty Smith, Assistant Attorney General. Respondent Richard Niquette was not represented by counsel, nor was Respondent present at the hearing. Respondent was found in default at the hearing. The Agency called as a witness Complainant Susan J. Bowlus, formerly known by her married name Susan J. Horton, and David E. Munz, investigator for the Civil Rights Division of the Agency.

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

**FINDINGS OF FACT –
PROCEDURAL**

1) On October 4, 1983, Susan J. (Horton) Bowlus filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she had been and continues to be discriminated against in connection with her employment in that Respondent retaliated against her by terminating her employment because she assisted in a proceeding under ORS 659.010 to 659.110 or attempted to testify or assist in such a proceeding.

2) Following the filing of the aforementioned verified complaint, the Civil Rights Division investigated the

allegations in the complaint and determined that substantial evidence existed to support these allegations.

3) Specific Charges were filed on June 18, 1985, alleging that Respondent committed an unlawful employment practice in violation of ORS 659.030(1)(f) for the reason that Respondent retaliated against Complainant by terminating her employment because she assisted in a proceeding under ORS 659.010 to 659.110 or attempted to testify or assist in such proceeding.

4) A Notice of Hearing and the Specific Charges were sent to Respondent by certified mail on June 22, 1985. Respondent signed the receipt on June 22, 1985.

5) Respondent was also given notice as required under ORS 183.413.

6) Respondent submitted a letter dated May 25, 1985, to the Agency in which he denied the charges against him, but offered no evidence or affirmative defense to the charges in that letter. This letter included a copy of the Notice of Hearing dated June 18, 1985, and was enclosed in an envelope postmarked July 10, 1985.

7) A subpoena to appear at deposition in connection with this matter was served on Respondent on September 5, 1985, and affidavit of service was filed with the Agency. Respondent did appear and was deposed before a court reporter on September 9, 1985.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Richard Niquette, dba Manning's Cafe, was an employer subject to the provisions of ORS chapter 659.

2) Respondent is engaged in the business of operating Manning's Cafe, a restaurant in Oakridge, Oregon.

3) Complainant was employed by Respondent on April 22, 1983, when Respondent leased Manning's Cafe from the owners and previous operators. Respondent then operated the business and signed all paychecks. Complainant was employed at Manning's Cafe for two years before Respondent leased the cafe. Complainant worked for Respondent as a waitress, dishwasher, cashier, and clean-up person.

4) Complainant worked an average of three days each week, eight hours per day, under both Respondent and the previous operators. Respondent generally maintained the same working schedule for the waitresses after he took over the cafe. Respondent supervised the work at the cafe each day.

5) A meeting was held after Respondent leased the cafe to determine the schedule for waitresses. Respondent retained all waitresses already employed at Manning's Cafe. The system established by the previous employer was maintained, that is, Complainant was to work three days each week.

6) Complainant was paid \$3.35 an hour, and testified she earned between \$5.00 and \$10.00 a day in tips. She received no employee benefits.

7) Respondent employed five or six other waitresses besides Complainant, and he prepared a weekly work schedule for the waitresses on the Friday evening or Saturday prior to the next work week. Complainant had

seniority along with one other waitress because she had worked at the cafe for more than a year and half before Respondent leased the cafe.

8) By July, it was determined that there was insufficient work for each waitress to work three days each week. At a meeting held on this matter on July 27, 1983, Complainant offered to help the other waitresses by agreeing to work only two days each week and to be on call for a third day.

9) Due to the fact that Complainant had "seniority", Complainant believed she would have been called to work for a third day during the week.

10) Respondent stated at his deposition that he never had too many waitresses as he was always short of help due to the fact that someone always wanted a day off work.

11) Complainant's working relationship with Respondent and her other co-workers was generally good.

12) Respondent also owned and operated the Food Basket business next door to Manning's Cafe, and paid the Complainant on Food Basket checks.

13) Prior to August 12, 1983, Complainant requested that she be allowed to have the weekend of August 12th through the 15th off of work in order to visit with some relatives who were arriving in town. She had already worked her three days of the week prior to that weekend.

14) About that time Respondent hired another waitress who had previously worked at the cafe. She was hired to fill in for waitresses on vacation. This waitress averaged three days of work each week. She worked

on Friday evening, August 12th, a day upon which Complainant normally would have worked.

15) That following week, the week of Sunday, August 14th, through Saturday, August 20th, Respondent scheduled Complainant for only one day of work. Normally, Complainant would have had two scheduled days plus one day when she filled in for the other waitresses. The following week, Sunday, August 21st, through Saturday, August 27th, Respondent again scheduled Complainant for only one regular day of work.

16) While working at Manning's Cafe, Complainant became friends with Patti Wood, another waitress. Some time during 1983, Ms. Wood filed a complaint with the Bureau of Labor and Industries of the State of Oregon alleging that Respondent had discriminated against her in the terms and conditions of her employment by subjecting her to sexual harassment.

17) On Thursday, August 25, 1983, Complainant rode with Ms. Wood from Oakridge to Eugene to accompany Ms. Wood to a fact-finding conference in regard to Ms. Wood's employment discrimination complaint. The conference was held at the offices of the Bureau of Labor and Industries in Eugene. Complainant had not been subpoenaed to testify, but went with Ms. Wood to provide "moral support." No other waitresses were involved at the fact-finding conference. Complainant was generally aware of Ms. Wood's complaint against Respondent from talking with her.

18) At the fact finding conference, Complainant was seated outside the door of the room in which the fact-

finding conference was being held. Respondent saw Complainant at the fact-finding conference with Ms. Wood; however, Respondent did not speak to Complainant.

19) On Saturday, August 27th, Complainant received a telephone call from one of the other waitresses, Rhonda Walker, at Manning's Cafe. Complainant was told that she, Complainant, was not listed on the work schedule for the week of August 28th.

20) On Thursday, September 1st, Complainant went to Manning's Cafe to pick up her paycheck. She asked Respondent at that time why she was not on the schedule for that week. Complainant reminded Respondent that she had two children to support. Complainant asked Respondent if she was fired. Respondent said "no" but did not know what her schedule would be. Respondent also did not explain why Complainant's name was not listed on the schedule.

21) The following Saturday, September 3rd, Complainant was once again not on the work schedule. Complainant checked several times after September 3rd to see if she was on the schedule and found that she was not scheduled. No other waitress working for Respondent at the time was omitted from the work schedule.

22) The Complainant worked for Respondent on August 24, 1985, the day before the fact finding conference involving Ms. Wood. This was the last day that Complainant was scheduled to work for Respondent. Prior to this time, Respondent had never stated he intended to fire Complainant, and gave her no reason to believe he would do so. Complainant was not aware of any

other waitress who was not scheduled for work after August 24, 1985. Patti Wood had been fired prior to the fact finding conference.

23) When interviewed by an investigator from the Bureau of Labor and Industries, Civil Rights Division, Respondent was asked why he failed to schedule Complainant for any work days after the Patti Wood fact finding conference. Respondent said "it was because of my great agitation over the Patti Wood case." Respondent also stated that Complainant's preference was to work two scheduled days a week and one day a week on call as a fill in for other waitresses. Respondent stated that the most he would have scheduled Complainant for was one or two days. Scheduling was based on the number of waitresses he had working at Manning's Cafe.

24) At his deposition taken on September 9, 1985, Respondent was asked how he felt about seeing Complainant at the fact finding hearing in Eugene. Respondent answered:

"Well, as I say I felt that, if she went in to testify against me, then she was working the same lie that Patti Wood was."

Respondent was then asked the question:

"You were told that Susan went in for what purpose?"

He responded:

"To testify against me."

25) In a letter to the Agency dated May 25, 1985, Respondent simply stated that he denied the charge against him but offered no explanation or evidence in that regard.

26) Respondent's denial, in his May 25, 1985, letter, of the allegation that he had discriminated against Complainant is not credible in light of his actions in dropping Complainant from the work schedule within a matter of days after seeing her at Ms. Wood's conference, and in light of his answers to questions on deposition and from the investigator for the Agency. In contrast to Respondent, Complainant's testimony was consistent and credible. Furthermore, Complainant's testimony regarding the connection between her appearance at the fact finding conference and Respondent's failure to schedule her for work was corroborated by documentary evidence and Respondent's own statements.

27) Respondent did stop scheduling Complainant for any work hours at Manning's Cafe and in effect discharged her. Complainant had intended to continue her work at Manning's Cafe indefinitely.

28) Some time after August 27th, 1983, Complainant applied for both unemployment and welfare benefits. She received unemployment benefits for some time and then received welfare.

29) During this period from September 1, 1983, through October of 1984, when she began work at another job, Complainant looked for various jobs as a waitress, doing sewing work, etc. Although she was agreeable to any type of work or hours, she was unable to secure any employment during this period. She received Aid to Families with Dependent Children from October 1983 to July 1985.

30) Also during this period, she was self-employed as an Amway distributor and as a dance instructor for "Inch

Away" dance company. She experienced a net loss each month while she was engaged in these self-employment enterprises. This was reported to Adult and Family Services and was recorded.

31) Complainant began working full time with Premier Plywood on October 24, 1984. In this job she earned \$4.55 an hour. Complainant intended this job to be a full time permanent position. Complainant ceased working at Premier Plywood when the mill burned down. Otherwise, she would have continued her employment there. Once she secured the job at Premier Plywood, Complainant no longer wished to return to employment with Respondent.

32) During the period when Complainant worked for Respondent, from April 22nd to August 27th, 1983, she earned an average weekly gross salary of \$70.12, based on an average of 20.93 hours a week at \$3.35 an hour. In addition, Complainant testified she earned between \$5.00 and \$10.00 a day in tips. It is noted that the record indicates that Complainant did not declare tip income on her 1983 Tax return.

33) If Complainant had not been terminated and had continued working for Respondent for the remainder of 1983, from August 28th until December 31st, a period of 18 weeks, she would have earned \$1667.16, including wages at \$70.12 a week and tips of \$22.50 a week calculated at \$7.50 per day, the average figure between \$5.00 and \$10.00, and three days of work per week. Instead she earned no net income during this period. As stated, Complainant did receive Aid to

Families with Dependent Children and unemployment benefits.

34) If Complainant had worked for Respondent from January 1, 1984, until October 24, 1984, when she began work for Premier Plywood, a period of 43 weeks and 2 days, she would have earned \$4046.90, including wages of \$70.12 a week and tips of \$22.50 a week calculated at \$7.50 per day and three days of work per week. Instead, she earned \$80.00 in wages working as a cashier and clerk for a record store. Complainant also earned \$4867.00 from a "hobby" and received Aid to Families with Dependent Children.

35) During the period between the time Complainant was effectively discharged from her job at Manning's Cafe and the time she found another job one year and several months later, she was upset and anxious. Complainant has two children to support and she was not receiving any child support. The only source of support for her family was her job at Manning's Cafe. Complainant felt she had been treated unfairly as she had been a good worker. She communicated her concern and anxiety to relatives and friends.

36) Respondent ceased operating Manning's Cafe on April 11, 1985, and is presently operating an establishment known as the Picnic Basket.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent operated Manning's Cafe, a restaurant in Oakridge, Oregon, and employed waitresses in that business. Respondent was subject to the provisions of ORS chapter 659.

2) When Respondent leased Manning's Cafe on April 22, 1983, he employed Complainant, who had previously been working at the cafe, as a waitress, dishwasher, cashier, and clean-up person effective April 22, 1983. Complainant generally worked three days a week, was paid wages of \$3.35 an hour, and earned approximately \$7.50 a day in tips. She received no employee benefits.

3) Once a week, on Friday or Saturday, Respondent would prepare a work schedule for the following week. Respondent usually scheduled Complainant to work two days a week and she would also work an extra day during that week filling in for other waitresses when ill or on vacation.

4) While working at Respondent's restaurant, Complainant became friends with Patti Wood, another waitress. During the course of this friendship, Complainant learned that Ms. Wood had filed an employment discrimination complaint with the Bureau of Labor and Industries against Respondent alleging sexual harassment.

5) On Thursday, August 25, 1983, Complainant accompanied Ms. Wood to a fact-finding conference in Eugene held in regard to her discrimination complaint. Respondent was present at the conference and saw Complainant there with Ms. Wood.

6) When Respondent prepared the work schedule for the waitresses for the week beginning Sunday, August 28th, Complainant was not included. Further, Respondent did not schedule Complainant for any days of work the next week or any week thereafter. The last day Complainant worked for Respondent was on August

24, 1983, the day before the fact-finding conference for Ms. Wood. Respondent did not fail to schedule any other waitresses for work.

7) Since Complainant could not work if she was not scheduled to do so, Respondent effectively discharged Complainant by failing to schedule her for any days of work after August 25th. Prior to August 25th, Complainant's working relationship with Respondent and her co-workers had been good, and she would have continued to work for Respondent if she had not been terminated.

8) Complainant earned an average weekly income of \$92.62 during the period when she worked for Respondent between April 22nd and August 27th, 1983. This figure includes \$70.12 in wages and \$22.50 in tip income based on earning of \$7.50 a day in tips.

9) Despite diligent efforts, Complainant was unable to find a job for the remainder of 1983, a period of 18 weeks. If she had not been terminated by Respondent she would have earned \$1667.16 during this period. From January 1 until October 24, 1984, Complainant earned only \$80.00 in wages from a temporary job. If she had not been terminated she would have earned \$4046.90 for this period in 1984, for net lost income of \$3966.90. Complainant lost income for the period of August 28, 1983, until October 24, 1984, in the net total amount of \$5634.06.

10) Complainant began work in a full time, permanent position for Premier Plywood on October 24, 1984, at a wage higher than she would have earned with Respondent. Once she

obtained this job, Complainant no longer wanted to work for Respondent.

11) As a direct result of Respondent's termination of her employment, Complainant suffered mental distress and anxiety over how she was going to support herself and her two children. This anxiety and distress continued for more than a year while Complainant was unable to secure new employment.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110.

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

3) Respondent and Complainant were advised in writing before the start of the contested case proceeding of the matters described in ORS 183.413.

Pursuant to ORS 183.415, at the commencement of the hearing the issues involved and the matters to be proved were explained to Complainant. Respondent was not present at the hearing.

4) Respondent violated ORS 659.030(1)(f) when he discharged Complainant because he believed that she was assisting or attempting to assist in the proceeding under ORS 659.010 to 659.110 initiated by Ms. Woods.

5) The accrual of back wages ended when Complainant began employment on October 24, 1984, in a permanent job in which she earned the same or more compensation than she would have earned working for

Respondent. An order to Respondent to reinstate Complainant in her former position would not be appropriate since Complainant no longer wishes to work for Respondent.

6) The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Complainant under the facts and circumstances of this record, and awarding as damages the sums of money specified in the Order below is an appropriate exercise of that authority.

OPINION

Neither Respondent, nor any representative thereof appeared at the hearing in this matter. The Specific Charges and Notice of Hearing were sent to Respondent by certified mail. Respondent signed the receipt for these documents. Respondent did, however, appear and testify at a deposition in this matter held one week prior to the hearing.

Respondent's letter dated May 25, 1985, made a part of the record herein, is Respondent's only contribution, aside from his deposition, to the record. This letter raised no defense to the allegations set forth in the Specific Charges.

Respondent has, for the reasons set forth, defaulted as to the charges. It is necessary, where a respondent has so defaulted, to determine whether the Agency has established a prima facie case that the Respondent violated the law as charged.

Therefore, the hearing in this matter was held to take evidence on the record to establish a prima facie violation of Oregon's laws on unlawful employment practices, specifically ORS

659.030(1)(f), and to establish damages. Because Respondent was not present at the hearing and had submitted no evidence to refute the evidence offered by the Agency on behalf of the Complainant, the Complainant's credible testimony and other evidence is accepted and relied upon herein. Respondent's "answer", a letter to the Agency dated May 25, 1985, and post-marked July 10, 1985, and made part of the record herein, simply denied the charge and offered no reason why he stopped scheduling Complainant for work after he saw her at the fact finding conference on Ms. Wood's employment discrimination complaint. In his deposition taken September 9, 1985, Respondent also made admissions against his interest as to what he believed Complainant's role to be in Ms. Wood's case. These statements were admitted into evidence against him.

Various of the exhibits offered by the Agency independently corroborated Complainant's testimony regarding the correlation between her appearance at the fact-finding conference and Respondent's immediate action effectively terminating her employment. The work schedules prepared by Respondent, and entered in the record, show that Complainant was dropped from the very next work schedule that Respondent prepared after seeing Complainant with Ms. Wood at the fact finding conference in Eugene. Moreover, Respondent's own statements to Mr. Munz, the investigator for CRD, and in his deposition establish that he was in fact retaliating against Complainant for what he believed was her role in Ms. Wood's

case. No other reason was offered or was apparent for Respondent's decision not to schedule Complainant for any days of work after the fact finding conference. She had worked at the restaurant for some time before Respondent took over the operation and had been kept on by Respondent. Complainant got along with Respondent and her co-workers. During the four months between April 22nd and August 27th, 1983, Respondent had always scheduled her for days of work. Respondent was in the cafe on a daily basis and was therefore able to observe Complainant's work performance. There is no evidence to suggest that Respondent's termination of Complainant was due to poor job performance.

ORS 659.030(1)(f) provides that an Employer shall not

"discharge, expel or otherwise discriminate against any person because the person has opposed any practices forbidden by this section * * * or because the person has filed a complaint or testified or assisted in any proceeding * * * or has attempted to do so." (Emphasis added.)

As stated, Respondent did not schedule Complainant for work after August 25, 1985, the date of Ms. Wood's fact-finding conference. Clearly, this action falls under the prohibition on employers to "otherwise discriminate." It is likewise clear that Complainant would not work where she was not scheduled to do so. Thus, while Respondent did not tell Complainant she was discharged, his actions amounted to a termination of her employment and she

was, therefore, constructively discharged.

This forum has adopted the standard set forth in *In the Matter of West Coast Truck Lines, Inc.*, 2 BOLI 192 (1981), *aff'd without opinion*, *West Coast Truck Lines, Inc. v. Bureau of Labor and Industries*, 63 Or App 383, 665 P2d 882 (1983), in determining whether a complainant has been constructively discharged. In that order this forum stated:

"The general rule, which this forum adopts, is that if an employer deliberately makes an employee's working conditions so intolerable that the employee is forced to involuntary resignation, then the employer has encompassed a constructive discharge * * * *West Coast Truck Lines*, at 215, quoting *Young v. Southwestern Savings and Loan Association*, 509 F2d 140, 144 (5th Cir 1975).

This forum made clear in that order that "deliberately" does not mean that the employer's imposition of "intolerable" working conditions need be done with the intention of either forcing the employee to resign or relieving himself of that employee. The term "deliberately" refers to the imposition of the working conditions; that is, it means that the working conditions were imposed by the deliberate or intentional actions of the employer. In *In the Matter of Sapp's Realty, Inc.*, 4 BOLI 232, 274 (1985), this forum stated:

"To find a constructive discharge, this forum must be satisfied that working conditions * * * so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to

resign, caused the employee to resign, and that the conditions were imposed by the deliberate, or intentional, actions or policies of the employer. *West Coast Truck Lines*, at 215, citing *Alicia Rosado v. Garcia Santiago* 562 F2d 114, 119 (1st Cir 1977); *Calcote v. Texas Educational Foundation*, 578 F2d 95, 97-98 (5th Cir 1978); EEOC Decision No 72-2062 (6-22-72)."

The Respondent "deliberately" failed to schedule Complainant for work. He "intended" to do so and he did. Clearly, it was reasonable for Complainant to feel compelled not to return to Respondent's business. Conditions were more than intolerable, conditions were non-existent. Complainant could not work where she was not scheduled to do so. As a result, the Respondent's intentional failure to schedule Complainant caused her not to return to Respondent's business.

It is likewise made clear in *West Coast Truck Lines* that where there has been a constructive discharge,

"an employer is liable for any unlawful conduct involved therein as if the employer had formally discharged the employee." *West Coast Truck Lines*, at 216.

Thus, Respondent is liable for his unlawful action in retaliating against complainant by terminating her employment.

The amount of damages awarded for lost income includes an amount for tips which complainant would have earned but for Respondent's actions in discharging her. Although Complainant's tip income was not actual wages

paid directly by Respondent, it was part of the overall compensation which Complainant earned in her job, and Respondent can be held liable because he caused the loss of income.

In *In the Matter of Love's Woodpit Barbeque Restaurant*, 3 BOLI 18 (1982), this forum recognized the difficulty inherent in determining precisely the amount of lost tip income because such income varies from week to week. However, as stated in that matter, and in the case law cited therein, damages may be awarded even though they cannot be computed with precision.

In this matter, the figure used was \$7.50 per day in tip income, or \$22.50 a week based on a three day work week. Complainant testified that she received tip income ranging "from \$5.00 to \$10.00 a day." There is therefore a basis for accepting \$7.50, the average figure between \$5.00 and \$10.00 per day, as the tip income earned. The figure of \$7.50 was used in calculating Complainant's lost income in that this figure reduces the possibility of overestimating speculative damages and is supported by credible testimony. There was, as stated, a discrepancy in the evidence on the record regarding Complainant's tip income, that is, the record indicates Complainant did not report this tip income on her 1983 income tax return. However, Complainant's testimony that she earned between \$5.00 and \$10.00 a day in tips was accepted because Complainant was a credible witness. Her testimony on other issues was corroborated by documentary evidence and by Respondent's own statements.

Furthermore, Complainant's testimony is consistent with common knowledge of how waiters earn money. Oregon law governing agency conduct of contested case proceedings, ORS 183.413 to 183.470, permits an agency to take notice of "Judicially cognizable facts." ORS 183.450(4). While the generally recognized "fact" that waiters earn income from "tips" may not rise to the level of a "judicially cognizable fact" it is nonetheless one which is ordinarily not subject to reasonable dispute. Moreover, Respondent had the opportunity to dispute this element of damages, but forfeited that opportunity by his failure to be present at the hearing. Under ORS chapter 659, the Commissioner of the Bureau of Labor and Industries is authorized to eliminate the effects of any unlawful practice found. For the reasons set forth, and pursuant to this statute, the figure of \$7.50 a day of tip income has been accepted as a fact and has been used to calculate the damage award.

On the issue of mitigation of lost income damages, the payments Complainant received from welfare and unemployment insurance after she was terminated were not deducted. This forum has long observed a rule similar to the collateral source rule that obtains in the area of tort law that benefits received by an injured party from a source wholly independent of the wrongdoer need not be deducted from the damages owed to the injured party.

The Oregon Supreme Court in the case of *McPherson v. Employment Division*, 285 Or 541, 556 P2d 381 (1979), stated that unemployment compensation is not intended to

compensate for a wrong done to an employee by an employer, but rather only to provide an unemployed worker a means of living while looking for new employment. This forum adopted that reasoning in *In the Matter of Pioneer Building Specialties Co.*, 3 BOLI 123, 129 (1982), stating that:

"Oregon law does not require the Commissioner of the Bureau of Labor and Industries to deduct the unemployment compensation received by Complainant from a damage award of back wages. Unemployment compensation was created only to provide a substitute income from public funds and is not intended to be a source for paying damages to a worker who has been wronged by an employer's racial discrimination. Unemployment benefits are collateral benefits to the employee only and are not designed to be used to reduce the employer's liability for the consequences of unlawful employment practices."

That same reasoning is applied to welfare benefits.

Although Complainant's 1984 tax return shows income of \$4867.00 from a source described only as a "hobby", this amount was not deducted from the damages assessed for 1984, because there was no evidence to determine or suggest that Complainant would not have been engaged in this hobby even if she had remained in Respondent's employ.

This forum has also found that Complainant not only incurred economic loss, but also suffered pain and anguish as a direct result of Respondent's sudden act of retaliation against

her. Complainant testified that she felt, in being discharged, she had been treated unfairly as she had been a good worker. Subsequent to her discharge, it took in excess of one year for Complainant to find another job. During this time, Complainant, who was not receiving any child support payments, was responsible for the support of two children. As she testified, this all left Complainant upset and suffering anxiety over how she was going to support herself and her two children until she was able to secure new employment. As a result of her discharge and consequent unemployment, Complainant was compelled to apply for and accept both unemployment and welfare benefits. For all of these reasons, it is appropriate to award Complainant a sum in damages for pain and anguish.

This forum has previously stated that there is further a public interest in discouraging retaliatory conduct. *In the Matter of Boost Program*, 3 BOLI 72 (1982). Enforcement agencies rely, in part, on individuals coming forward with complaints for or information regarding violations of the law. To insure the flow of information and the enforcement of the law, individuals must feel free and protected by the law to come forward. This type of protection is established in ORS 659.030(1)(f). No employee should fear to exercise any constitutional or statutory right. Retaliation for such conduct, in addition to the economic consequences and obvious emotional impact, can dilute an employee's self confidence and discourage an employee from assisting in the enforcement of the law. The effects of this kind of discrimination

extend beyond the Complainant, and it is for this reason a particularly insidious form of discrimination.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the violation of law found herein, as well as to protect the lawful interests of others similarly situated, Respondent is ordered to:

1) Deliver to the Hearings Unit of the Portland Office of the Bureau of Labor and Industries a certified check in trust for SUSAN J. BOWLUS in the amount of SIX THOUSAND SIX HUNDRED SIXTY-NINE DOLLARS and SIX CENTS (\$6,669.06), plus interest upon \$5,169.06 thereof compounded and computed annually at the rate of nine percent until the date upon which Respondent complies with this paragraph. This award represents \$5,169.06 in damages for income Complainant lost because of Respondent's violation of the law set out above, and \$1,500.00 in damages for pain and anguish Complainant suffered as a direct result of that violation;

2) Cease and desist from discriminating against any employee because that employee has testified or assisted, or attempted to assist, in any proceeding under ORS 659.010 to 659.110.

In the Matter of 3 SON LOGGERS, INC., Respondent.

Case Number 03-84
Final Order of the Commissioner
Mary Wendy Roberts
Issued March 19, 1986.

SYNOPSIS

Respondent discharged Complainant for refusing to perform work Complainant reasonably believed was unsafe (inflating truck tires on multi-piece rims without a required safety cage or other restraining device), in violation of ORS 654.062(5). The Commissioner awarded Complainant back pay.

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on April 25, 1985, next to the Blue Room of the State Forestry Building, 300 Fifth Street, Bay Park, Coos Bay, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Michael Cannady, Assistant Attorney General of the Department of Justice of the State of Oregon. 3 Son Loggers, Inc. (hereinafter Respondent) was represented by Robert L. Litchfield, Jr., Attorney at Law. Robin L. Wright (hereinafter Complainant) was present throughout the hearing.

The Agency called as its witnesses Complainant; George N. Pibum, Jr.

and Clarence Mansfield, Complainant's coworkers during his employment by Respondent; Jack Kalina, Respondent's Maintenance Supervisor during most of Complainant's employment; and John McCollum, Complainant's acquaintance and Respondent's employee after Complainant's termination. Respondent called as its one witness Gary Briggs, Respondent's owner, operator, and president during all times material herein.

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

FINDINGS OF FACT – PROCEDURAL

1) On or about October 3, 1983, Complainant filed a verified complaint with the Civil Rights Division of the Agency alleging that Respondent had discriminated and continued to discriminate against him by discharging him from employment because he had opposed safety hazards.

2) Before the commencement of the hearing of this matter, Complainant received from this forum a copy of a document entitled "Information Relating to Civil Rights and Wage and Hour Contested Case Hearings." At the commencement of the hearing, Complainant stated that he had read this document and had no questions about it. Before the commencement of the hearing, Respondent also received from the forum a copy of the same document. At the commencement of the hearing, Mr. Briggs, for

Respondent, stated that he had read this document and had no questions about it.

3) By letter dated April 15, 1985, Respondent's counsel asked the forum to issue (and return to him for service) subpoenas for Don Dery and Bill Whitely to testify at the hearing of this matter. On April 19, 1985, the forum did this. The record does not reveal whether Respondent was able to serve either subpoena. Neither Mr. Dery nor Mr. Whitely appeared at the hearing. At the start of the hearing, Respondent indicated that both it and the Agency believed that the testimony of Mr. Whitely, the person who took the action at issue in this matter, was critical herein. The Agency stated that it had served a subpoena upon Mr. Whitely, who responded by telling the Agency that he was moving to Tulare, California, on the Friday or weekend immediately before the hearing, in order to begin employment he had just obtained. Respondent and the Agency agreed to keep the record open after the hearing in order to obtain, perpetuate by deposition, and offer into the record the testimony of both Mr. Whitely and Mr. Dery. The Presiding Officer allowed the parties through May 24, 1985, to accomplish this and told them that they could request an extension of this deadline if necessary.

Thereafter, the forum did not receive any submission or request for extension from either party until on or about July 26, 1985, when the Agency submitted a Motion to Close the Record and a supporting affidavit, which the forum has admitted into the record. The affidavit stated in pertinent part that the witnesses had not been

deposed, Respondent apparently was not doing business, Respondent's attorney had moved his practice to California, and the Agency had not been able to contact him. In light of these statements and the absence of any submission from Respondent since the hearing, including any response to the Agency's motion, the Presiding Officer granted that motion and closed the record in this matter. The Presiding Officer gave written notice of those actions in a ruling admitted into the record.

FINDINGS OF FACTS – THE MERITS

1) During all times material herein, Respondent was an Oregon corporation engaged in the business of logging in the State of Oregon. In that business during all times material herein, Respondent directly engaged or utilized the personal service of one or more employees, reserving the right to control the means by which such service was performed in the State of Oregon.

2) During all times material herein, Gary Briggs was the owner, operator, and president of Respondent, which he founded in 1972.

3) During all times material herein, Respondent had one or more logging operations running in the forests of Oregon; a shop (where its mechanics maintained and repaired its vehicular equipment) located in Coquille, Oregon; and a yard (where Respondent's equipment was parked when not in use) located several miles outside of Coquille.

4) During the Summer of 1983, Respondent's vehicular equipment included at least six "big" (i.e., logging and chip) trucks, several "crummies"

(3/4 ton vans in which Respondent transported its logging crews to or from work sites), pickup trucks, one lowboy (to carry its equipment from one logging site to another), access road building equipment (including caterpillars and graters) and automobiles. (Although, for clarity, this forum will refer to Respondent's logging and chip trucks as "big" trucks in this order, the witnesses demonstrated at hearing that Respondent's employees during times material herein most often referred to Respondent's big trucks just as "trucks," while calling crummies "crummies" and pickup trucks "pickups.")

All but one of Respondent's big trucks had diesel engines, and virtually all the industrial engines in its fixed machinery were diesel.

5) During 1983, Respondent employed five or six mechanics at a time.

6) In June 1982, Respondent hired Complainant to work as a mechanic at wage of \$6.00 per hour.

7) During his employment by Respondent, Complainant's job was to service Respondent's equipment, mainly its crummies. As Complainant was a gasoline, rather than diesel, engine mechanic, he did not work on diesel engines himself. He did, however, help other mechanics work on them, and he serviced other parts of the vehicles which had diesel engines. Complainant performed his work primarily in Respondent's shop or yard.

8) Before the Summer of 1983, a local tire operation serviced the tires on Respondent's vehicles. However, in about June 1983, in order to reduce expenses, Respondent decided to be-

gin having its own employees service its tires.

9) For purposes of this order:

a) "Mounting a tire" means the assembling or putting together of rim components, tube, liner, and tire to form a wheel (including inflation of the tire). "Demounting" means the opposite of "mounting." See OAR 437-56-005(15).

b) "Installing a wheel" means the transferring and attaching of an assembled wheel onto a vehicle axle hub. "Removing" means the opposite of "installing." See OAR 437-56-005(14).

10) During all times material herein, servicing Respondent's tires included changing the tires on its vehicles. Changing those tires could entail any of the following three procedures, depending upon the situation:

a) If a tire had to be replaced (because it was flat and not immediately re-usable), changing it simply involved removing the wheel (of which the tire was part) from the vehicle and installing a spare (new or used) already-mounted tire onto the vehicle in its place. This process did not involve inflating the spare tire, as a mounted tire is already inflated.

b) If, however, a flat tire had to be replaced by a spare tire which was not already mounted and which had to be mounted on the same rim as the flat tire, changing the flat tire involved removing its wheel from the vehicle, demounting it, mounting the spare tire on the demounted tire's rim, and installing the spare tire onto the vehicle. The mounting portion of this process included inflating the tire.

c) On the other hand, if the tire to be changed was to be repaired and re-used immediately, the process of changing it meant removing its wheel from the vehicle, demounting it, repairing it, mounting it back on its rim, and reinstalling it onto the vehicle. The mounting portion of this process included inflating the tire.

11) Once Respondent started doing its own tire servicing, Respondent obtained the spare tires it put on its big trucks and crummies in uninflated batches, from a tire store. Respondent took them off the rims they came with and mounted them on appropriate rims (including inflation), one after another, in a batch, and set them aside until they were needed for a vehicle. Accordingly, Respondent's spare tires usually were mounted onto a wheel (and inflated) before they were needed for use and before the vehicle upon which they ultimately would be put was in the shop for a tire change.

12) During all times material herein, the tires on Respondent's big trucks were mounted on multi-piece rims which included lock(ing) rings. A multi-piece rim is a vehicle wheel rim consisting of two or more parts, one of which is a side or lock ring. A lock ring is a round piece of metal which is part of, and fits around the edge of, a wheel, holding the tire on the rim of the wheel when the tire is inflated. In other words, a lock ring helps hold the wheel together.

During all times material herein, a tire with a multi-piece rim had to be changed by hand. Changing that involved mounting or demounting such a tire (i.e., which involved more than removing one wheel and installing

another, already-mounted wheel) required the use of special tools, bars with lips and heels, to pry off the lock ring and complete the demounting and/or mounting process. OAR 437-56-005(16).

13) During times material herein, the tires on Respondent's crummies did not have multi-piece rims. Respondent had to have a tire machine to change those (as well as pickup truck and automobile) tires. This machine demounted the tire, i.e., broke the bead on its rim and took the tire off the rim by getting between the tire and rim and running around the rim. (Although one could change a crummy tire without a machine by simply removing its wheel from the crummy and replacing it with a spare, already-mounted crummy wheel, Respondent needed the machine to obtain, i.e., transform a spare tire into, such a spare, already-mounted crummy replacement wheel. See Finding of Fact 11 above.

Respondent did not acquire a tire machine until September 1, 1983. Accordingly, Respondent did not change (as explained in the previous paragraph) or, therefore, inflate its crummy tires in its shop until at least that date. The only tires Respondent changed (or, therefore, inflated) in its shop before September 1, 1983, were tires to be used with multi-piece rims.

14) When Respondent started doing its own tire servicing, Respondent hired Joe Pibum. Respondent's tire servicing was primarily Mr. Pibum's task, and he did most of the tire servicing done by Respondent's employees throughout the rest of Complainant's employment. However, if Mr. Pibum was not available when tire servicing

had to be done, Respondent's other shop employees, including Complainant, did it. Because the mounting of Respondent's spare tires was usually only done in advance, when Mr. Pibum was available (i.e., Mr. Pibum did it when he had nothing else to do), Mr. Pibum did virtually all of this mounting (including inflation).

15) After Respondent started doing its own tire servicing, Complainant sometimes changed a tire, in the simplest sense of that process (which did not involve inflating). In addition, Complainant occasionally helped Mr. Pibum with tire servicing, usually by helping him install wheels onto a vehicle. However, Complainant did not inflate tires more than approximately twice, when he helped Mr. Pibum inflate big truck tires in emergencies. Even after Respondent obtained its tire machine on September 1, Complainant did not inflate any crummy tires or help Mr. Pibum do this. (Although Mr. Kalina testified that Complainant did do crummy tire inflation, this forum has found that he did not, based upon the testimony to that effect of Complainant and Mr. Pibum, as well as the absence of probative evidence that Complainant inflated any crummy tires on the time cards, which describe all of Complainant's work after Respondent obtained the tire machine and started servicing its crummy tires.)

16) It can be hazardous to inflate big truck tires (i.e., for purposes of this order, tires mounted on multi-piece rims). A lock ring which is not on properly can come off at any time during the inflation process. If this occurs when the tire has sufficient air in it, the lock ring will fly off at a high rate of

speed, subjecting any person in its path to serious injury or death.

17) During all times material herein, the following provisions were included in Division 56 of the Oregon Occupational Safety and Health Code:

"The employer shall furnish and shall assure that employees use a restraining device in servicing multi-piece rim wheels." OAR 437-56-060(1).

"(In the servicing of multi-piece rim wheels,) * * * (t)ires shall be inflated only when contained by a restraining device * * *." OAR 437-56-070(4).

"Restraining device' - A mechanical apparatus such as a safety cage, rack, or safety bar arrangement or other machinery or equipment specifically designed for this purpose, that will constrain all multi-piece rim wheel components following their release during an explosive separation of the wheel components." OAR 437-56-005(17).

18) At no time during Complainant's employment did Respondent have a safety cage or other restraining device to fit over its big truck tires (i.e., tires which were part of multi-piece rim wheels) while they were being inflated. Mr. Briggs was aware of the safety hazard involved in inflating Respondent's big truck tires when Respondent decided to do its own tire work, and he knew of the above-quoted restraining device requirement. Respondent was in the process of building a cage, which was about 2/3 done, when Complainant was discharged.

19) During most of Complainant's employment at Respondent after about February 1983, his immediate supervisor was Jack Kalina, the Maintenance Supervisor. Part of Mr. Kalina's job was to see that "different people got assigned to different jobs" and to watch shop employees to make sure they were busy and doing their jobs correctly. However, Mr. Kalina frequently had to be away from the shop two to three days at a time, supervising maintenance and working as a diesel mechanic himself at remote job sites. During these absences, there was no one supervising shop employees who were not with Mr. Kalina. To fill this gap, Respondent hired Bill Whitely, during the very last part of August or the first part of September 1983, as the shop foreman to supervise the shop and yard when Mr. Kalina was absent from Coquille. (Although Mr. Kalina remained the overall supervisor of the shop and yard, the mechanics, and Mr. Whitely, Mr. Whitely was in charge when Mr. Kalina was not in Coquille.) Mr. Whitely also did parts ordering and inventorying for Respondent's shop.

By September 13, 1983, there was a lot of animosity in the shop toward Mr. Whitely, because its employees were used to doing what they wished during Mr. Kalina's absences and did not like Mr. Whitely telling them what to do. Up until September 13, Complainant had taken just "a few" orders from Mr. Whitely.

20) Because Mr. Kalina was not at Respondent's shop on September 13 or 14, 1983, Mr. Whitely was Complainant's immediate supervisor while

Complainant was in the shop on those days.

21) As of September 13 and 14, 1983, Respondent was still in the process of converting to doing all its own tire servicing, and Respondent probably was still having the bulk of that servicing done elsewhere.

22) On September 13, 1983, Complainant and another of Respondent's mechanics named Ralph Perry (spelling phonetic) returned to Respondent's shop at about 3 or 4 p.m., after having worked approximately thirty hours on September 12 and 13 at two locations away from Respondent's shop. Upon returning to the shop, Complainant encountered Mr. Whitely, and Mr. Whitely asked him to "go inflate some truck tires." Complainant told Mr. Whitely, in effect, that he would not do that until Respondent got a safety cage or some restraining device. Mr. Whitely told Complainant he "might as well go home." Mr. Whitely did not say that Complainant was fired, terminated, or discharged. Complainant went home.

23) The next day, September 14, 1983, Complainant reported for work at Respondent's shop as usual, around 7 to 8 a.m. When Mr. Whitely came in shortly thereafter, he asked Complainant to come to the upstairs office with him. Once they were there, Mr. Whitely told Complainant that he realized that Complainant had been tired and in a bad mood the previous day, and asked Complainant if he would go do the tires now. Complainant told him no, not until Respondent got the safety cage. In response, Mr. Whitely told him he might as well go home. When Complainant asked him if that meant he was fired, Mr. Whitely said yes.

With the help of coworkers, Complainant loaded his tools. When those coworkers asked Complainant what he was doing, Complainant told them he was fired. He did not say anything more. (Complainant's testimony at hearing illustrated that he speaks sparingly, using few words. He answers exactly what he is asked and no more.) Within about one week after September 14, Complainant did tell John McCollum, an acquaintance, that he had been discharged because of the safety cage. When Complainant's tools were loaded on September 14, 1983, Complainant left Respondent's shop and went home.

24) In his above-described discussions with Mr. Whitely on September 13 and 14, 1983, Complainant conveyed to Mr. Whitely that "(airing the) tires * * * (was) unsafe without the right equipment."

25) Complainant testified that as of September 13-14, 1983, Respondent "didn't have anything to do any crummy tires with," "no machines to change crummy or pickup tires with; no way to do crummy tires."

Complainant also testified (and in the absence of controverting evidence this forum finds) that he thought that Mr. Whitely, in his above-described September 13-14, 1983, directives to Complainant, was telling Complainant to change big truck tires, because there "was no crummies setting around; wasn't any flat tires in the shop." There were, however, big truck tires in the shop on those days. Accordingly, as far as Complainant knew then or knows now, Mr. Whitely was not asking him to work on crummy

tires; he was asking him to work on big truck tires.

For reasons explained in the portion of Section 2 of the Opinion below dealing with the testimony of Clarence Mansfield (another of Respondent's mechanics), which is hereby incorporated by reference into this Finding, this forum finds that during those parts of the above-described conversations between Complainant and Mr. Whitely, which took place in Respondent's shop on September 13-14, 1983, Mr. Mansfield was working about ten feet away from Complainant and Mr. Whitely. Accordingly, Mr. Mansfield overheard those exchanges. Mr. Mansfield testified that he is sure that during those conversations, he heard Mr. Whitely specify "truck" (i.e., rather than crummy) tires. He testified, when asked, that that stuck in his mind because (big) truck tires were the only tires in Respondent's shop at the time.

When Complainant told Mr. Whitely he would not inflate the tires because Respondent did not have a cage, Mr. Whitely did not reply anything to the effect that they were crummy or pickup tires and/or that Complainant would not need a safety cage or other restraining device.

Complainant did not go "down and check to see what kind of tires" he was being asked to inflate on September 13 and 14, because on both those days, Mr. Whitely told him to go home.

Mr. Briggs admitted in effect that he does not know whether the tires Mr. Whitely asked Complainant to inflate were big truck tires or crummy tires. He testified that he doesn't think anyone knew or knows that except Mr. Whitely.

26) Complainant testified that he had not ever mentioned the lack of a safety cage to Mr. Whitely before September 13, 1983, because Complainant "hadn't done any tires since (Mr.) Whitely had been there."

As indicated in Finding of Fact 19 above, Mr. Whitely was hired, at the latest, sometime during the first part of September 1983. On September 1, 1983, Complainant took a tire off a lowboy, took it to the shop, fixed it, took it back to and put it on the lowboy. On September 7, 1983, Complainant "changed a tire" on a "truck" in Respondent's shop.

27) Complainant had learned about the safety cage requirement cited in Finding of Fact 17 above long before he began working for Respondent, when he saw a television program about the problems of inflating truck tires. This program included a portrayal of a lock ring flying off a truck wheel at a high rate of speed.

28) Mr. Briggs learned of Complainant's refusal to inflate tires from Mr. Whitely late on September 13, 1983. Mr. Whitely told Mr. Briggs that on that day, he had told Complainant to change a tire, and Complainant had responded that he had not hired out to change tires; if Mr. Whitely wanted a tire change, he could fix it himself. Mr. Whitely asked Mr. Briggs what to do. According to Mr. Briggs, because Mr. Whitely said nothing about Complainant raising a safety issue or mentioning a safety cage, Mr. Briggs treated the incident as a simple instance of insubordination by Complainant. Reasoning that if Mr. Whitely let one employee refuse to do what he had told him to do, no other employees would do what he

told them to, Mr. Briggs told Mr. Whitely he could either terminate Complainant or he could quit. (In so doing, Mr. Briggs voiced Mr. Whitely's authority to discharge a supervisee.)

29) It was Mr. Briggs's opinion, at the time of hearing and at the time Complainant was discharged, that Complainant was discharged because he did not want to follow his supervisor's orders. Mr. Briggs did not know that there was any contention that Complainant was discharged "over the safety cage" until Don Dery, another employee, brought this to Mr. Briggs's attention four or five days after Complainant's termination.

30) Within about one week after being terminated by Mr. Whitely, Complainant returned to Respondent's shop and asked Mr. Kalina for his job back. There is no evidence that Complainant said anything about the safety cage when he talked with Mr. Kalina. Mr. Kalina told Complainant that he did not know what was going on or what had happened, and to give him a couple of days to see what he could find out. When Complainant returned to Respondent's shop twice thereafter and asked Mr. Kalina for his job back, Mr. Kalina told him he had been too busy to find out anything. Mr. Kalina never gave Complainant a definite answer, and Complainant never got his job back.

Complainant asked Mr. Kalina, rather than Mr. Briggs, for his job back because it seemed to him "that whoever was running the shop did all the hiring" for it.

31) When Mr. Kalina talked with Mr. Whitely about why Complainant was fired, Mr. Whitely told him that he had

asked Complainant to do something and Complainant had refused. Mr. Whitely didn't say anything about a safety issue.

32) Logging is a high-risk industry. Mr. Briggs testified that he feels very strongly (more as a personal feeling than as a matter of Respondent's policy) that an employee should not be asked or required to do what he or she feels is unsafe, even if it could be considered a normal practice. Mr. Briggs testified that, accordingly, an employee of Respondent would not be fired for refusing to do something unsafe unless Respondent had no other job to which it could assign the refusing employee. Mr. Briggs further testified that had Mr. Whitely told him that Complainant did not want to inflate big truck tires because Respondent did not have a safety cage, Mr. Briggs would have felt that Complainant's stance was reasonable, since a cage was legally required.

33) Until his refusal to inflate, Complainant performed his work for Respondent satisfactorily.

34) On September 21, 1983, John McCollum, a diesel mechanic, began working for Respondent. Mr. McCollum was hired as a diesel truck mechanic; he did not perform Complainant's work or take his job. After Mr. Pibum left Respondent's employ, and at Mr. McCollum's request, Mr. McCollum did all truck tire inflating at Respondent's shop. Mr. McCollum has worked for Respondent continuously since September 21, 1983, and is currently Respondent's maintenance supervisor.

35) When Complainant was discharged, he was earning \$7.00 per

hour for straight time, and \$10.50 per hour (time-and-one-half) for overtime (over forty hours per week).

During his employment by Respondent, Complainant "usually" worked more than forty hours per week. Complainant cannot supply an "average" number of hours he worked per week, because his work hours per week varied "quite a bit."

36) During Complainant's employment, Respondent's employees, including Complainant, recorded their work hours on time cards. An exhibit consisting of Complainant's September 1-14, 1983, time cards contains the only time cards in the record.

37) Respondent ceased operating on April 18, 1985, after the U.S. Internal Revenue Service levied all of its receivables. At the time of hearing, Mr. Briggs hoped that Respondent would operate again and was in the process of trying to obtain a loan to accomplish that objective. Apparently, however, at least as of July 17, 1985, Respondent has not resumed operation.

38) Up to the time it ceased operating, Respondent employed about the same number of mechanics it employed at the time Complainant was terminated. There is no evidence that if Complainant had not been discharged by Respondent on September 14, 1983, he would not have continued working for Respondent as a mechanic, earning at least as much as he earned at the time of his discharge, until April 18, 1985.

39) After Respondent discharged him, Complainant diligently searched for employment in the county in which Coquille is located, which has been

economically depressed since the time of Complainant's discharge. At some point before about November 1984, Complainant earned about \$300.00 doing work in a little shop he had rented at a junkyard. Thereafter, Complainant obtained employment as a janitor at a mill close to Myrtle Point, Oregon. He worked at that job from November through late December 1984 (and perhaps, Complainant testified, during October 1984), earning \$5.81 per hour for 40 hours of work per week. Complainant quit that job to do his normal work as a mechanic at a service station in Coquille, where he started employment about one month later, in approximately the last part of January 1985. At the time of hearing, Complainant was still working at the service station job, earning \$6.00 per hour for, usually, a "little over" forty hours of work per week.

Since being discharged by Respondent, Complainant has earned no other income than that described in this Finding.

40) Complainant is very credible. See Section 3 of the Opinion below.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent, a person for purposes of ORS chapter 654 and ORS 659.010 to 659.110, was an employer subject to the provisions of ORS 654.001 to 654.295 and 659.010 to 659.110.

2) Between June 1982 and September 14, 1983, Complainant, an individual, was Respondent's employee as that term is defined for purposes of ORS chapter 654 and ORS 659.010 to 659.110. Until he was terminated,

Complainant performed his work for Respondent satisfactorily.

3) During his employment by Respondent, a logging business, Complainant worked as a mechanic on Respondent's equipment, which included "big" (i.e., logging and chip) trucks, "crummies" (3/4 ton vans), pickup trucks, automobiles, and other rolling and non-rolling stock. As a gasoline engine mechanic, Complainant worked primarily on Respondent's crummies.

4) Between June 1983 and the termination of Complainant's employment, Respondent began converting from having its tires serviced by an outside tire operation to doing its own tire servicing. At first, this change affected just the servicing of big truck tires, because servicing the tires on crummies, pickup trucks, and automobiles required a machine which Respondent did not acquire until September 1, 1983.

5) Changing tires is part of servicing tires. During all times material herein, changing one of Respondent's tires entailed one of several procedures, depending upon the circumstances. However, changing one of Respondent's tires always involved inflating a tire, unless one merely removed a wheel (of which the tire to be changed was part) from a vehicle and replaced it with another already-mounted (and, therefore, already-inflated) wheel.

6) During all times material herein, Respondent's big truck wheels consisted of tires mounted on multi-piece rims with lock rings, and Respondent's crummy wheels did not have multi-piece rims with lock rings. Because

inflating a tire mounted on a multi-piece rim can present a serious safety hazard, OAR 437-56-070(4) and 437-56-060(1), rules promulgated under the authority set forth in ORS chapter 654 and in effect during all times material herein, require that such a tire be contained by a restraining device such as a safety cage while it is being inflated.

7) From June 1983 throughout the rest of Complainant's employment, Joe Pibum did most of the tire servicing performed by Respondent's employees. Apparently, no one else serviced tires if Mr. Pibum was available to do so, unless he needed assistance. Like Respondent's other mechanics, Complainant assisted Mr. Pibum with tire servicing when necessary, but he only inflated big truck tires in emergencies, on approximately two occasions, between the time Respondent started servicing its own tires and September 14, 1983. Even after Respondent acquired a tire machine on September 1, 1983, Complainant did not inflate crummy tires or help Mr. Pibum do this.

8) On September 13 and again on September 14, 1983, Bill Whitely, Respondent's employee and Complainant's supervisor at the moment, asked Complainant to inflate some truck tires. Complainant had just finished working thirty hours for Respondent during a two-day period. Complainant assumed that this directive pertained to big truck tires, as there were no crummies in the shop awaiting tires and no crummy flat tires awaiting repair, and there were big truck tires in the shop. (The only kind of tire inflation not associated with changing tires on an awaiting vehicle or repairing flat tires was inflation of

batches of spare tires Respondent bought and mounted. Mr. Pibum did virtually all of this, since it could be and was done on a non-emergency basis, when Mr. Pibum had time.) Complainant refused to inflate what he thought were big truck tires on September 13 and again on September 14, because Respondent did not have a restraining device for use in such inflation. He told Mr. Whitely that he would not inflate the tires without a safety cage or some restraining device. This refusal and explanation constituted Complainant's opposition to a perceived safety hazard. Mr. Whitely did not say anything to the effect that the tires to be inflated were not mounted on multi-piece rims and that, therefore, inflating them would not require a cage or other restraining device. Given the above-cited reasons for Complainant's assumption that Mr. Whitely wanted him to inflate big truck tires (i.e., tires mounted on multi-piece rims), and the absence of any evidence to the contrary, this forum finds that Complainant had a reasonable basis for his belief that the tires that Mr. Whitely wanted him to inflate were big truck tires. Furthermore, given those reasons for Complainant's assumption and the absence of any evidence to the contrary, this forum finds that the tires that Mr. Whitely wanted him to inflate were in fact big truck tires.

9) Mr. Whitely terminated Complainant because of his refusal to inflate tires as directed. Because that refusal constituted opposition to inflating tires on multi-piece rims without any restraining device, a practice forbidden by rules promulgated under the authority of ORS 654.001 to 654.295,

this forum concludes that Mr. Whitely terminated Complainant because Complainant had opposed a practice forbidden by ORS 654.001 to 654.295.

10) Mr. Whitely was authorized to terminate his supervisees. Mr. Whitely did not tell Jack Kalina, his supervisor, or Gary Briggs, Respondent's owner, operator, and president, that Complainant had raised any kind of safety issue in refusing to inflate the truck tires. About four or five days after Complainant was terminated, Mr. Briggs learned from another employee that there was a contention that Complainant had been discharged over the safety cage. Even thereafter, however, Mr. Briggs treated Complainant's termination as a result simply of Complainant's insubordination. Mr. Briggs did not ascertain from Mr. Whitely whether the tires he had asked Complainant to inflate were big truck tires or crummy tires, and there is no evidence he took any other steps to investigate the safety cage contention.

11) Despite his repeated requests to Mr. Kalina for rehire or reinstatement, Complainant was not rehired or reinstated by Respondent at any time after September 14, 1983.

12) At the time Complainant was terminated, Respondent was compensating him \$7.00 per hour for 40 hours of work or less per week, and \$10.50 per hour for work in excess of 40 hours in any one week.

13) Respondent ceased operating on April 18, 1985.

14) There is no evidence that if Complainant had not been discharged by Respondent on September 14, 1983, he would not have continued

working for Respondent as a mechanic, earning at least as much as he earned at the time of his discharge, until April 18, 1985. Given that and the fact that (A) Complainant performed his work for Respondent satisfactorily up to the time of his discharge, and (B) the number of people Respondent employed as mechanics remained about the same from the time of Complainant's discharge to April 18, 1985, this forum finds that had Respondent not discharged Complainant on September 14, 1983, Respondent would have employed him, at (at least) his September 14, 1983, rate of pay, until April 18, 1985, when it ceased operation.

Accordingly, during the fifteen weeks and two days remaining in 1983 after September 14, Complainant would have earned at least \$4312.00, working at least eight hours a day, five days a week, at \$7.00 per hour. (See Section 3 of the Opinion below concerning why this forum has not included any overtime in that calculation.) During 1984, working at least eight hours a day, five days a week for 52 weeks at the same rate of pay, Complainant would have earned at least \$14,560.00. During the fifteen weeks and two days in 1985 before April 18, Complainant would have earned at least \$4312.00, working at least eight hours a day, five days a week, at the same rate of pay.

15) After he was discharged by Respondent, Complainant searched diligently for other employment. Before he found it, he earned approximately \$300.00 in self-employment, presumably in 1984. Thereafter, during approximately eight weeks in November

and December 1984, Complainant earned approximately \$232.40 working as a janitor approximately forty hours per week, or a total of approximately \$1859.20. In 1985, Complainant earned \$6.00 per hour for approximately forty hours of work per week, or a total of approximately \$2880.00, in his employment as a mechanic during approximately twelve weeks before April 18, 1985. (See Section 3 of the Opinion below for further explanation of these calculations.) Complainant earned no other income between September 15, 1983, and April 18, 1985.

16) Accordingly, between September 15, 1983, and the present, Complainant has earned a total of \$18,144.80 less than he would have earned had Respondent not discharged him on September 14, 1983. In other words, Complainant has lost a total of \$18,144.80 in wages because of that discharge. \$4312.00 of that sum accrued from September 15 through December 31, 1983; \$12,400.80 of that sum accrued during 1984; and \$1432.00 of that sum accrued between January 1, 1985, and April 18, 1985.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and of the subject matter related to the violation of ORS 654.062 alleged herein.

2) The words, actions and inactions, and the motivations therefore, described herein of Bill Whitely (Respondent's Shop Foreman at the time of Complainant's discharge), Jack Kalina (Respondent's Maintenance Supervisor during most times material),

and Gary Briggs (Respondent's owner, operator, and president) are properly imputed to Respondent.

3) Before the commencement of the contested case hearing, this forum complied with ORS 183.413 by informing Respondent and Complainant of the matters described in ORS 183.413(2)(a) through (i).

4) By discharging Complainant from employment on September 14, 1983, because Complainant had opposed a practice forbidden by ORS 654.001 to 654.295, Respondent violated ORS 654.062(5)(a) as charged.

5) Complainant lost wages amounting to \$18,144.80 because of Respondent's violation of law found in the preceding Conclusion of Law. The Commissioner of the Bureau of Labor and Industries has the authority to award money damages to Complainant under the facts and circumstances of this record, and awarding as damages the sum of money specified in the Order below is an appropriate exercise of that authority.

OPINION

1. Credibility

Because Bill Whitely did not testify in this matter, key factual findings hinged primarily upon the forum's assessment of the credibility of Complainant and Mr. Mansfield, the only witnesses to the conversations at issue herein who did testify.

At hearing, Complainant impressed the Presiding Officer as very credible. He listened carefully to questions and responded sparingly, but not evasively, in a very straightforward, steady, guileless manner. The only potential qualification of this impression arose

because Complainant's testimony appeared to be inaccurate in two potentially significant ways. First, Complainant testified that on September 13, 1983, when he was asked to inflate truck tires, Respondent did not have the machine necessary to service crummy tires. However, the only evidence as to exactly when Respondent obtained this machine is Complainant's September 1, 1983, time card (completed by Complainant), which indicates that Complainant "worked on and got hooked up" the tire machine on that date. Hence, the forum has concluded that Respondent obtained the crummy tire machine on September 1, 1983. Second, when asked why he had not mentioned the lack of safety cage to Mr. Whitely before September 13, Complainant testified that he "hadn't done any tires since (Mr.) Whitely had been there." Although the record does not establish Mr. Whitely's hire date, he was on the job for at least approximately two weeks before Complainant was terminated on September 14, 1983. Complainant's time cards, again, reveal that on September 1, 1983, Complainant took a tire off a lowboy, took it to the shop, fixed it, and took it back to and put it on the lowboy;" and on September 7, 1983, Complainant "changed a tire" on a "truck" in Respondent's shop. Although Mr. Whitely may not have been hired on September 1, he almost certainly was on the job for Respondent by September 7, 1983.

Complainant was not asked and therefore did not have an opportunity to explain these discrepancies. However, the record does contain evidence which can explain, and thereby

minimize the effect of, both of them. First, although it appears obvious that Respondent had obtained and installed its tire machine on September 1, 1983, the record does not state whether the machine actually was being used at the time of Complainant's termination thirteen days later. One can presume that there may have been some period after Respondent installed the machine during which Respondent converted to servicing its own crummies, given the fact that Respondent's overall conversion to servicing all its own tires was still in process three months after it had started. Complainant's above-cited testimony that Respondent did not have the tire machine on September 13, 1983, therefore, could have been based upon Respondent not having that machine in use when Complainant was discharged. Second, although Mr. Whitely most probably was on the job by September 7, 1983, he was Complainant's supervisor only when Mr. Kalina was away from Coquille. It is logical that Complainant would not have mentioned the lack of a safety cage to Mr. Whitely unless he was being asked to work on tires with multi-piece rims while Mr. Whitely was supervising him. Accordingly, Complainant's above-cited testimony that he hadn't "done" any tires since Mr. Whitely had been "there" most probably meant that Complainant had not worked on any tires with multi-piece rims under Mr. Whitely's supervision. There is no evidence as to whether the tire work he did on September 1 and 7 was on tires with multi-piece rims or whether it was under Mr. Whitely's supervision. (As to the latter point, the record simply indicates, as noted above,

that Mr. Whitely may not have been on the job on September 1 (or even, conceivably, September 7 for that matter) and that, in any case, Complainant had taken only "a few" orders from Mr. Whitely before the time of his termination.)

Because there are plausible interpretations of Complainant's testimony which, if they are accurate renditions of what Complainant meant, would eliminate (or at least strongly dilute the effect of) the perceived inaccuracies in that testimony, and because there is no evidence that those interpretations are not accurate renditions of what Complainant meant, this forum has not concluded that those perceived inaccuracies impeach Complainant's credibility at all. (At the same time, however, this forum has not based any substantive findings on the testimony containing those perceived inaccuracies, since its meaning has not been established.)

Mr. Mansfield also appeared to be a perfectly sincere witness. He testified that he was working ten feet away from Complainant and Mr. Whitely when Mr. Whitely discharged Complainant, and that he overheard the conversation in which that discharge occurred. However, Mr. Mansfield's description of that conversation contains elements of both the September 13 and the September 14 conversations between Mr. Whitely and Complainant. While the conversation described appears to be a blend of both those conversations, Mr. Mansfield's testimony as to the time of day it occurred matches only the timing of the September 13 conversation. At the same time however, there are

elements of the conversation Mr. Mansfield described which did not occur until the September 14 interchange. There is no evidence on the record that Mr. Mansfield did not overhear those portions of the conversations of both September 13 and 14 which occurred in Respondent's shop, Mr. Mansfield's main workplace as a mechanic. This forum has concluded, therefore, that the most likely explanation for the apparent inconsistencies between Mr. Mansfield's rendition of the September 14 conversation and other evidence as to that conversation is that Mr. Mansfield has inadvertently fused, in his memory, both the September 13 and 14 conversations which he overheard in the shop into one conversation. Given the fact that Mr. Mansfield's memory of those conversations was indefinite enough to allow this to happen, this forum could not give great weight to his testimony on those conversations. Nonetheless, his testimony on the basic content of those conversations did have some value to the forum, because it matched Complainant's testimony as to that content. This corroboration was not crucial, however, to the finding that Complainant's direct testimony as to those conversations was accurate, because there was no direct evidence that it was not.

2. Respondent's Liability

Respondent contended, in effect, that if Mr. Whitely discharged Complainant because of Complainant's opposition to a safety hazard, Mr. Whitely took an action which Mr. Briggs, Respondent's owner, operator, and president, would not have taken and which violated Respondent's safety policy.

This appeared to go to an argument (which was never articulated) that Respondent should not be held liable for the acts of a supervisor which, as violations of Respondent's policy, went beyond the supervisor's authority. This argument, whether it was made or not, fails. By telling Mr. Whitely that terminating Complainant was one of his two options, Mr. Briggs made clear to this forum Mr. Whitely's authority to terminate his supervisees (which Respondent has not contested). It is well established that where a supervisor has authority to terminate supervisees, that supervisor's employer cannot escape legal responsibility for a discriminatory termination by the supervisor merely by asserting that such discriminatory action violated the employer's procedures or policies. However, even if that were not the case, Respondent's apparent argument still would fail. First, Mr. Briggs himself admitted that safety "policy" which Mr. Whitely allegedly may have contravened was not Respondent's policy as much as Mr. Briggs' personal predilection. The record does not reveal whether Mr. Briggs had even conveyed this predilection to Mr. Whitely. More importantly, the fact that Mr. Briggs himself took (or failed to take) certain actions, by itself, establishes Respondent's direct liability, through its owner, operator, and president, for the termination of Complainant. About five days after Complainant's discharge, Mr. Briggs learned that there was a contention that Complainant had been discharged "over the" safety cage. If, as a matter of personal policy, Mr. Briggs had the deep-seated concern for employee safety which he contended that he had, he would have investigated

Complainant's termination at that point. He did not, however, take even the most obvious and simple investigatory step of finding out from Mr. Whitely if a safety issue actually existed or not (i.e., if the tires Mr. Whitely has asked Complainant to inflate were big truck or crummy tires). In fact, there is no evidence that Mr. Briggs considered at all the possibility that a safety issue had been involved in Complainant's termination, even after he was apprised of a contention to that effect. By this failure to investigate or otherwise respond to this contention (which proved true), Mr. Briggs clearly assumed for Respondent any responsibility for Mr. Whitely's termination of Complainant which theoretically could be viewed as not already imputed to Respondent.

3. Damages

The Specific Charges do not specify the amount of, or any monetary figures concerning, the "lost wages" and "other benefits" the Agency seeks as damages in this matter. Despite the Presiding Officer's request that the Agency supply such information, the Agency has not. More importantly, the evidence on the record relevant to calculating Complainant's damages is very indefinite, especially as to the amount of overtime Complainant would have earned in Respondent's employ had he not been discharged, and as to Complainant's actual earnings since his discharge.

It is the Agency's burden to prove that Complainant incurred damages as a result of Respondent's unlawful action, and to prove the amount of those damages. Part of the damages sought herein is the overtime compensation described in the last sentence of the

previous paragraph (i.e., the overtime Complainant allegedly lost because of Respondent's unlawful action). Except for Complainant's time cards for his September 1-14, 1983, work, the only evidence relevant to the calculation of overtime damages is Complainant's testimony as to the overtime he earned during his employment by Respondent. Complainant testified that he did usually work overtime during that employment, but that he could not estimate how much overtime he worked, on the average, because it varied "quite a bit." The September 1-14 time cards cannot be viewed as any indication of how much overtime Complainant was working in Respondent's employ, as they include overtime information for only one full week. The forum cannot presume that Complainant's overtime that week was typical of the amount of overtime he usually worked in a week, given Complainant's testimony, and this forum's finding, that the amount of overtime he worked varied quite a bit. In sum, although Complainant's testimony that he usually worked overtime each week is uncontroverted and has been found to be fact, the forum has found no basis in the record for determining how much overtime to include in its lost (i.e., back) pay award. Any overtime component of that award therefore would be purely speculative. For that reason, this forum has not included any overtime figure in its calculation of what Complainant would have earned in Respondent's employ had he not been discharged on September 14, 1983.

It is Respondent's burden to elicit evidence proving mitigation, if any, of Complainant's back pay damages. A

complainant's actual earnings during a back pay accrual period are the most obvious type of such mitigation. Often, a respondent can obtain information as to such earnings only from the complainant. Herein, Complainant's testimony concerning mitigation consisted of his very inexact estimates of the time periods during which he earned income between September 15, 1983, and the hearing and the number of hours he worked each week during those periods, as well as his statement of his hourly straight time wage rates during those periods. There is no evidence or allegation that Respondent attempted to elicit any evidence on mitigation by any means other than questioning Complainant during hearing, and there is no evidence or allegation that Respondent had no other way to elicit that evidence. This forum has no reason to conclude, therefore, that at or before hearing Respondent could not have, for example, asked Complainant to state, or produce tax records concerning, his total income for each year during the lost pay accrual period.

Since it is uncontroverted that Complainant did earn some income between September 15, 1983, and the date of hearing, and since there is evidence on the record from which the forum can formulate an estimate of this income, this forum has made such an estimate and allowed it to mitigate Complainant's back pay damages (i.e., offset the income the forum has found Complainant would have made in Respondent's employ during this period). However, in making that estimate, this forum has resolved ambiguities or indefiniteness in the evidence on point in

the manner least favorable to Respondent (i.e., in the manner which mitigates to the least extent), since there is no indication Respondent took reasonable steps to meet its burden of proving damage mitigation. Accordingly, the forum has used the minimum number of hours Complainant estimated he worked in his various jobs since September 14, 1983, has included no overtime in that estimate, and has imputed Complainant's self-employment income to the latest year it could have occurred.

ORDER

NOW, THEREFORE, as authorized by ORS 654.062(5)(b), 659.060(3), and 659.010(2), and in order to eliminate the effects of the violation of law found herein, as well as to protect the lawful interests of others similarly situated, Respondent is hereby ordered to:

1) Deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries a certified check payable to the Bureau of Labor and Industries in trust for Robin L. Wright in the amount of EIGHTEEN THOUSAND ONE HUNDRED FORTY-FOUR DOLLARS AND EIGHTY CENTS (\$18,144.80), plus interest compounded and computed annually at the annual rate of nine percent on the accruing balance from the date of accrual to the date upon which Respondent complies with this paragraph. (Interest shall be deemed to begin accruing each January 1 on the principal and interest which has already accrued as of that date.) This award represents damages for wages Complainant lost because of Respon-

dent's violation of law set out in the Conclusions of Law above.

2) Cease and desist from discriminating against any employee because that employee has opposed a practice forbidden by ORS 654.001 to 654.295.

**In the Matter of
MARION P. NIXON,
dba Salem Restaurant and Store
Equipment Company, Respondent.**

Case Number 15-84
Final Order of the Commissioner
Mary Wendy Roberts
Issued March 19, 1986.

SYNOPSIS

Respondent willfully failed to pay Claimant's wages (including reimbursable mileage expenses) immediately upon termination. Respondent failed to show that he was financially unable to pay the wages at the time they accrued, and thus was liable for civil penalty wages. ORS 652.140; 652.150.

The above-entitled matter came on for contested case hearing before Diana E. Godwin, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on October 8, 1985, in the Conference Room of the Bureau of Labor and Industries, 3865

Wolverine Avenue N.E., Salem, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Betty Smith, Assistant Attorney General. Employer Marion P. Nixon was present and represented himself. Claimant Alton Lance Trelstad, was present and testified. Also present and testifying as witnesses were William Jefferson, owner of the West Salem "Dairy Queen" restaurant in Salem; and Del McKee, manager of "Coffee and More" restaurant in Albany.

Having considered the entire record in this matter, I, Mary Roberts, Commissioner of the Bureau of Labor and Industries, make the following Rulings, Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

RULINGS

At the hearing, the Agency moved to amend the original Order of Determination to revise some of the dates and dollar amounts in order to make them consistent with the expected testimony. Employer had no objection to the motion and it was granted. This Amended Order of Determination was admitted and is substituted for the original Order of Determination.

FINDINGS OF FACT – PROCEDURAL

1) On June 12, 1984, Claimant Alton Lance Trelstad filed a wage claim with the Wage and Hour Division of the Bureau of Labor and Industries alleging that Employer Marion P. Nixon, dba Salem Restaurant and Store Equipment Company, was his former employer and that Employer had failed to pay wages due to him.

2) Claimant assigned all wages due him under his claim to the Commissioner of the Bureau of Labor and Industries in trust for Claimant.

3) On October 19, 1984, the Administrator of the Wage and Hour Division issued an Order of Determination which, as amended at the hearing, found that Claimant had worked 221.5 hours, 20.5 of which were overtime hours, and that Employer owed Claimant \$1456.29 in unpaid wages for these hours and mileage, plus interest thereon at the legal rate per annum from July 1, 1984, until paid. In addition, the Order of Determination as amended found that Employer owed Claimant \$2364.84 in penalty wages plus interest thereon at the legal rate per annum from August 1, 1984, until paid. This Order of Determination was served upon Claimant and Employer.

4) Thereafter, Employer filed with the Wage and Hour Division a request for a contested case hearing in this matter, and an answer to the above-mentioned Order of Determination denying that he owed an wages or penalty wages to Claimant because Claimant claimed wages for time which he did not work. Employer also alleged as an "affirmative defense" that he would submit documents and present testimony from customers and former customers which would establish evidence contrary to Claimant's claim for time he alleged was spent on the repair of equipment. This document was dated November 15, 1984.

5) The Bureau of Labor and Industries duly served Employer and Claimant with the Amended First Notice of Time and Place of Hearing.

FINDINGS OF FACT – THE MERITS

1) At all times material herein Employer owned and operated a restaurant equipment re-sale and repair shop in the Salem area. In this business Employer employed one or more persons in the State of Oregon.

2) Claimant was hired personally by Employer and worked as an equipment service and repairman and shop supervisor from March 17, 1984, through June 12, 1984. His job was to repair used restaurant equipment that came into the shop for resale. He was also an "on-call" serviceman, and went to the place of business to do repairs on restaurant equipment.

3) Claimant had no experience in restaurant equipment repair before starting work with Employer. Claimant informed Employer of this fact at the time of his employment. On at least one occasion when Claimant was sent to a restaurant to repair a deep fat fryer, Claimant was unable to do so because he had no experience working on that type of equipment. He did, therefore, advise the owner of the restaurant to call a particular repair shop that could do the job.

4) Employer did argue at the hearing, however, that Claimant's claim should be reduced on the grounds that Claimant had not adequately performed his job. As grounds therefor Employer referred to this inability by Claimant to repair the deep fat fryer. For the reason that Employer knew at the time he hired Claimant that he could not repair restaurant equipment, his testimony in this regard was not found to be credible.

5) Claimant, however, did have experience working on air conditioning and refrigeration equipment. Employer had no knowledge of how to repair restaurant equipment.

6) Employer agreed to pay Claimant \$10.00 an hour plus \$.30 a mile for travel to "on-site" jobs.

7) Claimant's regular working hours at the beginning of his employment were 8:00 a.m. to 5:00 p.m., although he sometimes worked overtime when he was called out of his home in the evening for an "on-site" job.

8) Employer and Claimant agreed that Claimant would keep a notebook record of his hours worked and miles driven. Claimant did not have any regular, scheduled time off for lunch. Claimant filled out the date and the "In" and "Out" columns on time card tickets at Employer's shop for each day worked, using the notebook entries for the day to complete that ticket. He recorded in his notebook only the time actually worked and did not include the time he spent at lunch. If the shop was closed when Claimant returned from an "on-site" job, he filled out the time card ticket the following day, using his notebook to complete the ticket. Someone in Employer's Office, other than Claimant, calculated actual hours worked.

9) Employer kept no records of his own regarding hours worked by Claimant and he never questioned the hours which Claimant turned in on a daily basis. At the hearing, Employer did argue that Claimant's wages should be offset on the grounds that Claimant had been paid for more hours than he worked during a period prior to the period in dispute in this case. Employer,

however, was never present at the on-site jobs where Claimant worked, and testimony which he offered on the issue of whether Claimant had worked all hours claimed was not credible.

10) Claimant sometimes worked more hours than he recorded on his time ticket. Claimant liked Employer and wanted the business to succeed. Claimant also believed if Employer was successful, then he, Claimant, would be successful.

11) Employer agreed to pay Claimant once a week. At the beginning this was satisfactory. In May, however, Claimant was paid on a piecemeal basis in amounts of \$10.00 and \$20.00 at a time. Several times the checks which Employer issued to Claimant could not be cashed because Employer was overdrawn at his bank. Claimant decreased the hours he worked when Employer was not able to pay his wages regularly.

12) Employer fired Claimant on June 12, 1984, after a disagreement over Claimant's work performance. At the time he was terminated, Claimant asked Employer to be paid for wages then owed to him. Employer refused to pay the wages and offered no explanation for the refusal.

13) On Monday, April 30, 1984, Claimant received his last full, regular paycheck from Employer. It was for hours worked for the period of Monday, April 23, through Friday, April 27, 1984. Thereafter, Employer paid only part of Claimant's wages due. These partial wage payments were made on an irregular basis.

14) Claimant worked two hours on Saturday, April 28, 1984; 40 regular

hours and 13 overtime hours during the work week of April 30th to May 5th; 40 regular hours and seven and a half hours overtime during the work week of May 7th to May 12th; 32.5 regular hours during the work week of May 14th to May 19th; 29.5 regular hours during the work week of May 21st to May 26th; 32.5 regular hours during the work week of May 29th to June 2nd; 23 regular hours during the work week of June 5th to June 8th; and one and a half hours on June 12th, the day he was terminated. Thus, Claimant worked a total of 201 regular hours and 20.5 overtime hours from April 28 through June 12, 1984.

15) For the period of April 28 through June 12, 1984, Employer should have paid Claimant wages of \$2010 for regular hours worked (at \$10.00 an hour) and \$307.50 for overtime hours (at \$15.00 an hour) for a total of \$2317.50. To date, Employer has actually paid Claimant only \$1474.13 in piecemeal amounts, leaving an amount still due and owing for wages of \$843.37.

16) During this same period, from April 28 through June 12, 1984, Claimant drove 1308 miles in connection with his work for Employer. At the agreed upon \$.30 a mile rate, Employer should have reimbursed Claimant in the amount of \$392.40 for this mileage. To date, Employer has paid Claimant nothing for this mileage, leaving a total amount still due and owing of \$392.40.

17) On July 17, 1984, Employer signed an "Acknowledgment of Indebtedness of Wages" with the Wage and Hour Division of the Agency, acknowledging that he owed Claimant

\$1450.10 for wages earned between April 30 and June 12, 1984. Employer agreed to pay this sum in one payment on or before August 1, 1984. After signing this document Employer made payments to Claimant through the Wage and Hour Division of \$200.00 on August 1st and \$200.00 on August 23rd. This \$400.00 is included in the total amount of \$1474.13 that Employer has paid to Claimant to date for wages.

18) Employer did not plead or show financial inability to pay the wages or mileage reimbursement at the time these sums accrued.

ULTIMATE FINDINGS OF FACT

1) Claimant worked as an equipment service and repairman and shop supervisor for Employer from March 17, 1984, through June 12, 1984. Employer agreed to pay Complainant a regular wage of \$10.00 an hour, plus \$.30 a mile for transportation expenses.

2) During the period April 28, 1984, through June 12, 1984, the date upon which Claimant was terminated, Claimant worked a total of 201 regular hours and 20.5 overtime hours. Employer owed Claimant total wages of \$2,317.50 for these hours, and to date has paid \$1474.13, leaving an amount still due and owing for wages of \$843.37.

3) Employer owes Claimant reimbursement in the total amount of \$392.40 for 1308 miles driven in the course of employment. None of this amount has been paid.

4) At the time of his termination, Claimant requested that the Employer pay the wages then owed. Employer

refused to do so and offered no explanation. Employer signed an Acknowledgment of Indebtedness of Wages but failed to fully comply with the terms therein. Employer has shown no financial inability to pay the sums owed.

5) Employer willfully failed to pay Claimant wages owed to him in the amount of \$843.37 and reimbursable mileage expenses owed to him in the amount of \$392.40, and is liable for penalty wages. They total \$2172.60, a sum computed by multiplying Claimant's average daily wage at termination of \$72.42, which daily wage is calculated by dividing \$2317.50, Claimant's total wages earned between April 28 and June 12, 1984, by 32 days worked during this period, and multiplying \$72.42 by 30 days, the maximum period during which penalty wages accrue.

CONCLUSIONS OF LAW

1) At all times material herein, Employer was an employer subject to the provisions of ORS 652.110 to 652.220 and ORS 652.310 to 652.405.

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

3) Prior to the contested case hearing, Employer and Claimant were advised in writing of the matters described in ORS 183.413. Pursuant to ORS 183.415, at the commencement of the hearing the issues involved and the matters to be proved were explained to Employer and Claimant by the Presiding Officer.

4) Employer's failure to pay Claimant \$1235.77 in earned and unpaid wages and reimbursable mileage

expenses immediately after Employer terminated Claimant constitutes a violation of ORS 652.140.

5) Employer willfully failed to pay Claimant \$1235.66 in earned and unpaid wages and reimbursable mileage expenses, and because Employer failed to show financial inability to pay these wages and expenses at the time they accrued, Claimant's wages continued from the due date thereof at the same rate as his average daily wage of \$72.42 for 30 days, pursuant to ORS 652.150.

6) The Commissioner of the Bureau of Labor and Industries has the authority to order Employer to pay Claimant \$1235.77 in earned and unpaid wages and reimbursable expenses, and \$2172.60 in penalty wages, plus interest on both sums, under the fact and circumstances of this record.

OPINION

At the hearing, Employer did not dispute that some back wages and mileage were owed to Claimant, but attempted to show that Claimant had not worked some of the hours for which he was claiming unpaid wages. Employer had also alleged in his answer that Claimant had not worked all of the hours claimed.

Employer, however, was unable to present any reliable evidence that Claimant had not worked the hours listed on his time cards for the period from April 28 to June 12, 1984, the period at issue in this matter. Employer and the manager of a restaurant where Claimant had performed some work testified vaguely to the effect that they doubted that Claimant worked the

hours claimed. This evidence was not probative because Employer was never present at the on-site repair jobs where Claimant worked, and the restaurant manager's testimony was inconclusive and involved dates prior to the period in dispute.

Employer had made timely payment to Claimant for all regular and overtime wages for the hours which Claimant worked prior to April 28th, but sought to have some of those wages used to reduce the amount still owing to Claimant. Employer's contention that some hours worked and paid prior to April 27th should be offset against what is owed was rejected for several reasons. Employer had agreed to the system by which Claimant kept a record of his work hours. Employer never questioned the hours that Claimant had turned in and had paid all hours worked to and including April 27th. The time for Employer to have disputed those hours was before he paid Claimant for them.

As to Employer's contention that Claimant had not actually worked some of the hours claimed after April 27th, again Employer chose to have Claimant use the system whereby Claimant kept track of his hours. Employer used this system right up until the day he terminated Claimant and did not question any of the hours turned in by Claimant until after Claimant filed his wage claim. Moreover, Employer kept no records of his own of Claimant's hours worked, and therefore had no evidence beyond his own vague testimony that Claimant had not worked those hours. ORS 653.045 requires an employer to keep records of the actual hours worked each week by

each employee. Employer cannot use this system he established to circumvent his statutory responsibility to keep record of the hours worked by an employee.

As this forum held in *In the Matter of Jack Coke*, 3 BOLI 238 (1983), if an employer disputes the number of hours worked by a wage claimant, the Employer must produce reliable and credible evidence of the actual hours worked. In *Jack Coke* also, this forum cited the case of *McGinnis v. Keen* 189 Or 445, 221 P2d 907 (1950), in which the Supreme Court held that an employer has a duty to know the amount of wages due to an employee at the time of termination of said employee's employment, and that such amounts become due and payable immediately upon termination of employment. The holding in that case is equally applicable here, and since Employer offered no credible testimony or evidence of any kind to show the number of hours Claimant worked, although he had a legal duty to know the hours worked, Claimant's statement and record of the number of hours he worked must be accepted.

Also at the hearing Employer attempted to defend against the wage claim on the grounds that Claimant had not performed his job adequately, citing Claimant's inability to repair a deep fat fryer. That defense is without merit. If an employer determines that an employee is not performing a job adequately, the employer may take disciplinary action, or where appropriate, terminate the employee. However, the employer cannot seek redress by refusing payment after the

fact for hours actually worked by employee.

In this matter Employer signed an Acknowledgment of Indebtedness acknowledging that he owed Claimant \$1450.10 for wages earned between April 30th and June 12th of 1984. Employer then failed to make the full payment agreed upon in the acknowledgment, and this matter proceeded to contested case hearing. An Acknowledgment of Indebtedness, if introduced into the record of the contested case hearing, as this was, can be considered as evidence that an employer owes wages to a claimant. It is not, however, determinative of the fact that an employer owes wages or how much. Those issues are decided by the forum based on all the evidence in the record.

The Order of Determination assessed penalty wages against the Employer. The evidence established that Employer terminated Claimant, and thereafter, refused to pay Claimant the wages due to him. Employer was financially able to pay Claimant. As set forth in the facts, Employer argued that Claimant had not worked all the hours claimed, and in some cases, did not adequately perform his work. Despite these claims, and even Employer's belief in the accuracy of these claims, his failure to pay was willful, and Employer is subject to the civil penalty as set forth in ORS 652.150.

The figures for wages and penalty wages owed by Employer and set out in the Order differ from the amounts set out in either the Acknowledgment of Indebtedness or the Amended Order of Determination for several reasons. The total number of hours

Claimant worked, both regular and overtime hours, was set out in the Amended Order of Determination as 221.5, which is accurate. The Amended Order of Determination listed 20.5 of those 221.5 hours as overtime hours. That is also accurate. However, there appears to have been a calculation error in determining the actual wages due for these hours. It appears that the Agency multiplied all 221.5 hours by \$10.00 an hour and then additionally multiplied the 20.5 overtime hours (which were already included in the 221.5 hours) by \$15.00 and arrived at a figure of \$2215.00 for regular wages and \$307.50 for overtime wages for a total of \$2522.50. The figures should be \$2010.00 for regular hours (201 x \$10/hour) and \$307.50 for overtime hours (20.5 x \$15/hour) for a total of \$2317.50.

The Amended Order of Determination lists \$1458.61 as having been paid by Employer toward the wages owing. However, based on exhibits in the record, the correct amount which Employer has paid toward the wages owing is \$1474.13, a difference of \$15.52. This \$15.52 difference is accounted for by an amount which is listed in the exhibit which appears simply to have been overlooked by the Agency.

The correct figure for total penalty wages due (\$2172.60) also varies from the figure listed in the Amended Order of Determination (\$2364.84). The Agency used its figure for total amount of regular and overtime wages due for the period of April 28th through June 12th, \$2522.50, and divided it by 32, the number of days worked during that period, to arrive at a daily wage of

\$78.83. This amount was then multiplied by 30 days, the maximum period for accrual of penalty wages, to arrive at the figure of \$2364.84 (which, if the multiplication had been done correctly, would have been \$2364.90.) Again, however, the total wage figure of \$2522.50 was incorrect because the overtime hours had been added in twice, as explained above. Taking the correct figure of \$2317.50 for total wages due and dividing it by the 32 days worked results in an average daily wage of \$72.42. This amount is then multiplied by 30 days to reach the correct amount of penalty wages of \$2172.60

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Employer is hereby ordered to pay to the Bureau of Labor and Industries, in trust for Claimant ALTON L. TRELSTAD, the amount of \$3408.37, which amount represents \$1235.77 in earned and unpaid wages and reimbursable mileage expenses, and \$2172.60 in penalty wages; plus interest thereon at nine percent per annum, for the period from July 1, 1984, until paid on \$1235.77, and for the period from August 1, 1984, until paid on \$2172.60. This payment must be delivered to the Hearings Unit of the Bureau of Labor and Industries, Room 309, 1400 S.W. Fifth Avenue, Portland, Oregon 97201.

**In the Matter of
FRED G. VANKEIRSBILCK,
dba Van and Son Remodeling,
Respondent.**

Case Number 18-84
Final Order of the Commissioner
Mary Wendy Roberts
Issued March 19, 1986.

SYNOPSIS

Respondent willfully failed to pay Claimant's wages immediately upon termination. Respondent failed to show that he was financially unable to pay the wages at the time they accrued, and thus was liable for civil penalty wages. ORS 652.140; 652.150.

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on July 24, 1985, in Room 311 of the State Office building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Renee Bryant Mason, Assistant Attorney General of the Department of Justice of the State of Oregon. Fred G. Vankeirsbilck, doing business as Van and Son Remodeling (hereinafter the Employer), did not appear at the hearing either in person or through a representative. James Robert Billstine (hereinafter the Claimant) was present throughout the hearing. The Agency called the Claimant as its one witness. Not having appeared, the

Employer did not present any evidence.

Having fully considered the entire record in this matter, I, Mary Robert, Commissioner of the Bureau of Labor and Industries of the State of Oregon, 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 5, 1984, the Claimant filed with the Wage and Hour Division of the Agency a wage claim which alleged, in effect, that Fred G. and George C. Vankeirsbilck, doing business as Van and Son Remodeling, were the Claimant's former employers and that they had failed to pay wages due to him.

2) Also on January 5, 1984, the Claimant assigned all wages due him from the Employer (or any other persons legally responsible for the payment of his wages) to the Commissioner of the Agency in trust for the Claimant.

3) On May 9, 1984, the Commissioner of the Agency issued an Order of Determination based upon the Claimant's above-cited wage claim. The Order of Determination found that the Employer (and George C. Vankeirsbilck) owed the Claimant \$288.75 in unpaid wages for work he had performed, and \$1,560.00 in penalty wages, plus interest on both of those sums.

There is no evidence on the record that this Order of Determination was served on George C. Vankeirsbilck.

4) On or about June 25, 1984, the Employer requested a hearing on the above-described Order of Determination. On or about July 9, 1984, the Employer again requested a hearing on this Order and filed an answer to it. In this answer, the Employer stated that:

a) The Claimant had worked for him and David Cornstock, and Van and Son Remodeling was no longer in business at that time.

b) The Employer and Mr. Cornstock made a partial wage payment to the Claimant of \$150.00. They never were able to pay the Claimant the remaining wages due him because they did not finish the job on which the Claimant worked, and were not paid for it themselves.

c) The Employer and Mr. Cornstock no longer work together.

Also in his answer, the Employer agreed to pay the Claimant \$288.75 if some kind of payment plan could be worked out.

5) On March 11, 1985, this forum transmitted to the Employer, the Agency, and the Claimant a Notice of Time and Place of Hearing in this matter. This notice was personally served on the Employer on April 18, 1985. There is no evidence on the record that this Notice of Hearing was served on George C. Vankeirsbilck.

6) This forum sent a document entitled "Information Relating to Civil Rights or Wage and Hour Contested Case Hearings" with the above-mentioned Notice of Hearing. At the commencement of the hearing, the Claimant stated that he had received

and read this document and had no questions about it.

7) Because neither the Employer nor any representative of him appeared at the hearing, it was conducted as a default proceeding, as provided in ORS 183.415(6).

FINDINGS OF FACT – THE MERITS

1) During times material herein, the Employer did business as Van and Son Remodeling, a home improvement service, which employed one or more persons in the State of Oregon. George C. Vankeirsbilck was also affiliated with Van and Son Remodeling in some capacity during this period, but there is no evidence on the record that Van and Son Remodeling was a partnership or that Fred and George Vankeirsbilck owned and operated Van and Son Remodeling as partners.

2) At some time during the Fall of 1983, the Employer hired the Claimant to work as a carpenter. At this time, the Employer gave the Claimant a business card and represented to the Claimant that he was Van and Son Remodeling. Because of this representation and the fact that the business card was for Van and Son Remodeling, the Claimant believed, and this forum finds, that he was going to work for Van and Son Remodeling.

3) The Claimant worked in Oregon for the Employer from December 2, 1983, to December 14, 1983. During this period, the Claimant worked 7.5 hours during each of the nine work days, or a total of 67.5 hours.

4) The Claimant and the Employer had agreed that the Claimant's rate of pay would be \$6.50 per hour.

5) Because the client for which the Employer was doing the job on which the Claimant was working became dissatisfied, the job ended, and the Claimant's work for the Employer ceased.

6) The Claimant earned total wages of \$438.75 for the work he performed for the Employer. The Employer paid the Claimant \$150.00 of that amount and owed him the remaining sum of \$288.75 at the time the Claimant's employment ended.

7) The Claimant asked the Employer four or five times to pay the wages the Employer owed him. In response to each request, the Employer told the claimant that he did not have the money to pay the Claimant at the time. The Employer never disputed the amount of the wages he owed to the Claimant.

8) The Employer has not ever paid the claimant the \$288.75 in wages he owes him. During all times material herein, the Employer has had an address to which he could have sent these wages, had he chosen to do so.

ULTIMATE FINDINGS OF FACT

1) From December 2, 1983, through December 14, 1983, the Employer was a person who in the State of Oregon directly engaged the personal services of one or more employees in the operation of Van and Son Remodeling, his business.

2) From December 2, 1983, through December 14, 1983, the Claimant was an individual who (other than as a co-partner of the Employer or as an independent contractor) rendered personal services, wholly in the State of Oregon, to the Employer in his above-described business. The

employer agreed to pay the Claimant for these services at a fixed rate, based upon the time the Claimant spent performing them.

3) For the services he rendered in his above-described employment between December 2 and 14, 1983, the Claimant earned total gross wages of \$438.75.

The Employer has paid the Claimant only \$150.00 of those wages and still owes the Claimant the remaining \$288.75.

4) The Employer discharged the Claimant as of the conclusion of his work on December 14, 1983, because of the cessation of the job on which the Claimant was working.

5) During all times material herein, the Employer has been aware that he owed the Claimant the above-cited wages and aware of an address for the Claimant to which these wages could be sent. The Employer willfully failed to pay the Claimant \$288.75 of the wages the Employer owed the Claimant.

6) The Employer has not shown that he was financially unable to pay the above-cited wages due the Claimant at the time they accrued (or at any later time).

7) The Claimant's average daily rate of pay during his employment for the Employer was \$48.75. (This amount was calculated by dividing \$438.75, the total wages the Claimant earned during this employment, by nine, the number of days the Claimant worked during the same period.)

CONCLUSIONS OF LAW

1) Between December 2, 1983, and December 14, 1983, inclusively,

the Employer was an employer, and the Claimant was his 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 of the Employer herein. The Commissioner has not established jurisdiction over George C. Vankeirsbilck.

3) Before the commencement of the contested case hearing, this forum complied with ORS 183.413 by informing the Employer and the Claimant of the matters described in ORS 183.413(2)(a) through (i).

4) When the Employer terminated the Claimant's employment effective December 15, 1983, the Employer had not paid the Claimant \$288.75 of the total gross wages the Claimant had earned in the Employer's employ. These unpaid earned wages became due and payable immediately upon the Claimant's termination.

5) Because the Employer willfully failed to pay the above-cited earned, due, and payable wages to the Claimant, and because the Employer has not shown that he was financially unable to pay those wages at the time they accrued, the wages of the Claimant continued, as the penalty required by ORS 652.150, at the average daily rate of \$48.75 from the due date thereof for thirty days. These penalty wages total \$1462.50, a sum computed by multiplying the Claimant's average daily rate of pay at termination by thirty days, the maximum number of days in the penalty accrual period.

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 and must order the Employer to pay the Claimant the above-cited earned, unpaid, due, and payable wages and the above-cited sum in penalty wages, plus interest on those wages and penalty wages.

OPINION

Neither the Employer nor any representative of him appeared at the hearing of this matter. In fact, the Employer's requests for hearing and answer to the Order of Determination are the Employer's only contribution to the record herein. This exhibit contains nothing concerning the merits of this matter other than unsworn and unsubstantiated assertions. Having offered no evidence at all in support of those assertions, which are the only defenses to the Order of Determination which the Employer has raised herein, the Employer has defaulted in this matter.

In a default situation, the task of this forum is to determine if the Agency has made a prima facie case on the record that the Employer has violated the statute. ORS 183.415(6). In this matter, the evidence on the record shows that the Employer owes earned, unpaid, due, and payable wages to the Claimant, his former employee, in the amount specified above, and that the Employer has willfully failed to pay the Claimant these wages. This evidence is not only uncontroverted, but complete, credible, and persuasive and the best evidence available, given the Employer's failure to appear, and it clearly

constitutes a prima facie case that the Employer has violated ORS 652.140 and owes the Claimant penalty wages pursuant to ORS 652.150.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Fred G. Vankeirsbilck, doing business as Van and Son Remodeling, to deliver to the Hearings Unit of the Bureau of Labor and Industries, Room 309, 1400 S.W. Fifth Avenue, Portland, Oregon 97201, a certified check payable to the Bureau of Labor and Industries in trust for JAMES ROBERT BILLSTINE in the amount of ONE THOUSAND SEVEN HUNDRED FIFTY-ONE DOLLARS AND TWENTY-FIVE CENTS (\$1751.25), (representing \$288.75 in earned, unpaid, due, and payable wages, and \$1462.50 in penalty wages) plus interest at the rate of nine per cent per year, for the period from January 1, 1984, until paid on \$288.75, and for the period from February 1, 1984, until paid on \$1462.50

**In the Matter of
M3X Corporation, dba
KBOY RADIO STATION,
Respondent.**

Case Number 04-84
Final Order of the Commissioner
Mary Wendy Roberts
Issued March 31, 1986.

SYNOPSIS

Respondent's supervisor discharged Complainant for poor performance before the supervisor knew of Complainant's on-the-job injury, and therefore Respondent did not violate ORS 659.410, which prohibits terminating a worker because the worker applied for workers' compensation insurance benefits or invoked or utilized the workers' compensation system. The Commissioner also held that Respondent did not violate ORS 659.415, which requires employers to reinstate injured workers when they are fully released for work, because Respondent had discharged Complainant for cause before she demanded reinstatement. ORS 659.410, 659.415; OAR 839-06-150(2)(a) and (3)(b).

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on April 11 and 12, 1985, in Room 300 of the Jackson County Courthouse in Medford, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was

represented by Michael Cannady, Assistant Attorney of the Department of Justice of the State of Oregon. M3X Corporation, doing business as KBOY Radio Station (hereinafter Respondent), was represented by H. Scott Plouse, Attorney at Law. Suzi E. Spangenberg-Krenzin (hereinafter Complainant) was present throughout the hearing.

The Agency called Complainant as its one witness. Respondent called as witnesses Alan Schneider, Gerald Hayford, Steve Pierce, Kitty Herzog, and Gordon Herzog, all employees of Respondent during Complainant's employment by Respondent; Barbara Turner, Senior Investigator for the Civil Rights Division of the Agency; Scott Crites, Sales Manager for Respondent during most of Complainant's employment; Complainant; and Robert Esty, president and owner of Respondent corporation.

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

FINDINGS OF FACT-- PROCEDURAL

1) On or about November 3, 1982, Complainant filed a verified complaint with the Civil Rights Division of the Agency alleging that Respondent had discharged her from employment because of her on-the-job injury, and had failed to reinstate her to her former position after she had been released to return to work.

2) Following the filing of the aforementioned complaint, the Civil Rights Division investigated its allegations and, on or about October 20, 1983, determined that substantial evidence existed to support them.

3) Thereafter, the Civil Rights Division attempted to reach an informal resolution of the complaint through conference, conciliation, and persuasion, but was unsuccessful in these efforts.

4) Thereafter, the Agency caused to be prepared and duly served on Respondent Specific Charges dated October 1, 1984, alleging that Respondent had violated ORS 659.410 and 659.415 in connection with Complainant's application for workers' compensation benefits or invocation or utilization of the workers' compensation process.

5) The forum duly served on Respondent and the Agency a notice of the time and place of the hearing of this matter. Pursuant to a request by the Agency and Respondent, the hearing was postponed once. Thereafter, pursuant to Respondent's request, the convenement of the hearing was postponed again, for one day.

6) On or about March 11, 1985, Respondent served its answer to the Specific Charges upon the forum.

7) Before the commencement of the hearing, Complainant received from this forum a copy of "Information Relating to Civil Rights or Wage and Hour Contested Case Hearings" which had been sent to her, and stated that she had read it and had no questions about it. Before the commencement of the hearing, Respondent also

received from this forum a copy of "Information Relating to Civil Rights or Wage and Hour Contested Case Hearings" which had been sent to it. At the commencement of the hearing, Respondent waived the reading of it for all purposes herein.

8) At the convenement of the hearing, Respondent moved to amend its answer. The Agency did not oppose this motion, and the Presiding Officer granted it, making the amendment the operative answer for all purposes herein.

Also at the convenement of the hearing, Respondent asked that "for the loss of her automobile through repossession," be deleted from the Specific Charges. The Agency agreed to withdraw this language, so the forum deleted it from the Specific Charges.

9) After hearing, at Respondent's motion, the forum reopened the record to admit as an exhibit the transcript of the April 29, 1985, hearing of Oregon Workers' Compensation Board Case Number 84-4973. Thereafter, at the Agency's request and with Respondent's agreement, the forum admitted as an exhibit the Opinion and Order of Referee S. Brown in the same case.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was an Oregon corporation doing business in Medford, Oregon, as KBOY Radio Station. In that broadcasting business, Respondent employed six or more persons in the state of Oregon during all times material.

2) During all times material herein, Robert Esty was the owner and president of Respondent corporation.

3) From April 6, 1982, to September 22, 1982, Respondent employed Complainant, an individual, as a salesperson of radio advertising. Complainant started this employment with no experience selling radio advertising. Her duties included contacting prospective and current customers to sell advertising time on Respondent's radio broadcasts; making and closing those sales; and preparing orders, sales contracts, and other sales-related paperwork required by Respondent. These duties required Complainant to spend a great deal of her work time away from Respondent's office.

4) During Complainant's employment, Respondent compensated her \$1000 per month in salary and \$100 per month as a gasoline allowance. When Respondent hired Complainant, Respondent informed her that she would be compensated on a straight commission basis as soon as she demonstrated that she could make the same amount of money in commissions as she was making in salary.

5) In Respondent's employ, Complainant's basic work hours were from 8 a.m. to 5 p.m., Monday through Friday.

6) During Complainant's employment, Respondent also employed Galen Finley, Gerald Hayford, Steve Pierce, and Alan Schneider and advertising salespeople. Messrs. Finley, Hayford, and Pierce each had worked for Respondent about one year before Complainant stated, and each of them worked as a salesperson for Respondent throughout Complainant's employment. Mr. Schneider worked in the capacity starting in September 1982, before Complainant's termination.

(Respondent did employ one other person as salesperson during Complainant's employment, but he or she was terminated soon after Complainant was hired.)

During all of Complainant's employment at Respondent after June 19, 1982, Scott Crites was Respondent's sales manager and Complainant's immediate supervisor

7) Respondent gave each of its salespeople a sales goal for each month, measured in the dollar volume of sales. During her first month of employment, Complainant's goal was \$2000, which was low compared to the goals assigned to Respondent's more experienced sales people. During each month of Complainant's employment, her sales goal was increased \$1000, until it reached \$5000 by July 1982.

8) Complainant did not reach any of her sales goals until July 1982, when she exceeded her goal by \$100 to \$200.

9) In August 1982, Complainant reached 45 percent of her sales goal of \$6000, a performance which Complainant termed failing "fairly short" of her August goal. During the same month, Respondent's other salespeople reached 83 to 89 percent of their respective goals.

Frequently during August 1982 Complainant spoke with Mr. Crites concerning the decline in her sales that month; she was somewhat concerned about her sales performance. Mr. Crites advised her to continue trying to sell Respondent's current promotion.

10) Complainant's sales goal for September 1982 was \$6000.

September usually was a strong advertising month for Respondent in Ashland, Oregon, the city which comprised most of Complainant's sales territory. During the first part of September, Complainant's sales performance improved. (Complainant believes that she reached her weekly goals – given percentages of her monthly goal – for the first week and the first two weeks before any of Respondent's other salespeople.) Mr. Crites commented to Complainant that her September sales were "picking up" and that she was doing a good job. Mr. Esty gave her the same kind of encouragement.

Complainant's good volume sales performance appeared to be continuing into the third week in September 1982 (September 13-17).

11) Around 3 p.m. on September 16, 1982, Complainant slipped and fell, spraining her back, while on her way to call on a customer.

Complainant testified that she does not know if she told Respondent of her injury on September 16 by phone or not; she may have. She testified that she thinks but is not positive that she went back to the office after her injury. She did not call on the client she was en route to see at the time of the accident, and she doesn't recall if she called on any other client on September 16 after the accident.

Mr. Crites testified, and in the absence of any evidence to the contrary this forum finds, that on September 16, 1982, he did not know of Complainant's on-the-job injury.

12) Complainant came to work as usual on Friday, September 17, 1982.

Complainant testified that Respondent held a sales meeting each weekday morning at 8 a.m., and that she is sure she came to the sales meeting on September 17, per her usual routine. Mr. Crites testified that Respondent normally had a sales meeting each Monday morning, not daily. He also testified that the sales staff had very informal encounters during the first hour of each day, by virtue of the proximity of their work areas.

It is not clear whether Complainant worked all day on September 17, 1982, but her injury was starting to hurt by the end of whatever period she did work that day.

13) Complainant did see Mr. Crites in the office on September 17, 1982. She initially testified that she told Mr. Crites that day that she had hurt herself while calling on a customer. Complainant further testified that Mr. Crites told her to go see Gordon Herzog, Respondent's Business Manager, but that she does not recall if Mr. Crites seemed angry or at all concerned. Complainant testified that she does not recall if she told Mr. Herzog, when she went to him, that Mr. Crites had sent her.

Later, Complainant testified that she "thinks" Mr. Crites knew of her injury before (a sales meeting on) September 20, 1982.

Mr. Crites testified that on September 17, 1982, Complainant did not tell him she had hurt herself and that he did not tell her to go see Mr. Herzog. Mr. Crites further testified that Complainant did not say anything about a workers' compensation claim or injury on September 17; that Mr. Herzog did not talk with him about Complainant's

workers' compensation claim or injury on September 17; that Complainant did not complain to him of pain on September 17; and that he did not notice anything unusual about her appearance that day. (Mr. Herzog corroborated that he said nothing to Mr. Crites or anyone else of Complainant's injury on September 17, because Complainant led him to believe that it was very minor when she reported it to him. He stated that Complainant did not indicate to him that Mr. Crites had sent her or that she had spoken to Mr. Crites. Mr. Herzog also stated that he was the only one at Respondent whom Complainant spoke to on September 17 about her injury.)

Because of this forum's conclusions in Findings of Fact 51 and 52 below as to the credibility of Complainant and Mr. Crites (and in light of Complainant's apparent admission above, that she is not certain she told Mr. Crites of her injury on September 17, 1982; Mr. Crites's emphatic testimony that Complainant did not, and Mr. Herzog's testimony corroborating the latter assertion), this forum has concluded that Complainant did not inform Mr. Crites, and he did not know, of her injury (or any potential workers' compensation claim for it) on September 17, 1982.

14) Complainant did report her injury to Mr. Herzog on September 17, 1982. She told him that she had hurt herself on her way to call on a customer and that she wanted to see a doctor. She did not ask Mr. Herzog for a workers' compensation claim forum or indicate that she wanted to file such a claim at that time. However, Complainant did say something to the

effect that she supposed that seeing a doctor would involve filling out forms. She and Mr. Herzog then, in essence, discussed whether a workers' compensation claim should be filed at the time. Mr. Herzog told Complainant that such a claim is not filed until the injured worker sees a doctor. He asked Complainant how serious her injury was, and if her discomfort was such that she could not work. Complainant told him that she did not know how serious her injury was, but she did not think she was hurt badly; that her discomfort was not too bad, but it could get worse; and that she could work. Complainant asked Mr. Herzog what she should do. Mr. Herzog suggested that she wait and rest and, if her discomfort worsened, see a doctor. Since Complainant's discomfort was not then disabling her from work, Mr. Herzog recommended that she wait in order to avoid the "careless" use of Respondent's workers' compensation insurance. Complainant testified that Mr. Herzog asked her to wait before filing a claim also because Respondent's workers' compensation insurance rates would increase if she filed a claim. Mr. Herzog testified that he did not express any concern over those rates rising.

Mr. Herzog has not been impeached. He is not currently employed by Respondent (although his wife is). This forum's assessment of Mr. Herzog's credibility has been enhanced by his demonstration of forthrightness in making at least one admission against interest in his testimony concerning this conversation. Accordingly, this forum finds Mr. Herzog credible. Given that finding, this forum's assessment of Complainant's

credibility (see Finding of Fact 52 below), and Complainant's lack of precise memory concerning related discussions which took place about the same time as this conversation, this forum considers Mr. Herzog's above-cited assertions more accurate than those of Complainant. Therefore, this forum finds that in Mr. Herzog's September 17 conversation with Complainant, his discussion specifically concerning workers' compensation insurance was limited to what is recounted above: Mr. Herzog suggested that she wait and rest and, if her discomfort worsened, see a doctor; since Complainant's discomfort was not then disabling her from work, Mr. Herzog recommended that she wait in order to avoid the "careless" use of Respondent's workers' compensation insurance.

At no time did Mr. Herzog refuse to allow Complainant to file a workers' compensation claim or to give her a form to do so. Respondent has never advised Mr. Herzog of any concern about workers' compensation claims.

15) Complainant's pain increased considerably during September 18 to 19, 1982. Complainant had no contact with any of Respondent's employees during that weekend.

16) Complainant offered the following testimony concerning Monday, September 20, 1982 (which this forum recites without at the same time finding it to be fact):

a) Complainant worked on September 20, 1982. She believes that she came to the office to attend the 8 a.m. sales meeting, and it was postponed until 4 p.m. that day.

b) Complainant remained at the office between 8 a.m. and 9:30 a.m. During that time, she told Mr. Herzog that her injury had worsened and that she was going to see a doctor concerning it. Complainant believes that she filled out "some forms" when she talked to Mr. Herzog, and that she was given "something" to take to the doctor. She does not believe that anyone else was present when she talked with Mr. Herzog.

c) Also on September 20, 1982, Complainant told Mr. Crites that her injury was "bad," and she may have mentioned it to other of Respondent's employees. Complainant believes that when she was in for the sales meeting, she talked with Mr. Crites about filing a workers' compensation claim, because she had to talk to Mr. Herzog about it. (Since Mr. Crites was her boss, Complainant "would talk to him and tell him what was going on before doing anything.")

d) After leaving the office at about 9:30 a.m. on September 20, 1982, Complainant may have made some sales calls in Medford. She returned to the office to attend the 4 p.m. sales meeting. Complainant does not recall seeing or talking with anyone from Respondent between leaving the office that morning and return for the sales meeting that afternoon.

17) Mr. Herzog testified that Complainant did not come to him on September 20. (In fact, he remembers no face-to-face discussion with Complainant after September 17, 1982, and he doesn't believe he even saw Complainant on September 20.) Mr. Herzog testified (and wrote in a letter to the Agency) that he got a message, (he

believes) on September 20, that Complainant was not coming to work and was going to the doctor, and that this caused him to fill out Respondent's portion of a workers' compensation claim form for Complainant's injury.

18) Mr. Crites testified that the September 20, 1982, sales meeting was held at 8 a.m. as usual, and that Complainant was not present. He testified that he did not see Complainant or have any contact with her on September 20, 1982.

19) An exhibit consists of Complainant's daily call sheets for August and September 1982. (A daily call sheet is a form Respondent's salespeople were required to complete each day as a record of their work activity during that day. It helped Respondent monitor its salespersons' work performance.) The exhibit does not include any call sheet for September 20, 1982. In light of this forum's assessment of Complainant's credibility in Finding of Fact 52 below, this forum cannot view Complainant's testimony that she might have misplaced call sheets after her termination from Respondent's employ as any indication that a call sheet for September 20, 1982, ever existed.

20) In an (amended) Determination Order issued December 7, 1982, the Workers' Compensation Department of the State of Oregon found, in effect, that Complainant was totally disabled from work on September 20, 1982.

21) Complainant offered the following testimony concerning a sales meeting on September 20, which this forum recites without at the same time finding it to be fact: All of Respondent's salespeople, and possibly Mr. Esty,

were present at a 4 p.m. sales meeting on September 20, 1982. As usual, Mr. Crites conducted the meeting and gave Respondent's salespeople a breakdown of advertising which had been sold since the last meeting. Complainant is certain that Mr. Crites directed some comments to her personally, because he did this to everyone. She is also sure that Mr. Crites discussed her sales record to date. In addition, Mr. Crites discussed the daily call sheets, which were a problem as far as Respondent was concerned, because Respondent's salespeople were not turning them in promptly. Mr. Crites did not direct any comments about the call sheets specifically to Complainant; he made general comments about them to all the salespeople. Mr. Crites told the salespeople that if they all did not start taking care of the paperwork, their jobs would be in jeopardy. Mr. Crites had made that type of statement at other sales meetings; in fact, he brought up the problem of daily call sheets more often than not. However, this time Mr. Crites seemed to be a bit more concerned and upset about it than usual. Although Mr. Crites said that he wanted the sales people all to do the required paperwork, he also mentioned something to the effect that good sales people always seem to have a problem with paperwork.

At no time before, during, or after this meeting, according to Complainant, did Mr. Crites single out Complainant, and Complainant testified that he did not come to Complainant and discuss the call sheets with her after the meeting.

22) Mr. Crites testified that he does not recall saying generally at a sales meeting something to the effect that the call sheets had better be done, shape up or ship out. He also testified that he does not specifically recall saying generally at a sales meeting something to the effect that the best sales persons usually are the ones who have the most trouble getting their paperwork done. He testified that in fact he believes that the best radio salespeople are those who are most organized, an attribute which he believes is manifested by completing paperwork as required.

23) Complainant testified that she experienced pain during the September 20, 1982, sales meeting, which she said lasted 45 to 60 minutes, but that she does not recall if she said anything about it to anyone at the meeting. Complainant testified that she does not remember specifically telling either Mr. Crites or Mr. Esty of her injury at this meeting. When asked at hearing if her injury was evident or obvious at the meeting, Complainant testified that she is sure her posture was changed, that she probably looked like she was in pain, and that she was keeping her arm fairly close to her side and being careful about how she walked and sat. Complainant also testified that people may have asked how she was doing.

Complainant testified that she did a little work at the office for 10 to 15 minutes after the sales meeting.

24) Complainant testified that on September 20, 1982, she felt her future at Respondent was very secure. She stated that she felt very good about her recent sales and was looking forward to working on a straight

commission basis. Complainant testified that she felt that, considering her lack of experience and training in radio sales, she did very well, relative to Respondent's other sales people, in meeting her monthly sales goals during her employment by Respondent.

25) In light of this forum's assessment of the credibility of Complainant and Mr. Crites in Findings of Fact 52 and 51 below and of Mr. Herzog in Finding of Fact 14 above, and given the above-found absence of a September 20 call sheet for Complainant and the above-cited Workers' Compensation Department finding that Complainant was disabled on September 20, this forum finds Complainant's above-cited testimony concerning September 20 not credible, and further finds that Complainant did not work on September 20, 1982; that Mr. Crites's testimony recited in Findings of Fact 18 and 22 above did not occur on September 20, 1982, if it occurred at all.

26) Complainant twice testified that she first went to see a doctor (Mary Ellen Dowling) concerning her injury on September 20, 1982, after the sales meeting and very close to 6 p.m. Complainant testified that she believed she made an appointment for this visit early on September 20 or possibly on the night of September 19. She also testified that she believed that she told Mr. Crites and Mr. Herzog about her appointment before the sales meeting on September 20. Complainant testified that Mr. Dowling referred her to Dr. John G. Maurer.

Complainant first testified that she believed (but was not positive) that she first saw Dr. Maurer on the morning of Tuesday, September 21, 1982, and

that at that time, Dr. Maurer gave her a sling to wear to prevent aggravation of her injury. However, Complainant continued on to testify that on September 20, 1982, Dr. Dowling referred her to Valdemar Swanson of Ashland Physical Therapy before sending her to Dr. Maurer, and that Mr. Swanson gave her the sling. Complainant testified that she saw Mr. Swanson either after she saw Dr. Dowling "that night" (September 21) or the "very next morning" (September 22). Thereafter Complainant testified that she does not know if she saw Mr. Swanson on September 20 or 21.

Finally, Complainant testified that she saw Dr. Dowling at lunch time on September 20, 1982, and that Dr. Dowling told her not to return to work on September 20. (Complainant testified that she did return anyway.) Complainant also then testified that Dr. Dowling referred her to Mr. Swanson, whom she saw after the sales meeting and after work on September 20, 1982.

Because it was Complainant's final testimony on this point and it is not controverted, and in light of this forum's assessment of Complainant's credibility in Finding of Fact 52 below, this forum finds the previous paragraph (excluding the sentence in parentheses) to be fact. However, this forum has also included in this Finding of Fact the recitation of the testimony which precedes that paragraph in order to illustrate Complainant's confusion and/or lapse of memory, concerning the sequence of events material herein.

27) According to Complainant, on Tuesday, September 21, 1982, she

called Respondent and told Mr. Crites, she believes, that because her back was still hurting and her doctor had recommended that she stay home in bed, she would not be in to work that day. Complainant does not recall Mr. Crites's response. Complainant did not perform any work for Respondent on September 21, 1982.

Mr. Crites testified that, having received a message for Complainant which Mr. Crites left with Respondent's receptionist, Complainant called Respondent on September 21, 1982, but did not make contact with Mr. Crites. Mr. Crites testified that he had no contact whatsoever with Complainant on September 21. Furthermore, he testified he received no doctor's note taking Complainant off work, he was not able to telephone Complainant (as she had no home telephone), and he was not advised on September 21 that Complainant had talked with Mr. Herzog about filing a workers' compensation claim. Mr. Crites testified that on September 21 he had no idea where Complainant was and was frustrated at not being able to reach her.

Given this forum's assessment of the credibility of Complainant and Mr. Crites (see Findings of Fact 52 and 51 below), and the indefinite nature of Complainant's testimony concerning September 21, this forum finds Complainant's testimony concerning that day not credible and Mr. Crites's testimony concerning that day to be fact.

28) On Wednesday, September 22, 1982, Complainant did not work. When she contacted Respondent that day, she received a message from Mr. Crites insisting that she come to the office as soon as possible. When

Complainant arrived, she had her arm in a sling, and Mr. Crites asked her what happened. According to Mr. Crites, Complainant mentioned something about falling down and getting hurt. Mr. Crites handed her her final paycheck and told her that she was fired, effective immediately.

Complainant testified that when she asked Mr. Crites why she was being fired, he told her that she had not been doing the required paperwork correctly. Complainant testified that Mr. Crites did not give her any other reason.

Mr. Crites testified that he told Complainant she was being discharged because of her inability to work with Respondent's system, that she was basically a disruptive force, and did not follow directions as well as she should. Mr. Crites said that in that explanation, he focused on Respondent's "overall" system, which included paperwork. Mr. Crites testified that he talked with Complainant about fifteen minutes, and Complainant objected to her termination, but did not suggest that he was firing her because of her injury.

In light of this forum's assessment of the credibility of Complainant and Mr. Crites (see Findings of Fact 52 and 51 below), this forum finds Mr. Crites's testimony recited in this Finding of Fact to be fact.

29) Mr. Crites testified that two to three weeks before he terminated Complainant, he had determined that she was "not going to be productive or a cohesive unit of (Respondent's) team." However, he also testified he did not make his decision to terminate Complainant suddenly. Mr. Crites

testified that because he wanted to take ninety days (from the start of his employment at Respondent on June 19, 1982) to evaluate the performance of each salesperson, and because he wanted any termination to coincide as closely as possible with a payday, he elected to continue his evaluation of Complainant and not put into effect any termination of her before September 20, 1982. (To minimize paperwork, Respondent and Mr. Crites generally tried to time discharges to coincide as closely as possible with paydays, which for Respondent fell on the fifth and the twentieth of each month.) Mr. Crites testified that when he was serious enough about his inclination to discharge Complainant, and by no later than the beginning of September 20, 1982, he discussed it with Mr. Esty, with whom he had been discussing problems with Complainant's job performance for some time. Mr. Esty's management style was to support the decisions of Respondent's department heads, of which Mr. Crites was one, and Mr. Esty approved Complainant's termination. When he made this approval, Mr. Esty had no personal knowledge of an on-the-job injury to, or workers' compensation claim filing by, Complainant. Mr. Crites testified that, having obtained Mr. Esty's approval, he had decided, by no later than the beginning of September 20, 1982, to discharge Complainant as early as possible that day.

In light of corroborative testimony from Mr. Esty and Complainant's co-workers concerning problems in complainant's work performance (cited in Findings of Fact 40 through 43 below); Mr. Esty's corroboration that Mr. Crites

had discussed these problems on an ongoing basis before Mr. Crites sought his actual approval for her discharge; this forum's assessment of Mr. Crites's credibility in Finding of Fact 51 below; and this forum's finding in the next Finding of Fact that Mr. Crites prepared most of Complainant's final payroll report form on September 20, this forum adopts Mr. Crites's testimony cited above in this Finding as fact. Accordingly, this forum concludes that as of September 20, 1982, Mr. Crites intended to fire Complainant as early as possible on September 20, 1982.

30) During times material herein, Respondent used a payroll report form to provide its business manager with the information he needed to formulate employee paychecks. Mr. Crites testified that, on September 20, in order to obtain a final paycheck for Complainant, he filled out a payroll report form concerning Complainant's imminent termination, supplying all requested information except the date of termination and the date the final check would be required. (Mr. Crites testified that it was his practice to sign and date this form when he wrote the reason for a termination and not to write in the termination date or submit the form to Respondent's business manager until the termination had actually occurred.) On that report, Mr. Crites listed the reason for complainant's termination as "her inability to follow instructions and her inability to work under our system here at KBOY." Mr. Crites could not explain to the forum why his signature and date of that signature ("9/20/82") were written in a different color of ink than the rest of the report form, including those portions Mr. Crites alleged he

completed at the same time as the latter information.

Mr. Crites testified that he kept this payroll report form until September 22, 1982, when he could supply the termination date. Mr. Herzog corroborated the latter assertion, in effect, by testifying that he got the payroll report form for Complainant's termination on the morning of September 22, 1982. Respondent's department heads customarily did not submit this form to Mr. Herzog until they were ready for the paycheck to which it pertained to be issued. Consequently, it was not unusual for Mr. Herzog to get this report two days after Mr. Crites had signed it. (However, in a letter he wrote to the Agency, Mr. Herzog states that he received an "employee termination report" for Complainant from Mr. Crites on September 20. The document he enclosed in reference to that statement is the payroll report form for Complainant's final check. This forum does not find this discrepancy material, as it is logical and therefore certainly possible, as well as consistent with all the testimony of Messrs. Herzog and Crites on point (see this Finding and Finding of Fact 33 below), that Mr. Herzog received this form on both September 20 and September 22; i.e., that Mr. Crites gave Mr. Herzog the almost completed form on September 20 so that Mr. Herzog could cut Complainant's final paycheck, Mr. Herzog cut the check and return the form to Mr. Crites for completion when he terminated Complainant, and Mr. Crites returned the form to Mr. Herzog on September 22 after he terminated Complainant. See Finding of Fact 51 below.)

Given this forum's assessment of Mr. Crites's credibility in Finding of Fact 51 below, and in light of the other Findings herein, this forum finds Mr. Crites's assertions in this Finding of Fact to be fact.

31) Kitty Herzog, Respondent's copywriter-production director during all times material herein, testified that rumors of Complainant's impending termination were sweeping through Respondent's office before she was terminated. Mr. Crites and sales secretary C. Carruthers told Ms. Herzog, apparently on September 21, 1982, that Complainant was going to be terminated as soon as she came to work.

32) Mr. Crites did not discharge Complainant until September 22, because he was not able to contact Complainant on September 20 or 21.

33) Complainant's final paycheck is dated September 21, 1982. Normally, if Mr. Crites could not terminate a person on a payday, he had Mr. Herzog cut the final paycheck while he was in the process of terminating the person. However, when Mr. Crites was unable to terminate Complainant on September 20, he assumed she would be coming in to work on September 21. Accordingly, since he had already filled out a payroll report form, he had Mr. Herzog cut Complainant's final paycheck showing pay through September 21. When he was unable to terminate her on September 21, in order to avoid having to cut another check for September 22 pay, he left messages with Respondent's reception to have Complainant come in first thing on September 22.

34) Mr. Herzog testified that before he was told to make out Complainant's

final paycheck, he had not told Mr. Crites or Mr. Esty that Complainant had suffered an on-the-job injury. Since there is no evidence to the contrary, and since Mr. Herzog's wife testified that he had not even told her of Complainant's injury at that time, this forum finds this assertion to be fact.

35) Mr. Crites testified that his decision to terminate Complainant was not based at all on Complainant's having incurred a workers' compensation injury.

36) Dr. Dowling had also referred Complainant to Dr. Maurer, a specialist. Dr. Maurer had Complainant refrain from working from the time he first saw her until October 20, 1982, when he released her to return to work without restriction as of the same date.

On October 20 or 21, Complainant contacted Respondent, told Mr. Crites that she was released to return to work and asked to be reinstated to her former job. Mr. Crites declined to reinstate Complainant, stating that Respondent had no positions available for her. Mr. Crites also told Complainant that her termination had nothing to do with her injury. This was Complainant's first contact with Mr. Crites since September 22, 1982, and it was their only contact concerning reinstatement of Complainant.

37) According to Mr. Crites's testimony, there was no position with Respondent available for Complainant when Complainant asked to be reinstated.

38) On October 20, 1982, Mr. Crites terminated salesperson Galen Finley for poor sales performance.

During September 1982, Mr. Finley's sales goal had been \$8250.00, and his sales had totaled \$5302.00. Despite this poor September performance, Mr. Crites had not fired Mr. Finley when he discharged Complainant, mainly because he did not have sufficient staff to cover both of their account lists at once. Because Mr. Finley had worked longer for Respondent, and had a much larger account list than Complainant, and because Complainant's attitude (see the next Finding of Fact) and the fact that she was not working well within Respondent's system had indicated to Mr. Crites that she had to be terminated immediately, Mr. Crites had decided to terminate Complainant first.

On or about November 1, 1982, Respondent hired Tom Schmidt to take over Mr. Finley's accounts.

39) Mr. Crites offered the following testimony (in addition to what has been recited above) concerning Complainant's job performance during her employment for Respondent, which this forum does not by this recitation find to be fact unless it so specifies:

Complainant's performance was very inconsistent, and Mr. Crites was not satisfied with her. Mr. Crites's biggest problem with Complainant was her attitude, particularly about listening and taking directions, and listening for and applying constructive criticism of her ability to perform. As one result of her attitude, Complainant was very disruptive. Mr. Crites also had problems with Complainant's paperwork, in that her submission of daily call sheets and her ability to turn in accurate traffic orders were inconsistent (and, concerning traffic orders, well below average at

Respondent), and her ability to submit completed production orders was "pathetic." (This forum finds that a production order was a form Respondent's salespeople completed and submitted to Respondent, once a sale of radio time had closed, which described what the customer wanted.) Complainant was average at "getting in the door and make the (sales) contact" but unable to close sales; i.e., she did not have the ability to "get people to commit themselves and say 'yes' or sign on the dotted line." Mr. Crites spent long periods of time making sales calls with Complainant to assist her in selling, more time than he spent with other salespeople. Without Mr. Crites, Complainant's sales production was "very, very poor." In many instances Mr. Crites gave Complainant credit for sales he actually closed. (It was not at all unusual for Mr. Crites to do this for any salesperson, such as Complainant, who was going to have to service the accounts Mr. Crites had sold.) Mr. Crites received several complainants from customers about Complainant. In one instance, the customer specifically told him he did not want to have to deal with Complainant because he wanted someone who had knowledge of and was a "real professional" in radio, and because he did not think Complainant listened well to him or was open to his ideas. Approximately two other customers made the same types of complaints. In addition, Mr. Crites testified that he received complaints about Complainant using profanity on the job (but he did not recall the clients from whom he had received such complaints). Finally, between the time Complainant was terminated and October 20, 1982, Mr. Crites discovered

"fraudulent" orders which Complainant had created and submitted to Respondent (i.e., orders which Complainant turned in with advertising for which the customer had not been contracted). (Mr. Crites named three customers, and six September 1982 orders, in this category. Two of those customers specifically told him that they had not ordered the advertising that Complainant submitted, and declined to take this advertising.) Mr. Crites is not aware that any of those orders failed because Complainant was terminated, and he stated that no customers canceled advertising because of Complainant's termination. Submitting fraudulent orders was cause for dismissal, and Mr. Crites would have dismissed Complainant (or presumably anyone) for this alone, had he discovered it during her employment.

40) Mr. Esty had advised Mr. Crites to be meticulous in discharging Complainant, because Mr. Esty thought Respondent might have trouble terminating Complainant, given what Mr. Esty at hearing termed Complainant's abrasive resistance to Respondent in the past when something had not gone as Complainant perceived it should have. (Mr. Esty had assumed Complainant's termination would come within the latter category, given Complainant's comments to him that she could do a better job than Mr. Crites and that she would have his job in a very short time.)

41) Respondent called as witnesses three of the four salespeople who worked for Respondent during Complainant's employment. (The fifth such person left Respondent's employ shortly after Complainant started.)

None of these witnesses is currently employed by Respondent.

Gerald Hayford knew Complainant as a fellow salesperson throughout her employment for Respondent. His general impression of her was that she had "a chip on her shoulder" and that she wanted, but did not have the sales ability, to do well. Having gone on sales calls with Complainant on four or five different occasions toward the beginning of her employment, Mr. Hayford observed that "her ability to conduct a professional sales transaction was lacking." On October 19, 1983, when the Agency interviewed Mr. Hayford in connection with this matter, he stated that it was typical of Complainant to be claiming that her termination was not her fault.

Steve Pierce also knew Complainant as a fellow salesperson throughout her employment for Respondent. He never observed her when she was working with a sales contact or client. He feels that Complainant had a "chip on her shoulder," was feminist or was out to prove something. He was "tolerable" (sic) of her. He feels that Complainant was like a person running in front of and across, i.e., interrupting, the flow of a team of people moving in one direction. In other words, he feels Complainant was disruptive of the sales team effort to sell radio time for Respondent. He gave the example that at sales meetings Complainant would dilute a point he was trying to make, which could have been beneficial to everyone else, by interrupting him. Mr. Pierce stated that Complainant's "argumentative point of view," "derogatory comments" or "comments which hurt one's feelings" became very

disruptive and aggravated to the other team members. Mr. Pierce also offered the example of Complainant repeatedly not submitting daily/weekly reports, which he felt also disrupted the team effort. (Mr. Pierce admitted that on occasion, he did not submit paperwork on time.)

Alan Schneider testified that he knew Complainant briefly (during his September 1982 employment by Respondent) and that his impression of her was that she was a "disruptive force." Mr. Schneider elaborated by stating that Complainant was always very argumentative, and what he deemed an "extreme women's lib advocate," to the point that she wanted to be referred to as a "salesperson" rather than "salesman." (In an interview with the Agency concerning this matter on October 14, 1983, Mr. Schneider stated that Complainant was a totally disruptive force; that she thought she was above the system; and that she didn't feel that she should have to turn in her daily call sheets.)

On October 19, 1983, the Agency interviewed Galen Finley, the fourth salesperson who worked with Complainant during her employment by Respondent, in connection with this matter. Mr. Finley was employed as a salesperson by Respondent throughout Complainant's employment. He stated that in his opinion, Complainant was terminated for poor performance, not because she filed a workers' compensation claim. According to Complainant, Mr. Finley never went with Complainant on calls to her accounts. Respondent was unable to obtain the attendance of Mr. Finley at the hearing.

42) Mr. Schneider testified that he took over some of Complainant's contacts and accounts in Ashland after her termination, and discovered a lot of problems with them. He testified, for example, that he knew of two instances in which Complainant had turned in orders which turned out, shortly after she was terminated, not to be orders at all. Mr. Schneider advised Mr. Crites of this problem at length. In one instance, he testified, Complainant had turned in twelve changes in advertising schedule for a business which informed Mr. Schneider that it had never "put in" for any kind of schedule or signed any order. Mr. Schneider testified that if he had been sales manager when Complainant submitted "false" orders, he would have terminated her therefor. Mr. Schneider also testified that Complainant's Ashland market had not been at all well developed when he took it over from her, and that the Ashland accounts which she had handled were basically not really customers at all.

Mr. Hayford testified that after Complainant was terminated, he too took over some of her contacts and accounts. He stated he discovered one or two accounts which were scheduled for commercial time which was not and really had not been ordered. The clients said they had never signed any orders, and the transactions completely fell apart. Mr. Hayford also stated that, within one month after complainant's termination, he observed quite a few instances in which Complainant's clients actually bought a little less than had been stated in the "orders" Complainant had submitted for those clients.

Mr. Hayford testified to the effect that he has submitted orders before they were "signed, sealed and delivered," (i.e., anticipated an order) when he was dealing with repeat and regular customers. He also testified that he did not do this during his first three to four months of employment at Respondent.

During times material, it was possible to submit an unsigned order, although it was Respondent's policy to get a signed order when dealing with a first-time customer.

Mr. Hayford testified that one major goal of Respondent's salesperson was to develop a returning clientele.

43) During Complainant's employment at Respondent, it was the job of Ms. Herzog, Respondent's copywriter-production director (and Gordon Herzog's wife), to write or edit radio commercials and to make sure they were produced by the disc jockeys. She used the copy notes the salesperson submitted to her in the production order to ascertain what to write in a commercial. Ms. Herzog testified that Complainant's copy notes were inadequate. She stated that "often" (more than twelve but not necessarily more than 24 times), in order to do a proper job, she had to go to Complainant to get more information than appeared on her copy notes, and that she did not receive Complainant's notes in time to run the commercial as scheduled. She further stated that these shortcomings occurred more often as Complainant's employment continued, and that Complainant was "worse" than Respondent's other salespeople. Ms. Herzog testified that she told Complainant of these problems and that she spoke

with Mr. Crites about them as they occurred.

Ms. Herzog is currently employed as an administrative assistant by Respondent.

44) In specific response to Mr. Crites's above-recited comments, Complainant offered the following testimony, which this forum does not find to be fact by the recitation below unless it so specifies:

While she was employed by Respondent, Complainant never had problems with her orders being canceled and she never had any trouble closing her sales. Complainant doesn't recall Mr. Crites ever criticizing her at all for any inability to close sales. Complainant never had to give any of her accounts or potential accounts to Mr. Crites or another salesperson for assistance in closing. Complainant never consciously wrote an order for which she knew she did not have an account. Complainant tried to get the majority of her orders signed. Complainant intimated that she would have finalized all her September 1982 orders if she had not been terminated before the end of that month. One of the customers who, according to Mr. Crites, complained about Complainant told her, after her discharge, that they very much disliked Mr. Crites and his methods of selling; that they were upset by her discharge; that they had enjoyed the way she presented Respondent to them, and that they were going to withdraw from a promotion of Respondent's for which they had signed up.

Another customer who, according to Mr. Crites, complained about Complainant had told Complainant that he

had difficulties dealing with a woman because he felt that women did not really know anything about his kind of business, and that he would feel more comfortable with a male salesperson. As a result of that conversation, that account went to another salesperson. No other client indicated to Complainant any dissatisfaction with her or told her that it wanted to be serviced by another salesperson.

45) Complainant also testified, in succession, that

a) She turned in her daily call sheets every day;

b) Sometimes she did not turn them in every day;

c) On "some days," she did not turn in a call sheet, but, by the end of a week or a month, she had "caught up" and submitted a call sheet for every day.

Complainant testified that "maybe once, if at all," Respondent expressed to Complainant particular concern about Complainant's regularity in submitting call sheets.

An exhibit containing Complainant's August and September 1982 call sheets does not include a call sheet for 57 percent of the days in September 1982 on which Complainant claimed she worked, and does not include a call sheet for 27 percent of the workdays in August 1982. Complainant's vague assertion that she may have misplaced some of her August and September 1982 call sheets since her termination is not considered by this forum to be probative of any assertion that those sheets, which are absent from the exhibit, ever existed.

46) When asked at hearing to describe her relationship with Mr. Crites, Complainant testified that they "got along," not "famously," but with no big problems. She also testified that she got along "fairly well" with her coworkers at Respondent. Complainant testified that she does not recall any of Respondent's management ever talking with her about not being a "team player."

47) In response to the testimony in general which Respondent offered about her job performance, Complainant stated that as a new person in the radio sales business, she did tend to ask more questions than anyone else: if she was uncertain, she would ask a question. No one told or asked her not to do that, so she assumed her doing it at sales meetings was appropriate. Complainant also stated that sometimes she would correct people if they called her a man.

48) Complainant testified that she was not aware of any particular problem in her job performance concerning production orders. Complainant testified that Ms. Herzog never told Complainant that her order forms did not contain sufficient information. Complainant testified that, in fact, she believes that she tended to make very clear on her production orders just what her customers wanted. Complainant testified that occasionally if, very late in the day, she closed a sale and submitted the order form for an advertisement to be played the very next day, Ms. Herzog asked Complainant to try to give her more time to write the advertisement.

49) In light of this forum's assessment of Complainant's credibility and

the credibility of Mr. Crites and Respondent's other employees during times material (see Findings of Fact 51, 52, and 53 below), and because of the corroboration of Mr. Crites's testimony concerning Complainant's work performance by the testimony of Mr. Esty and virtually all the testimony of Complainant's available coworkers (see Findings of Fact 40 through 43 above), as well as the flaws in Complainant's testimony concerning her job performance recited in Finding of Fact 52 (and the Opinion) below, this forum finds Mr. Crites's assertions in Finding of Fact 39 to be fact.

50) After hearing all the testimony at hearing, Complainant testified that she still felt she was fired by Respondent solely because she had filed a workers' compensation claim. No one from Respondent has ever represented directly to Complainant that Respondent fired her because she had filed a workers' compensation claim. Complainant believes that she was fired for that reason because, she alleges, there was no other reason to fire her and (Complainant agreed, after being asked) because of the timing of her firing.

51) During hearing, Mr. Crites impressed this forum as a sincere witness.

The forum examined two facets of Mr. Crites's testimony which conceivably could have tainted his credibility, and determined that neither did so.

The first was the fact that information Mr. Crites alleges he wrote at one time was written in two different colors of ink. (See Finding of Fact 30 above.) The Agency has suggested that Mr. Crites in fact wrote the information in

one color after he wrote the information in another color, while attempting through backdating to make it appear that he wrote all the information at one time. The forum agrees with Respondent that this suggestion makes no sense: if Mr. Crites were attempting to make writings appear contemporaneous when they were not, her certainly would not have made them in different colors of ink. Accordingly, this testimony does not impeach Mr. Crites at all.

Second, Mr. Crites testified that he kept the payroll report form for Complainant's termination until September 22, 1982, when he could supply the date of termination. This assertion is both corroborated and contradicted by evidence from Mr. Herzog. It leaves unexplained how Mr. Herzog could have issued Complainant's final paycheck on September 21, that check's date, without the payroll report form on which that check should have been based. As noted in Findings of Fact 30, however, this forum has not found this seeming discrepancy in evidence material, as there is a logical and plausible explanation for it. Neither Mr. Crites nor Mr. Herzog offered that explanation; but this discrepancy was not pointed out to either of them, and neither was asked to explain it.

Respondent discharged Mr. Crites on March 19, 1985, and there is no evidence that Mr. Crites had any interest in Respondent at the time of the hearing of this matter.

In the absence of any effective impeachment of Mr. Crites, and in light of his sincere demeanor and lack of any interest in Respondent, this forum has found his testimony credible.

52) For reasons given and explained in Section 1 of the Opinion below, which are hereby incorporated by reference into this Finding of Fact, this forum has found Complainant not credible. Accordingly, this forum has treated Complainant's testimony as described in that Section of the Opinion; most importantly, giving her testimony less weight than that of any other witness.

53) Mr. Finley was discharged by Respondent in October 1982, as indicated in Finding of Fact 38 above. Mr. Pierce was discharged by Respondent in March 1983. Mr. Hayford left Respondent's employ voluntarily in April 1983. He has not seen Mr. Esty since that time. Mr. Schneider was discharged abruptly by Respondent in 1984. Mr. Schneider feels hostility toward Respondent because of that discharge, and he was uncomfortable testifying on Respondent's behalf in this proceeding. (Of the witnesses mentioned in this Finding of Fact, only Mr. Schneider was asked about his feelings toward Respondent.)

There is no evidence that Messrs. Finley, Pierce, Hayford, or Schneider had any interest in Respondent at the time they testified or made their statements on this record. The above-cited evidence concerning the nature of the termination's of the employment of Messrs. Finley, Pierce, and Schneider indicates that each has reason to feel hostility toward Respondent, and Mr. Schneider attested to feeling that hostility.

Given this forum's assessment of the credibility of Complainant and Mr. Crites in Findings of Fact 52 and 51 above; the absence of any evidence

that Messrs. Finley, Pierce, Hayford, or Schneider had any interest in testifying in Respondent's favor, and the existence of evidence to the contrary, this forum finds the testimony and statements by Messrs. Finley, Pierce, Hayford, and Schneider recited in Findings of Fact 41 and 42 above to be accurate reflections of the facts as they each new them.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent, a corporation doing business as a radio station, was a person and an employer subject to the provisions of ORS chapter 659.

2) Respondent employed Complainant as a salesperson of radio advertising from April 6, 1982, to September 22, 1982. Complainant's duties were to make contacts with prospective and actual customers to sell advertising, to make and close those sales, and to prepare related paperwork required by Respondent.

3) When Complainant started her employment with Respondent, she had no experience selling advertising. Accordingly, her monthly sales volume goal was low at first, and it increased each month. Complainant did not reach her goal during any month of her employment except July 1982. In August 1982, Complainant fell 55 percent short of her sales goal. In September, usually a big radio advertising month in most of Complainant's sales territory, her sales performance improved, and she met her first two weekly sales goals.

4) On September 16, 1982, Complainant fell and sprained her back while working. She did not inform

anyone at Respondent, and Respondent did not learn, of this injury on September 16.

5) On September 17, 1982, Complainant came to work as usual. Complainant did not inform Scott Crites, Respondent's sales manager and Complainant's immediate supervisor, of her injury, and he did not learn of it that day. On September 17, Complainant did tell Gordon Herzog, Respondent's business manager, that she had hurt herself on the job and wanted to see a doctor. Complainant asked Mr. Herzog what to do. As Complainant had told him that she did not think she was hurt badly and that she could work, Mr. Herzog advised her to wait, rest, and see a doctor if her discomfort worsened. He wanted Complainant to avoid "careless" use of Respondent's workers' compensation insurance. Respondent had not conveyed to Mr. Herzog any concern about workers' compensation claims.

Because he had gained the impression from Complainant that her injury was minor, Mr. Herzog did not mention it to anyone on September 17. Mr. Crites did not learn of Complainant's injury on September 17, 1982.

7) After the pain of her injury increased considerably during September 18 and 19, 1982, a weekend during which Complainant had no contact with Respondent, Complainant notified Mr. Herzog, by message on September 20, that she was not coming to work and was going to see a doctor. Complainant did not work on September 20, and neither Mr. Herzog nor Mr. Crites saw Complainant or had any other contact with her on September 20. (Because Complainant did not

have a home telephone, Respondent could not contact her when she was not at work.) Other than the testimony of Complainant which has been found not to be credible concerning September 20, 1982, there is no evidence on the record that Mr. Crites learned of Complainant's injury or potential workers' compensation claim on September 20. According, this forum finds that he did not.

8) Around noon on September 20, Complainant saw a doctor concerning her injury, and the doctor advised her not to return to work. Complainant was disabled from work by this injury from September 20, 1982, to October 20, 1982.

9) Complainant did not work on September 21, 1982. Although she contacted Respondent by telephone on that day, she did not have any direct contact with Mr. Crites. As this forum has found Complainant's testimony concerning September 21 not credible, there is no credible evidence that Mr. Crites learned of Complainant's injury on September 21. Accordingly, this forum concludes that he did not. Mr. Crites, therefore, did not know of Complainant's potential workers' compensation claim on September 21.

10) Complainant did not work on September 22, 1982. However, when she contacted Respondent that day, Mr. Crites insisted that she come to Respondent's office as soon as possible. She did, with her arm in a sling. Mr. Crites learned of Complainant's injury at that point, although it is not clear whether he learned it was an on-the-job injury then. As soon as Complainant arrived, Mr. Crites handed her her

final paycheck and told her she was fired, effective immediately. When asked why, Mr. Crites told Complainant something to the effect that it was because of her inability to work within Respondent's system, that she was disruptive and didn't follow directions as she should. As far as Mr. Crites was concerned, the paperwork Respondent required of its salespeople was a part of Respondent's "system."

11) Mr. Crites had been considering terminating Complainant for two or three weeks before September 22, 1982. Because Mr. Crites wanted to afford each of his employees a ninety day evaluation period after June 19, 1982, when Mr. Crites began his employment as Respondent's sales manager, and because he tried to time terminations to coincide as closely as possible with a payday, for administrative convenience, Mr. Crites chose to continue his evaluation of Complainant and not put into effect any termination of her before September 20, 1982, the first payday after the above-described ninety day period. Mr. Crites had obtained approved for Complainant's termination from Robert Esty, Respondent's owner and president, by at least September 20, 1982.

By the beginning of work on September 20, Mr. Crites intended to terminate Complainant on that date. As of September 20, Mr. Crites did not know that Complainant had suffered an on-the-job injury or had an actual or pending workers' compensation claim.

Mr. Crites was not able to terminate Complainant on September 20 or at any time before actually terminating her on September 22, because

Complainant was absent from work and he could not contact her.

12) There is no evidence other than the testimony of Complainant that Mr. Crites knew of Complainant's on-the-job injury, much less of any actual or pending workers' compensation claim by Complainant, before she met with him on September 22, 1982. Mr. Crites's testimony indicates that he did not. Other than the testimony of Complainant, there is no evidence that any one at Respondent except Mr. Herzog knew of Complainant's injury before she met with Mr. Crites on September 22. Not only did Mr. Herzog not tell Mr. Esty or Mr. Crites of her injury before he was told to prepare Complainant's final paycheck, but there is no evidence at all that Mr. Herzog informed anyone of her injury or pending/actual claim before Complainant met with Mr. Crites on September 22. Given this forum's assessment of the credibility of Complainant, Mr. Crites, and Mr. Herzog, this forum must conclude that Complainant's testimony by itself does not have sufficient weight to support a finding that Mr. Crites knew of her injury before she met with him on September 22, 1982 (much less overwhelm the testimony of Messrs. Crites and Herzog indicating the opposite). This forum has concluded therefore that Mr. Crites did not know of Complainant's injury or pending/actual workers' compensation claim before he saw Complainant on September 22. By this time, Mr. Crites had already decided to terminate Complainant and had obtained her final paycheck. Accordingly (and as Mr. Crites asserted), Mr. Crites's termination of Complainant could not have

been (and was not) based to any extent upon her injury or pending/actual workers' compensation claim. In other words, Respondent did not discharge Complainant from its employ because she applied for benefits or invoked or utilized the procedures provided for in ORS 656.001 to 656.794.

13) After receiving a release to return to work on October 20, 1982, Complainant demanded of Mr. Crites that Respondent reinstate her to her former job. By this time, Complainant's accounts had been assigned to other salespeople. Although Mr. Crites discharged another salesperson the day, or the day before, Complainant demanded reinstatement, and did not hire another person to take that salesperson's accounts until November 1, 1982, Mr. Crites did not reinstate Complainant and told her that he had no position available for her.

4) A preponderance of the credible evidence indicates that Mr. Crites terminated Complainant for the reasons he gave her at the time of that termination. Complainant's attitude was perceived by Mr. Crites and Respondent's other salespeople as abrasive, resistant to the directions or constructive criticism of others, and disruptive of the team effort of Respondent's salespeople; and Complainant often did not submit required paperwork on time which was accurate and complete. In addition, Complainant's sales performance during her employment was inconsistent (as recited in Ultimate Finding 3 above, it had slumped badly in August 1982 after peaking the previous month), and Mr. Crites perceived her sales production as very poor with out his help.

Furthermore, between the time of Complainant's termination and her demand for reinstatement, Mr. Crites learned of a least several orders which Complainant had submitted to respondent prematurely, before they were fully consummated. After her termination and before her demand for reinstatement, the customers involved denied having ordered the advertising shown on the "orders" Complainant had submitted concerning them, and changed these "orders" to buy less than, or none of, the advertising Complainant had submitted. If Mr. Crites had not already terminated Complainant, he would have terminated her, or any other salesperson presumably, upon discovering these submissions of orders which had not been finalized. As there is no evidence on the record to support Complainant's contention that she would have been able to finalize these orders as submitted had she not been terminated on September 22, this forum cannot find that argument is accurate.

Between Complainant's termination and her demand for reinstatement, Respondent also discovered, through the salespeople who took over Complainant's accounts, that the city which constituted most of Complainant's sales territory had not been "well developed," and that Complainant's "accounts" in that city could not really be considered customers.

Accordingly, by the time Respondent declined to reinstate Complainant to her former or any other available and suitable position, Respondent had terminated Complainant for reasons unrelated to her workers' compensation injury and claim, and had

discovered facts which would have caused her (or, presumably, any other worker in her place) to be discharged even in the absence of her September 22 termination.

The existence of the above-stated reason for Complainant's termination indicates, and this forum finds, based on the record herein, that Complainant was not performing her job duties satisfactorily. This forum reasonably can and does presume that unsatisfactory job performance also had caused or would cause Respondent to discharge other salespeople. Further, by the time Complainant demanded reinstatement, Respondent had discovered further problems in Complainant's work which would have caused Respondent to discharge her or presumably any other salesperson. Accordingly, this forum has also concluded that Respondent has shown that it had just cause to terminate Complainant on September 22, 1982, as well as by the time she demanded reinstatement.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent, an Oregon corporation, was an employer subject to the provisions of ORS chapter 659.

2) Between April 6, 1982, and September 22, 1982, Complainant was Respondent's "workman" and "worker," as those terms were used in ORS 659.410 and 659.415 during times material herein.

3) The words, actions and inaction's, and the motivations therefor, described herein, of Robert Esty, Respondent's owner and president during all times material; Scott Crites, Respondent's employee and

supervisor of Complainant during all times material; and Gordon Herzog, Respondent's business manager during all times material, are properly imputed to Respondent.

4) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the person and of the subject matter related to the violations of ORS 659.410 and 659.415 alleged herein.

5) Before the commencement of the contested case hearing, this forum complied with ORS 183.413 by informing Respondent and Complainant of the matters described in ORS 183.413(2)(a) through (i).

6) Respondent did not violate ORS 659.410 as charged, because Respondent did not discriminate against Complainant with respect to her employment tenure because she had applied for benefits or invoked or utilized the procedures provided for in ORS 656.001 to 656.794.

7) Respondent did not violate ORS 659.415 as charged, because by the time Complainant was no longer disabled from performing the duties of her former position and demanded reinstatement to that position, Respondent had terminated her for just cause. Accordingly, ORS 659.415 did not require Respondent to reinstate Complainant. This forum notes, although it is not necessary to the latter conclusion, that moreover, between the time of that termination and Complainant's demand for reinstatement, Respondent gained information which by itself would have given Respondent just cause to terminate Complainant, and would have caused it to do that, had

Respondent not already terminated Complainant.

OPINION

1. Credibility

To a great extent, the Agency's case herein hinges upon the testimony of Complainant, the Agency's only witness: there is no testimony or documentary evidence on the record to corroborate, clarify, or supplement Complainant's testimony on many of the Agency's key factual assertions. Given this paucity of other evidence on the record supporting the Agency's case, this forum's assessment of that case must be determined, to a dispositive extent, upon the forum's assessment of the nature of, and the weight to be given, the testimony of Complainant.

For purposes of that assessment, this forum divides Complainant's testimony into three subjects:

1) Complainant's job performance from April 6, 1982, when she started working for Respondent, to September 16, 1982, when she suffered and on-the-job injury;

2) Events which occurred between September 16, 1982, and October 21, 1982, i.e., from the time of Complainant's injury through her termination to her request for reinstatement; and

3) Complainant's ability to work while suffering from and being treated for depression.

This forum considers Complainant's testimony on the second subject first.

In describing events which occurred or allegedly occurred between September 16 and October 21, 1982, Complainant qualified her testimony a

great deal. For example, she very frequently testified that she believed (i.e., but was not sure) or she thought (i.e., but was not sure) that she had done certain things to certain people at a certain time. She also testified that she "may" have done other things. (Parts of Findings 10, 11, 13, 16, 19, 26, and 27 illustrate these kinds of statements.) Moreover, Complainant testified that she did not recall certain facets of key occurrences during the above time period. Furthermore, Complainant's testimony was confused and inconsistent concerning other events of that period, and that testimony often wavered on cross-examination between knowing and not being sure of a given fact. These qualifications, lapses of memory, inconsistencies, and confusion in Complainant's testimony as to these events (most vividly illustrated in Finding of Fact 26 above) have forced the forum to regard that testimony as tentative, inexact, incomplete, and inaccurate, and those characteristics greatly dilute its potential probativeness.

On the other hand, in testifying on the first subject, her job performance in Respondent's employ, Complainant initially offered testimony which was largely unequivocal. On direct examination, Complainant stated that Respondent did not have any reason to terminate her based on her job performance. When asked about particular aspects of that performance, Complainant provided an almost totally positive picture of the quality of her work. However, after being confronted with documentary evidence and the testimony of all other witnesses indicating that there were flaws in both her sales performance and her interaction

with coworkers and her supervisor, Complainant herself admitted to some shortcomings in her work. This shift, along with all the other evidence as to her job performance, led the forum to conclude that Complainant's initial testimony concerning the quality of her work cannot be viewed as accurate, especially where it conflicts with other evidence.

Finally, this forum considers Complainant's testimony on the third subject mentioned above. During the hearing of this matter, while attempting to establish the potential period for her recovery of back pay damages, Complainant testified that she was able to work between May and August 1984, when she was being treated for depression by a Dr. Kirkpatrick. However, 2½ weeks after this hearing, while attempting in a hearing before the Workers' Compensation Board of Oregon (hereinafter the WCB) to establish her right to receive workers' compensation benefits, Complainant testified that she did not feel able to work during that depression. She did not account for this contradiction when asked about it at the WCB hearing. These two assertions appear to be irreconcilable; both cannot be true. Complainant's assertion herein coincides with her pecuniary interests herein, while her assertion before the WCB coincides with her pecuniary interests in that proceeding. At the very least, the diametric difference in Complainant's sworn testimony before two forums offers further reason for this forum's conclusion that it cannot necessarily regard any of Complainant's testimony as accurate, especially if it concerns a point at issue herein.

Not only does Complainant's testimony have the above-cited "internal" flaws, but it is inconsistent with the documentary record on some points, and actively contradicted by one or more of the other witnesses on each point at issue. For the following reasons, this forum has considered the testimony of those witnesses, as well as the documentary record, to be at the very least an accurate reflection of the facts as they (or their writers) knew them. None of those witnesses, and none of the documentary record, has been impeached. There is no indication on the record that any of those witnesses (with the exception of Mr. Esty, Ms. Herzog, and, indirectly, Mr. Herzog) has any stake in Respondent at present. In fact, the nature of the terminations of each of their relationships with Respondent indicates that all but Mr. Gaylord have reason to feel hostile to Respondent. (The one witness who was asked about this admitted to feeling that hostility.)

How has the above analysis of Complainant's testimony affected this forum's view of that testimony? First, where Complainant's testimony was inconsistent or indefinite, this forum has considered the interpretation of that testimony least favorable to Complainant to be her testimony. Often, that interpretation was so vague that it could not be regarded as sufficiently probative to support a finding of fact by itself, even if it was not controverted.

Furthermore, where Complainant's testimony conflicted with other evidence which has not been found to be incredible, this forum has regarded Complainant's testimony as highly suspect and given it little weight (and

certainly less weight than the other, conflicting evidence). Finally, even where Complainant's testimony was consistent and unequivocal, this forum has accorded it less weight than other credible evidence varying from it.

The forum had one dispositive task in this matter: to decide whether to believe Complainant or her supervisor Crites. Their testimony was absolutely irreconcilable on key points herein. Given the above assessment of Complainant's credibility, and in light of this forum's specific assessment of Mr. Crites's credibility in Finding of Fact 51 above, this forum has given much more weight to the testimony of Mr. Crites than that of Complainant, and has adopted as fact the testimony of Mr. Crites where it differs from that of Complainant.

2. Did Respondent Discharge Complainant Because of Her On-The-Job Injury or Any Reason Related to It?

The main indication that Respondent might have discharged Complainant because of her on-the-job injury or for a reason related to it is the timing of Complainant's discharge: Complainant was discharged at the start of her second work day after her injury of September 16, 1982. However, Mr. Crites has offered logical and credible explanations for choosing the particular day on which he tried to terminate Complainant and for Complainant's actual termination date. These reasons have nothing to do with Complainant's injury. Moreover, the Agency has not offered credible evidence that Mr. Crites knew of Complainant's injury before he decided that (and when) he would fire Complainant. Even

Complainant admitted that her only reason for thinking Respondent fired her was because of her injury or resulting claim was the absence of any other reason to fire her. Whether Complainant realized it or not, Respondent did have reason to fire her which was unrelated to her injury or claim. Accordingly, this forum has concluded that Respondent did not discharge Complainant because of that injury or claim.

3. The Effect of Complainant's Termination Upon Her Reinstatement Rights Under ORS 659.415

In *Williams v. Waterway Terminals Company*, 298 Or 506, 693 P2d 1290 (1985), the Oregon Supreme Court made its latest pronouncement concerning the effect of a discharge from employment upon the discharged worker's right to be reinstated pursuant to ORS 659.415. In that case, the court commented that:

"In [*Shaw v. Doyle Milling Co.*, 297 Or 251, 683 P2d 82 (1984)], we recognized the general rule that in absence of a contract or statute to the contrary, an employer may discharge an employee at any time and for any cause. 297 Or at 254. However, we also noted that ORS 659.415 constitutes a statutory exception to the general rule. However, this does not mean that the employer may never lawfully refuse to reinstate an employee who makes a demand for reinstatement pursuant to ORS 659.415(1). As we recognized in *Vaughn v. Pacific Northwest Bell Telephone*, [289 Or 73, 611 P2d 281 (1980)], that statute requires reinstatement unless the employer had just

cause to discharge the employee." 298 Or 506, 511.

OAR 839-06-150(2)(a), the Agency's administrative rule concerning the same topic, articulates, in pertinent part, the same interpretation:

"(2) An injured worker loses *** (his or her right to reinstatement/reemployment under ORS 659.415) if:

"(a) The employer discharges the worker for reasons not connected with the injury and for which others are or would be discharged, except as provided in subsections (3)(a) and (3)(b) of this rule;"

Subsection (3)(a) is not relevant to the factual situation herein. Subsection (3)(b) provides:

"(3) An injured worker who is not subject to the terms and conditions in a valid collective bargaining agreement to the contrary does not lose his right if:

"(b) The employer discharges the injured worker other than for cause ***"

This rule was promulgated on January 26, 1983, before which time the Agency did not have an administrative rule on point. Accordingly, although it went into effect after times material herein, this rule is instructive as an indication of Agency policy.

In this matter, Respondent discharged Complainant while she was disabled by an on-the-job injury. This forum has concluded that Respondent had just cause to discharge Complainant, in that (A) Respondent did not discharge Complainant because of (or for

In the Matter of
JOHN A. OWEN and Kathy Owen,
dba Drop In Printing Center,
Respondents.

Case Number 10-85
Final Order of the Commissioner
Mary Wendy Roberts
Issued April 11, 1986.

SYNOPSIS

Respondents willfully failed to pay Claimant's wages for overtime hours immediately upon termination. Respondents failed to show that they were financially unable to pay the wages at the time they accrued, and were thus liable for civil penalty wages. An agreement between an employer and a worker to waive overtime pay is no defense to a wage claim and void under Oregon law. Employers are required to keep records of the actual hours worked each week by each employee. ORS 652.140, 652.150, 652.360, 653.045, 653.055(2), 653.261; OAR 839-21-017.

ORDER

NOW, THEREFORE, as Respondent has not been found to have engaged in any unlawful practice charged, the Complaint and the Specific Charges filed against Respondent are hereby dismissed according to the provisions of ORS 659.060(3).

The above-entitled matter came on for contested case hearing before Diana E. Godwin, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on October 24, 1985, in Room 311 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries was represented by Betty Smith, Assistant Attorney General. Employers John A. Owen and Kathy Owen were present and

represented themselves. Claimant Jeffrie M. Dotter was present and testified.

Having fully considered the entire record in this matter, the forum makes the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) In September 1984, Claimant Jeffrie M. Dotter filed a wage claim with the Wage and Hour Division of the Bureau of Labor and Industries alleging that Employers John A. Owen and Kathy Owen, doing business as Drop In Printing, were his former employers and that the Employers had failed to pay wages due to him.

2) Claimant assigned all wages due him under his claim to the Commissioner of the Bureau of Labor and Industries in trust for Claimant.

3) On March 8, 1985 the Administrator of the Wage and Hour Division issued a Order of Determination which found that Claimant had worked 858 hours, 135½ of which were overtime hours, and was entitled to \$3,027.32 in regular hourly wages and \$863.16 in overtime wages. Employers had paid only \$3560.18 toward these wages, and therefore owed Claimant \$330.30 in unpaid wages plus interest thereon at the legal rate per annum from August 1, 1984, until paid. In addition, the Order of Determination found that Employers owed Claimant \$1,228.50 in penalty wages plus interest thereon at the legal rate per annum from September 1, 1984, until paid. This Order of Determination was served upon the Claimant and upon Employers.

4) By letter dated April 17, 1985, Employers filed with the Wage and Hour Division a request for an administrative hearing in this matter, and an answer to the above-mentioned Order of Determination essentially denying that they owed any overtime wages or penalty wages to Claimant. Employers alleged as a first affirmative defense that they had an agreement with Claimant that he would work for straight time and would not receive any overtime pay for hours worked over 40 hours in one week because he would work less than 40 hours in other weeks. Employers also denied that they willfully failed to pay wages because Claimant did not tell them he was quitting nor did he claim any overtime wages until after he was unable to collect unemployment insurance. At the hearing, Employers raised the defense that Claimant had not actually worked all of the overtime hours claimed.

5) The Bureau of Labor and Industries duly served Employers and Claimant with a Notice of Time and Place of Hearing.

6) Prior to the contested case hearing, Employers and Claimant were advised in writing of the matters described in ORS 183.413. Pursuant to ORS 183.415, at the commencement of the hearing the issues involved and the matters to be proved were explained to Employers and Claimant by the Presiding Officer.

FINDINGS OF FACT – THE MERITS

1) At all times material herein Employers owned and operated a printing business in Aloha, Oregon. In this business Employers employed one or more persons in the State of Oregon.

2) Claimant worked for Employers as a press operator from February 24, 1984, to July 9, 1984. His job was to operate the printing press, do counter work, assist customers, and perform clean-up duties. Employers hired Claimant at \$4.00 an hour.

3) Claimant and Employers agreed that Claimant would work part-time, but if business increased his hours would be expanded to full time.

4) At Employers' request, Claimant kept his own records of hours worked. Each day Claimant would record the time he started work and the time he finished. These pay records were kept at the print shop. Employers paid Claimant twice a month using Claimant's time records to calculate wages owed.

5) Claimant did not always list all hours worked because he felt that, since Drop In Printing was a small business, his efforts would be rewarded by a greater share in the business.

6) Claimant was given a raise to \$4.25 an hour on April 2, 1984, and received the title of "manager", although he had no authority to hire or fire personnel. Claimant felt he had been given more responsibilities regarding his duties although there was no real change in his actual work.

7) Claimant sometimes worked more than 40 hours in a given week; however, he did not receive overtime pay. Employer John Owen was aware of at least some of the times when Claimant would work overtime because Employer would work there with him. Claimant and Employer had agreed that there would be no

overtime pay. Claimant also agreed that if he worked more than eight hours in a day in order to get a job done, he would donate those hours.

8) Claimant was unaware that Employers were obligated by law to pay him overtime until after he quit his employment. Employers believed that they were not required to pay overtime because Claimant had agreed that he would not be paid for overtime hours earned one week in that Claimant would reduce hours worked the next week to compensate. Employers also believed that their printing business was exempt from the requirement to pay overtime wages on the grounds that their work was "seasonal" and comparable to agricultural work.

9) Claimant worked 173¼ regular hours and 3½ overtime hours, for a total of 176¾ hours, during the period of February 24, 1984, through and including March 31, 1984. He was paid his regular hourly rate of \$4.00 per hour for all of these hours. Claimant actually worked 549¼ regular hours and 132 overtime hours, for a total of 681¼ hours, during the period of April 2, 1984, through and including July 9, 1984. He was paid \$4.25 per hour for all of these hours. Employers paid Claimant promptly twice a month using Claimant's regular hourly rate.

10) Claimant's last day of work for Employers was July 9, 1984, and he picked up his last paycheck on July 16, 1984. Claimant had taken time off between July 10th and July 16th in order to take care of some personal problems. Employers intended to continue employing Claimant and told Claimant on July 16th, when he came into pick up his check, that he should come in

for work the next day. Claimant agreed at that time that he would come in, but changed his mind later that night and decided to quit. Claimant made this decision as he learned that Employers had given his name to the police in connection with the robbery of another business located next door to Employers. As a result, the police had interviewed him. He did not inform Employers that he was quitting, but failed to show up for work when scheduled. Claimant's last day of work was July 9, 1984.

11) Employers were aware that Claimant had quit his employment at least by August 24, 1984, when Employers received a notice of claim filed by Claimant for unemployment insurance. Employers responded to this unemployment claim by saying they wished to continue employing Claimant in their business. Employers did not, after notice that Claimant had quit, pay the overtime wages owed to Claimant.

12) Employers had the financial ability to pay the overtime wages owed to Claimant at the time they accrued, and also on August 24, 1984, when Employer was notified that Claimant had quit his employment.

ULTIMATE FINDINGS OF FACT

1) Claimant worked as a press operator for Employers from February 24, 1984, to July 9, 1984. Claimant effectively quit his employment on or about July 16, 1984, but failed to notify Employers of this action. Claimant did not, however, appear for scheduled work after that date. Employers were aware that claimant had quit his employment at least by August 24, 1984.

2) Claimant worked a total of 858 hours from February 24, 1984, to July 9, 1984. By agreement between Claimant and Employers, Claimant received pay at the rate of \$4.00 for the first 176½ hours and, after being given a raise by Employers, was paid \$4.25 for the remaining 681¼ hours.

3) Of these 858 hours, a total of 135½ were hours worked over 40 in a given week. During this period, the Employers were required by the provisions of OAR 839-21-017 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 February 24th to July 9th, Claimant was entitled to \$3,027.31 in regular wages and \$862.50 in overtime wages for a total of \$3,889.81, no part of which was paid except the sum of \$3,560.18, leaving a balance due and owing in the sum of \$329.63.

4) After receiving notice that Claimant had quit, Employers willfully failed to pay Claimant \$329.63 in unpaid overtime wages.

5) Employers are liable for penalty wages. They total \$1228.50, a sum computed by multiplying Claimant's average daily wage at termination of \$40.95 by 30 days, the maximum period during which penalty wages may accrue. This daily wage is calculated by dividing the total number of days Claimant worked for Employers (95) into \$3889.81, the total wages earned by Claimant.

CONCLUSIONS OF LAW

1) At all times material herein, Employers were subject to the provisions of the Oregon Administrative Rules

and ORS 652.110 to 652.220 and ORS 652.310 to 652.405.

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

3) Employers owe Claimant \$329.63 in earned and unpaid overtime wages. Their failure to pay these wages within 48 hours after receiving notice that Claimant quit his employment was willful, and therefore constitutes a violation of ORS 652.140(2).

4) Because Employers willfully failed to pay Claimant \$329.63 in earned and unpaid wages, Claimant's wages continued from the due date thereof at the same rate as his average daily wage of \$40.95 for 30 days, pursuant to ORS 652.150.

5) The Commissioner of the Bureau of Labor and Industries has the authority to order Employers to pay Claimant \$392.63 in earned and unpaid overtime wages and \$1228.50 in penalty wages, plus interest on both sums, under the facts and circumstances of this record.

OPINION

Requirement to Pay Overtime

Employers raised several defenses to Claimant's claim for overtime wages. One defense, raised in Employers' answer, was that Claimant had agreed that if he worked more than 40 hours in one week he would waive any claim for overtime because there would be other weeks when he would work fewer than 40 hours. This defense fails for two reasons. First, Oregon law, OAR 839-21-017, requires that any hours over 40 worked in any single work week must be compensated

at a rate one and one-half times the regular hourly wage. An employer cannot balance hours over 40 worked in one week against fewer than 40 hours worked in another week. The law provides that "for purposes of overtime entitlement computation, each work week stands alone." OAR 839-21-017-(2)(a).

Second, an agreement between an employer and an employee to waive overtime pay is void under Oregon law. ORS 652.360 provides that

"no employer may by special contract or any other means exempt himself from any provision of or liability or penalty imposed by ORS 652.310 to 652.405 or by any statute relating to the payment of wages * * *."

Thus the Employers here cannot exempt themselves from the provisions of ORS 653.261. Pursuant to ORS 653.261, the Wage and Hour Commission has adopted OAR 839-21-017 which requires that

"all work performed in excess of forty (40) hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay * * *."

Not only can an employer not avoid the mandate to pay overtime wages by entering into an agreement with an employee, an employee on his own behalf cannot waive the employer's statutory duty to pay overtime. ORS 653.055(2) explicitly states that an employer cannot use as a defense to a wage claim the fact that there was an agreement between the employer and employee to work for less than the

wage rate, including the overtime rate, required by ORS 653.261.

There are obvious public policy reasons for the statutory prohibition against an employer using as a defense to an overtime wage claim the fact that the employee agreed to forego overtime compensation. If such an agreement were a defense, an employer could require an employee to "agree" to waive overtime as a condition of employment, and the purposes of the overtime wage laws would be frustrated.

The Employers here also attempted to excuse their failure to pay overtime wages on the grounds that they thought their printing business was "seasonal," and therefore exempt from the overtime wage requirements. They offered no testimony or evidence that they had any objective basis for this supposition, and in fact there could be no basis for this belief other than Employers' own predilection.

A further defense to payment of at least some of the overtime wages interposed by Employers at hearing was that they doubted that Claimant had actually worked all of the overtime hours claimed. This defense also fails for the following reasons. Employers offered no evidence that Claimant had not worked all of the hours claimed, and Employers had in fact made timely payment to Claimant for all hours claimed, albeit only at his regular hourly rate. Moreover, Employers had been present at least some of the times when Claimant worked overtime.

The time for Employers to have questioned the validity of the hours Claimant indicated on his time card was when Employers prepared the

payroll. Having accepted the hours for payment then, they cannot now dispute them without some probative evidence that was not available to them at payroll time. Also, Employers chose to have Claimant keep track of his own working hours. ORS 653.045 requires an employer to keep records of the actual hours worked each week by each employee. Since Employers had the legal responsibility for record keeping and not Claimant, they cannot now discredit or disavow the system which they chose to have Claimant use.

Willfulness

The issue of whether Employers here should be assessed penalty wages was the most difficult. The key element which must be proved before penalty wages can be assessed under ORS 652.150 is willfulness.

ORS 652.140(2) provides that when an employee terminates employment with less than 48 hours' notice, all earned and unpaid wages must be paid 48 hours after termination. ORS 652.140(2) further states that if "such notice" is not given, the wages become due within 48 hours after the employee has quit his employment. The term "such notice" refers to the employee's notice of his intention to quit his employment. Once the employee gives such notice, or the employer is otherwise on notice that the employee has quit his employment, the employer is obligated to pay the wages owed within 48 hours.

ORS 652.150 provides that if the employer willfully does not pay the final wages, as mandated in ORS 652.140, the employer must, as a penalty, continue to pay wages of the employee from the due date thereof until the

wages are paid or action therefor is commenced, but in no case for more than thirty days. ORS 652.150 then provides that an employer may avoid the assessment of penalty wages by showing financial inability to pay the wages at the time they accrue.

The Oregon Supreme Court has addressed the question of when failure to pay is willful under ORS 652.150. In *Sabin v. Willamette Western Corporation* 276 Or 1083, 1093, 557 P2d 1344 (1976), the court said:

"In defining the term 'willfully' for the purpose of this statute, however, we held in *State ex rel Nilsen v. Johnston et ux, supra* at 108, as follows:

" * * * Its purpose is to protect employees from unscrupulous or careless employers who fail to compensate their employees although they are fully aware of their obligation to do so. In *Nordling v. Johnston*, 205 Or 315, 283 P2d 994 (1955), this court said: 'The meaning of the term "willful" in the statute is correctly stated in *Davis v. Morris*, 37 Cal App 2d 269, 99 P2d 345.' We now quote the definition thus adopted:

" * * * In civil cases the word "willful," as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intention-

ally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent." (Emphasis supplied.)

The facts indicate that Claimant was employed as a "manager" despite the fact that he did not have all the responsibilities and authority usually associated with such a position. Nevertheless, his position was of some import and value to Employers. When Claimant did not return to work on the agreed upon date, or at any time thereafter, it must have been quite clear that a problem regarding his employment had arisen.

Claimant's last day of work was July 9, 1984. He picked up his last paycheck on July 16, 1984. The facts indicate that Claimant did not contact Employers after July 16, 1984. Employers received notice, however, on August 24, 1984, that Claimant had filed a claim for unemployment insurance. Although it should have been abundantly clear prior to this date, it was certainly clear at this time to Employers that Claimant had quit his employment. The fact that Employers still desired to use his services does not change the situation or excuse them from the obligation to pay Claimant the overtime wages due him. The testimony established that Employers actually worked some of Claimant's overtime hours with him, and therefore were aware that Claimant did work overtime.

Once Employers were on notice that Claimant had quit, they had 48 hours to pay Claimant his wages.

Employers' ignorance of the law is not a defense to the obligation to pay Claimant. Thus, Employers' failure to pay the wages due him within 48 hours after they received notice that Claimant had quit, that is on August 24, 1984, was willful and subjects Employers to liability for a civil penalty.

These Employers, or any employer, cannot be excused due to their ignorance of their legal obligation to pay overtime for all hours over 40 worked in a single work week. The Oregon Supreme Court held in *McGinnis v. Keen*, 189 Or 455, 221 P2d 907 (1950), that an employer has a duty to know what wages are due to an employee at the time of termination. Thus, Employers are obligated to pay Claimant for the overtime hours worked.

ORS 652.150 provides that an employer may avoid liability for the penalty by showing his financial inability to pay the wages at the time of accrual. Here, however, the facts indicate that Employers did in fact have the financial ability to pay. Therefore, penalty wages are owed for thirty days commencing on August 24, 1984, the date the wages were due.

Miscellaneous

The Order of Determination sets forth the figure of \$863.16 as the total amount of overtime wages earned by Claimant. This figure was apparently determined by multiplying all 135½ hours by \$6.37, which represents Claimant's overtime hourly rate after April 2, 1984, for a total of \$863.14 (the Order of Determination has a multiplication error of \$.02). This calculation is not correct, however, because 3½ of Claimant's overtime hours were

earned before he received his raise on April 2nd, and therefore are payable at \$6.00 an hour rather than \$6.37. The figure in this Final Order for overtime wages earned, \$862.50, was calculated by multiplying 3½ hours by \$6.00 an hour (\$21.00) and 132 hours by \$6.375 (\$841.50), and adding the two figures together.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, Employers are hereby ordered to pay to the Bureau of Labor and Industries, in trust for Claimant JEFFRIE M. DOTTER, the amount of \$1,558.13, which represents \$329.63 in earned and unpaid overtime wages, and \$1,228.50 in penalty wages; plus interest thereon at nine percent per annum, for the period from August 1, 1984, until paid on \$329.63, and from September 1, 1984, until paid on \$1,228.50. This payment must be delivered to the Bureau of Labor and Industries, Hearings Unit, 309 State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon 97201.

In the Matter of
MARK LEWIS TRACTON,
dba The Job Exchange,
Respondent.

Case Number 08-84
Final Order of the Commissioner
Mary Wendy Roberts
Issued April 24, 1986.

SYNOPSIS

An employment counselor for Respondent, a private employment agency owner, failed to show on a job referral document the names and addresses of the persons who had given Respondent an exploratory job order, when that information was on the job order document and available to Respondent, in violation of OAR 839-17-070(1)(b). Because the employment counselor did not knowingly make a false representation concerning the job title, kind of work, special skills, and minimum performance level required to a job applicant in the exploratory job referral, Respondent did not violate ORS 658.195(3) and related rules. The Commissioner assessed a \$250 civil penalty for the violation found. ORS 658.115, 658.195(3); OAR 839-17-052(4), 839-17-060, 839-17-070, 839-17-277.

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held, in conjunction with the hearing of Case Number 07-84, another

matter concerning Mr. Tracton's private employment agency license, on February 20-21, 1985, and May 29, 1985, in Rooms 311 and 707 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Frank T. Mussell, Assistant Attorney General of the Department of Justice of the State of Oregon. Mark Lewis Tracton, doing business as The Job Exchange, (hereinafter Respondent) was represented by Anthony A. Bucino and William T. Goode, Attorneys at Law.

The Agency called as witnesses Respondent; Robert Jasper, Respondent's client during times material herein; and Christine Hammond, Compliance Specialist Supervisor with the Wage and Hour Division of the Agency. Respondent called Respondent; Ms. Hammond; Gary Sandstrom, an employment counselor employed by Respondent during times material herein; and Mr. Jasper.

Having fully considered the entire record in this matter, I, Mary Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact, Ultimate Findings of Fact, Ruling, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT -- PROCEDURAL

1) By a notice dated June 29, 1984, the Agency informed Respondent that the Agency proposed to revoke Respondent's private employment agency license. The Agency cited as the bases for that proposal the following allegations: Respondent made a false representation

concerning the job title, kind of work, special skills, and minimum performance level required in referring its client Robert Jasper to an employer, referred Mr. Jasper on the basis of an exploratory job order which did not contain as much information as was available from the employer; failed to indicate on the job order for the Jasper referral that weekend and night work were required, and whether union membership was required; failed to indicate on the Jasper job referral document the name and address of the person who had given the job order, and misrepresented the daily hours of work and approximate wages or salary on the Jasper job referral document. The Agency charged that those acts and failures violated various specified provisions of ORS chapter 658 and/or Division 17 of OAR chapter 839.

2) By a letter dated July 24, 1984, Respondent, through counsel, requested a hearing on the Agency's proposed action.

3) The Agency referred this matter to the forum for hearing at the same time the Agency referred to the forum for hearing a proposal to revoke Respondent's private employment license on a basis unrelated to the bases recited in Procedural Findings of Fact 1 above. The agency asked the forum to schedule the hearing of these two matters together and to issue a separate Order concerning each. The forum denominated this matter (described in Procedural Finding of Fact 1 above) as Case Number 08-84 and the other revocation matter described above as Case Number 07-84. This Order concerns only Case Number 08-84.

4) By a notice dated November 6, 1984, this forum notified Respondent and the Agency of the time and place set for the hearing of this matter. (The forum set the hearing of Case Number 07-84 for the same time and place.)

5) By a notice dated December 21, 1984, the Agency informed Respondent that the Agency proposed to refuse to renew Respondent's private employment agency license for, in effect, one or more of the reasons recited in the Agency's proposed revocation of that license in Case Number 08-84, and the reason recited in the Agency's proposed revocation of that license in Case Number 07-84. Included in this December 21, 1984, notice was notice of the time and place set for the hearing on the proposed refusal to renew Respondent's license, the same time and place as were set for the hearing on the proposed revocation of that license. In other words, since the cases numbered 07-84 and 08-84 had been set for hearing together, the Agency issued a consolidated proposal to refuse to renew reciting as its bases the allegations in both cases. The Agency clarified at the pre-hearing conference that it issued the proposed refusal to renew because it was not certain whether the proposal to revoke would be appropriate when (and if) the license at issue expired at the end of the licensing period, December 31, 1984. The Agency clarified at hearing that it is the Agency's position that the allegations in Case Number 08-84 by themselves support a revocation of or refusal to renew (whichever is appropriate) Respondent's private employment

agency license, as does the allegation in Case Number 07-84 by itself.

6) Before the commencement of the hearing of this matter, Respondent received from this forum a copy of "Information Relating to Civil Rights and Wage and Hour Contested Case Hearings," a document which is part of the record, and stated on the record that he had read this document and understood it perfectly. The Presiding Officer told Respondent to inform her if at any time during the hearing he had any question about the proceedings.

7) In his exceptions to the Proposed Order, Respondent requested a "hearing" before the Commissioner, pursuant to ORS 183.460. This forum presumes that this was meant to be a request for oral argument to the Commissioner. This request is denied. In the two convenements of hearing and his exceptions to the Proposed Order, Respondent has had full opportunity to present any relevant argument to the forum, orally and in writing. The forum has carefully reviewed all such argument and found that it adequately speaks for itself without further explanation.

FINDINGS OF FACT - THE MERITS

1) Respondent is a natural person who, during all times material herein, operated a business named The Job Exchange as a sole proprietorship in the State of Oregon. During all times material herein, The Job Exchange was a private employment agency, as defined in ORS 658.005, which Respondent was licensed to maintain pursuant to ORS 658.005 to 658.245.

2) In July 1983, Robert Jasper was a college graduate who had

worked as a grocery cashier for five years and was seeking a position in management with a large firm. He noticed a newspaper advertisement concerning management trainee work which had been placed by Respondent. On or about July 14, 1983, in response to that advertisement, Mr. Jasper went to Respondent's office for an interview concerning this employment prospect. He spoke with Gary Sandstrom, an employment counselor employed by Respondent. Mr. Sandstrom discussed with Mr. Jasper the job options available to him, telling Mr. Jasper that because of his background in retail grocery work, he was much more likely to get a job in that field than the job described in the advertisement. Specifically, Mr. Sandstrom suggested to Mr. Jasper that his future might be better served by his taking a job in a management training program at "Fred Meyer" (hereinafter the Employer), a retail store. Mr. Sandstrom told Mr. Jasper that Mr. Sandstrom had a friend working for the Employer in connection with a management training program. Mr. Sandstrom explained to Mr. Jasper that that program involved touring different departments in the grocery store, receiving training in each of those departments, and eventually (after going through the training program) working into a supervisory position overseeing all those departments. Mr. Sandstrom told Mr. Jasper that he might start as a produce manager. These were all the details Mr. Sandstrom provided Mr. Jasper as to what the Employer's management training program involved.

3) About six months before this conversation with Mr. Jasper, Mr.

Sandstrom had talked informally with Richard Basch, an old friend whom he had encountered by chance that day. Not having seen each other for a few years, Mr. Sandstrom and Mr. Basch talked about their careers. Mr. Basch said that he had worked for the Employer and recently had been promoted to corporate headquarters, where he was involved in the placement and training of people moving into the Employer's beginning and lower level management. Mr. Sandstrom told Mr. Basch that he worked for Respondent. Mr. Basch told Mr. Sandstrom about his progression to management at the Employer. He said that he had started with the Employer as a clerk out of high school, worked his way to management in produce, assumed further management responsibilities at another of the Employer's stores, become store manager at a third, new store of the Employer, and finally obtained his recent promotion. Mr. Basch did not specifically use the term "management training program" or "management trainee" in describing what he had been through and been at the Employer; he said he had gone through the progression to management. Mr. Basch also described the kind of person the Employer seeks for this progression into management. He gave specifications concerning background (education and experience) and character. For example, Mr. Basch said that having a college degree was and should be beneficial, and that the alternative was heavy field experience. Mr. Sandstrom asked Mr. Basch whether he could present applicants to him, and Mr. Basch said he could call him about an applicant who fit the above-mentioned specifications.

4) After his discussion with Mr. Jasper, Mr. Sandstrom was not able to reach Mr. Basch for four days. Finally, on July 18, 1983, in a hurried telephone conversation, Mr. Sandstrom told Mr. Basch that he had a client who looked like good management material for the Employer, a person who could train into management. Mr. Sandstrom said that this person met the specification he and Mr. Basch had discussed six months earlier, and described Mr. Jasper's credentials and background. Mr. Basch told Mr. Sandstrom that he knew of no specific job available at the time. However, because he was impressed by Mr. Jasper's qualifications, Mr. Basch referred Mr. Sandstrom to John Brown, the Employer's Valley Division Manager.

Mr. Sandstrom telephoned Mr. Brown and, in another hurried conversation, told Mr. Brown that Mr. Basch had directed him to call and present an applicant. After Mr. Sandstrom made that presentation, Mr. Brown agreed to talk with Mr. Jasper. Although Mr. Brown knew that there was no particular position open at the time, he was impressed with Mr. Jasper's apparently superior abilities. Mr. Brown instructed Mr. Sandstrom to have Mr. Jasper call him.

5) Mr. Sandstrom telephoned Mr. Jasper in Astoria, Oregon, on July 18, 1983, and told him to call Mr. Brown. Mr. Sandstrom did not specifically tell Mr. Jasper that his interview with Mr. Brown would be an "exploratory" interview, but he did explain to Mr. Jasper that there was not a specific position available with the Employer at that time. Mr. Jasper testified that Mr. Sandstrom did not tell him the purpose

of calling Mr. Brown, but Mr. Jasper understood from his conversation with Mr. Sandstrom that it was to seek employment with the Employer. Mr. Jasper did not know, at that point, if he wanted to work for Employer or not.

6) On July 18, 1983, after speaking with Mr. Basch, Mr. Sandstrom completed the original of a job order document (hereinafter JOD) concerning his referral of Mr. Jasper to the Employer. Mr. Sandstrom put the following information relevant to this matter on the JOD:

a) He wrote "EXPLORATORY INTERVIEW" in the upper left corner.

b) In the section for "position/job title," he wrote "MGMT TRNEE."

c) In the section entitled "Order by," he wrote "Rich Basch" and "John Brown" and their titles.

d) In the section entitled "specifications (education, experience, etc.) basic skills required," he wrote "Individual should be degreed in business or related field with heavy business bkgd. Retail experience is helpful preferably in groceries."

e) In the section encaptioned "duties (what will the person be doing the first thirty days," he wrote "Individual will go right to work with heavy OJT (on-the-job training).

Mr. Sandstrom did not fill in the section marked "union membership yes ___ no ___."

Mr. Sandstrom testified at hearing that he put all the information which he had obtained about the Employer from Mr. Basch on the JOD.

The JOD is not for dissemination to applicants, and Mr. Jasper did not see it before the hearing of this matter.

7) On July 18, 1983, after speaking with Mr. Brown, Mr. Sandstrom completed the original of a job referral document (hereinafter JRD) concerning his referral of Mr. Jasper to the Employer. Mr. Sandstrom put the following information relevant to this matter on the JRD:

a) He wrote "EXPLORATORY INTERVIEW" across the top. Along the left side he noted: "This in (sic) an exploratory interview. Though no position is currently available, an interview has been agreed to."

b) In the section encaptioned "Kind of Work/Employment (Job Title or Titles and any Required Skills not usually associated with Job Title," he wrote "MGMT TRNEE."

c) In the section entitled "Approx. Monthly Earnings," he wrote "1000 DOE" (depending on experience) and circled "Approx."

d) In the section stating "Union Membership Required Yes ___ No ___," he checked the box "no."

e) In the section stating "Daily Hours of Work ___ Eight ___ Other," he did not mark either box, but he printed "40 hrs + eves and wkends"

Mr. Sandstrom left blank the sections on the JRD for the name and address of the person giving the job order. He testified that he did this because he did not know whose name, Mr. Basch's or Mr. Brown's, to put down. For reasons stated in Section 2.C. of the Opinion below, which is incorporated herein by reference, this forum finds that Mr. Sandstrom left these sections blank because of his confusion as to which name would be most appropriate on the JRD.

As required by OAR 839-17-070 (2), Mr. Sandstrom mailed the JRD to Mr. Jasper. (He did not personally deliver it, because Mr. Jasper was out of town.) Mr. Jasper received the JRD on or about July 21, 1983, after he had gone to his interview with Mr. Brown and started working with the Employer.

8) Mr. Sandstrom testified that he did not tell Mr. Jasper anything about the nature of his potential work with the Employer other than what Messrs. Basch and Brown told him.

9) On January 3, 1984, Christine Hammond, Compliance Specialist Supervisor for the Wage and Hour Division of the Agency, interviewed Mr. Basch by telephone in connection with this matter. Mr. Basch told Ms. Hammond that he did not provide Mr. Sandstrom with the information on the JOD and denied that the information in the "Specifications" section of the JOD came from him. He also stated that he did not provide Mr. Sandstrom with the information contained on the JRD. Mr. Basch, and Mr. Brown in a telephonic interview on December 30, 1984, told Ms. Hammond that no management training program existed at the Employer's grocery store.

10) Mr. Brown and Mr. Jasper met and discussed Mr. Jasper's goals and what he wanted to achieve at the Employer. Mr. Jasper told Mr. Brown that his goal was to work in the office in some administrative capacity. Mr. Brown said that Mr. Jasper would have to become a store manager first. Mr. Jasper testified, and this forum finds, that Mr. Brown did not tell Mr. Jasper how he would start at the Employer. (Mr. Jasper knew that the Employer's managers and assistant managers

started by working as cashiers and that he had to go to cashier's training school. The record does not reveal how Mr. Jasper knew these facts.)

11) After that discussion, Mr. Jasper telephoned Mr. Sandstrom and told him that all had "gone fine" and that he was going to cashier school, i.e., he had been hired by the Employer.

12) Pursuant to his interview with Mr. Brown, Mr. Jasper was hired by the Employer. He worked there from July 1983 until November 1984. During that time, in the grocery store, he worked as a cashier, worked freight, and, six to eight months after he had started, he began working in the produce department. (Although he received cashier training, there is no direct evidence as to whether Mr. Jasper received training in his freight or produce work.)

13) Sometime during Mr. Jasper's first 2½ months of employment, Mr. Davis, manager of the store in which Mr. Jasper worked, told Mr. Jasper that he had to be a cashier as a prerequisite to doing anything else, and that he was to go to work on the freight crew after working as cashier. Mr. Jasper assumed that his cashier work was phase one of the Employer's management training program, and working on the freight crew would be phase two.

14) Mr. Jasper testified that about 2½ months after his employment with the Employer began, Mr. Jasper discovered that he was not working in a management training position. After noting that another employee hired at the same time he was hired had begun to take on some management roles, Mr. Jasper asked Mr. Davis if he, Mr.

Jasper, was a management trainee. Mr. Davis said that he was not.

15) It is not the Employer's policy to hire people directly into management. In order to advance into a management position with the Employer, one generally starts "at the bottom" as a cashier and is promoted upward over time, based on job performance. There is no formal Management Training Program; potential managers are trained in the progression described in the previous sentence. The change of command in each of the Employer's stores, from the bottom up, is cashier, fifth in command (if store size warrants that position), fourth in command, third in command, Assistant Manager and Store Manager.

16) Mr. Jasper testified that he does not think that progressing into management at the Employer was "intended for him," because during his employment there, he saw people promoted before him and hired above him. However, Mr. Jasper's further testimony revealed, and this forum finds, that the people hired "above him," as a fourth in command, had previous experience with the Employer, and the person promoted before him had previous experience as a store manager. (Mr. Jasper felt that the latter person was a management trainee, a "person flagged for management." This person boxed groceries for one week, cashied for one week, and then went on to the freight crew.)

Mr. Jasper testified, and this forum finds, that as a general rule, people whom the Employer hires who have no prior experience with the Employer and no store manager experience progress

just the way Mr. Jasper did during his employ at the Employer.

The latter testimony, plus Mr. Jasper's testimony concerning contact he had with the Employer in December 1983, indicates that even after Mr. Davis told him he was not a management trainee, Mr. Jasper continued to believe that the Employer had management trainees and a management trainee program.

17) Mr. Sandstrom testified that by "management training program," he meant the progression into the Employer's management.

18) There is no evidence that, at the times of their above-described contacts with Mr. Sandstrom concerning Mr. Jasper, either Mr. Basch or Mr. Brown knew or told Mr. Sandstrom that Mr. Jasper would start his employment for the Employer in a cashier position. Mr. Sandstrom's testimony about his conversations with Mr. Basch and Mr. Brown about Mr. Jasper included no mention of a cashier position.

19) Mr. Jasper testified that by "management training program," he means an organized procedure with some educational benefits attached to it, i.e., training classes and working under people in different sorts of apprenticeships.

20) Respondent testified that "management training program" means exactly what Mr. Jasper entered into at the Employer. He testified that Mr. Jasper's employment at the Employer is the "profile" of a management training program: it fits the progression of Mr. Basch and others in the Employer's management today. He also testified that management training

programs vary greatly from business to business, and that not all such programs involve classroom work. He testified that the Employer's management training program was of the type where the employer requires or prefers to hire participants with a college degree, start them at the bottom and progress them through different positions up to a management position. He testified that although maybe the word "Program" was not attached to this progression up to a management position, it in fact constitutes a management training program, and Mr. Jasper was hired by the Employer as, and was, a management trainee.

21) Ms. Hammond testified, and this forum finds, that the definition of "management trainee" could vary within "the industry." (It is not clear whether she meant the private employment agency or the grocery industry.)

22) Mr. Jasper was hired by the Employer as a part-time employee. He worked 35 to 40 hours per week and received full fringe benefits.

23) Mr. Jasper testified, and this forum finds, that Mr. Sandstrom told him he would be salaried at approximately \$1000 per month if he worked for the Employer. In fact, Mr. Jasper was paid an hourly wage and earned \$1700 to \$1800 per month during his employment.

When Mr. Basch talked with Mr. Sandstrom on July 18, 1983, about Mr. Jasper, Mr. Basch told Mr. Sandstrom he did not know what Mr. Jasper's salary would be if he went to work for the Employer. Thereafter, however, in response to Mr. Sandstrom's questions, Mr. Basch told him that it would be at least \$1000 for full-time work.

The JRD herein states monthly rather than hourly compensation for Mr. Jasper. The appropriate blank on that document is encaptioned in terms of monthly, rather than hourly, earnings.

24) Mr. Sandstrom wrote "40 hours * * *" in the "Daily Hours of Work" space on the JRD because Mr. Basch or Mr. Brown had told him that Mr. Jasper would work about forty hours per week. Mr. Jasper does not think that by writing that phrase and not checking the box for "eight" in this space, Mr. Sandstrom misrepresented to him the daily hours of work in his potential job. In business, forty hours per week is generally considered to mean full-time, eight hours per day, five days per week.

Mr. Sandstrom added "+ eves and wkends" to his above-described notation of "40 hours" because, given the nature of the Employer's business, Mr. Sandstrom correctly assumed that Mr. Jasper's work would require working during those times. Neither Mr. Basch nor Mr. Brown had told Mr. Sandstrom that Mr. Jasper would be required to work on weekends, evenings, or nights.

During his employment with the Employer, Mr. Jasper worked all hours. He testified that before he started, he knew he would "have some night work," but he did not understand that that meant he would sometimes work the swing shift, i.e., at 3 or 4 a.m. Mr. Jasper's testimony as to what Mr. Sandstrom told him about work hours is inconsistent: he testified first that Mr. Sandstrom told him he would be working nights and weekends, then he testified that Mr. Sandstrom did not

mention when his daily hours of work would be. Finally, Mr. Jasper testified that both the JRD and his conversations with Mr. Sandstrom led him to believe that he would be working "days and evenings."

25) Neither Mr. Basch nor Mr. Brown told Mr. Sandstrom that union membership would or would not be required in Mr. Jasper's potential job. Mr. Sandstrom assumed that it would not and so noted on the JRD. In fact, Mr. Jasper was required to join a union within one month of commencing employment with the Employer.

26) There is no evidence that Respondent ever supplied to Mr. Jasper the names and addresses of the persons who gave Respondent the job order upon which Mr. Jasper was referred to the Employer. There is no evidence that this failure resulted in any monetary damage to Mr. Jasper.

Respondent terminated Mr. Sandstrom subsequent to the above-described events. (There is no evidence as to why Respondent terminated him.) Since Mr. Jasper's referral, Respondent has taken steps to assure that his employees fully complete required forms.

27) At hearing, Mr. Jasper demonstrated how it could be difficult to communicate effectively with him. He was hesitant in manner of speech, equivocal and at times defensive, and his answers were in some instances incomplete, confusing and/or ambiguous, inconsistent, and in at least one instance erroneous. In short, Mr. Jasper was not forthright or articulate. This forum disagrees with the Agency's attribution of these characteristics to the nervous strain of the

hearing: if that were the explanation, this forum would expect them to have diminished as Mr. Jasper became accustomed to testifying, and they did not. Furthermore, one might well assume that if Mr. Jasper were nervous at hearing, he was also nervous in his interviews with Mr. Sandstrom and Mr. Brown. In sum, this forum concludes that Mr. Jasper's handicaps to effective communication, along with (what the Agency itself labeled) his naiveté in business matters, can explain at least in part Mr. Jasper's inaccurate assumptions and misconceptions about the nature of his position at the Employer.

Where Mr. Jasper's testimony on a point was inconsistent, this forum has considered the version least favorable to Mr. Jasper as his testimony on the point in question.

28) Mr. Sandstrom was a very credible witness. His manner was professional: he was serious, relaxed and straightforward, and he made no attempt to hide even those facts which could have portrayed him as something of a scapegoat herein. Both Mr. Sandstrom's demeanor and the consistency of his testimony gave the forum the strong impression that Mr. Sandstrom was a truthful and accurate witness, and the forum assessed his testimony in that light.

29) Mr. Sandstrom testified that he never intended to misrepresent anything to Mr. Jasper in his above-described contacts with Mr. Jasper.

30) Because this forum has found Mr. Sandstrom a very credible witness, as noted in Finding of Fact 28 above, and because the statements of Mr. Basch and Mr. Brown to Ms.

Hammond cited herein above were not subject to clarification through cross-examination and questioning by the forum, this forum has given more weight to Mr. Sandstrom's testimony than to the statements of Mr. Basch or Mr. Brown, where they may conflict.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent did and was duly-licensed to do business in the State of Oregon as The Job Exchange, a private employment agency.

2) On July 18, 1983, Gary Sandstrom, an employee of Respondent, brought the qualifications of Robert Jasper, an applicant for work and Respondent's client, to the attention of Richard Basch and John Brown, employees of the Employer, a potential employer of Mr. Jasper. As a result of this action by Mr. Sandstrom, the Employer's interest in exploring the possibility of employing Mr. Jasper was evidenced by Mr. Brown's agreement to interview Mr. Jasper, even though the Employer had no particular job available for him at the time. Consequently, the Employer gave to Mr. Sandstrom a "bona fide exploratory job order" requesting that Respondent refer one specific applicant only, Mr. Jasper, for an "exploratory interview," as those terms are defined in OAR 839-17-051(2) and OAR 839-17-053.

3) Mr. Sandstrom notified Mr. Jasper of this referral and directed him to call Mr. Brown concerning employment at the Employer. Mr. Sandstrom told Mr. Jasper that there was not a specific position available with the Employer at that time.

4) Also on July 18, 1983, after receiving the above-described exploratory job order and before Mr. Jasper interviewed with Mr. Brown, Mr. Sandstrom completed an exploratory job order document (JOD) concerning this job order. On the JOD Mr. Sandstrom did not indicate that weekend and night work was required or whether union membership was required in the potential job. The Employer had not supplied this information to him. On the JOD, Mr. Sandstrom noted that Messrs. Basch and Brown had placed the job order and supplied their titles. Finally, on the JOD, Mr. Sandstrom indicated that the hours of work per day would be eight and that the approximate monthly salary would be \$1000 depending on experience. The only information the Employer had given Mr. Sandstrom concerning Mr. Jasper's potential hours or times of work was that he would be working approximately forty hours per week. The above-cited salary information was based upon Mr. Basch's statement to Mr. Sandstrom that Mr. Basch did not know what Mr. Jasper's salary would be, but that it would be at least \$1000 per month for full-time work.

5) On July 18, 1983, after receiving the exploratory job order from the Employer, Mr. Sandstrom completed a job referral document (JRD) concerning Mr. Jasper's referral. On this JRD, Mr. Sandstrom correctly indicated that evening and weekend work would be required. He also indicated on the JRD that union membership would not be required in Mr. Jasper's potential position, which proved to be accurate only for the first month of employment. This information was based upon Mr.

Sandstrom's assumptions derived from his knowledge of retail grocery and not upon information he had received from the Employer. On the JRD, Mr. Sandstrom did not supply the names and addresses of the persons giving the job order, Messrs. Basch and Brown. In the blank on the JRD marked "Monthly Earnings," Mr. Sandstrom noted approximately (emphasized by Mr. Sandstrom) \$1000 depending on experience. In the blank on the JRD marked "Daily Hours of Work," Mr. Sandstrom did not mark either printed box, labeled "eight" and "other" respectively, but wrote "40 hrs + eves and wkends."

Because Mr. Sandstrom had to mail the JRD to Mr. Jasper, Mr. Jasper received it after his interview with Mr. Brown.

6) There is no evidence that the above-described JOD did not contain as much information as was available from or could be supplied by the Employer, given the fact that, since no specific job was available when the Employer gave the job order, the Employer presumably did not know at that time to what specific job Mr. Jasper would be assigned. With the exception of the information as to the number of hours of work per week, the above-cited information concerning hours of work and union membership which the JRD contained and the JOD did not contain did not come from the Employer.

7) During his employment with the Employer, Mr. Jasper earned an hourly wage which amounted to \$1700 to \$1800 per month. The fact that the compensation information on the JRD proved to be inaccurate as to the

amount and type does not mean, by itself, that Mr. Sandstrom failed to include or "misrepresented" that information on the JRD. Given the information Mr. Sandstrom was given for this exploratory job order by the Employer and the lack of any evidence that more or other information was available (as there was no specific job available), Mr. Sandstrom did not fail to include or "misrepresent" the approximate wages or salary on the JRD.

8) Mr. Sandstrom did not explicitly note on the JRD, as he had on the JOD, that the daily (as opposed to weekly) hours of work would be eight. However, he did note what the employer had told him: the weekly hours of work would be forty (and would include, he assumed, evenings and weekends). In business, forty hours per week generally means eight hours per day. For these reasons, Mr. Sandstrom did not fail to include or "misrepresent" information available to him from the Employer concerning the daily hours of work.

9) Mr. Jasper had told Mr. Sandstrom that he sought work in management. Mr. Sandstrom indicated on the JRD, which he sent to Mr. Jasper on or about July 18, 1983, that there was no position then available and this was an exploratory interview. However, Mr. Sandstrom described the kind of work the referral concerned as "MGMT TRNEE."

10) During all times material herein, the Employer did not have a formal Management Training or Trainee Program in which it hired and formally designated people as managers-in-training, thereby evidencing a commitment to make them managers.

Instead, the Employer hired people with good education or experience credentials, placed them at the bottom of their job ladder, and, if job performance so indicated, had them work various positions and progress up the chain of command to store and corporate management. It was not the Employer's policy to hire people directly into management.

11) When Mr. Sandstrom referred Mr. Jasper to the Employer, Mr. Sandstrom knew the management training policy of the Employer described in Ultimate Finding 10 above. There is no evidence the Employer specifically used the term "management trainee" or "management training program" in describing to Mr. Sandstrom the work concerning which Mr. Jasper would be interviewed.

12) Before referring Mr. Jasper to the Employer, Mr. Sandstrom described to Mr. Jasper what Mr. Sandstrom called the Employer's management training program as involving "touring" different grocery units and receiving training in each, and thereafter working into supervising all those units. By "management training program," therefore, Mr. Sandstrom meant the Employer's progression into management. Mr. Sandstrom added no further details about this program or progression except that Mr. Jasper might start as a produce manager and Mr. Sandstrom had a friend employed at the Employer in connection with the program.

13) Mr. Sandstrom got the information he gave Mr. Jasper about the nature of his potential job with the Employer from Messrs. Basch and Brown.

14) Mr. Jasper apparently understood that in describing his potential work with the Employer, Mr. Sandstrom was describing a Management Training Program as described in the first sentence of Ultimate Finding 10 above. At least part of this misapprehension can be attributed to Mr. Jasper's naiveté.

15) There is no reliable evidence on the record that "management training program" or "management trainee" are terms which have an exact, consistent meaning. There is uncontroverted evidence, and so this forum has found, that the meaning of "management trainee" could vary. Accordingly, this forum finds that the meanings of "management training program" and "management trainee" are inexact.

16) Mr. Sandstrom referred Mr. Jasper to the Employer in culmination of two conversations he had with Mr. Basch and one brief ensuing conversation with Mr. Brown. In those conversations with Mr. Basch, Mr. Sandstrom and Mr. Basch had discussed the Employer's progression into management. Mr. Basch had told Mr. Sandstrom he could call Mr. Basch if he found an applicant who fit the Employer's specifications concerning background and character for this progression. Mr. Sandstrom felt that Mr. Jasper fit these specifications and told Mr. Basch this. To Mr. Basch, Mr. Sandstrom labeled Mr. Jasper a person who looked like good management material for the Employer, a person who could train into management.

17) There is no evidence that when they each talked with Mr. Sandstrom briefly about Mr. Jasper, either Mr.

Basch or Mr. Brown knew or told Mr. Sandstrom that Mr. Jasper would start his employment for the Employer in a cashier position, if he was hired. Furthermore,

a) Mr. Sandstrom testified that he put all the information he got from Mr. Basch about the Employer on the JOD, which says nothing about a cashier position.

b) Mr. Sandstrom's testimony about his conversations with Mr. Basch and Mr. Brown about Mr. Jasper included no mention of a cashier position.

c) In their interview, Mr. Brown did not even tell Mr. Jasper where he would start his employment with the Employer.

In light of all these facts, this forum has concluded that when Mr. Sandstrom referred Mr. Jasper to the Employer, neither Mr. Basch nor Mr. Brown (nor anyone else from the Employer) had told Mr. Sandstrom, and Mr. Sandstrom did not know, that Mr. Jasper would start any employment with the Employer in a cashier position.

18) As a result of (and not before) Mr. Jasper's interview with Mr. Brown, Mr. Jasper decided to go to work for the Employer. The Employer hired Mr. Jasper knowing, from Mr. Sandstrom and Mr. Jasper, that Mr. Jasper's goal was to progress into management. Mr. Jasper had told Mr. Brown that his goal was to work in some administrative capacity, and Mr. Brown had told him he had to start as a cashier in order to do that.

19) Mr. Jasper worked for the Employer for approximately 17 months, first as a cashier, then in freight, and

finally in the produce department. Accordingly, Mr. Jasper did begin the Employer's progression into management by working in various grocery units and jobs. (Mr. Jasper did receive training as a cashier. There is no direct evidence as to whether he received training in his freight or produce work. However, as there is no evidence that Mr. Jasper had done this work before, this forum presumes the Employer must have trained him to do it.)

20) After Mr. Jasper had worked for the Employer about 2½ months, he noticed one person who had been hired by the Employer at a higher place in the chain of command and another person who, having been hired at the same time as Mr. Jasper, was promoted before him. Mr. Jasper asked his supervisor if Mr. Jasper was a management trainee and was told he was not.

21) Despite the statement of Mr. Jasper's supervisor cited in the previous sentence, Mr. Sandstrom's labeling Mr. Jasper's position "management trainee" or part of a "management trainee program" was not clearly erroneous. That is, it is not clear that Mr. Jasper was not a management trainee, in some reasonable sense of that inexact term.

There is no evidence that at any time during Mr. Jasper's employment by the Employer, the Employer did not intend that Mr. Jasper progress into management. The Employer hired Mr. Jasper knowing his goal was to manage, and in fact, Mr. Jasper progressed, during his employment, just as would one progressing toward the Employer's management. The two above-mentioned other employees

who were hired above Mr. Jasper or promoted before him had previous experience with the Employer or store management experience which Mr. Jasper lacked.

22) A preponderance of the evidence certainly does not indicate that Mr. Sandstrom knowingly made a false representation concerning the job title, kind of work, special skills, and minimum performance level required in potential employment with the Employer when he referred Mr. Jasper to the Employer for an exploratory interview. Neither Mr. Sandstrom's statements to Mr. Jasper nor his statements on the JOD (which Mr. Jasper did not see until hearing) and the JRD, when viewed in light of all the information Mr. Sandstrom received from or gave to the Employer, or gave to Mr. Jasper, concerning Mr. Jasper's potential position and the progression into management at the Employer constitute knowing false representations concerning job title, kind of work, special skills, and minimum performance level required.

RULING

At the conclusion of the Agency's case-in-chief, Respondent moved to dismiss the Notices of Proposed Revocation of and Proposed Refusal to Renew Respondent's private employment agency license. Respondent argued that the Agency had failed to make a prima facie case in support of any allegation in those Notices concerning this matter. In responding to this motion, the forum need only consider the one allegation which has been found to be true in light of the whole record: that Respondent failed to indicate on the Job Referral Document herein the names and addresses of the persons

who gave Respondent the corresponding job order. Having examined the evidence presented during the Agency's case-in-chief, this forum has concluded that it clearly does constitute a prima facie case of that allegation. Therefore, to the extent that Respondent's Motion to Dismiss has not been mooted by the forum's findings and conclusions elsewhere in this Order, the forum denies that motion.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent did business as a private employment agency licensee subject to the provisions of ORS 658.005 to 658.245.

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

3) The words, actions and inactions, and the motives therefore, described herein of Gary Sandstrom, Respondent's employee during times material herein, are properly imputed to Respondent.

4) Before the commencement of the contested case hearing of this matter, this forum complied with ORS 183.413 by informing Respondent of the matters described in ORS 183.413(2)(a) through (i).

5) By labeling the kind of work or employment concerning which Robert Jasper was being referred to the Employer for an exploratory interview "management trainee" in the Employer's "management training program," and in his description of that program, Mr. Sandstrom was not knowingly making a false representation concerning the job title, kind of

work, special skills, and minimum performance level required, in violation of ORS 658.195(3), OAR 839-17-060(4) and ORS 839-17-070(1)(f).

6) OAR 839-17-052(4) requires a job order document to contain only as much of the information cited in OAR 839-17-060 as is available from the Employer. Consequently, by failing to put information on the JOD which was based upon Respondent's assumptions, Respondent did not violate OAR 839-17-060 unless this information also was available from the Employer. Furthermore, in an exploratory job order situation, failing to include on the JOD the information recited in OAR 839-17-060 which is included on the corresponding JRD is not a violation of law unless that information was available from the employer. Accordingly, Respondent did not violate OAR 839-17-060 or OAR 839-17-052(4) by failing to indicate on the JOD that weekend and night work was required or whether union membership was required (even though Respondent did so indicate on the JRD), because there has been no showing that this information was available from the Employer. There is no evidence that Respondent otherwise violated OAR 839-17-060 and 839-17-052(4) herein.

7) In an exploratory interview referral, OAR 839-17-052(4) requires a JRD to contain all available job order information. It is not a violation of OAR 839-17-070 therefore to fail to include information on the JRD if it was not available from the Employer at the time of the job order. Consequently, as there has been no showing that the daily hours of work or the fact that the compensation would be hourly and

would amount to \$1700 to \$1800 per month was information available from the Employer at the time of the job order, and since the information on the JRD concerning compensation came from the Employer, Respondent did not violate OAR 839-17-070(1) by failing to include on the JRD explicit information as to the daily hours of work or an accurate prediction of the amount or type of compensation. Furthermore, this forum cannot find (and it is not clear that the Agency is alleging) that Respondent violated OAR 839-17-070(1) by stating on the JRD that union membership would not be required, because there is no evidence that Respondent knew (or should have known) that this information would be accurate only concerning the first month of employment.

8) On or about July 18, 1983, Respondent violated OAR 839-17-070(1)(b) by failing to indicate on the JRD the names and addresses of the persons who had given Respondent the exploratory job order pursuant to which Mr. Jasper was being referred, even though that information was contained on the corresponding JOD and therefore clearly available from the Employer.

9) The Commissioner of the Bureau of Labor and Industries has the authority to impose a civil penalty against Respondent under the facts and circumstances of this record, and her imposition of the sum of money assessed in the Order below as a penalty is an appropriate exercise of that authority.

OPINION

1. The Merits – Misrepresentation Allegation

In the first particular stated in the Notices of Agency action, the Agency has alleged that in referring Mr. Jasper to the Employer, Respondent made a false representation concerning the job title, kind of work, special skills, and minimum performance level required of and by the position to which the referral pertained, in violation of ORS 658.195(3), OAR 839-17-060(4) and OAR 839-17-070(1)(f). In pertinent part, ORS 658.195(3) prohibits a private employment agency from knowingly making any false representations concerning employment to an applicant such as Mr. Jasper. OAR 839-17-060(4) appears to require that a job order document contain, in pertinent part, information as to the "job title(s)/kind of work," i.e., a "list of special skills required to perform adequately on the job together with the minimum performance level required." OAR 839-17-070(1)(f) requires that a job referral document include the "kind of work or employment as shown by the job classification stated on the *** (JOD)." (In the context of an exploratory job order and interview, the requirements of the latter two rules are modified in effect by OAR 839-17-052(4) to require as much of the recited information as can be supplied by the employer.)

After examining these provisions together, this forum has concluded that the questions raised by this allegation are whether Mr. Sandstrom, by his oral statements to Mr. Jasper or by the JOD or the JRD Mr. Sandstrom completed concerning Mr. Jasper, made a

false representation to Mr. Jasper concerning required information about the nature of the work which was to be the subject of Mr. Jasper's exploratory interview, and, if so, whether Mr. Sandstrom did this knowingly, as prohibited by ORS 658.195(3). The Agency maintains that the answer to both questions must be affirmative: Mr. Sandstrom fabricated entirely the existence or potential existence of a management trainee position or program with the Employer.

This forum will not consider these questions with regard to the JOD itself. As Mr. Jasper did not receive a copy of this document, it could not have been a vehicle for making any false representation to him.

Through his words to Mr. Jasper and the JRD he completed, Mr. Sandstrom represented in essence that Mr. Jasper was being referred to the Employer for an exploratory interview concerning employment as a management trainee. Orally, Mr. Sandstrom described the Employer's management training program to Mr. Jasper as consisting of touring different units in the Employer's grocery operation, receiving training in each, and thereafter working into a supervisory position overseeing these units. The JRD contained the caveat required for an exploratory interview that there was no specific job available at the time and that this was to be an exploratory interview.

As this was an exploratory job order and interview, Mr. Sandstrom was charged with conveying to Mr. Jasper as much job order information (job title, kind of work, special skills, and minimum performance level) as was then

available from the Employer, without knowingly making any false representations. Did Mr. Sandstrom fail to do this?

The only respect in which Mr. Sandstrom could be said to have failed was in labeling the work which the interview would concern "management trainee." There is no evidence that the Employer specifically used the terms "management trainee" or "management trainee program" in describing to Mr. Sandstrom the work concerning which Mr. Jasper would be interviewed. However, Mr. Sandstrom had told the Employer that he was referring Mr. Jasper because of his management potential, as the Employer had defined that quality to Mr. Sandstrom. Accordingly, Mr. Sandstrom was justified if he concluded (and there is no evidence to the contrary) that the Employer was interested in interviewing Mr. Jasper on the basis and as a result of Mr. Sandstrom's having brought to the Employer's attention Mr. Jasper's qualifications to become (and interest in becoming) a manager. Consequently, it was logical to believe that the work which was to be the subject of the exploratory job order and interview was that of a person intended for management, whom Mr. Sandstrom denominated a management trainee.

Mr. Jasper and the Agency believe that denominating the position and kind of work Mr. Jasper would do "management trainee" was a false representation because in fact Mr. Jasper was hired as a cashier and not as part of any management training program. Mr. Jasper appears to assert that even though working as a cashier is the first step, as a general rule, in any

progression into management with the Employer, a progression which revolves around on-the-job training, it could not constitute the first step in a management training program, because it involved no class instruction and was not part of a formally structured Management Training Program. (Mr. Jasper did not explain why he did not consider cashier training school "class instruction.")

The Employer appears to believe that during times material herein it had an advancement pattern which could be called its progression into management, rather than a Management Training Program. (Unfortunately, none of the three employees of the Employer who were said to so believe were produced at the hearing or, therefore, made available for elaboration as to what is a management training program. There was no contention that any of these employees were unavailable.)

The Agency argued that the Employer did not have a management training program because in such a program, an employee has more than the possibility of entering management; in such a program one is being groomed for advancement into management by scheduled movement from one unit to another to learn the employer's operation, in a consciously designed program of management training. However, the Agency introduced no reliable evidence as to whether "management trainee" or "management training program" are terms which in either common English usage or within the business world convey an exact meaning and, if so, what is that meaning. The only useful

evidence on these points was Ms. Hammond's testimony, which this forum has found to be fact, that the meaning of "management trainee" could vary in the (private employment agency or grocery) industry. The forum could take official notice that, according to dictionary definitions "program" can mean a plan, procedure or schedule to be followed, while "progression" connotes merely a moving forward or onward, a sequence. In a program, therefore, there is an element of deliberateness or guidance, or commitment, by the "programmer" (herein the Employer) which may be lacking in a progression. However, this distinction is hardly exact and, especially in light of the Employer's having hired Mr. Jasper with knowledge of his qualifications and goals, it does not clearly establish that there was not a management training program at the Employer, in some reasonable sense of that term. Furthermore, this forum cannot conclude that Mr. Sandstrom made a false representation to Mr. Jasper by using language in a manner which was imprecise according to one part of a dictionary definition of just one of the words of the focal phrase in that representation.

This forum considers the fact that although Mr. Sandstrom entitled Mr. Jasper's potential position "management trainee," the description Mr. Sandstrom gave Mr. Jasper of what he meant by that term can be said to accurately describe Mr. Jasper's actual employment: he worked in three different units of the Employer's grocery operation, presumably receiving training in each as to how to do his assigned work. This is how, per the Employer's

policy, Mr. Jasper thereafter would have met the third phase on Mr. Sandstrom's description, working into a supervisory position overseeing these units, had Mr. Jasper remained in the Employer's employ. Moreover, Mr. Sandstrom's above-cited description was a perfectly accurate description of what the Employer told him about how one progresses into management at the Employer. The Employer did not tell Mr. Sandstrom, and Mr. Sandstrom did not know, that Mr. Jasper would start any employment with the Employer in a cashier position.

The question remaining, therefore, was whether Mr. Sandstrom was falsifying the impression he gave Mr. Jasper of his potential position by calling it "management trainee," or part of a "management training program," even though his description of what he meant by the latter was not inaccurate. Absent some showing that (A), either of those terms has an exact meaning in common English usage or in business, and (B), that Mr. Sandstrom used those terms inaccurately in light of that meaning and what he knew about the potential position, this forum cannot conclude that Mr. Sandstrom made a false representation to Mr. Jasper concerning the nature of his potential work. Furthermore, absent the above showing and some showing that Mr. Sandstrom knew or should have known that he was using those terms inaccurately, given their exact meanings and what Mr. Sandstrom knew of Mr. Jasper's potential employment with the Employer, this forum certainly cannot find that Respondent knowingly made a false representation concerning the title or nature of work to be the

subject of Mr. Jasper's exploratory interview with the Employer.

2. Penalty

ORS 658.115 provides that a violation of the statutory scheme for regulation of private employment agencies (ORS 658.005 to 658.245) can result in revocation or suspension of the violator's private employment license or imposition of a civil penalty against the violator. Herein, the Agency proposed to revoke or refuse to renew Respondent's license because of his alleged violation of private employment agency law.

Respondent offered into the record an exhibit entitled "Guidelines for the Imposition of Civil Penalties for Violation of the Private Employment Agency Statutes or Any Rule Promulgated Thereunder" and dated June 15, 1978. Respondent argued that even if the forum found that Respondent had committed the violations charged herein, license revocation or refusal to renew would not be an appropriate or justifiable "sanction" under these Guidelines. In the hearing of Case Number 07-84, the matter heard just before and in conjunction with this matter on February 20, 1985, the Agency maintained that although these Guidelines have not been promulgated as rules, they have the force and effect of administrative rules and, therefore, bind the Agency and the forum. The Agency did not alter this position in this matter, so the forum presumes it remained unchanged for purposes of this matter. Accordingly, neither Respondent nor the Agency challenged, and Respondent (implicitly) and the Agency (explicitly) presumed, the validity of these Guidelines as interpretations of OAR

839-17-277 and 839-17-278 and ORS 658.115. Given the absence of any such challenge and that mutual presumption, this forum will apply the Guidelines in formulating its response to the violation of law it has found herein.

According to Section III. (1) and Section V. of the Guidelines, a civil penalty of \$100 to \$1000 may be imposed for the instant violation of OAR 839-17-070(1)(b). According to Section VI. C. of the Guidelines, this violation is a "procedural" violation, since it does not fall within any category of "substantive" violation listed in Section VI. B. Therefore, the first step in determining the amount of the civil penalty herein is to assign "weight factors" to each of the following "circumstances."

A. Past History (OAR 839-17-277(1))

Did Respondent take "all feasible steps or procedures necessary or appropriate to prevent or to correct any deficiencies and to abate the problem" (OAR 839-17-277(1))? There is no evidence that Respondent cured or attempted to cure the immediate violation by supplying the information missing from the JRD to Mr. Jasper. Although Respondent did terminate Mr. Sandstrom, the person immediately responsible for the missing information, subsequent to the violation, the record does not reveal whether he did this to prevent recurrence of the violation. Respondent has, however, taken steps to see that his forms are completely filled out by his employees. Accordingly, although Respondent did not make every necessary or appropriate effort to resolve the instant violation

immediately upon notification (Section VI. C. I. a of the Guidelines), Respondent made more than little or no effort to resolve (i.e., prevent recurrence of) the problem. (Section VI. C. I. c. of the Guidelines and OAR 839-17-277(1)). Consequently, the forum should assign a weight factor between 3 and 6 to this category (Section VI. C. I. b. of the Guidelines). Given the above steps Respondent took, the forum assigns a weight factor of 4 to this category.

B. Prior Violations of Private Employment Agency Law (OAR 839-17-277(2))

The record reveals that Respondent:

- a) Entered into a consent order with the Agency in which he agreed to pay a civil penalty of \$350 in 1973;
- b) Entered into another such order in which he agreed to pay \$1550 in 1978; and
- c) Refunded money to an applicant at the Agency's request in March 1983.

If the Agency wanted the forum to view this evidence as a showing of Respondent's "prior violations" of private employment agency law, the Agency should have provided evidence as to what type of violations were charged and when they allegedly occurred, as well as some legal argument that evidence of the existence of a consent order or a refund, by itself, should be considered sufficient evidence of a "violation" for purposes of this rule and guideline. As consent orders typically do not include any finding or admission of a violation, and absent the latter evidence and argument, the forum lacks

sufficient basis to find that Respondent has a history of even one violation of private employment agency law or to assess any weight factor based thereon. Consequently, this forum must assign a weight factor of zero to this category.

C. Compliance Difficulties (OAR 839-17-277(3))

This rule concerns "the opportunity and degree of difficulty to comply." The violation herein consisted of Mr. Sandstrom's not supplying on the JRD the name and address of the person who gave him the Jasper job order, as required by OAR 839-17-070(1). Mr. Sandstrom testified that he did not include this information because he did not know which of two possible names to indicate. He did not explain why he did not simply put down both names, as he did that same day on the corresponding JOD. Mr. Sandstrom's failure to supply any of the required information on the order given was a deliberate act, and for that reason it cannot be attributed to mere carelessness. There is no indication, however, that Mr. Sandstrom was wilfully committing a violation of law by this failure. In the absence of evidence supporting any other explanation, this forum has attributed Mr. Sandstrom's failure to supply this information to the confusion he confessed, rather than to any will on his part to violate the law. Therefore, this violation is seen as a violation "otherwise not wilfully committed" (Section VI. C. 3. b of the Guidelines) for purposes of this rule. Accordingly this forum assesses a weight factor of 6 to this category.

D. Magnitude and Seriousness of the Violation (OAR 839-17-277(4))

This rule assesses the magnitude and seriousness of a violation in terms of the amount of monetary damage to the applicant it involves. Herein, there is no evidence that failing to provide the names and addresses of the persons giving the job order involved any monetary damage to the applicant, Mr. Jasper. The job he obtained pursuant to Respondent's referral paid him \$700 to \$800 more per month than the approximation Respondent had given him. Accordingly, this forum must assign a weight factor of zero to this category.

Section E.(2) of the Guidelines directs that a civil penalty will be determined by averaging the weight factors assigned above, and multiplying that average by \$100. Herein, the resulting figure is \$250.

The agency has not propounded any legal basis, under applicable statutes, rules, and guidelines, for revoking or refusing to renew Respondent's license in response to the violation of law found herein. Having examined those statutes, rules, and guidelines thoroughly, this forum has found no indication that revocation or refusal to renew would be appropriate or justifiable under them. Consequently, this forum assesses a civil penalty in the amount of \$250 against Respondent for his violation of law found herein.

ORDER

NOW, THEREFORE, as authorized by ORS 658.115, Respondent is ordered to deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries a certified check

payable to the Bureau of Labor and Industries in the amount of TWO HUNDRED FIFTY DOLLARS (\$250) plus any interest thereon which accrues, computed at the annual rate of nine percent, between a date ten days after the issuance of this Order and the date Respondent complies with this Order. This assessment is a civil penalty against Respondent for his violation of OAR 839-17-070(1)(b) found above.

**In the Matter of
P. MILLER AND SONS CONTRACTORS, INC., an Oregon Corporation,
and Paul O. Miller and June W. Miller, Respondents.**

Case Number 06-85
Final Order of the Commissioner
Mary Wendy Roberts
Issued May 20, 1986.

SYNOPSIS

Respondent corporation intentionally failed to pay the prevailing wage rate to workers on two public works, in violation of ORS 279.350. Paul and June Miller, as the corporation's sole owners and officers, were responsible for the failure to pay prevailing wage rates. The provision of a recreational vehicle hookup for some workers, and use of a boat dock for other workers, did not constitute wages or a fringe benefit. The Commissioner held the corporation and the Millers ineligible for

public works contracts for three years, pursuant to statute. ORS 279.350; 279.361(1) and (2); 279.348(4); OAR 839-16-004(12).

The above-entitled matter came on regularly for contested case hearing before Diana E. Godwin, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on December 10, 1985, in Room 311 of the State Office Building, 1400 SW Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Renee Bryant Mason, Assistant Attorney General. P. Miller and Sons Contractors, Inc. (hereinafter the Contractor) was represented by Deryck Dittman, Attorney at Law. Paul O. Miller, president and one of the owners of the Contractor, was present and testified.

The Agency called as its witness Merle Erickson, Compliance Specialist for the Wage and Hour Division of the Agency. The Contractor called as witnesses Paul O. Miller and M. Ann Ashby, former bookkeeper for the Contractor.

Having fully considered the entire record in this matter, the forum makes the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) Pursuant to OAR 839-16-085, and by a notice dated May 8, 1984, the Wage and Hour Division of the Agency informed the Contractor that the

Agency intended to place the Contractor and Paul O. Miller and June W. Miller on the list of contractors ineligible to receive any contract or subcontract for public works for a period of three years from the date of publication of their names on the ineligible list.

2) As the basis for this action, the notice cited the intentional failure of the Contractor and of Paul O. Miller and June W. Miller, in violation of ORS 279.350(1), to pay the prevailing wage rate to workers employed on two public works contracts let by the City of Lincoln City. One contract was for the Alice Park/Indian Shores project dated June 9, 1983, with workers employed during the period of late June 1983 through November 8, 1983. The other contract was for the Anchor-Coast Dunes, Schedule A Sewer project dated October 6, 1983, with workers employed during the period October 18, 1983, through February 8, 1984. Workers on both projects spent more than 20 percent of their time performing manual or physical work on the construction projects.

3) By a letter dated May 23, 1984, the Contractor and the Millers requested an administrative hearing on the Agency's intended action, and stated that the Contractor would be represented by counsel at the hearing.

4) The Agency duly served the Contractor and the Millers with notice of the time and place of the hearing. Enclosed with this notice was a document entitled "Information Relating to Civil Rights or Wage and Hour Contested Case Hearings," which contained the information required by ORS 183.413.

5) At the commencement of the hearing the parties were advised verbally by the Presiding Officer of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

FINDINGS OF FACT – THE MERITS

1) The Contractor is an Oregon corporation owned entirely by Paul O. Miller, who serves as president, and June W. Miller, who serves as secretary. The Contractor has been engaged in the business of installation of sewer and water pipelines in Oregon since 1968. Approximately 30 to 50 percent of the Contractor's recent work involves public works projects. Public works projects have been part of Contractor's business since the mid 1970's.

2) Pursuant to a Bid Announcement dated April 25, 1983, the Contractor bid for the right to perform a public works contract for Lincoln City, a political sub-division of the State of Oregon. The Contractor was awarded the contract hereinafter referred to as the Alice Park project, which required the Contractor to pay the prevailing wage rate in accordance with ORS 279.350. Work began on the project in early July of 1983. The contract called for installation of sewer and water lines, a pump station and storm sewers. The prevailing wage rate applicable to the Alice Park project was that rate published in the "Prevailing Wages Rates for Public Workers Contracts in Oregon" dated February 1, 1983.

3) The Contractor normally employs a year round crew of about five persons but 10 workers were employed for the Alice Park project. Six of

the 10 workers did not live in the Lincoln City area and had to make arrangements for local living accommodations for themselves and their families during the project. These workers were concerned about the cost and availability of living accommodations on the coast during the project.

4) In order to assist the workers who lived out of town, the Contractor arranged to have the workers live in their own trailers at a closed recreational vehicle park adjacent to the work site. In order for the recreational vehicle park to be made habitable, the Contractor opened up the road. Paul Miller also cleared debris from the site, rehabilitated the hot water tanks, re-stored the water lines into the bath houses, installed a large holding tank for the sanitary facilities and had the lights turned on. This work was not part of the Alice Park project. The workers on the Alice Park project provided most of the labor to rehabilitate the recreational vehicle park. The work at the recreational vehicle park was not completed at the time work began on the Alice Park project, and the workers continued to work on the project after their normal working day was over.

5) The Contractor paid out-of-pocket expenses in the amount of \$1,059.67 to rehabilitate the recreational vehicle park.

6) The Contractor did not pay the applicable prevailing wage rate to the workers on the Alice Park project for the reason that the Contractor intended to have the recreational vehicle park living accommodations count as part of both the base wage rate and the fringe benefit amounts required to

be paid on the project. The workers were not paid even the base hourly wage specified in the Prevailing Wage Rate booklet dated February 1, 1983. As a result of attending a pre-construction meeting 10 to 15 days prior to the start of work on the project, Paul Miller knew that the workers must be paid the prevailing wage rate, plus fringe benefits. There was also a copy of the prevailing wage rate publication in the Contractor's office.

7) The Contractor made no calculation of the value of the recreational vehicle park living accommodations in advance in order to determine whether or not the value was equal to the difference between the prevailing base wage rate, plus required benefits, and what the Contractor was actually paying the workers. The Contractor did not consult its accountant or lawyer or telephone the Wage and Hour Division of the Agency in order to determine whether it would be permissible to substitute housing for a portion of the required wage rate and/or fringe benefits. He was not aware that the value of the housing could not be included either as a fringe benefit or as part of the base wage rate.

8) Only six of the 10 workers on the Alice Park project lived at the recreational vehicle park; however, the four who did not live there received the same base wage rate, with no benefits, as those workers who did. The Contractor offered to let these other four workers have use of a boat dock in the recreational vehicle.

9) On August 10, 1983, Mr. Miller signed a "Public Works Contractor Wage Certification" for the Alice Park project stating that no worker on the

project was being paid less than the basic hourly rate, which ranged from \$12.84 for a Laborer, Group 1, to \$16.06 for an Operator, Group 11, or less than 4.35 or 4.50 an hour in fringe benefit payments. Mr. Miller signed this statement as president of the Contractor. It was signed under oath before a notary.

10) At the time he signed the wage certification form, Mr. Miller knew that the workers on the Alice Park project were not receiving the listed base wages, and also, he had not done a calculation to determine if the value of the recreational vehicle park accommodations provided was equal to the listed fringe benefit amounts that he certified were being provided. Mr. Miller instructed the Contractor's bookkeeper, Ann Ashby, to fill out this "Public Works Contractor Wage Certification" for the Alice Park Project by using the hourly wage rate and fringe benefit amounts published in the prevailing wage rate book. Ms. Ashby complied and did not use the workers' actual pay records to complete the form.

11) Sometime during the period of July through September 1983, the Wage and Hour Division of the Agency received a complaint from an anonymous telephone caller stating that the Contractor was not paying the prevailing wage rate on the Alice Park project. The case was assigned to Mr. Erickson, Compliance Specialist with the Wage and Hour Division of the Agency, for investigation.

12) On October 7, 1983, Mr. Erickson telephoned the Contractor's office, advising the Contractor that a complaint had been initiated against it. Mr. Erickson requested that the Contractor

provide him with information on the Alice Park project to determine if the prevailing wage rates were being paid on that project. On October 10, 1983, the Contractor received a letter from Mr. Erickson formally advising the contractor that the Agency was conducting an investigation.

13) After the Contractor had been notified of the complaint, Mr. Miller instructed a secretary, Susan Wood, to make some telephone calls to determine the cost of living accommodations in the local area. She determined the average cost to be \$29.00 a day. Mr. Miller also instructed Ms. Ashby to prepare for Mr. Erickson a summary of the expenses incurred in preparing the recreational vehicle park for occupancy.

14) Mr. Erickson relied upon the Bureau of Labor and Industries' prevailing wage rate book dated February 1, 1983, the "Public Works Contractor Wage Certification" on the Alice Park project dated August 9, 1983, and an examination of the Contractor's payroll records to determine if the prevailing wage rate had been paid to workers on the Alice Park project. Ms. Ashby, former bookkeeper for the Contractor, was also interviewed. Mr. Erickson also examined the Contractor's records of labor and money expended on the rehabilitation of the recreational vehicle park for the Alice Park project workers. After examining these documents, Mr. Erickson determined that the Contractor was not in fact paying either the prevailing base wage rate or the required fringe benefits.

15) Mr. Erickson determined that \$21,121.10 was owed in back wages to employees. This figure represented

the difference between the prevailing base wage rate and benefits and what was in fact paid in base wages and accommodation expenses. Contractor paid this amount to the employees through the Agency sometime after the project was completed.

16) Pursuant to a Bid Announcement dated August 11, 1983, the Contractor bid upon and was awarded another Lincoln City public works contract for installation of sewers, hereinafter referred to as the Anchor Dunes project. The Contractor employed 10 workers on this project.

17) The written agreement between the Contractor and Lincoln City for the Anchor Dunes project required the Contractor to pay the prevailing wage rate in accordance with ORS 279.350. The contract period commenced October 6, 1983, although work did not actually begin until October 18, 1983. The prevailing wage rate applicable to the Anchor Dunes project was that rate published in the "Prevailing Wage Rates for Public Works Contracts in Oregon" dated July 1, 1983.

18) The Contractor paid the applicable prevailing base wage rate to its workers on the Anchor Dunes project. However, the Contractor was not providing or paying the required fringe benefits for the reason that he was inquiring into establishing a health and welfare plan for the employees. This plan was never implemented.

19) On October 27, 1983, the Contractor submitted a "Public Works Contractor Wage Certification" for the Anchor Dunes project stating that no worker on the project was being provided or paid less than \$4.50 an hour in fringe benefits.

20) At the time this wage certification form was prepared and signed by Mr. Miller, the Contractor and Mr. Miller knew that these fringe benefits were not in fact being provided. The fringe benefit amounts listed in the form were taken from the July 1, 1983, prevailing wage rate book and were not based on the Contractor's actual payments.

21) In the course of reviewing the information provided by the Contractor for the Alice Park project, Mr. Erickson determined that the Contractor was not in compliance with the prevailing wage rate on the Anchor Dunes project because the Contractor was not paying fringe benefits.

22) On November 29, 1983, Mr. Erickson sent a letter to the Contractor requiring an inspection of payroll and other related records on the Anchor Dunes project to determine if the prevailing wage rate was being paid. After an investigation Mr. Erickson determined that the prevailing wage rate was not being paid. Although the Contractor was paying the applicable prevailing base wage rate, it was not providing or paying fringe benefits.

23) The Contractor decided that it was not practical to set up a health and welfare plan in that there had been a long delay in obtaining information. For this reason, and in response to the Agency's investigation, the Contractor began to pay in late November the prevailing amount for fringe benefits directly to the workers on the Anchor Dunes project as additional wages.

24) The Anchor Dunes project was substantially completed in November of 1983 and fully completed in the Spring of 1984. At some point after the project was substantially completed,

the Contractor paid to the workers the wage differential of \$2,555.96. This amount represents fringe benefits from the start of the project until the Contractor began regularly paying the benefits as additional wages. This amount was paid to the employees through the Agency. The delay in paying this lump sum amount was attributable to a delay in negotiations between the Contractor and the Agency as to how much was actually owed for fringe benefits.

ULTIMATE FINDINGS OF FACT

1) The Contractor is an Oregon corporation owned entirely by Paul O. Miller, who serves as president, and June W. Miller who serves as secretary.

2) Pursuant to a Bid Announcement dated April 25, 1983, the Contractor entered into an agreement with Lincoln City, a political subdivision of the State of Oregon, to perform a public works contract known as the Alice Park project. The prevailing wage rate published in the "Prevailing Wage Rates for Public Works Contracts in Oregon", dated February 1, 1983, applied to the Alice Park project. The Contractor was aware of the requirement to pay the prevailing wage rate on the project.

3) The Contractor employed 10 persons on the Alice Park Project, and work was performed under the contract from early July until early October of 1983.

4) The Contractor, with knowledge of the law and its contractual obligations, failed to pay the workers on the Alice Park project either the required base hourly wage rate or provide or

pay the required hourly amount of fringe benefits when due.

5) In response to an investigation by the Wage and Hour Division of the Agency of the Contractor's failure to pay the prevailing wage rate, the Contractor paid an additional \$21,121 in wages and benefits owing to the workers on the Alice Park project.

6) The Contractor is a corporation. Therefore, Paul O. Miller and June W. Miller, as sole owners and officers of the corporation, were responsible for the failure to pay the prevailing wage rate on the Alice Park project.

7) Pursuant to a Bid Announcement dated August 11, 1983, the Contractor entered into an agreement with Lincoln City to perform a second public works contract known as the Anchor Dunes project. The prevailing wage rate published in the "Prevailing Wage Rates for Public Works Contracts in Oregon" dated July 1, 1983, applied to the Anchor Dunes project. The Contractor was aware of the requirement to pay the prevailing wage rate on the project.

8) The Contractor employed 10 workers on the Anchor Dunes project. The majority of the work required by the contract was performed in October and November of 1983 and the project was fully completed in 1984. The Contractor paid the prevailing base wage rate but did not pay or provide the required hourly amount in fringe benefits.

9) The Contractor, with knowledge of the law and its contractual obligations, failed to pay or provide the workers on the Anchor Dunes project the required hourly amounts for fringe benefits at the time of the workers'

regular payday and only paid these fringe benefits after an investigation by the Agency had been commenced.

10) The Contractor is a corporation. Therefore, Paul O. Miller and June W. Miller, as sole owners and officers of the corporation, were responsible for the failure to pay or provide the required fringe benefit amounts on the Anchor Dunes project.

CONCLUSIONS OF LAW

1) The provisions of ORS 279.348 to 279.363 are applicable to the Alice Park and Anchor Dunes public works project performed by the Contractor.

2) The recreational vehicle facility provided to some of the Contractor's employees on the Alice Park project does not constitute a "fringe benefit" or "wages" under ORS 279.348 or under OAR 839-16-004.

3) The Contractor, with knowledge of the legal requirements of ORS 279.310 to 279.356, and its contractual obligations, failed to pay the prevailing rate of wages to workers employed on the Alice Park and Anchor Dunes public works projects in violation of ORS 279.350. The payment of fringe benefits and additional wages by the Contractor subsequent to an investigation by the Wage and Hour Division of the Agency is not a defense to failure to pay the prevailing wage rate.

4) Pursuant to ORS 279.361(2), Paul O. Miller and June W. Miller are corporate officers of the Contractor, and were responsible for the failure to pay the required prevailing wage rate on the Alice Park and Anchor Dunes public works projects, and therefore, are subject to the provisions of ORS 279.361(1).

5) Under ORS 279.361, the Commissioner has the authority to place the names of the Contractor and Paul O. Miller and June W. Miller on the list of persons who are ineligible to receive any contract or subcontract for public works for a period not to exceed three years from the date of publication of their names on the ineligible list.

OPINION

There were no significant disputes as to the facts in this matter. Neither the Contractor nor Mr. Miller disputed at the hearing that the workers on the Alice Park project had not in fact been paid either the prevailing base wage rate or the required fringe benefit amounts. Furthermore, it was not disputed that the Contractor failed to pay the prevailing fringe benefit amounts on the Anchor Dunes project until after the Agency's investigation. The sole issue to be resolved in this matter is whether the Contractor's failure to pay the prevailing wage rate applicable to the two public works projects was intentional.

ORS 279.361 provides for placement of a Contractor's name on the list of persons ineligible to receive a public works contract only if the contractor "intentionally failed" to pay the prevailing wage rate. Although no Oregon appellate court has established under what circumstances a contractor can be said to have "intentionally failed" to pay the prevailing wage rate, the Supreme Court did address the question of when a regular employer's failure to pay wages is "willful" under ORS chapter 652, in *Sabin v. Willamette Western Corporation*, 276 Or 1083, 557 P2d 1344 (1976). ORS 652.150 provides for the imposition of a penalty if an

employer "willfully" fails to pay wages due. The terms "intentional" and "willful" have been determined to be interchangeable. *Starr v. Brotherhood's Relief & Compensation Fund*, 268 Or 66, 518 P2d 1321 (1974). Therefore, the court's interpretation of "willful" in the *Sabin* case is applied here:

"In defining the term "willfully" for the purpose of this statute, however, we held in *State ex rel Nilsen v. Johnson et ux supra* at 108, as follows:

"* * * Its purpose is to protect employees from unscrupulous or careless employers who fail to compensate their employees although they are fully aware of their obligation to do so. In *Nording v. Johnston*, 205 Or 315, 283 P2d 994 (1955), this court said: 'The meaning of the term "willful" in the statute is correctly stated in *Davis v. Morris*, 37 Cal App 2d 269, 99 P2d 345.' We now quote the definition thus adopted:

"* * * In civil cases the word 'willful,' as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent.'

"That definition excludes the individual who does not know that

his employee has left his employ or who has made an unintentional miscalculation." (276 Or at 1093) (Emphasis supplied.)

As stated in the Findings of Fact, the Contractor has been doing business in Oregon since 1968 and has worked on public works projects since the mid-1970's. Approximately 30 to 50 percent of its work involved public works projects. The Contractor knew specifically that it was required to pay the prevailing wage rate on both of the projects involved in this matter. The two contracts, which the Contractor signed for the Alice Park and Anchor Dunes projects, included a written notice that the prevailing wage rate provisions of ORS 279.310 to 279.356 applied to the projects. Mr. Miller testified on cross-examination that he became aware, at a pre-construction meeting held 10 to 15 days before the start of work on the projects, that the prevailing wage rate would have to be paid to all workers on the job. He also testified that there was a copy of the prevailing wage rate book in the Contractor's office. Thus, it is clear that the Contractor knew of the requirement to pay the prevailing wage rate, and that the Contractor failed to make such payment. This constitutes an intentional failure to pay.

ORS 279.348(1) defines "prevailing rate of wage" as "the rate of hourly wage, including all fringe benefits under subsection (4) of this section, paid in the locality * * *." Subsection (4) defines "fringe benefits" as follows:

"(4) "Fringe benefits" means the amount of:

"(a) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a plan, fund or program; and

"(b) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program which is committed in writing to the workers affected, for medical or hospital care, pensions or retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal, state or local law to provide any of such benefits." (Emphasis added.)

The Alice Park/Indian Shores Project

The Oregon Administrative Rules adopted by the Agency under ORS chapter 279 and pursuant to its rule-making authority, further define what constitutes "fringe benefits". OAR 839-16-004(12) restates the language of ORS 279.348(4) but also clarifies what is meant by "other bona fide fringe benefits." It provides that "Other bona fide fringe benefits do not include reimbursement to workers for meals, lodging or other travel expenses * * *." (Emphasis added.)

Mr. Miller testified that the rehabilitation of a recreational vehicle park had resulted in six of the 10 employees having the capability to hook up their trailers. He further testified that he believed the value of that housing opportunity would be enough, when added to the hourly wage, to equal the prevailing wage rate, including the required fringe benefits. According to Mr. Miller, he did not know until he was contacted by Mr. Erickson of the Wage and Hour Division that the value of housing could not be included either as a "fringe benefit" or as part of the base wage rate. However, that defense to the charge of intentional failure to pay is without support for a number of reasons.

First, the Oregon Supreme Court has held in the case of *McGinnis v. Keen*, 189 Or 445 (1950), that an employer (contractor) has a duty to know what wages are due to an employee. Therefore, ignorance of the law as to what qualifies as a "fringe benefit" cannot serve to excuse the Contractor or the Millers. Second, there was no reasonable or objective basis for the supposed belief that the provision of a recreational vehicle park hook-up was worth the difference between the prevailing wage rate, including fringes, and what the Contractor was paying in actual wages. In fact, the complete absence of any objective basis for the belief can only lead to the conclusions, inescapable here, that the Contractor and the Millers did not in fact believe at any time that they were meeting the requirements of the prevailing wage rate law.

The Contractor did not check into the value of housing in the local area

prior to deciding the amount of hourly wage to be paid, nor prepare any calculation of out-of-pocket expenses incurred at the recreational vehicle park for the benefit of the employees. When Ms. Wood, a secretary for the Contractor, did finally make inquiry about the value of housing, it was after the Contractor had notice of the complaint. The Contractor never inquired of the Wage and Hour Division or its lawyer or accountant to determine if it was permissible to substitute housing for part of the wages.

Ms. Ashby also testified that the Public Works Contractor Wage Certification form signed by Mr. Miller on August 10, 1983, was completed without reference to any documents detailing the cost of repairs to or value of accommodations at the recreational vehicle park. The form was signed, however, with reference to the prevailing wage rate book, which detailed what the Contractor was required to pay. It is apparent from the evidence that the Contractor deliberately falsified this document.

Perhaps the most damaging evidence against the Contractor in this regard was the testimony that the four workers who did not live at the park were paid the identical wages. This evidence clearly established that the Contractor could not have believed the workers were being paid appropriately by virtue of their use of the recreational vehicle park. In order to explain away this discrepancy Mr. Miller offered the feeble testimony that these four workers were entitled to use the boat dock. The evidence establishes that the Contractor was aware of his obligation to pay the prevailing wage rate,

including fringe benefits, and his failure to do so was intentional.

The Anchor Coast Dunes Project

The Contractor's defense to the charge that it failed to pay the prevailing wage rate, specifically the required fringe benefits, was that the Contractor was inquiring into setting up a health and welfare plan for employees. Under ORS 279.348, "fringe benefits" include the amount a contractor may reasonably anticipate in providing health benefits "pursuant to an enforceable commitment to carry out a financially responsible plan or program which is committed in writing to the workers affected." The facts with regard to the Anchor Dunes project indicate that there was no "enforceable plan" and no "written commitment to the workers." While the applicable prevailing base wage rate was paid, there was no payment to the workers for these fringe benefits.

The total amount of wages owed was not paid to the workers until after the project was substantially completed. The fact that the wage differential was ultimately paid to the workers does not negate the violation. Likewise, the fact that the Contractor did eventually begin to pay the appropriate prevailing wage rate does not release the Contractor from liability. The fact remains that the fringe benefits were not paid, when due, to workers. The Contractor was aware of its obligation to pay this amount and intentionally failed to make such payment.

ORDER

NOW, THEREFORE, as authorized by ORS 279.361, it is hereby ordered that the Contractor and Paul O.

Miller and June W. Miller, or any firm, partnership, corporation, or association in which the Contractor has a financial interest, shall be ineligible to receive any contract or subcontract for public works for a period of three years from the date of publication of their names on the ineligible list maintained and published by the Commissioner.

In the Matter of MARK LEWIS TRACTON, dba The Job Exchange, Respondent.

Case Number 07-84
Final Order of the Commissioner
Mary Wendy Roberts
Issued June 2, 1986.

SYNOPSIS

Respondent, a private employment agency owner, failed, when requested, to furnish to the Agency a copy of a job order document concerning a job referral, in violation of ORS 658.078. The Commissioner assessed a civil penalty of \$500 for the violation. ORS 658.078, 658.115; OAR 839-17-277.

The above-contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The

hearing was held, in conjunction with the hearing of Case Number 08-84, another matter concerning Mr. Tracton's private employment agency license, on February 20, 1985, in Room 311 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Frank T. Mussell, Assistant Attorney General of the Department of Justice of the State of Oregon. Mark Lewis Tracton, doing business as The Job Exchange, (hereinafter the Respondent) was represented by Anthony A. Buccino, Attorney at Law.

The Agency called as its one witness Douglas McKean, Compliance Specialist for the Wage and Hour Division of the Agency. Respondent called Christine Hammond (Mr. McKean's Supervisor) and Respondent.

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

FINDINGS OF FACT

1) Respondent is a natural person who, during all times material herein, operated the Job Exchange, a private employment agency as defined in ORS 658.005, in the State of Oregon. During 1984 and thus far in 1985, the period herein material, Respondent

has been licensed to maintain this business pursuant to ORS 658.005 to 658.245.

2) On March 19, 1984, Jim Harrison filed a complaint against Respondent with the Wage and Hour Division of the Agency. This complaint alleged misrepresentation in connection with Respondent's referral of Mr. Harrison, a person for whom Respondent was attempting to procure employment, to a prospective employer.

3) On March 29, 1984, the Agency assigned Douglas McKean, a Compliance Specialist for the Wage and Hour Division, to investigate Mr. Harrison's complaint.

4) On April 6, 1984, Mr. McKean contacted Respondent for the first time and asked him to furnish to the Agency Respondent's records concerning Mr. Harrison.

5) On May 1, 1984, at Mr. McKean's request, he and Respondent met at Mr. McKean's office to discuss Mr. Harrison's complaint. Mr. McKean had asked Respondent to bring to this meeting the same records he had asked Respondent to furnish on April 6, 1984. (See Finding of Fact 4 above.) Respondent brought his "job folder" concerning Mr. Harrison, but it did not include a copy of the job order document (hereinafter JOD) concerning Mr. Harrison's referral. Consequently, when during the meeting Mr. McKean asked for a copy of the JOD,

Respondent could not provide it. However, Respondent promised Mr. McKean that he would get the JOD for him and made a note to do so on the cover of his job folder concerning Mr. Harrison. At the close of this meeting, Mr. McKean made a written list for Respondent of documents the Agency needed from him, including the JOD.

6) According to Respondent, on May 2, 1984, he personally delivered a copy of the JOD concerning Mr. Harrison to the Agency for Mr. McKean. He testified that he put it in an envelope with Mr. McKean's name on it, which he left with "the people at the third floor" to give to Mr. McKean, since Mr. McKean was not there. This forum takes official notice that the Agency's Wage and Hour Division, and reception therefor, is among the Agency divisions located on the third floor of the State Office Building at 1400 S.W. Fifth Avenue in Portland, Oregon. The only non-Agency occupant of space on this floor is the Pacific Marine Fisheries Commission.

7) Mr. McKean never received the Harrison JOD.

8) Mr. McKean is not aware of any occasion during his employment with the Agency on which a document has been lost or misplaced in his office.

9) Between May 1, 1984, and June 19, 1984, Mr. McKean repeatedly renewed his request, in telephone

contacts with both Respondent and his secretaries, that Respondent furnish the Harrison documents the Agency still needed, including the JOD.

10) On June 19, 1984, Mr. McKean and Respondent met briefly at Mr. McKean's office. Respondent told Mr. McKean why he had not had an opportunity to provide the requested documents, and Mr. McKean again renewed his request for them, including the JOD. Respondent assured Mr. McKean that he would provide them."

11) June 22, 1984, Mr. McKean telephoned Respondent to ascertain why he had not submitted the requested documents, including the JOD. Mr. McKean was told Respondent was not in, and he therefore left a message for Respondent. At that time, Mr. McKean spoke at length with a secretary at Respondent's office and again requested the Harrison JOD. The secretary said that she could not get it for Mr. McKean then, because the files were locked in Respondent's desk, to which she did not have access."

12) On June 27, 1984, Mr. McKean sent to Respondent's correct address, by regular US mail, a letter recounting Mr. McKean's repeated requests and need for, and Respondent's repeated promises to provide, the JOD concerning Mr. Harrison. Mr. McKean asked

* A job order document, as that term is used in this Order, is a form which a private employment agency is required by law to complete when it receives an order from an employer for applicants for a job, before the agency refers any applicant to the employer for that job. The JOD details the private employment agency's specifications of the employer's order, including, for example, the job's compensation, its typical hours of work, the existence of any union dispute, etc.

* Respondent testified that he has not had a secretary since he consolidated his offices at "324 S.E. 82nd." However, since the record does not reveal whether that consolidation had taken place by May 1, 1984, June 19, 1984, or June 22, 1984, the latter testimony is probative of no issue herein.

** Respondent testified that he does not remember anything being said about the Harrison matter at this meeting, and that he thought it pertained only to another matter.

*** Respondent testified that he does not lock files in his desk.

Respondent to respond to this letter by July 6, 1984, and reiterated Mr. McKean's telephone number.

13) Respondent did not respond to the June 27, 1984, letter. Respondent testified at hearing that he never received that letter and never saw it before the instant hearing.

14) In response to Mr. McKean's repeated requests for the Harrison JOD between May 2, 1984, and June 27, 1984, Respondent did not contact Mr. McKean and tell him that Respondent had already submitted the JOD to the Agency, that it must have been lost, and/or that Respondent would send another copy of it to Mr. McKean.

15) Mr. McKean could not and did not complete his investigation of Mr. Harrison's complaint against Respondent, because Mr. McKean did not have sufficient evidence, including the JOD, to decide whether the allegations of the complaint were accurate. Mr. McKean believed that the JOD was particularly important to the decision, because he could not contact either the person who had given or the person who had taken that job order. Accordingly, about one month after June 27, 1984, Mr. McKean turned the Harrison case over to his supervisor.

16) In addition to the JOD, Mr. McKean did not receive from Respondent statements from Mr. Harrison's employer as to why he was discharged and what his earnings were. Mr. McKean had requested, and Respondent had promised to provide, these statements. Respondent did give Mr. McKean telephone numbers of a person at the employer's office and did provide information about Mr. Harri-

son's failure to pay Respondent for his referral.

17) By a notice dated September 6, 1984, the Agency informed Respondent that the agency proposed to revoke Respondent's private employment agency license because Respondent had failed to provide, when requested, a copy of the JOD concerning Mr. Harrison, in violation of ORS 658.078. This notice was served on Respondent sometime between September 19, 1984, the date of its cover letter, and September 26, 1984.

18) Respondent testified that between May 2, 1984, and the time he received the notice described in the previous Finding of Fact, the Agency did not tell him it had not received the JOD from him.

19) By letter of his attorney dated September 26, 1984, Respondent requested a hearing on the Agency's proposed action and made an "initial request for discovery," asking the Agency to provide specified information to Respondent.

20) By letter of his attorney dated October 4, 1984, Respondent furnished to the Agency the JOD concerning Mr. Harrison, and alleged that Respondent had previously tendered it to Mr. McKean.

21) According to Respondent, the JOD is complete, and all of the information on it also appears on Respondent's job referral document for Mr. Harrison's referral. As these assertions are not controverted by the JOD itself or any other evidence on the record, the forum finds them to be fact.

22) The Agency referred this matter to the forum for hearing at the same

time the Agency referred to the forum for hearing a proposal to revoke Respondent's private employment agency license on bases unrelated to the basis for the revocation proposal herein (recited in Finding of Fact 17 above). The Agency asked the forum to schedule the hearing of these two proposals together but to issue a separate Order concerning each. The forum therefore denominated the proposals two separate matters and numbered the Harrison matter Case No. 07-84 and the Jasper matter Case No. 08-84. This Order, therefore, concerns (just) Case No. 07-84.

23) By a notice dated November 6, 1984, the forum notified Respondent and the Agency of the time and place set for the hearing of this matter. The forum set the hearing of Case No. 08-84 for the same time and place.

24) By a notice dated December 21, 1984, the Agency informed Respondent that the Agency proposed to refuse to renew Respondent's private employment agency license for, in effect, the reason recited in the Agency's proposed revocation of that license in this matter, and one or more of the reasons recited in the Agency's proposed revocation of that license in Case No. 08-84. Included in this notice was notice of the time and place set for the hearing on the proposed refusal to renew Respondent's license, the same time and place as were set for the hearing on the proposed revocation of that license. In other words, since the cases no. 07-84 and 08-84 had been set for hearing together, the Agency issued a consolidated proposal to refuse to renew, reciting as its bases the allegations in both cases. The Agency

clarified at a pre-hearing conference that it issued the proposed refusal to renew because it was not certain whether a proposal to revoke would be appropriate when (and if) the license at issue expired at the end of the licensing period, December 31, 1984. The Agency also clarified at hearing that it is the Agency's position that the allegation in Case No. 07-84 by itself supports a revocation of or refusal to renew (whichever is appropriate) Respondent's private employment agency license.

25) Before the commencement of the hearing of this matter, Respondent received from this forum a copy of "Information Relating to Civil Rights and Wage and Hour Contested Case Hearings," as part of another document, and stated on the record that he had read this document and understood it perfectly. The Presiding Officer told Respondent to inform her if at any time during the hearing he had any questions about the proceedings.

ULTIMATE FINDINGS OF FACT

1) On March 29, 1984, the Agency through Compliance Specialist Douglas McKean began its investigation of a complaint against Respondent which had been filed by Jim Harrison, a client of Respondent. Respondent was doing business as a duly-licensed private employment agency in the State of Oregon. As a crucial part of that investigation, Mr. McKean sought from Respondent a copy of the job order document (JOD) pursuant to which he had referred Mr. Harrison to a prospective employment. Mr. McKean requested that Respondent furnish this JOD to the Agency in a direct telephone contact with Respondent on

April 6, 1984; requested that Respondent bring this JOD to his May 1, 1984, meeting with Mr. McKean; requested at this meeting that Respondent produce this JOD in repeated telephone contacts with Respondent and his staff between May 1, 1984, and June 19, 1984; requested this JOD at his June 19, 1984, meeting with Respondent; requested this JOD by telephone contact with Respondent's staff on June 22, 1984; and, finally, requested this JOD by letter to Respondent dated June 27, 1984. (Because this letter was sent by regular US mail to Respondent's correct address, and for reasons explained in Section 1 of the Opinion below, the forum presumes that it was delivered to that address.)

2) Each of these requests was made because, and carried the implicit message that, Mr. McKean had not received the Harrison JOD. In response to these requests, on at least May 1, 1984, and June 19, 1984, Respondent promised to submit the JOD to Mr. McKean. At no time did Respondent tell Mr. McKean that he had already submitted the JOD or that it must have been lost, and/or promise to re-submit it.

3) Respondent asserts that he personally delivered the Harrison JOD to the Agency, for Mr. McKean, on May 2, 1984. Mr. McKean never received the JOD. Other documents have not been lost or misplaced in Mr. McKean's office.

For the reasons explained in Section 1 of the Opinion below, this forum does not believe Respondent's above assertion, and finds that Respondent failed to furnish (and made no discernible effort to furnish) a copy of the

Harrison JOD to the Agency at any time before he had received the Agency's Notice of Proposed Revocation of Respondent's license, between September 19-26, 1984. There is no evidence as to why Respondent failed to do this.

4) Because Respondent did not furnish to the Agency, upon its request, a copy of the Harrison JOD, Mr. McKean could not and did not complete his investigation of Mr. Harrison's complaint against Respondent. There is no evidence that Respondent's failure to furnish resulted in any monetary damage to Mr. Harrison.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was a private employment agency licensee subject to the provisions of ORS 658.005 to 658.245.

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

3) Before the commencement of the contested case hearing of this matter, this forum complied with ORS 183.413 by informing Respondent of the matters described in ORS 183.413(2)(a) through (i).

4) Respondent violated ORS 658.078 by failing, when requested, to furnish to the Agency a copy of the job order document pursuant to which Jim Harrison was referred for employment.

5) The Commissioner of the Bureau of Labor and Industries has the authority to impose a civil penalty against Respondent under the facts and circumstances of this record, and her imposition as a penalty of the sum

of money assessed below is an appropriate exercise of the authority.

OPINION

1. The Merits

There is only one substantive issue herein: did Respondent furnish to the Agency a copy of the Harrison job order document on May 2, 1984, as Respondent has alleged. Mr. McKean never received this document, and the only evidence indicating that Respondent furnished it at that time is Respondent's own testimony.

This forum does not believe that Respondent furnished the JOD to the Agency on May 2, 1984. After May 2, 1984, when Mr. McKean repeatedly, by several different means, directly and indirectly, let Respondent know that the Agency had not received and needed the JOD, Respondent did not even once tell Mr. McKean that he had already submitted the JOD to the Agency. (In fact, at least once after May 2, Respondent promised to submit it, thereby indicating that he had not yet submitted it.) It is logical to conclude that, had Respondent in fact submitted the JOD to the Agency on May 2, Respondent would have made that clear when Mr. McKean thereafter persisted in seeking the JOD from Respondent. Respondent attempted to explain his failure to do that by implying that Mr. McKean did not make the telephone calls to him or his staff recited in the Findings of Fact above, by denying any recollection of Mr. McKean's bringing up this matter at their June 19, 1984, meeting, and by denying that he ever received Mr. McKean's June 27, 1984, letter. This forum might believe the latter denial by Respondent if it could believe the former implication

and denial by Respondent. However, this forum has absolutely no reason to believe that implication or that denial, and to therefore find that Mr. McKean lied or was mistaken about the existence and content of all (much less any) of his contacts with Respondent regarding the Harrison JOD after May 2, 1984.

This forum finds Respondent's suggestion that Mr. McKean confused him with someone else an absolutely baseless conjecture. Why, therefore, should his forum believe Respondent's assertion that a correctly addressed and duly sent letter from the Agency did not reach him? This forum believes that Mr. McKean did make repeated attempts by telephone, by letter, and in person, after May 2, 1984, to obtain the Harrison JOD from Respondent, and that Respondent failed to mention even once, in response, that he had already submitted this JOD to the Agency because in fact he had not.

2. Penalty

ORS 658.115 provides that a violation of the statutory scheme for regulation of private employment agencies (ORS 658.005 to 658.245) can result in revocation or suspension of the violator's private employment license or imposition of a civil penalty against the violator. Herein, the Agency proposes to revoke or refuse to renew Respondent's license because of his alleged violation of private employment agency law.

Respondent has offered into the record an exhibit entitled "Guidelines for the Imposition of Civil Penalties for Violation of the Private Employment Agency Statutes or Any Rule

Promulgated Thereunder" and dated June 15, 1978. Respondent argues that even if the forum finds that Respondent committed the violation charged, license revocation or non-renewal is not an appropriate or justifiable "sanction" under these Guidelines. The Agency, which provided the Guidelines to Respondent, maintains that although they have not been promulgated as rules, they have the force and effect of administrative rules and, therefore, bind the Agency and the forum. In other words, neither Respondent nor the Agency challenge, and Respondent (implicitly) and the Agency (explicitly) have presumed, the validity of these Guidelines as interpretations of OAR 839-17-277 and 839-17-278 and ORS 658.115. Given the absence of any such challenge and that mutual presumption, this forum will apply the Guidelines in formulating its response to the violation of law it has found herein.

According to Section III. (1) and Section V. of the Guidelines, a civil penalty of \$100 to \$1000 may be imposed for the instant violation of ORS 658.078. According to Section VI. C. of the Guidelines, this violation is a "procedural" violation, since it does not fall within any category of the "substantive" violations listed in Section VI. B. Therefore, the first step in determining the amount of the civil penalty herein is to assign "weight factors" to each of the following "circumstances."

A. Past History (OAR 839-17-277(1))

Section VI. C. of the Guidelines provides that a weight factor of 7 to 10 will be assigned to each violation the violator has made little or no effort to

resolve. As this forum has concluded that Respondent made no discernible effort to resolve this violation (i.e., furnish the JOD) during the six months between April 6, 1984, and October 4, 1984, despite repeated Agency requests that he do so, the forum assigns a weight factor of 9 to Respondent's "past history."

B. Prior Violations of Private Employment Agency Law (OAR 839-17-277(2))

The record in Case Number 08-84, heard in conjunction with this case, reveals that Respondent

A) entered into a consent order with the Agency in which he agreed to pay a civil penalty of \$350 in 1973;

B) entered into another such order, in which he agreed to pay \$1550 in 1978; and

C) refunded money to an applicant at the Agency's request in March 1983.

If the Agency wanted this forum to view this evidence as a showing of Respondent's "prior violations" of private employment agency law, the Agency should have provided evidence as to what type of violations were charged and when they allegedly occurred, as well as some legal argument that evidence of the existence of a consent order or a refund, by itself, should be considered sufficient evidence of a "violation" for purposes of this rule and guideline. As consent orders typically do not include any finding or admission of a violation, and absent the latter evidence and argument, the forum lacks sufficient basis to find that, for purposes of OAR 839-17-277(2), these

consent orders or refund constitute "violation/s" of private employment agency law.

However, in the Order in Case No. 08-84, the Commissioner concluded that on or about July 18, 1983, Respondent violated OAR 839-17-070 (1)(b) and imposed a civil penalty on Respondent for this violation. As this violation predates the violation found herein, it is a "prior" violation for purposes of this Guideline category. Section VI. C. 2. of the Guidelines provides that a weight factor of 3 to 6 will be assigned when there has been a procedural violation of a private employment agency statute once in a six month period. As the violation in Case Number 08-84 falls within that category, this forum assigns a weight factor of 4 to this category.

C. Compliance Difficulties (OAR 839-17-277(3))

This rule concerns "the opportunity and degree of difficulty to comply." The Guidelines direct the forum to assign a weight factor of 0 to 2 to each violation "resulting from carelessness or some other such reason;" of 3 to 6 to each violation "otherwise not willfully committed," and of 7 to 10 to each violation "willfully committed." There is no evidence as to why Respondent failed to furnish the JOD to the Agency. However, given the repeated Agency requests to Respondent for compliance and Respondent's promises to comply, Respondent's failure to do so must be seen as willful and a weight factor of 7 applied to this category.

D. Magnitude and Seriousness of the Violation (OAR 839-17-277(4))

This rule assesses the magnitude and seriousness of a violation in terms of the amount of monetary damage to the applicant resulting from the violation. Herein, there is no evidence to establish that the violation involved any monetary damage to the applicant. Accordingly, the forum must assign a weight factor of 0 to this category.

Section E. (2) of the Guidelines directs that a civil penalty will be determined by averaging the weight factors assigned above and multiplying that average by \$100. Herein, the resulting figure is \$500.

The Agency has declined to explain to the forum any legal basis, given applicable statutes, rules, and guidelines, for revoking or refusing to renew Respondent's license in response to the violation of law alleged and found herein. Having examined those statutes, rules, and guidelines thoroughly, this forum has found no indication that revocation or refusal to renew would be appropriate or justifiable under them. Consequently, this forum assesses a civil penalty in the amount of \$500 against Respondent.

ORDER

NOW, THEREFORE, as authorized by ORS 658.115, Respondent is ordered to deliver to the Hearings Unit of the Portland office of the Bureau of Labor and Industries a certified check payable to the Bureau of Labor and Industries in the amount of FIVE HUNDRED DOLLARS (\$500) plus any interest thereon which accrues, computed and compounded annually at the rate of nine percent, between a date

ten days after the issuance of this Order and the date Respondent complies with this Order. This assessment is a civil penalty against Respondent for his violation of ORS 658.078 found above.

**In the Matter of
JON HOWARD PAAUWE,
dba Paauwe Reforestation,
Respondent.**

Case Number 12-85
Final Order of the Commissioner
Mary Wendy Roberts
Issued June 2, 1986.

SYNOPSIS

Respondent, a licensed farm labor contractor, failed to submit six certified payroll reports on two forestation contracts, in violation of ORS 658.417(3) and OAR 839-15-300. The Commissioner assessed a civil penalty of \$1000 for the six violations. ORS 658.417(3), 658.453; OAR 839-15-300, 839-15-520.

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. With the consent of the Presiding Officer and pursuant to their own

stipulation, the Bureau of Labor and Industries (hereinafter the Agency) and Jon Howard Paauwe, doing business as Paauwe Reforestation (hereinafter the Contractor), presented their evidence and argument entirely through written submissions, rather than at a hearing. The Agency was represented by Renee Bryant Mason, Assistant Attorney General of the Department of Justice of the State of Oregon, and the Contractor represented himself.

Having fully considered the record in this matter, which consists of the written submissions and administrative exhibits listed in Procedural Finding of Fact 5 below, I, Mary Roberts, Commissioner of the Bureau of Labor and Industries hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

**FINDINGS OF FACT –
PROCEDURAL**

1) By a notice dated September 5, 1985, the Agency informed the Contractor that the Agency intended to assess a civil penalty of \$1,000 against the Contractor. As the basis for this assessment, the notice cited the Contractor's failure to provide to the Commissioner a certified true copy of all payroll records for farm labor contracting work performed by the Contractor's employees on two forestation projects from about April 2, 1985, to at least June 27, 1985, in violation of ORS 658.417(3). This notice was served on the Contractor on September 6, 1985.

2) By memorandum dated September 23, 1985, the Contractor requested a hearing on the Agency's intended action.

3) By a notice dated January 2, 1986, this forum notified the Contractor and the Agency of the time and place set for the requested hearing and the designated presiding officer. As part of this Notice of Hearing, the forum sent a document entitled "Information Relating to Civil Rights or Wages and Hour Contested Case Hearings."

4) Shortly after the issuance of the Notice of Hearing, the Agency proposed that the Agency and the Contractor stipulate to adjudication based upon written stipulations and argument rather than presentations at a hearing. The Contractor stipulated and the forum agreed to this proposal. On or about February 20, 1986, the Agency and the Contractor submitted Stipulated Facts. Following that, the Agency submitted a brief, and the Contractor notified the forum, through the Agency, that he declined to file any argument.

5) The record herein consists solely of the following exhibits:

Administrative Exhibits:

1. Notice of Intent to Assess Civil Penalty and Certificate of Service.
2. Contractor's Request for Hearing.
3. Notice of Hearing and enclosures, and Certificate of Mailing.
4. Agency's January 9, 1986, letter to the forum, with its letter to the Contractor of same date attached.
5. The forum's January 22, 1986, letter to the Agency.
6. Agency's January 29, 1986, letter to the forum.

Joint Exhibit:

J-1. Stipulated Facts, with attached exhibits "A" through "D".

Agency Exhibits:

- A-1. Agency Brief.
- A-2. Agency's March 24, 1986, letter to the forum.

FINDINGS OF FACT – THE MERITS

1) The Contractor is a natural person who, during all times material herein, was a licensed farm labor contractor doing business in the State of Oregon as Paauwe Reforestation.

2) On January 11, 1985, the Forest Service of the United States Department of Agriculture (hereinafter the Forest Service) issued a solicitation of bids for mulching, tree planting, and site preparation in the Rogue River National Forest in the State of Oregon. On February 5, 1985, the Contractor made an offer for that project. On March 1, 1985, the Forest Service accepted the Contractor's offer and awarded to him Contract Number 52-04N7-5-20, in the amount of \$59,651.00.

3) On or about March 9, 1985, the Contractor received a "Notice to Proceed * * *". A work order issued on the same date by the Forest Service. This order stated that it was the Contractor's notice to proceed with the work on Contract No. 52-04N7-5-20 and that the time on that contract would start at the beginning of business on March 11, 1985 (the Monday following the date of the notice).

4) The Contractor employed a crew to perform contract No. 52-04N7-5-20 and paid its members directly for that work. They completed that contract on or about July 4, 1985.

5) On January 17, 1985, the Forest Service issued a solicitation of bids for planting and mulching in the Rogue River National Forest in the State of Oregon. On February 13, 1985, the Contractor made an offer for that project. On March 15, 1985, the Forest Service accepted the Contractor's offer and awarded to him contract number 52-04N7-5-24, in the amount of \$88,726.00.

6) On April 25, 1985, the Contractor received a "Notice to Proceed ***" A work order issued on the same date by the Forest Service. This notice stated that it was the Contractor's notice to proceed with work on Contract No. 52-04N7-5-24 and that the time on that contract would start at the beginning of business on April 29, 1985 (the Monday following the date of that notice).

7) The Contractor employed a crew to perform Contract No. 52-04N7-5-24 and paid its members directly for that work. They completed that contract on or about June 9, 1985.

8) As of June 24, 1985, the Contractor had not filed with the Agency any certified true copies of payroll records (i.e., wage certifications) for the work done on Contract No. 52-04N7-5-20 or 52-04N7-5-24. On or about that date, Agency Compliance Specialist Ron Kimmons contacted the Contractor concerning his failure to file these documents. The Contractor represented that he would try to prepare and file them by July 5, 1985.

9) As of January 29, 1986, the Contractor had not filed any wage certifications related to Contract No. 52-04N7-5-20 or 52-04N7-5-24.

10) The Contractor employed E. Gallegos as a crew foreman during the first six months of 1985 until, on or about June 24, 1985, Mr. Gallegos left the United States. When he left, Mr. Gallegos had in his possession documents the Contractor believes are necessary to the Contractor's preparation of wage certifications for the work done on Contract No. 52-04N7-5-20 and 52-04N7-5-24. Although the Contractor has attempted to locate Mr. Gallegos, he had not been successful in doing so as of the date of the filing of the Stipulated Facts (on or about February 20, 1986). To the best of the Contractor's knowledge, information, and belief, Mr. Gallegos is in Mexico.

The Contractor and the Agency have stipulated that the Contractor has been unable to prepare and file wage certifications on these two contracts because the records necessary for that preparation have been in the control and custody of Mr. Gallegos.

11) The Contractor has represented to the Agency that he intends to and will file wage certifications for the work done on these two contracts as soon as he recovers the records cited in the previous Finding of Fact.

ULTIMATE FINDINGS OF FACT

1) During all material times herein, the Contractor was a farm labor contractor, as defined by ORS 658.405, and was licensed as such, as required by ORS 658.410.

2) In March of 1985, the United States Forest Service awarded two forestation or reforestation contracts to the Contractor. The Contractor employed workers to perform these contracts, and he paid them directly for

that work. One crew of workers started work on the first contract no later than March 11, 1985, and finished that work on or about July 4, 1985. Another crew started work on the second contract no later than April 29, 1985, and finished that work on or about June 9, 1985.

3) The Contractor failed to file with the Agency any certified true copies of payroll records (wage certifications) for work done on either contract. Records which the Contractor believes are necessary for preparation of those certifications were in the possession and control of a foreman of the Contractor, who left the United States on or about June 24, 1985. Since that time, the Contractor has been unable to locate this foreman.

4) As explained in Conclusion of Law 3 below, Oregon law requires the Contractor to file at least three wage certifications concerning Contracts No. 52-04N7-5-20 and 52-04N7-5-24 before June 24, 1985, when the Contractor's foreman departed with records concerning the work on those contracts. The Contractor has offered no explanation for his failure to file those three certifications, and, absent any assertion or evidence to the contrary, this forum concludes that the Contractor could have filed them. Moreover, absent any assertion or evidence to the contrary, this forum concludes that the Contractor could have obtained from the Contractor the records concerning Contract No. 52-04N7-5-24 during the approximately 15 days between completion of work on that contract and the foreman's disappearance. Furthermore, absent any assertion or evidence to the contrary, the forum concludes that even without those

records, the Contractor could have taken steps to recreate at least some of the information required by the wage certifications. Absent any evidence or assertion to the contrary, this forum concludes that the Contractor took no such steps.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the subject matter and of the person herein.

2) As a person licensed and acting as a farm labor contractor with regard to the forestation or reforestation of lands in the State of Oregon during all times material herein, the Contractor was and is subject to the provisions of ORS 658.405 to 658.475.

3) During all times material herein, ORS 658.417(3) required the Contractor to provide to the Agency a certified true copy of all payroll records (wage certifications) for work done on Contracts No. 52-04N7-5-20 and 52-04N7-5-24. Specifically, as implemented by OAR 839-15-300, this statute required the Contractor to submit such a wage certification at least once every 35 days from the time he first began work on each contract. Accordingly, the Contractor was required to file a wage certification concerning work on Contract No. 52-04N7-5-20 by at least April 15, 1985, and again on May 20, June 24, and July 29, 1985. Concerning work on Contract No. 52-04N7-5-24, the Contractor was required to file a wage certification by at least June 3, 1985, and again on July 8, 1985. The Contractor has violated ORS 658.417(3) by failing to provide any of

these wage certifications to the Agency.

4) Under the facts and circumstances of this record, and according to the law applicable in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may assess a civil penalty against the Contractor, and the assessment of the sum of money specified in the Order below is an appropriate exercise of that authority.

OPINION

ORS 658.417 provides:

"* * * a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:

"* * *

"(3) Provide to the Commissioner of the Bureau of Labor and Industries a certified true copy of all payroll records for work done as a farm labor contractor when the contractor pays employees directly. The records shall be submitted in such form and at such times and shall contain such information as the commissioner, by rule, may prescribe * * *."

OAR 839-15-300 implements ORS 658.417(3) by providing that a contractor engaging in the work described in that statute must submit to the Wage and Hour Division of the Agency the required payroll records (wage certifications) at least once every 35 days from the time such work first begins. The same rule provides that such a submission must contain the information requested on Form WH-141, including, in pertinent part, the names, addresses, and social security

numbers of employees; their work classification(s); their total hours (and pieces if applicable); their rate(s) of pay; their gross amounts earned; the amounts deducted from these gross amounts, itemized; and the net wages paid them.

Herein, as a farm labor contractor, the Contractor engaged in the performance of two forestation or reforestation contracts, using employees he paid directly. Based upon the Contractor's receipt of the Notice to Proceed with work on the first contract (No. 52-04N7-5-20) on March 9, 1985, and the fact that the Notice made clear that the time for performing the contract would start to run on the following Monday, March 11, 1985, and in the absence of any assertion to the contrary, this forum has inferred that the Contractor's work on that contract first began no later than March 11, 1985. Work on that contract ended on or about July 4, 1985. Accordingly, pursuant to ORS 658.417(3), as implemented by OAR 839-15-300, the Contractor should have filed a wage certification concerning work on Contract No. 52-04N7-5-20 at least once every 35 days from March 11, 1985, i.e., by at least April 15, 1985, and again on May 20, June 24, and July 29, 1985. Likewise, based upon the Contractor's receipt of the Notice to Proceed with work on the second contract (No. 52-04N7-5-24) on April 25, 1985, and the fact that the Notice made clear that the time for performing that contract would start to run the following Monday, April 29, 1985, and in the absence of any assertion to the contrary, this forum has inferred that the Contractor's work on that contract

first began no later than April 29, 1985. Work on that contract ended on or about June 9, 1985. Accordingly, the Contractor should have filed a wage certification concerning work on Contract No. 52-04N7-5-24 at least once every 35 days from April 29, 1985, i.e., by at least June 3, 1985, and again on July 8, 1985. The Contractor did not file any wage certifications on either contract.

The only issue herein is whether the Commissioner should impose upon the Contractor the intended civil penalty of \$1,000 for these violations of ORS 658.417(3).

ORS 658.453(1) provides that the Commissioner may assess a civil penalty of up to \$2,000 for each violation by a farm labor contractor who fails to comply with ORS 658.417(3).

Herein, the Contractor failed to file six wage certifications required by ORS 658.417(3). Each of these failures to file a wage certification when lawfully due constitutes one violation of ORS 658.417(3). Accordingly, pursuant to ORS 658.453, the Commissioner may assess a penalty of up to \$2000 for each of those violations, or a penalty totally as much as \$12,000. Any circumstances which could explain the Contractor's failures to file may be relevant to determination of the amount of the penalty to be assessed, but they in no way change the fact that the Contractor has violated ORS 658.417(3) six times by these failures, or, therefore, affect the authority of the Commissioner to impose a penalty.

OAR 839-15-520(1) provides that in determining the amount of any civil penalty to be imposed, the Commissioner will take into consideration:

"(a) the past history of the violator in taking all necessary measures to prevent or correct violations of statutes or rules;

"(b) prior violations, if any, of statutes or rules;

"(c) the magnitude and seriousness of the violation;

"(d) any other mitigation circumstances."

The record contains no evidence or assertion concerning the above-cited factors (a) and (b). Concerning (c), this forum considers six failures to file wage certifications when due to be violations of, at the least, considerable magnitude and seriousness.

Concerning factor (d) above, the Stipulated Facts state that the Contractor could not prepare and file the wage certifications because the records necessary for formulating those certificates were in the control and custody of his foreman, E. Gallegos, who left the United States on or about June 24, 1985. For the following three reasons, the forum does not consider the unavailability of these records as of June 24, 1985, to be a circumstance which mitigates either the Contractor's violations herein, or, therefore, the penalty to be assessed against the Contractor for those violations:

1) The Contractor could have filed the three wage certifications which were due before June 24, 1985, while Mr. Gallegos was still in his employ.

2) OAR 839-15-400 requires a farm labor contractor to make and maintain for three years a variety of employment records, including almost all the information necessary to formulate wage certifications. To meet this

requirement, a contractor should endeavor to keep such records in a safe place, and therefore, logically, retrieve these records from the field as soon as possible. Accordingly, the Contractor should have obtained the employment records concerning contract No. 52-04N7-5-24 from his foreman during the approximately 15 days which elapsed from the completion of Contract No. 52-04N7-5-24 until Mr. Gallegos departed.

3) After Mr. Gallegos left with his records on or about June 24, 1985, the Contractor could have taken steps to at least partially reconstruct those records, to the extent necessary to comply with ORS 658.417(3). For example, he could have gathered the names and addresses and other employment data of the crew members still working on Contract No. 52-04N7-5-20, which was not completed until July 9, 1985. Presumably, he also could have referred to canceled payroll checks to ascertain the names of workers and amounts paid to them before June 24, 1985. In other words, the Contractor at least could have attempted to comply with the requirements of ORS 658.417(3), if he had chosen to do so, and he did not.

Finally, the forum notes that filing the wage certifications as soon as he recovers the records Mr. Gallegos took, as the Contractor states he intends to do, will not cure the Contractor's instant violations of ORS 658.417(3). Filing the Certifications at this time would not change the fact that those wage certifications were not filed within the 35 day period as required. Furthermore, for the above-described three reasons, such a filing, or intention

to file, would not and does not mitigate the Contractor's instant violations or the penalty to be assessed therefor.

Having found that the forum may assess civil penalties totaling up to \$12,000 against the Contractor for his violations herein, that those violations are of at least considerable magnitude and seriousness, and that the explanations offered for them are not circumstances which mitigate either the violations or the amount of the penalty to be assessed therefor, this forum has determined that assessment of a civil penalty of \$1,000 against the Contractor for those violations is not only well within the Commissioner's discretion, but an appropriate (and entirely reasonable) exercise of authority.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, the Contractor is hereby ordered to deliver to the Hearings Unit of the Bureau of Labor and Industries, Room 309, 1400 S.W. Fifth Avenue, Portland, Oregon 97201, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of ONE THOUSAND DOLLARS (\$1,000.00) plus any interest thereon which accrues, at the annual rate of nine per cent, between a date ten days after the issuance of this Order and the date the Contractor complies with this Order. This assessment is a civil penalty against the Contractor for his violations of ORS 658.417(3) found above.

In the Matter of
CHERYL MILLER,
formerly dba Miller Ceramics,
Respondent.

Case Number 08-85
Final Order of the Commissioner
Mary Wendy Roberts
Issued June 26, 1986.

SYNOPSIS

Respondent failed to pay claimant the minimum wage for all hours worked, and willfully failed to pay her wages immediately upon termination. Respondent, who defaulted by failing to appear at hearing, failed to show that she was financially unable to pay the wages at the time they accrued, and thus was liable for civil penalty wages. ORS 653.023(3), 652.140, 652.150.

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by Mary Roberts, the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on December 5, 1985, in the Conference Room of Suite 1 E-1 at 3865 Wolverine Street NE, Salem, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Jeff Van Valkenburgh, Assistant Attorney General of the Department of Justice of the State of Oregon. Cheryl Miller, formerly doing business as Miller Ceramics, (hereinafter the Employer) did not appear at the hearing either in person or through a

representative. Rose E. Cox (hereinafter the Claimant) was present throughout the hearing. The agency called the Claimant as its only witness. Not having appeared, the Employer did not present any evidence.

Having fully considered the entire record in this matter, the forum hereby makes 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 March 25, 1985, the Claimant filed with the Wage and Hour Division of the Agency a wage claim which alleged, in effect, that the Employer was the Claimant's former employer and that the Employer had failed to pay wages due to the Claimant.

2) On or about March 18, 1985, the Claimant assigned all wages due her from the Employer to the Commissioner of the Agency in trust for the Claimant.

3) On June 7, 1985, the Commissioner of the Agency issued an Order of Determination based upon the Claimant's above-cited wage claim. The Order of Determination found that the Employer owed the Claimant \$2,604 in unpaid wages for work the Claimant had performed under the Employer's employ, and \$774 in penalty wages, plus interest on both of those sums.

4) On or about June 13, 1985, the Employer, through a letter by her attorney, requested a hearing on the Order of Determination, and noted that she

contested "the issue" that she was an employer.

5) On September 4, 1985, this forum transmitted to the Employer, the Agency, and the Claimant a notice of the time and place of the hearing of this matter.

6) As part of that notice, this forum sent a document entitled "Information relating to Civil Rights or Wage and Hour Contested Case Hearings." At the commencement of the hearing, the Claimant stated that she had received and read this document and that she had no questions about it.

7) On or about September 9, 1985, the Employer asked the forum to change the location of the hearing from Salem, Oregon, to Madras, Oregon. The Agency opposed this request. Having concluded that the Salem hearing location would not be unduly burdensome to either the Claimant or the Employer, the Presiding Officer denied the Employer's request.

8) At the start of the hearing, the Agency moved to amend the Order of Determination to correct a typographical error in which "480" (the number of hours the Agency claimed the Claimant worked for the Employer) had been inadvertently transposed to "840." The Agency asked that "840" be deleted (where it appears in the Order of Determination) and that "480" be inserted in its place, and that, concomitantly, the amount of wages claimed (as noted in the Order of Determination) be changed from "\$2604" to "\$1488." This forum grants this motion, noting these changes by handwritten interlineation on the Order of Determination.

9) The Presiding Officer asked the Agency to submit the Claimant's wage claim and assignment of wages to the forum, which the Agency did after the hearing. The Presiding Officer admitted these documents as exhibits.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, the Employer owned and operated (as a sole proprietor) Miller Ceramics, a ceramics shop located in Yoncalla, Oregon. In that business the Employer employed one or more persons in the State of Oregon during all times material herein.

2) The Employer employed the Claimant at Miller Ceramics continuously from August 17, 1984, through November 16, 1984. The Claimant's duties in this employment evolved and expanded as she learned more and more about making ceramics: she performed the various activities involved in producing a ceramic product, helped shop customers, and taught some classes which the shop offered. Eventually, the Employer made the Claimant the manager of Miller Ceramics.

3) The Employer had hired the Claimant herself, setting the Claimant's starting wages at \$50 per week, to be paid weekly. As of September 3, 1984, the Employer raised the Claimant's wage rate to \$100 per week, telling the Claimant that she was doing a good job. When the Employer made the Claimant manager of the shop, she told the Claimant she was going to increase the Claimant's wage rate again.

4) In fact, the Employer never paid the Claimant any wages for the Claimant's work for her.

5) When the Claimant asked the Employer for her wages, the Employer told Claimant that she did not have enough money to pay her. However, the Employer kept the Claimant on the job by promising the Claimant that she would pay her.

6) During her employment by the Employer, the Claimant's basic work week was eight hours per day, five days per week (Monday through Friday), or a total of forty hours per week. Each time the Claimant returned home from work, she recorded the hours she had worked that day on her calendar. That calendar reflects, and the forum finds, that the Claimant worked a total of 60 eight-hour days for the Employer. The Claimant did not work over 40 hours in any seven-day period during her employment.

7) The Employer terminated the Claimant's employment by laying her off after the Claimant had completed her work on November 16, 1984. Shortly thereafter, the Employer moved to Madras, Oregon.

8) In a letter dated May 3, 1985, from the Employer (through David Glen, then her attorney) to an Agency representative, the Employer indicated (without elaboration) that she owed the Claimant \$1198.00 for her work, minus a claimed off-set of \$353.00 for glaze and pottery material which the Employer alleges that the Claimant took from Miller Ceramics.

9) The Claimant denies that she took any supplies or materials from Miller Ceramics. Because the Employer's assertion that the Claimant did take supplies is not supported by any sworn testimony or other substantiation, the Claimant's credible denial is deemed uncontroverted. Accordingly, this forum finds that the Claimant did not take any supplies or materials from Miller Ceramics.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, the Employer was a person who in the State of Oregon directly engaged the personal services of one or more employees in the operation of Miller Ceramics, a business which she owned.

2) From August 17, 1984, through November 16, 1984, the Claimant was an individual who (other than as a co-partner of the Employer or as an independent contractor) rendered personal services in various capacities, wholly in the State of Oregon, to the Employer in her below-described business. The Employer agreed to pay the Claimant for these services at a fixed rate, based upon the time the Claimant spent performing them.

3) The Claimant worked for the employer a total of 480 regular hours during her above-described employment.

4) The Employer has not paid the claimant any wages (or other compensation) for the Claimant's above-cited work.

* Although the Claimant sometimes also worked during weekend time, she did so as a "favor" to the Employer, and the Agency is not claiming wages for any weekend time.

** None of these hours were overtime, as that term is defined and described in ORS 653.261 and OAR 839-21-017; all were straight time hours.

5) The Employer discharged the Claimant, by laying her off, as of the conclusion of her work on November 16, 1984.

6) Because the claimant worked on the premises of the Employer's business continuously between the time the Employer personally hired her and personally discharged her, and in the absence of any evidence to the contrary, the forum infers that the Employer was aware, during all times material herein, of when Claimant was working. Based on this awareness, combined with the Employer's agreement to pay the Claimant weekly wages for work and the Employer's failure to pay her any wages for her sixty days of work, and in the absence of any evidence or assertion to the contrary, this forum concludes that the Employer intentionally and knowingly failed to pay the Claimant any wages for her work. As there is no evidence or assertion to the contrary, this forum also concludes that the Employer, a sole proprietor, acted as a free agent in so failing to pay the Claimant.

7) The Employer has not shown that she was financially unable to pay any of the above-cited wages due the Claimant at the time the wages accrued.

8) The Claimant's average daily rate of pay during her employment by the Employer was \$24.80. (This amount was calculated by multiplying \$3.10, the applicable minimum wage rate (see Conclusions of Law 4 below), by eight, the number of hours the Claimant worked each day.)

CONCLUSIONS OF LAW

1) During all times material herein, the Employer was an employer, and the Claimant was her employee, subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

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

3) Before the commencement of the contested case hearing, this forum complied with ORS 183.413 by informing the Employer and the Claimant of the matters described in ORS 183.413(2)(a) through (i).

4) The Agency has stated, and this forum has concluded, that the minimum wage rate for each hour of the Claimant's work for Employer was \$3.10, as set forth in ORS 653.023(3). Accordingly, the Employer was and is legally obligated to pay the Claimant wages computed at a rate of no less than \$3.10 per hour. Hence, for the Claimant's 40 hours of work per week, the Employer was obligated to pay her at least \$124.00, a sum which exceeds even the highest weekly wage rate the Employer set for the Claimant. Accordingly, the Employer was and is legally obligated to pay the Claimant \$3.10 for each of the 480 hours the Claimant worked for the Employer, or total gross wages of \$1488.00.

5) All of the \$1488.00 in wages the Claimant earned in the Employer's employ was unpaid, and became immediately due and payable, when the Employer terminated the Claimant's employment effective at the end of the Claimant's workday on November 16, 1984.

6) The Employer willfully failed to pay the claimant any of the Claimant's earned, due, and payable wages. Accordingly, and because the Employer has not shown that she was financially unable to pay those wages at the time they accrued, the wages of the Claimant continued, as required by ORS 652.150, at the average daily rate of \$24.80 from the due date thereof for 30 days, as penalty for the Employer's non-payment of the Claimant's earned, due and payable wages. As a result, the Employer has incurred penalty wages herein totaling \$774.00.

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 and must order the Employer to pay the Claimant the above-cited earned, unpaid, due, and payable wages and the above-cited sum in penalty wages, plus interest on those wages and penalty wages.

OPINION

Neither the Employer nor any representative of her appeared at the hearing of this matter. In fact, the Employer's request for a hearing and the Employer's May 3, 1985, letter to the Agency comprise the Employer's total contribution to the record herein. These exhibits contain nothing concerning the merits of this matter other than unsworn and unsubstantiated assertions. Having offered no evidence at all in support of those assertions, which are the only defenses to the Order of Determination which the Employer has raised herein, the Employer has defaulted in this matter.

In a default situation, the task of this forum is to determine if the Agency has made a prima facie case that the Employer has violated the law. ORS 183.415(6). In this matter, the evidence on the record shows that the Employer owes \$1488.00 in earned, unpaid, due, and payable wages to the Claimant, her former employee, and that the Employer has willfully failed to pay the Claimant any of those wages. This evidence is not only uncontroverted, but completed, credible, and persuasive, and the best evidence available, given the Employer's failure to appear, and it clearly constitutes a prima facie case that the Employer has violated ORS 652.140 and owes the Claimant penalty wages pursuant to ORS 652.150.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Cheryl Miller, formerly doing business as Miller Ceramics, to deliver to the Hearings Unit of the Bureau of Labor and Industries, Room 309, 1400 S.W. Fifth Avenue, Portland, Oregon 97201, a certified check payable to the Bureau of Labor and Industries in trust for ROSE E. COX in the amount of TWO THOUSAND TWO HUNDRED SIXTY-TWO DOLLARS (\$2262.00), (representing \$1488.00 in earned, unpaid, due, and payable wages, and \$774.00 in penalty wages) plus interest at the rate of nine per cent per year, for the period from December 1, 1984, until paid on \$1488.00, and for the period from January 1, 1985, until paid on \$774.00.

**In the Matter of
JOSE SOLIS,
dba Northwest Reforestation Com-
pany, Inc., Respondent.**

Case Number 02-85
Final Order of the Commissioner
Mary Wendy Roberts
Issued August 15, 1986.

SYNOPSIS

Respondent, a farm labor contractor, twice failed to provide certified payroll reports to the Agency, six times failed to furnish to workers a written statement meeting statutory requirements, knowingly employed six workers not legally present or legally employable in the United States, and failed to pay workers all wages due and owing. These violations reflected on Respondent's character, competence, and reliability and rendered him unfit to act as a farm labor contractor. After hearing, Respondent's license expired and he did not apply for renewal; the Commissioner assessed \$26,000 in civil penalties for the violations found. ORS 658.417(3); 658.440(1)(d) and (f), (2)(d); 658.453; OAR 839-15-510.

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on September 20, 1985, in Conference Room A of the Labor and Industries Building at 800 Center Street, Salem, Oregon, and on

November 5, 1985, in the Conference Room of Suite E-1 at 3865 Wolverine Street, N.E., Salem, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Renee Bryant Mason, Assistant Attorney General of the Department of Justice of the State of Oregon. Jose Solis, doing business as Northwest Reforestation Company, (hereinafter Contractor) was represented by Kathy Peck, Attorney at Law.

The Agency called as its witnesses Jerry Garcia, Compliance Specialist for the Wage and Hour Division of the Agency; Roberto Gutierrez, Rafael Zamudeo, and Rojelio Gutierrez, former employees of Contractor; Luis Caraballo, former attorney for the Oregon Legal Services Corporation, who currently works in some capacity for the Agency; and Camelia Gutierrez, wife of Rojelio Gutierrez.

Contractor called as his witnesses Adan Morfin, foreman for Contractor; Grace H. Solis, Contractor's wife; and Contractor himself.

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

**FINDINGS OF FACT –
PROCEDURAL**

1) Contractor applied to the Agency for renewal of his farm labor contractor's license for the licensing year which started February 1, 1985, and ended January 31, 1986.

2) By a notice dated January 23, 1985, the Agency informed Contractor that the Agency proposed to refuse to renew Contractor's farm labor contractor's license. This notice cited the following four bases for that proposal:

a) Contractor had failed to provide to the Agency a certified true copy of all payroll records relating to employees paid directly for specified work, in violation of ORS 658.417(3);

b) Contractor had failed to furnish each such worker with a written statement regarding the terms and conditions of employment, in violation of ORS 658.440(1)(f)(E);

c) Contractor had knowingly employed alien workers not legally present or legally employable in the United States during a specified time period, in violation of ORS 658.440(2)(d); and

d) In that Contractor had failed to pay wages owed in a timely manner, in violation of OAR 839-15-145(1)(c), his character, reliability, and competence made him unfit to act as a farm contractor.

3) By a letter dated January 24, 1985, Contractor, through his attorney, requested a hearing on the Agency's proposed action.

4) By a notice dated August 9, 1985, this forum notified Contractor and the Agency of the time and place set for the requested hearing and the designated presiding officer.

5) As part of the Notice of Hearing, the forum sent a document entitled "Information Relating to Civil Rights or Wage and Hour Contested Case Hearings." At the commencement of the hearing, Contractor stated that he

had received and read this document and that he had no questions about it.

6) At the commencement of the hearing, the Agency moved to amend its charges by deleting from its item 4 "OAR 839-15-145(1)(c)" and inserting in its place "ORS 658.445(3)." The Agency stated that the latter reference is more applicable to this matter than the former reference. Contractor agreed and did not object to the motion, and the Presiding Officer granted it. This amendment is noted on the document by handwritten interlineation. When they filed their closing arguments, the parties submitted a stipulation to amend the another paragraph to read as follows:

"You failed to provide to the Commissioner of the Bureau of Labor and Industries a certified true copy of all payroll records relating to employees paid directly for work performed at any time since August 1, 1983."

The forum made this amendment, admitted the stipulation, and noted this amendment by handwritten interlineation.

7) At the hearing, Agency witnesses Roberto and Rojelio Gutierrez and Rafael Zamudeo could not readily understand and communicate in the English language, but they could do so in the Spanish language. At the request of the Agency, and with no objection by Contractor, the Presiding Officer, after inquiry, deemed Camelia Gutierrez, Jerry Garcia, and Luis Caraballo "qualified" translators under ORS 183.418(3)(b). Accordingly, the Presiding Officer appointed them to act in this capacity during the hearing, and, one at a time, they did.

8) On November 15, 1985, the Agency submitted written closing arguments, and on December 3, 1985, Contractor did the same. These arguments have been admitted as exhibits.

9) By letter dated January 8, 1986, the Presiding Officer notified the Agency and Contractor that, pursuant to ORS 183.450(4), she had taken official notice of the existence and effective period of a temporary Agency rule entitled "Wage Certification Form." At the same time, the Presiding Officer afforded the Agency and Contractor the opportunity to contest this noticed fact required by ORS 183.450(4). Neither did so.

10) As of January 31, 1986, Contractor had not applied to renew his Oregon farm labor contractor's license for the licensing year which began on February 1, 1986.

11) In February 1986, Agency counsel Bryant-Mason notified Contractor's counsel Peck that the issues of revocation of and refusal to renew Contractor's farm labor contractor's license herein had been mooted by Contractor's failure to renew his 1985 farm labor contractor's license. At this time, Ms. Bryant-Mason also notified Ms. Peck that she intended to ask to re-open the record herein in order to put that fact into it, and to ask the forum to assess civil penalties for violations found herein. Ms. Peck, having been unable to otherwise reach Contractor, notified him of Ms. Bryant-Mason's statements by letters dated February 20 and March 26, 1986.

12) The Proposed Order in this proceeding was issued on March 31, 1986. At that time, the record contained no information as to the status

of Contractor's farm labor contractor's license after the January 31, 1986, close of the 1985 licensing year.

13) On or about April 10, 1986, Ms. Peck resigned as counsel for the Contractor.

14) On April 16, 1986, the Agency filed a Motion to Re-Open the Record in this matter for the purpose of supplementing the record with new information which, the Agency alleged, might materially affect the Proposed Order. This motion has been admitted as an exhibit. On the same day, the Agency sent a copy of this motion to Ms. Peck. On May 9, 1986, having received notice that Ms. Peck no longer represented Contractor, the forum sent the Agency's motion directly to Contractor and informed Contractor that if he did not file a written response to it within 10 days, the forum would assume he had no objection to it. Contractor made no response to the Agency's motion to re-open the record or to the forum's letter and the forum grant that motion.

15) Thereafter, by telephone and by letter dated May 19, 1986, Ms. Bryant-Mason contacted Contractor and informed him that she had moved to re-open the hearing to introduce evidence of his failure to renew his farm labor contractor's license and to request that the forum impose civil penalties of up to \$2,000 for each violation found herein, or up to a total of \$32,000 or more.

16) In her May 19, 1986, letter, Ms. Bryant-Mason also informed Contractor that she would consider settling this matter for a specified sum paid on or before June 11, 1986. On or about June 4, 1986, Contractor agreed by telephone to this settlement and

represented that he would deliver a check for the specified amount to Agency counsel at a given time on June 9, 1986. Agency counsel informed him that it would proceed to re-open the hearing and request civil penalties if it did not receive the check as promised.

17) On June 9, 10, and 11, 1986, Agency counsel tried to contact Contractor by telephone. Agency counsel left messages with his housekeeper that if they did not receive his settlement check by June 11, 1986, they would proceed with their request to assess civil penalties.

18) On June 12, 1986, the Agency offered two affidavits into the record, pursuant to its reopening. In the first affidavit, Margaret Pargeter, supervisor of the Agency's Licensing Unit, made sworn statements as to whether Contractor had applied for a farm labor contractor's license for the licensing year starting February 1, 1986, and as to whether he was a licensed farm labor contractor in Oregon. In the second affidavit, Agency counsel made sworn statements describing its contacts with Contractor's counsel concerning the reopening of this record. Two letters from Contractor's counsel to Contractor and one letter from Agency counsel to Contractor were attached as exhibits to that affidavit. The Agency sent copies to Contractor. He made no submission to the forum in response thereto.

As these affidavits and attached exhibits are relevant to the issue of what action the forum may and should

take against Contractor herein, and in the absence of any objection by Contractor, they are admitted as exhibits: Ms. Pargeter's affidavit, Agency counsel's affidavit and exhibits thereto, and the cover letter have been admitted as exhibits.

19) Contractor has not applied to renew his Oregon farm labor contractor's license for the licensing year which began February 1, 1986. Accordingly, at this time, Contractor is not a licensed farm labor contractor in the State of Oregon.

FINDINGS OF FACT – THE MERITS

A. General

1) Contractor is a natural person who, pursuant to ORS chapter 658, has been licensed as a farm labor contractor by the State of Oregon for approximately ten years.

During all times material herein Contractor, as a sole proprietor, owned and operated Northwest Reforestation Company, a business which hired, recruited, solicited, and employed workers to perform labor in Oregon in the reforestation of lands, including but not limited to the planting and thinning of trees. Contractor's workers performed labor pursuant to certain contracts entered into between Contractor and Crown Zellerbach Corporation, a Nevada corporation (hereinafter called Crown Zellerbach). Contractor performed these activities for remuneration or a rate of pay agreed upon in those contracts.

2) Beginning August 13, 1983, Contractor employed a six-person

* The forum presumes that, having offered as exhibits documents stemming from Contractor's failure to apply for this license, the Agency would have advised the forum if, after their dates, Contractor had applied for the license.

crew to thin 232 acres of forest on a tract of land known as Unit 321 near Seaside, in Clatsop County, Oregon, pursuant to a precommercial tree thinning contract entered into by Crown Zellerbach and Contractor on July 8, 1983. The members of that crew were Roberto Gutierrez, Rojelio Gutierrez, Salvador Orosco (then known as Rafael Zamudeo), Jose Chavez, Enrique Ramirez, and Anjel (last name unknown). Hereinafter, this contract/job will be referred to as the Unit 321 contract/job, and this particular group of individuals as the Unit 321 crew.

3) At all material times herein, Contractor employed Adan Morfin as his foreman. Mr. Morfin's duties included recruiting, hiring, and overseeing workers, including the Unit 321 crew. During times material, Mr. Morfin had worked for Contractor about ten years and had been foreman for the previous approximately five years.

4) The day before the Unit 321 crew began work, Mr. Morfin had brought its members to meet with Contractor at Contractor's home office in Salem, Oregon. Contractor hired the Unit 321 crew, agreeing to pay it, upon completion of the Unit 321 contract to Crown Zellerbach's satisfaction, a total of \$45.00 for every acre it had thinned. Contractor also agreed to advance the crew monies, during the crew's performance of the Unit 321 contract, to cover various living expenses. The crew was to repay these advances at completion, through deduction of the total amount advanced from the amount the crew had earned.

No part of this oral agreement was reduced to writing, and the Unit 321 crew members did not sign anything

allowing Contractor to deduct the amount of money advanced from their pay.

5) The Unit 321 crew started working on the Unit 321 contract on August 13, 1983. During the Unit 321 job, Mr. Morfin, overseeing work on three different jobs at once, visited the Unit 321 job site at least two hours every day. Contractor never visited the Unit 321 crew while it was working.

6) As of approximately September 6, 1983, Anjel resigned from the Unit 321 crew, due to illness.

7) On September 30, 1983 (according to Contractor), or October 8, 1983 (according to the Agency), all of the remaining Unit 321 crew except Enrique Ramirez quit its employment, in a dispute with Mr. Morfin over an advance of money for repair of a truck.

Mr. Morfin did not know that the crew had resigned until Mr. Ramirez came and told him that the crew had left and did not want to work for him anymore. As the Unit 321 job was not completed, Contractor had a replacement crew, plus Mr. Ramirez, begin work on the contract two days after the Unit 321 crew left. Those workers finished the Unit 321 contract sometime between October 27, 1983, when Mr. Morfin received his payment for that job from Contractor, and November 8, 1983, when Crown Zellerbach issued its final check to Contractor for completion of that contract.

8) At hearing, Mr. Morfin testified that he kept records of the advances he gave the Unit 321 crew, consisting of a book noting each advance and a book of the receipts he had each recipient sign upon receiving an

advance. Contractor maintains that sometime after the contract was completed, Contractor's payroll records concerning the Unit 321 contract (consisting of Mr. Morfin's above-described advance records as well as all of Contractor's records based thereon and pertaining to the Unit 321 crew's employment) were lost. Ms. Solis, Contractor's bookkeeper, testified that after she computed the earnings and net wages of the Unit 321 crew, using Mr. Morfin's advance records and his information as to their earnings, she returned his records to him and gave him her computations so that he could show them to the Unit 321 crew. Mr. Morfin testified that he left all those records in the door pouch of his truck when he sold it. Mr. Morfin testified that when Contractor told him he needed the advance records and he could not find them, he returned and asked the dealer to whom he had sold the truck about the records, and the dealer said he had not seen any papers and had sold the truck to someone else the day after Mr. Morfin had sold it to him.

Mr. Morfin testified that he told Contractor he had lost the records. Contractor testified that he first became aware of the loss when Mr. Morfin told him about it after he came back from California, some time in the latter part of 1983 or early part of 1984.

9) The evidence as to whether, and if so when, these records were lost is very inconsistent.

a) In November and December 1983, Contractor and Mr. Morfin met with Luis Caraballo of Oregon Legal Services (hereinafter OLS) concerning wage claims regarding Unit 321 work

which the Unit 321 crew (excepting Anjel and Mr. Ramirez) had brought to OLS. Contractor and Mr. Morfin brought a single sheet of paper detailing what Mr. Morfin had purportedly paid out to the Unit 321 crew (advances, rents) and what the crew had earned. According to this sheet, the former exceeded the latter, so the Unit 321 crew owed Contractor money. Contractor and Mr. Morfin indicated that a substantial part of the information on that sheet was from recollection and odds and ends they had kept. When OLS asked if they had their regular business records or checks stubs, etc., Contractor and Mr. Morfin indicated that they were not aware of where their records were at present, and that they would talk with their accountant and then provide OLS with that documentation as well as receipts for food and other expenses. OLS never received any such records

b) On October 17, 1984, Contractor told Agency Compliance Specialist Jerry Garcia, in connection with this matter, that Mr. Morfin had Contractor's Unit 321 payroll records with him and that Contractor would produce them when Mr. Morfin returned to Oregon on November 19, 1984.

c) On December 3, 1984, Compliance Specialist Garcia interviewed Mr. Morfin in connection with this matter, in Contractor's presence. Mr. Garcia's verbatim rendition of the questions he asked and the answers Mr. Morfin provided appears in an exhibit herein. According to pertinent parts of that rendition, Mr. Morfin first indicated he did not keep records of advances he gave the Unit 321 crew, and then said that he did keep records concerning

wages due the Unit 321 crew. When asked if he had those records with him, he replied, "No, I left them in my truck, in the door pouch and I sold my truck about four months ago, so I don't have them." "Four months ago" would have been August 1984.

d) At hearing, Mr. Morfin testified that he sold his truck right after the time the Unit 321 contract was finished (i.e., according to Finding of Fact 7 above, sometime after October 27, 1983) and returned to the dealer to seek the lost records soon thereafter.

e) Ms. Solis testified that when she asked Mr. Morfin to return the records concerning the Unit 321 crew, he said he left them in his truck and would bring them to her. Thereafter, he sold that truck. After that sale, Mr. Morfin told Ms. Solis that he thought that he had had the records Ms. Solis requested in a house, but he remembered leaving them in the truck when he sold it.

Given these inconsistencies and contradictions in the testimony and other statements by Mr. Morfin, this forum cannot conclude that he ever kept the records alleged or that, if he did, he lost them as he alleges.

10) For the reasons stated in Section 1 of the Opinion below, which is incorporated by reference herein, this forum has found Mr. Morfin to be the least credible of the witnesses who appeared before it in this matter. Moreover, this forum cannot necessarily view his testimony as accurate or truthful. Therefore, this forum has given it little weight where it is controverted by any other credible evidence. Accordingly, where the testimony of Mr. Morfin conflicts with other credible evidence, this

forum has adopted that other credible evidence as fact. Furthermore, where the testimony of Mr. Morfin is inconsistent, this forum has adopted as his testimony whichever version is least favorable to his interests herein.

B. Concerning the Charge that: the Contractor Failed to Provide to the Commissioner of the Bureau of Labor and Industries a Certified True Copy of All Payroll Records Relating to Employees Paid Directly for Work Performed At Any Time Since August 1, 1983, in violation of ORS 658.417(3)

11) On August 1, 1983, twelve days before work on the Unit 321 job commenced, ORS 658.417 became effective. It read:

"Additional requirements for reforestation activities. In addition to the regulation otherwise imposed upon farm labor contractors pursuant to ORS 659.405 to 658.475, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:

"* * *

"(3) Provide to the Commissioner of the Bureau of Labor and Industries a certified true copy of all payroll records for work done as a farm labor contractor when the contractor pays employees directly. The records shall be submitted in such form and at such times and shall contain such information as the Commissioner, by rule, may prescribe." Or Laws 1983, ch 264.

12) On August 2, 1983, the Agency promulgated the following temporary rule:

"Wage Certification Form

"1. Each person acting as a Farm Labor Contractor engaged in the forestation or reforestation of lands must submit a certified true copy of all payroll records to the Bureau of Labor and Industries when the contractor or the contractor's agent pays employees directly.

"2. The certified true copy of payroll records may be submitted on Form WH-141. A sample of this form is available to any interested person and is attached to these rules as Appendix 1. Any person may copy this form or use a similar form provided such form contains all the elements of Form WH-141.

"3. The certified true copy of payroll records shall be submitted at least once every 35 days starting from the time work first began on the forestation or reforestation of lands. More frequent submission may be made.

"4. The certified true copy of payroll records shall be submitted to: Wage and Hour Division, Farm and Forest Labor Contract Licensing, 309 State Office Building, Portland, Oregon 97201."

13) In August 1983, the Agency informed all licensed Oregon farm labor contractors of the new statute and sent forms to aid them in compliance.

14) As noted in Contractor's Closing Argument, Contractor admits that:

a) He failed to submit to the Commissioner of the Agency a certified true copy of payroll records concerning employees who worked on the Unit 321 contract; and

b) He has not since submitted certified true copies of payroll records concerning employees paid directly for work performed.

15) The admission noted in section (b) of the previous Finding of Fact is irrelevant herein, because the record contains no evidence as to whether Contractor has engaged in forestation or reforestation contracts for which he has paid employees directly, and has thereby incurred any obligation to file wage certifications under ORS 658.417, since the completion of the Unit 321 contract.

16) Contractor testified that he understood, during all times material herein, that he was required to file wage certifications for employee advances if the employees were paid. However, he stated that he did not believe he was required to file such documents concerning the Unit 321 crew, as it was never paid; it was simply advanced moneys. Contractor alleges that as he does not consider advances on payroll or draws to be wages, he determined that there was nothing to report concerning that crew.

However, Contractor also maintains that through the sums he advanced the Unit 321 crew, which he alleges exceed wages earned, he fully paid the Unit 321 crew.

17) Even if the forum believed that Contractor's contention that his payroll records concerning the Unit 321 crew were lost at some point, that loss

occurred, at the earliest, after the contract was completed, i.e., no earlier than October 27, 1983.

18) Until Mr. Morfin's December 3, 1984, interview with Compliance Specialist Garcia, Contractor never informed the Agency that his payroll records concerning the Unit 321 employees were lost. Contractor did not make any attempts to re-create the lost records, i.e., to submit what he could in an effort to comply with laws requiring actions by him based upon those records.

C. Concerning the Charge that: the Contractor failed to furnish each worker employed on the Crown Zellerbach tree thinning contract (Unit 321) a written statement regarding the terms and conditions of employment, in violation of ORS 658.440(1)(f)

19) Contractor admits, and the forum finds, that Contractor failed to furnish to any worker employed on the Unit 321 contract a written statement regarding his or her terms and conditions of employment.

20) Contractor maintains that sometime in 1984 he learned that he is legally required to furnish to each of his workers a written statement describing the terms and conditions of employment. Contractor further asserts that as a result of that discovery, Contractor has since provided to each of his employees, before he or she has commenced employment with him, a completed copy of the proper form (an exhibit herein) in English or Spanish, whichever is appropriate. Although the text of the printed portions of this exhibit is indecipherable, this exhibit appears to be the form issued by the

Agency which, if completed, can be used to comply with the above-cited requirement. The blank spaces on this form contain printing indicating that it pertains to a contract for work between April 22 and May 22, 1985.

D. Concerning the Charge that: the Contractor knowingly employed alien workers not legally present or legally employable in the United States during the period August 13, 1983, through October 8, 1983, in violation of ORS 658.440(2)(d)

21) During all material times herein, Contractor knew it was a violation of law to knowingly employ an alien not legally present or legally employable in the United States.

22) All of the six persons on the crew Contractor hired in August 1983 to perform the Unit 321 contract were at that time aliens not legally present or legally employable in the United States.

23) Contractor testified that he did not know, during times material or at hearing, whether any member of the Unit 321 crew was not legally present and employable in the United States. Mr. Morfin testified that he did not know if those crew members were "illegal" or not.

24) When Contractor hired the six members of the Unit 321 crew, the only precaution he took against hiring aliens not legally present and employable in the United States was to ask them if any of them had a driver's license and, when they responded affirmatively, to inspect the driver's license of one of them. Contractor asked about the driver's license for insurance reasons, as one crew

member was going to drive Contractor's truck.

25) On May 7, 1982, Contractor entered into a Consent Order with the Agency in which he "acknowledged and represented" that he would "take appropriate steps calculated to insure compliance with ORS 658.440(2)(d) by himself or by any of his partners, agents or employees engaged in his business as a farm labor contractor."

26) Contractor testified that ever since he signed this Consent Order, the only thing he has done to comply with ORS 658.440(2)(d) is ask employees or potential employees who were going to drive on-the-job to show him a driver's license. Contractor has not required any applicant or employee to show him (or Mr. Morfin) any other identification.

Contractor further testified that as far as he is concerned, a driver's license is acceptable proof that the bearer is legally employable and present in the United States (because one must present about three pieces of identification to obtain it), as is a green card or birth certificate (but not a social security card).

27) There are numerous forms of documentation which indicate that their subject is legally present and legally employable in the United States. For example, for aliens, an alien registration card or Form I-94 with an employment endorsement, both issued by the US Immigration and Naturalization Service (hereinafter INS), documents that status. A passport of the United States, or a birth or baptismal certificate showing birth in the United States, indicates that its subject is a citizen of the United States.

28) To obtain an Oregon driver's license, a person must present proof of age, but not proof of legal presence or employability in the United States. Consequently, an Oregon driver's license is not, and is not generally viewed as, proof of its subject's legal presence or legal employability in the United States.

29) Contractor testified that if a worker volunteered to show him documentation of the worker's status in the United States, and that documentation looked like it might be invalid, Contractor would make and keep a photocopy of it.

30) Contractor testified that he did not and does not take any further steps to ask his applicants or workers to document their status in the United States because as far as he knew or knows, it is not legal for him to do so.

Contractor testified that he was told by an attorney that he could not demand to see a prospective employee's documentation of status in the United States; he could simply ask if his employees had identification. Contractor agreed that he can legally ask to see the driver's license of each of his applicants or employees.

31) When asked if he had checked with INS to ascertain how he could legally determine if a person was legally present and employable in the United States, Contractor responded that what he did was ask an "immigration judge," in connection with the above-mentioned Consent Order, how he could interrogate applicants thoroughly, without violating their civil rights, unless he was an INS agent. Contractor did not state the judge's

response (except to clarify that the judge did not make him an INS agent).

32) Contractor admitted that he has never asked INS to verify an applicant's or employee's status in the United States or his or her documentation of that status. Contractor stated that although he knew he could call INS, he did not know that INS would verify such documentation for him.

33) According to the testimony of Roberto Gutierrez, Rafael Zamudeo, and Rojelio Gutierrez, Mr. Morfin hired them and three other crew members knowing that they were not legally present and legally employable in the United States. They testified, in essence, that:

a) Mr. Ramirez and Rojelio Gutierrez obtained work for the crew from Mr. Morfin, after explaining to him that three members of the crew (Messrs. Zamudeo, Chavez, and Roberto Gutierrez) were in California.

b) Needing workers, Mr. Morfin drove to California with Mr. Ramirez to pick up the three missing crew members and transport them back to Oregon, while Rojelio Gutierrez and Anjel began helping the Contractor complete another contract.

c) Roberto Gutierrez and Mr. Zamudeo explained to Mr. Morfin that they were in California because they had been picked up by INS and deported to Mexico together, and had just re-entered the United States (illegally).

d) When Roberto Gutierrez and Mr. Zamudeo asked Mr. Morfin if there would be any problems concerning "immigration," Morfin answered negatively.

e) Right before starting work, Rojelio Gutierrez told Mr. Morfin, in effect, that he was not legally employable and legally present in the United States.

f) Mr. Morfin never asked the crew if its members were legally present and employable in the United States, and he did not ask any of them for any identification or documentation of their status in the United States.

g) Neither Mr. Zamudeo, Roberto Gutierrez, Mr. Chavez, nor Rojelio Gutierrez had counterfeit documentation when they were hired by Mr. Morfin.

34) Taken together, Contractor and Mr. Morfin deny all of the allegations stated in the previous Finding of Fact before item (f).

Mr. Morfin testified that since he had three other crews to supervise, he stayed in Seaside during the summer of 1983. He further testified that since there were many people in the immediate area who are available to work, he did not need to travel to California to obtain employees.

35) As stated in Section (c) of Finding of Fact 9 above, on December 3, 1984, Contractor and Mr. Morfin met with Agency Compliance Specialist Garcia, who specializes in farm labor contractor matters. According to Mr. Garcia's verbatim written rendering, during that meeting, in the presence of Contractor, Mr. Garcia asked Mr. Morfin the following questions, to which Mr. Morfin gave the following answers:

"Q. Did you keep a record of what you gave them (Rojelio and Roberto Gutierrez, Jose Chavez, and Salvador Orosco), or did you have them sign anything for the money?"

"A. No, I just paid them in cash! Like when * * * Another time Rojelio came to my house asked to borrow \$500.00 for passage for Roberto, Anjel and Rafael up, because Immigration had picked them up!

"* * *

"Q. Did you ask if these men were here legally?"

"A. No, I did not ask for any papers. Roberto and Rafael told me they had been picked up by Immigration before!"

At hearing, Mr. Morfin testified, with regard to the first answer above, that "Immigration" never picked those people up while they worked for him, and he never heard of any problems from "Immigration." Mr. Morfin also stated that he advanced \$500 for Rojelio to pay rent for his apartment in Washington. With regard to the second above question and answer, Mr. Morfin testified that he "never heard that" and never told Mr. Garcia that. He stated that he did not know why Mr. Garcia would have written down the above second answer. However, when asked what he did tell Mr. Garcia about these employees, Mr. Morfin stated he did not recall. Contractor denied hearing Mr. Morfin comment to Mr. Garcia that any of these Unit 321 crew members had been deported.

36) Based upon this forum's assessment of Mr. Morfin's relative credibility recited in Finding of Fact 10 above, as well as the fact that his testimony as to his knowledge of the undocumented status of the Unit 321 crew is controverted by the unequivocal testimony of several crew

members and his own earlier statements to the Agency, this forum finds that Mr. Morfin knew, at least by the time the Unit 321 crew went to work, that its members were not legally present or legally employable in the United States.

37) Contractor testified that he did not have any reason to believe any member of the Unit 321 crew was not legally present and employable in the United States. He stated that Mr. Morfin never said anything to him about these employees being "illegal" aliens or having been deported.

E. Concerning the Charges that: The Contractor's character, reliability, and competence make him unfit to act as a farm labor contractor in that he failed to pay wages owed in a timely manner, in violation of ORS 659.445(3)

38) There is no evidence that Contractor did not fully pay Mr. Ramirez, the one member of the Unit 321 crew who completed that contract, at the time of completion. After completion, Enrique told the crew that Contractor had fully paid him (but he did not tell them how much). Accordingly, this forum concludes, for purposes of this particular charge only, that Contractor timely paid Mr. Ramirez' wages.

39) Determining the wages due the other Unit 321 crew members at the time four of them quit the Unit 321 job involves ascertaining the numbers of acres these workers had thinned at the end of their last day of work on the Unit 321 contract, multiplying that number by their piece rate wage of \$45 per acre, and subtracting from the resulting total wage figure the total amount of wage advances received by those

workers from Contractor during their employment.

40) After discovering that the Unit 321 crew (minus Mr. Ramirez) had quit and left the job, Mr. Morfin informed Contractor of this. Contractor instructed Mr. Morfin to calculate how much money he had advanced to the crew, and to ascertain how much the crew had earned by finding out from Crown Zellerbach how many acres it had thinned.

1. The Amounts of Wages Earned:
The Number of Acres Thinned

41) At Contractor's direction, Mr. Morfin had another crew, plus Mr. Ramirez, finish the Unit 321 contract after the Unit 321 crew quit. The Agency and Contractor dispute how much of the Unit 321 job's 232 acres was completed by the Unit 321 crew and how much was done by the crew which replaced the Unit 321 crew.

42) The Agency maintains that the Unit 321 crew left work on October 8, 1983, and that according to the best evidence available, as of October 7, 1983, approximately 148 acres had been thinned on the Unit 321 project.

43) At hearing, the testimony of Agency witnesses as to when the crew members completed their last day of work on the Unit 321 contract was very inconsistent.

During their employment on that contract, the crew members main-

tained a daily log of their hours of work, which includes notations of work hours starting on August 8, 1983, and ending on September 30, 1983.

Roberto Gutierrez testimony concerning the date of the crew's last day of work varied. However, after carefully analyzing all of it, the forum has concluded that Mr. Gutierrez is not sure when that last day was, but (he) believes that all the work time of the Unit 321 crew is noted in the daily log.

Rafael Zamudeo testified that he does not remember when the last day of work of the Unit 321 crew was. He also testified that he is not sure if the daily log accurately reflects all the crew's work hours, because the crew sometimes may have forgotten to note those hours during the course of a day.

Rojelio Gutierrez, who is Roberto Gutierrez's brother, testified that the crew worked an additional week (after September 30, i.e., through October 8, 1983) and that there had been one more page attached to the back of the daily log noting the hours the crew worked that week. When asked to explain why it was no longer attached, he testified that the crew left the log, with that page, in a truck which Mr. Ramirez took to Longview, and they never got that page back from Mr. Ramirez. He later added that the last page was torn up by Mr. Ramirez's small child.

* The forum sets aside the potential question of whether Contractor could lawfully deduct any advances from the wages the Unit 321 crew earned, given the fact that he had not obtained written authorization from any of the crew to withhold, deduct, or divert such advances from their wages, as required by ORS 652.610. Although the Agency mentioned this statute, it did not assert, for purposes of this matter, that Contractor was not entitled to deduct the advances it gave the Unit 321 crew from that crew's earnings.

Luis Caraballo gave testimony as to what the Unit 321 told him about their quit date when they contacted OLS during the Fall of 1983 concerning their wages for the Unit 321 contract. However, Mr. Caraballo's testimony, offered on both hearing dates, was contradictory as to whether or not the crew gave him any explanation of why their log of hours ended earlier than their claimed quit date. Accordingly, this forum must ignore Mr. Caraballo's testimony on and stemming from that point.

44) Approximately every two weeks during the performance of a Crown Zellerbach farm labor contract, as part of that company's procedure for calculating its periodic payments to contractor, a Crown Zellerbach inspector estimates how much of the contract has been completed. Pursuant to this process, and as documented, Crown Zellerbach estimated that, and paid the Contractor as if, 148 acres had been thinned on the Unit 321 project as of October 7, 1983. The Agency is relying upon this and its evidence that the Unit 321 crew quit work on October 8, 1983, to prove that the Unit crew completed work on 148 acres.

45) Contractor argues that it is unlikely that the routine progress check described in the previous Finding was conducted exactly contemporaneously with the Unit 321 crew's completion of its last day of work.

46) Mr. Morfin testified at hearing that the Unit 321 crew quit on September 30, 1983, but he previously told the Agency on December 3, 1984, that he did not remember when it quit. Therefore, this forum finds that Mr. Morfin does not recall when the crew quit.

Contractor has no independent knowledge of when they quit.

47) Contractor maintains that the Unit 321 crew thinned 122 acres and that the remaining 26 acres thinned on the Unit 321 contract were thinned by the replacement crew.

The first thing that Contractor and Mr. Morfin did after learning that the Unit 321 crew had quit was determine what these crew members had earned. To accomplish this, Mr. Morfin contacted Marie Swanson, inspector for Crown Zellerbach, and requested that she inspect the Unit 321 work site to determine the number of acres thinned on the contract. Ms. Swanson did this, apprising Mr. Morfin of her estimate by providing him with a map of the job site (the front page of the Unit 321 contract) with a yellow sticker affixed to it identifying the number of acres thinned as 122. Both Contractor and his wife also saw this map and sticker. Contractor's position that the Unit 321 crew thinned 122 acres is based entirely upon this sticker; neither he nor Mr. Morfin had any other basis for ascertaining the acreage this crew thinned.

48) If the forum believes that the Unit 321 crew quit work on September 30, 1983, Contractor's above-cited evidence that the crew had completed 122 acres when it quit is corroborated by Crown Zellerbach routine October 7, 1983, estimate of acreage completed on this contract. According to all such periodic Crown Zellerbach estimates and Mr. Morfin, the Unit 321 job progressed at the rate of about 40 acres per two weeks. One can extrapolate from the October 7, 1983, estimate of 148 acres completed

that, at the latter rate, about 128 acres or less had been completed on September 30, 1983.

49) If the crew left work on September 30, 1983, having completed 122 acres, as Contractor contends, they had earned \$5490. If they left work on October 8, 1983, having completed 148 acres, as the Agency contends, they had earned \$6660.

2. The Amount of Advances Made to the Crew

50) Contractor gave cash for advances to Mr. Morfin, which Mr. Morfin was in turn to disburse to the Unit 321 crew in cash.

51) Mr. Morfin testified that it was his policy to require employees to sign for advances they received. Mr. Morfin further testified that each time he gave money to the Unit 321 crew, he noted the day and the name of the recipient (and presumably the amount) in a money receipt book. Mr. Morfin also testified that he gave the crew a copy of the receipts for the advances they had received.

The three crew members who testified denied that Mr. Morfin had the crew sign, or gave the crew a copy of, any receipt for the money he advanced to them.

52) Mr. Morfin testified that normally, every two weeks, Mr. Morfin gave Contractor an (apparently oral) accounting of how many acres he figured had been done and how much money he had advanced the workers.

53) The exact amount of money which Mr. Morfin advanced to those crew members is the subject of considerable dispute. This dispute is compounded by the lack of any records of

Contractor concerning those advances, occasioned according to Contractor by Mr. Morfin's loss of all records pertaining to those crew members' employment, including the receipts for those advances. Contractor admits that he has no specific records providing the exact amount of advances made to the Unit 321 crew members.

54) So that Mr. Morfin could make advances to the employees who worked on the Unit 321 contract, Contractor advanced Mr. Morfin a total of \$6,000 in cash. No portion of this sum was returned to Contractor unused.

55) Mr. Morfin testified that after he called Contractor to report that the crew members had left the job site, he received instructions from Contractor to determine whether the crew members had been properly paid. In response, Mr. Morfin reviewed the advance receipts then in his possession and determined that the crew members had been paid approximately \$5,200. Mr. Morfin testified that after comparing this figure with the amount the crew had earned, Morfin figured that he had advanced the crew more money than it had earned. He reported this to Contractor. Contractor testified that when Mr. Morfin told him this, Contractor told him to "let it go at that" or to "figure things out" if the crew came back.

56) Rojelio Gutierrez, Roberto Gutierrez, and Rafael Zamudeo identified the figures set forth in an exhibit as the Unit 321 crew's accurate recording of the advances they received from Mr. Morfin.

57) The exhibit is labeled, in pertinent part, "prestamos para comedor

selebe Adan," roughly translated as "advances for food from Adan (Morfin)." The total amount acknowledged as being received in advances by the crew members according to the exhibit is \$2,139. The Agency contends that this is the total amount of expenses for which the crew was responsible, and therefore the total amount which may be deducted from their earnings on the Unit 321 contract. The testimony and other statements of crew members, however, is far from clear on that point. For example, although all appeared to agree that advances were made for expenses other than food, no one could explain why the title of the exhibit limited its scope to advances for food. In fact, each witness contradicted himself as well as the other crew members in attempting to explain the scope of the exhibit, and to explain which disbursements by Mr. Morfin were advances to be deducted from wages and which were expense payments which, according to some of their testimony, were not to be deducted from wages. For example, although crew members agreed that they were to repay Contractor for Mr. Morfin's payment of the rent for the housing they used while working, their testimony varied greatly as to whether that rent was included on this exhibit and if so, where. Another example was whether the sizable and allegedly numerous advances made to individual crew members were to be deducted from the group's earnings and the extent to which, and where, the exhibit included such advances. From the testimony of the crew members, it was impossible for the forum to ascertain whether each figure on the exhibit represents one or a group of advances. No crew

member could explain the significance of the figure \$505 appearing on the lower right hand corner of the exhibit; no one could state whether it should be added to the \$2139 total on the lower left or not. In short, this forum is not able to ascertain with any degree of certainty just what the exhibit represents, much less conclude that it constitutes probative evidence that the deductions to be made from the Unit 321 crew's earnings totaled \$2139.

58) When faced with the fact that there was a \$290 gap between what he testified the Unit 321 crew had earned and what he testified he advanced them, Mr. Morfin testified that he did not try to contact the crew and settle up the accounts, because he never saw them. Although Mr. Morfin had previously testified that he did not know where the crew members were living, he then admitted, and this forum finds, that he knew they were living in Kelso, Washington, and that he could reach them through Mr. Ramirez, whom he continued to supervise at least through the completion of the Unit 321 contract.

59) Mr. Morfin also testified that none of the Unit 321 crew members contacted him after they left the job site.

The crew members who testified admitted that they did not give Mr. Morfin a copy of the exhibit discussed in finding 57. They testified, however, that they approached Mr. Morfin some days after they quit, intending to show Mr. Morfin the document and settle upon what they owed or were owed. However, Mr. Morfin told them to go; he flatly stated that he did not owe them anything and that they owed him

money. Mr. Morfin did not show the crew any records. The crew left without responding to Mr. Morfin.

Based upon this forum's assessment of the relative weight to be given the testimony of Mr. Morfin (see Finding of Fact 10 above), and the fact that the crew member testimony on point is consistent and otherwise credible, the forum concludes that the crew member testimony recited above in this Finding is fact.

60) After resigning, the Unit 321 crew did not contact Contractor himself, because the members felt that their work agreement was not directly with him, but fixed through Mr. Morfin.

61) Whether the forum adopts the figures of the Agency or Contractor as to how much the Unit 321 crew earned and how much they received in advanced wages, Contractor owed the crew members some wages at the time they quit. If the figures most favorable to the Agency are adopted, Contractor owed the crew \$4521 (\$6660 minus \$2139 in advances); if the figures most favorable to Contractor are adopted, Contractor owed the crew \$290 (\$5490 minus \$5200).

62) The Consent Order establishes, and so this forum finds, that between February 1, 1982, and March 8, 1982, Contractor violated ORS 658.410 and ORS 658.415(1) by acting as a farm labor contractor in Oregon without a valid license. By consent order, Contractor admitted this and consented to a civil penalty of \$500 for these violations.

ULTIMATE FINDINGS OF FACT

1) During all material times herein, Contractor was a farm labor contractor,

as defined by ORS 658.405, and was licensed as such, as required by ORS 658.410.

2) On August 13, 1983, Contractor employed a six-person crew to thin trees on a tract of land in Oregon (labeled Unit 321), pursuant to Contractor's farm labor contract with Crown Zellerbach Corporation. One member of the Unit 321 crew quit in early September 1983 due to illness. All but one of the remaining five members quit their employment on September 30, 1983, before completion of the contract, because of a dispute with Mr. Morfin. At the time they quit, the Unit 321 crew had thinned approximately 122 acres. The one remaining Unit 321 crew member, and a replacement crew, finished the Unit 321 contract on a date no earlier than October 27, 1983.

3) Contractor was to, and alleges that he did, pay the Unit 321 crew directly for its work. These payments were to consist of advances on wages made through Contractor's employee Adan Morfin during performance of the contract, and payment of any remaining wages due the crew, at the rate of \$45 per acre thinned, at the contract's completion. Contractor has not provided to the Commissioner of the Agency a certified true copy of any payroll records for work done on the Unit 321 contract by the Unit 321 crew or the replacement crew.

4) Contractor did not furnish to any of the six Unit 321 crew members a written statement complying with the requirements of ORS 658.440(1)(f).

5) During times material herein, Contractor employed at least six aliens not legally present or legally

employable in the United States (the original members of the Unit 321 crew). Contractor denies personally knowing that these people were not legally present or employable in the United States.

6) Contractor's foreman and employee Morfin recruited, and Contractor hired, each of these workers. Contractor took no steps to ascertain or verify the status in the United States of the Unit 321 crew members, or any of his other workers during or since times material herein, other than asking if any member of a crew had, and asking one member to produce, a driver's license. Contractor did not ask his applicants or workers if they were legally present and employable in the United States. He did not ask his workers to produce any of the identification which indicates that its subject is legally present and employable in the United States. If a worker volunteered such production, and the identification appeared suspect to Contractor, he merely made a photocopy of it. Contractor did not ask more than one member of the Unit 321 crew to produce the identification which Contractor allegedly (and inaccurately) believed would indicate legal status in the United States, and he asked that one member for insurance purposes. Contractor did not instruct Mr. Morfin to avoid recruiting or help him avoid employing undocumented aliens or persons not legally present and employable in the United States. All of this clearly constitutes a failure by Contractor to make diligent inquiry into the status in the United States of any of his workers, or to take any step seriously calculated to detect or discourage

undocumented aliens among his hires and workers. Contractor failed to take even those steps which would have been effective (or which he allegedly believed would have been effective) and which were not proscribed by the purported advice of his attorney.

7) At no time material herein did Contractor attempt to ascertain whether the US Immigration and Naturalization Service could help him, or seek INS advice or other aid, as to how Contractor could detect undocumented workers among his applicants and workers. This constitutes a failure by Contractor to make diligent inquiry into the means of complying with ORS 658.440(2)(d).

8) By no later than the time the six original Unit 321 workers began working for Contractor, Mr. Morfin, their supervisor, actually and personally knew they were not legally present or legally employable in the United States.

9) At the uncontested rate of \$45.00 per acre, the Unit 321 crew earned a total of \$5490 on the Unit 321 project. During its employment, the crew received advances against those wages totaling no more than \$5200. Accordingly, when all but one member of the Unit 321 crew quit on September 30, 1983, Contractor owed them at least \$290 in wages. Contractor has not paid this, or any amount over the advances given, to the members of the Unit 321 crew who resigned, and he has refused to make a final accounting of wages and advances to them.

10) Even since promising to do so in a Consent Order in 1982, Contractor has not taken any appropriate steps calculated to insure his compliance with ORS 658.440(2)(d).

11) Prior to times material herein, Contractor violated ORS 658.410 and ORS 658.415(1) by acting as a farm labor contractor without a license and agreed to pay a penalty for that violation.

12) As it is uncontroverted, the forum finds as fact Contractor's assertion that since sometime in 1984, he has been providing to his workers, before they begin working for him, a written statement (in the appropriate language) containing the information required by ORS 658.440(1)(f).

CONCLUSIONS OF LAW

1) At all times material herein, Contractor was a farm labor contractor subject to the provisions of ORS 658.405 to 658.475.

2) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the subject matter and of the persons (including Contractor) herein.

3) The knowledge and actions of Mr. Morfin described herein are properly imputed to Contractor.

4) As Contractor failed to provide a certified true copy of payroll records to the Commissioner by September 17, 1983, 35 days from the August 13, 1983, start of the forestation or reforestation work of the Unit 321 job,

or, thereafter, by October 22, 1983, 35 days after September 17, 1983, Contractor at least twice violated or failed to comply with ORS 658.417(3).

5) During all times material herein, Contractor six times violated or failed to comply with ORS 658.440(1)(f), in that he did not furnish to each of the six workers he employed on the Unit 321 contract a written statement that met the requirements of ORS 658.440(1)(f).

6) Contractor's employment of at least six aliens not legally employable in the United States, Contractor's failure to make diligent inquiry into the status in the United States of any of his workers during times material herein, Contractor's failure to make diligent inquiry into the means of complying with ORS 658.440(2)(d), and the actual and personal knowledge of Contractor's employee and the supervisor of the above-mentioned six aliens that they were not legally present or legally employable in the United States, together constitute, as a matter of law, Contractor's knowledge that he was employing at least six alien workers not legally present or legally employable in the United States, within the meaning of the word "knowingly" as it is used in ORS 658.440(2)(d).

* The forum would reach this conclusions even without the finding that Mr. Morfin actually knew that the original six Unit 321 crew members were not legally present or employable in the United States. Contractor's failure to make reasonably diligent inquiry into the status in the United States of any of his workers and his failure to make reasonably diligent inquiry into the means of complying with ORS 658.440(2)(d), during times material herein, combined with his employment of a crew of aliens not legally present or employable in the United States, comprise constructive knowledge which constitutes, as a matter of law, Contractor's knowledge that he was employing alien workers not legally present or legally employable in the United States, within the meaning of the "knowingly" as it is used in ORS 658.440(2)(d). That is, a contractor who em-

7) During times material herein, Contractor six times failed to comply with or violated ORS 658.440(2)(d), in that he knowingly employed six aliens not legally present or legally employable in the United States.

8) Contractor failed to pay the Unit 321 crew at least \$290 which, according to his most specific evidence, he had agreed to pay that crew for its work. Contractor offered no credible mitigating explanation for this failure. It is obvious, in fact, that Contractor made no effort to contact the crew and provide a final accounting of the crew's earnings, which he was obligated to do by ORS 652.610 whether he owed the crew any further money or not. Contractor relied upon excuses of his foreman, which this forum does not believe (for example, concerning lost records and the crew's failure to make itself available to receive wages) to explain his failure to fully pay or provide a final accounting to the Unit 321 crew. In so doing, Contractor made absolutely clear to this forum that his failure to pay the Unit 321 crew all wages due (an apparent failure to comply with ORS 652.140) is a reflection upon his character, reliability, and/or competence, which renders him unfit to act as a farm labor contractor. That failure also constitutes a violation of ORS

658.440(1)(d), as it was a failure by Contractor to comply with the terms of the valid agreement Contractor entered into in his capacity as a farm labor contractor to pay the Unit 321 crew \$45 per acre of trees the crew thinned for Contractor.

9) Until that action was mooted, the Agency sought the forum's refusal to renew Contractor's license to act as a farm labor contractor, for Contractor's violations established on the record herein. Since notifying the forum of the mooting, the Agency has sought the assessment of civil penalties of up to \$32,000 or more for the violations established by the same record. Contractor has been given full and fair notice that the Agency would seek, and is seeking, those penalties. Contractor has also been afforded full and fair opportunity to respond to this modification in the action the Agency seeks herein. Accordingly, under the facts and circumstances of this record, and according to the law applicable in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may assess the civil penalties imposed in the Order below.

Under those facts and circumstances and according to that law, the Commissioner would have the authority to, and would, refuse to renew

employs an alien not legally present or employable in the United States does so knowingly, under ORS 658.440(2)(d), if the contractor actually knows (herein through imputation of the actual knowledge of his supervisory employee to him) that alien's status, or if the contractor would know this fact if he made efforts to ascertain the alien's status which would be reasonably diligent under the circumstances as he knows them. In the Matter of Alfonso Gonzales, 1 BOLI 121, 128 (1978), aff'd without opinion, Gonzales v. Bureau of Labor, 39 Or App 407, 593 P2d 532 (1979); followed in the Matter of Desiderio Salazar, 4 BOLI 154, 173 (1984); In the Matter of Highland Reforestation, Inc., 4 BOLI 185, 206-207 (1984); and OAR 839-15-530.

Contractor's license to act as a farm labor contractor, if Contractor had any such license. However, as Contractor has permitted his Oregon farm labor contractor's license to expire without applying for its renewal, there is no license to refuse to renew.

OPINION

1. Credibility

The inconsistencies in the testimony of Adan Morfin recited in Finding of Fact 10 above are exemplary of the irreconcilable statements which riddled Mr. Morfin's testimony. No explanation has been offered for those inconsistencies, many of which the forum only detected during painstaking examination of the very confusing testimony of all witnesses herein. A great deal of that confusion may have been occasioned by the fact that the first language of the Presiding Officer and counsel for the Agency and Contractor is English, while the first language of most Agency witnesses is Spanish. Despite the efforts of several diligent translators, this proved an obstacle to effective communication concerning specific items and occurrences. However, even if the forum ignores those inconsistencies which can be explained by the possibility that Mr. Morfin did not understand a question or the forum did not understand his answer, or by the possibility that Mr. Morfin's recollection of pertinent events was not accurate, there remain those inconsistencies which can be explained only by the conclusion that Mr. Morfin did not always state the truth concerning events material herein. Accordingly, this forum cannot necessarily regard

his testimony in general herein as truthful.

The forum found the testimony of the Agency witnesses, as a whole, confusingly inexact and inconsistent at best. However, the painstaking examination referred to in the previous paragraph revealed that virtually all the apparent contradictions and equivocations in the testimony of Agency witnesses could be explained by misunderstanding or faulty recollection, or were accompanied by caveats that the testifier was not sure of the fact mentioned. Accordingly, although the forum cannot give much weight to testimony flawed by any of these three characteristics, they have prevented the Presiding Officer from concluding that the inexactness and inconsistency in the testimony of Agency witnesses reflected a lack of general veracity on their part. In that important respect, these witnesses are deemed more credible than Mr. Morfin.

These conclusions are the basis of the forum's conclusions on relative credibility stated in Finding of Fact 10 above.

2. Failure to File Payroll Records

Contractor argued that a farm labor contractor could not comply with the ORS 658.417's record filing requirement until the form, content, and time of such filing was prescribed by rule by the Commissioner. That was accomplished as of August 2, 1983, eleven days before the commencement of work on the Unit 321 contract, when the Commissioner promulgated the temporary rule quoted in Finding of Fact 12 above.

That temporary rule provided that a farm labor contractor engaged in the forestation or reforestation of lands had to file a certified true copy of all payroll records with the Agency at least once every 35 days, starting from the time work first began on the forestation or reforestation of lands. As advances or draws to be deducted from wages earned, Contractor's advances to the Unit 321 crew clearly were intended to be advances of wages and therefore had to be reported pursuant to this rule. Moreover, nothing in ORS 658.417 or its above-cited temporary rule indicates that this submission requirement is triggered only when wages have been paid; instead it clearly is triggered by the commencement of work.

Within 35 days of the commencement of the Unit 321 job, and at least once during each subsequent 35 day period during which the contract continued, therefore, Contractor was required to submit payroll records including all the elements of Agency form WH-141,^{*} i.e., wages earned and

deductions incurred (including herein advances given) by workers on the contract, and whether or not Contractor paid all wages earned.

3. Failure to Pay Wages Owed

Because of the lack of consistency in the memories of Agency witnesses as to when the four Unit 321 crew members quit Contractor's employ or whether an exhibit enumerates all their work hours, this forum has resolved the ambiguity by relying upon the face of the exhibit, which records no work by those people after September 30, 1983. Accordingly, the forum has concluded that September 30, 1983, was their last day of work. Furthermore, having so concluded, the forum adopted the assertions cited in Findings of Fact 47 and 48 above as fact, thereby concluding that those workers had completed approximately 122 acres of work when they quit. Accordingly, at the agreed-upon rate of \$45 per acre, the Unit 321 crew earned a total of \$5490 on the project. When all but one of the remaining crew members quite their employment on

replaced, in effect, by OAR 839-15-300.

* Assume, purely for the sake of argument, that this forum concluded that Contractor incurred no obligation under ORS 658.417(3) to report the advances given the Unit 321 crew until they were transformed into what Contractor considered a final wage settlement by (A) the crew's resignation and (B) Contractor's failure to pay the crew any more money within forty-eight hours of that resignation (the time period during which ORS 652.140 required Contractor to compensate the crew what he owed them). Even if this were the case, by not submitting any certified payroll records concerning the Unit 321 crew between October 2, 1983 (forty-eight hours after Contractor alleges the Unit 321 quit), and October 27, 1983 (the earliest time the payroll records could have been lost), and by not thereafter filing with the Agency an explanation as to why he believed he could not file payroll records or making any effort to recreate whatever payroll records he had lost, if any, Contractor failed to comply with the requirement of ORS 658.417(3).

** The temporary rule implementing ORS 658.417(3) referred to this form and made it Appendix 1 to that rule.

* This temporary rule remained in effect until April 30, 1984, when it was

September 30, 1983, Contractor owed them at least \$290 in wages. Contractor has not paid this or any amount to the members of the Unit 321 crew who resigned, or made a final accounting of wages and advances to them.

This conclusion originally pertained to the allegation that this failure established that Contractor's character, reliability, and competence make him unfit to act as a farm labor contractor. That allegation was cited as one of four bases for refusing to renew Contractor's Oregon farm labor contractor's license. However, this forum is not any longer considering taking any action concerning that license, as Contractor has allowed it to expire without applying for renewal. This forum is, instead, considering the imposition of civil penalties for the violations found herein, under the authority given the forum by ORS 658.453.

Each of the other three bases for the original proposed refusal to renew the license are also statutory bases for the assessment of civil penalties. The forum must determine whether the fourth basis, the failure to pay wages due, constitutes a violation for which a civil penalty may be assessed.

In pertinent part, ORS 658.453(1) provides that the Commissioner may assess a civil penalty for each violation by a farm labor contractor which fails to comply with ORS 658.440(1)(b) through (g). ORS 658.440(1)(d) requires a farm labor contractor to:

"(c) comply with the terms and provisions of all legal and valid agreements or contracts entered into in the contractor's capacity as a farm labor contractor."

Included in such agreements was Contractor's agreement, herein, to compensate the Unit 321 crew at a given rate for each acre it thinned. Therefore, his failure to compensate the four Unit 321 crew members who quit for the work they did constitutes a failure to comply with the terms of his compensation agreement with that crew.

4. Penalties

In pertinent part, ORS 658.453 provides that the Commissioner:

"may assess a civil penalty not to exceed \$2000 for each violation by:

"(c) A farm labor contractor who fails to comply with ORS 658.440(1)(b), (c), (d), (e) or (f).

"(e) A farm labor contractor who fails to comply with ORS 658.417(1), (3) or (4)."

At least twice herein, Contractor failed to comply with ORS 658.417(3), by failing to provide to the Agency a certified true copy of payroll records for the Unit 321 crew. This constitutes at least two violations of that statute, for purposes of ORS 658.453(1)(e).

Contractor also failed to furnish to each of the six workers on the Unit 321 contract the written statements required by ORS 658.440(1)(f). This constitutes six violations of that statute, for purposes of ORS 658.453(1)(c).

Furthermore, Contractor knowingly employed six aliens not legally present or legally employable in the United States, in violation of ORS 658.440(2)(d). This constitutes six violations of that statute, for purposes of ORS 658.453(1)(c).

Finally, as explained above, with regard to four of the Unit 321 crew members, Contractor failed to comply with the terms of his valid agreement with the crew to pay it \$45 per acre for its work, as required by ORS 658.440(1)(d). This constitutes four violations of that statute. Although the agreement was with the crew as a whole, Contractor was to pay each individual. The facts indicate that Mr. Morfin did in fact, on more than one occasion, make advances to crew members separately.

Accordingly, there are a total of eighteen violations of statute, for each of which the Commissioner may assess Contractor total civil penalties not to exceed \$2000. The question becomes how much will the Commissioner assess for each violation. This forum finds OAR 839-15-510 instructive on this issue, even though, as an administrative rule promulgated after times material herein, it does not bind the forum herein.

Section (1) of OAR 839-15-510 provides that in determining the amount of any civil penalty to be imposed on a farm labor contractor, the forum will take into consideration:

"(a) the past history of the violator in taking all necessary measures to prevent or correct violations of statutes or rules;

"(b) prior violations, if any, of statutes or rules;

"(c) the magnitude and seriousness of the violation;

"(d) any other mitigating circumstances."

A. Past History of Preventive or Corrective Measures

In 1982, Contractor signed a Consent Order in which he promised to take appropriate steps calculated to insure his future compliance with ORS 658.440(2)(d). Even though this Consent Order underscored Contractor's legal duty to take such steps, he failed, after signing that Consent Order, to take any such steps.

B. Prior Violations of Statute or Rule

On the record, there is proof of one prior violation of Oregon farm labor contractor statutes by Contractor. For that violation (acting as a farm Labor contractor without a valid license for about 35 days in 1982), Contractor agreed to a penalty of \$500.

C. Magnitude and Seriousness of the Violations Found Herein

Magnitude and seriousness of the violations this forum has found Contractor committed are both very substantial, as indicated by the fact that they would cause this forum to refuse to renew Contractor's farm labor contractor's license, if he had applied for any such renewal.

D. Mitigating Circumstances

Since sometime in 1984, Contractor has furnished to his workers, before they begin working for him, a written statement in English or Spanish which appears to contain the information required by ORS 658.440(1)(f). This appears to constitute compliance with that statute (if such a statement has been furnished at the time the workers are hired, recruited, or solicited, whichever occurs earlier) and is, at least, an attempt to comply with that statute.

Taking into consideration the above-cited factors, the forum assesses Contractor the maximum penalty for each of his six violations of ORS 658.440(2)(d), or \$12,000; the maximum penalty for each of his two violations of ORS 658.417(3), or \$4,000; a penalty of \$2,000 for his six violations of ORS 658.440(1)(f); and the maximum penalty of \$8,000 for his violations of ORS 658.440(1)(d). Accordingly, the forum assesses penalties in the amount of \$26,000 against Contractor.

ORDER

NOW, THEREFORE, as authorized by ORS 658.445, Contractor is hereby ordered to deliver to the Hearings Unit of the Bureau of Labor and Industries, Room 309, 1400 S.W. Fifth Avenue, Portland, Oregon 97201, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of TWENTY SIX THOUSAND DOLLARS (\$26,000.00) plus interest thereon which accrues, at the annual rate of nine percent (9%), between a date ten days after the issuance of this Order and the date Contractor complies with this Order. This assessment consists of civil penalties against Contractor for his violations of ORS 658.417(3), 658.440(1)(d), 658.440(1)(f) and 658.440(2)(d) found above.

**In the Matter of
EDWARD W. ARNOLD,
dba Edward W. Arnold, Accountant,
Respondent.**

Case Number 02-86
Final Order of the Commissioner
Mary Wendy Roberts
Issued October 10, 1986.

SYNOPSIS

Respondent willfully failed to pay Claimant's wages immediately upon termination. Although there was a dispute over the amount of wages due, Respondent was required to pay all wages he conceded were due the employee without condition. ORS 652.160. Claimant's final paycheck, which contained a condition that it was based upon acceptance of terms in an attached letter, was invalid. Respondent failed to show he was financially unable to pay the wages at the time they accrued, and thus was liable for civil penalty wages. ORS 652.140, 652.150, 652.160.

The above entitled contested case came on regularly for hearing before Susan T. Venable, Hearings Referee, designated to preside over the hearing by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on August 29, 1986, in Room 311 of the State Office Building, 1400 S.W. 5th Avenue, Portland, Oregon. Present at the hearing were the following: Douglas McKean, Program Coordinator of the Wage and Hour Division of the Agency; Merle Erickson,

Investigator for the Wage and Hour Division; Eileen Cayo (hereinafter the Claimant); and Edward W. Arnold (hereinafter the Employer).

The Hearings Referee called Douglas McKean, Merle Erickson, and Eileen Cayo as witnesses for the Agency. Employer was present throughout the hearing, questioned witnesses, made objections to the admission of evidence, and offered testimony through his questioning of the witnesses.

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

FINDINGS OF FACT – PROCEDURAL

1) On August 20, 1986, Claimant Eileen Cayo filed with the Wage and Hour Division of the Agency a wage claim form that alleged that Edward W. Arnold was the Claimant's former employer and that he had failed to pay wages due to Claimant.

2) At the same time Claimant filed the wage claim form, she assigned, by signing a form prepared by the Agency, all wages due her from Employer, to the Commissioner of the Agency, in trust for Claimant.

3) On March 17, 1986, through the Multnomah County Sheriff's Office, the Commissioner of the Agency served on Employer an Order of Determination based on the Claimant's wage claim form and the Agency's investigation of the matter. The Order of

Determination stated that Employer owed Claimant \$480.98 in unpaid wages and \$1,311.90 in penalty wages, plus interest on both sums. The Order of Determination required payment of the sums stated or that Employer request a hearing and submit an answer within twenty days.

4) On March 27, 1986, Mary Mattson of the Wage and Hour Division sent a letter to Employer granting his request to extend the time period within which to respond to the Order of Determination.

5) Employer sent, by certified mail, to the Wage and Hour Division a "Request for Administrative Hearing" dated April 29, 1986. Attached to this request were two other documents entitled "Answer to Allegations in Order of Determination No. 85-22" and "Statement of Defense."

In his "Answer to Allegations in Order of Determination No. 85-22," Employer stated that Claimant had worked for him from August 1, 1985, to August 15, 1985, and that her salary had been \$1010.00 per month. Employer further stated that Claimant had worked hours that were not authorized, that she had been overpaid by check, that thirty days had not elapsed between the time she was paid and the time wages became due and that there was no willful failure to pay.

In his "Statement of Defense," Employer stated that Claimant had been paid her wages for August by check, which she failed to cash timely, that the US National Bank illegally transferred money out of his account on which a good check to claimant had been written, and that the "State of Oregon, the Governor, et al" were "using alleged

extortion" and "attempting to murder" him.

6) On July 28, 1986, a Notice of Hearing was sent to Employer. Together with this notice was a document containing the information required by ORS 183.413. At the commencement of the hearing, Employer was given an opportunity to review this information. After his review, Employer stated he had no questions and was prepared to proceed with the hearing.

7) Employer sent four letters requesting the issuance of subpoenas, dated August 8, 15, 18, and 25, 1986. The letters, and his previous correspondence, indicate his grounds were as follows:

a) That Governor Atiyeh, members of his staff, and Commissioner Roberts should be subpoenaed as they were attempting to murder him and to extort money from him.

b) That individuals connected with the Department of Commerce, Board of Tax Service Examiners, and State Board of Accountancy should be subpoenaed to testify about their "alleged harassment" of Employer in regard to this case.

c) That sixteen directors of the US National Bank be subpoenaed to prove that the check, dated August 28, 1985, written to Claimant "was good."

The Hearings Referee responded to each request in detail, citing and quoting the relevant law and providing copies of the applicable statutes. The first two requests were denied as being clearly beyond the reasonable scope of the proceedings. A review of the Summary of the Case submitted by the Agency, and copied to Employer,

indicated that whether the check dated August 28, 1985, was negotiable was not an issue in the case. Therefore, the third request was denied for the reason that the testimony to be elicited was not within the reasonable scope of the proceedings.

8) At the commencement of the hearing, the Hearings Referee explained the issues involved, the matters that had to be proved or disproved herein, and also, that this statement was not evidence in the case.

9) At the commencement of the hearing, the Hearings Referee administered the affirmation to each witness to be called. All witnesses remained under oath throughout the hearing.

10) The hearing in this matter commenced at 9:30 a.m. and continued until 4:35 p.m. During that time the forum accommodated Employer's demands to recess so that he could tend to his parking meter and his demand that the lunch break be extended so that he could complete an errand in Washington County. At 4:30 p.m., Employer announced that he intended to leave the hearing to return to his office. The Notice of Hearing did not specify a time at which the hearing would be concluded and there had been no discussion in this regard. The forum was prepared to continue the hearing and the witnesses for the Agency were present and available for further examination by the Employer.

During the course of the hearing, Employer had heard the forum's examination of the witnesses for the Agency and had questioned those witnesses as follows: Douglas McKean for approximately 1½ hours, Merle Erickson for 30 minutes, and Eileen Cayo

for about 45 minutes. It was during his cross examination of Claimant that he chose to leave the hearing.

Throughout the hearing, Employer was uncooperative, often yelled at the Hearings Referee and witnesses, persisted in throwing stacks of papers at the Hearings Referee and witnesses and used offensive language. The forum made every effort to, and did, insure Employer's rights as set forth in ORS chapter 183, and to accommodate his behavior. However, the forum must balance these considerations with the interests of the state in enforcing the law, and the interests of Claimant, who could also be adversely affected by a decision of this forum, in pursuing her claim for wages. In an effort to do so, rather than concluding the hearing, which would have clearly been appropriate under the circumstances, the forum allowed Employer the opportunity to submit any written testimony or documents to the forum until 5:00 p.m. on September 3, 1986. Furthermore, since Employer had already been sworn when he questioned the Agency's witnesses, the forum has considered the statements he made in support of his position during his questioning as testimony.

11) On September 3, 1986, the forum received a letter from the Employer requesting either a continuance of the hearing or additional time to submit testimony. As grounds for his request for a continuance, Employer stated there were "constraints" that prohibited him from completing his cross examination. The Employer, as stated, announced during his cross examination of Claimant that he was leaving the hearing and did so. When

advised that the forum was prepared to continue the hearing, Employer responded, "to hell with it" and "to hell with you." When informed that the forum and witnesses would stay as long as Employer so wanted, he replied that "he didn't give a damn." His written request was therefore denied as there were no constraints, except his inclination to leave, that prevented him from continuing the hearing.

As grounds for his request for a extension of one week to prepare documents and testimony, Employer stated that it was unreasonable to require documents one business day after the hearing and that he had personnel leaving and could not write his case down. This request was denied for several reasons. First, Employer was notified in the information sheet attached to the Notice of Hearing, that he should be prepared to present all evidence to support his position on the date of the hearing. Employer had many documents set out before him at the hearing and did in fact submit evidence. Therefore, Employer should have been prepared, and did appear to be so, with his documents on August 29, 1986. Second, while there were two, rather than one as stated by the employer, working days between the hearing and the submission date, there were five days total. Again, Employer should have been prepared with his testimony on August 29, 1986, leaving only the task of setting down his position in writing. He is the Employer and obviously has access to his premises, whether it be a working day or otherwise. Finally, assistance of personnel is not necessary to write down his testimony.

12) After receiving Employer's letter of September 2, 1986, Etta Creech, Hearings Coordinator for the Agency, contacted Employer and advised him of the forum's response denying his request, and again advising that he must present any written evidence by 5:00 p.m. on September 3, 1986. Ms. Creech documented this telephone conversation.

13) At 4:25 p.m. on September 3, 1985, Employer hand delivered a letter to the Hearings Unit addressed to the Governor, the Commissioner, the US National Bank, Eileen Cayo and "others." In this letter he stated he was making a demand for "fraud/and or attempted fraud" by the named parties. There was no submission of documentation, other evidence or written testimony relevant to the case.

14) The Agency had suggested that should the evidence show that the agreed rate of pay was \$12,120 per year, based upon working 2,000 hours, that the hourly rate would be \$6.06 (\$12,120 divided by 2,000 hours). As a result, the Order of Determination should be amended to reflect that the wages earned and unpaid equal \$499.95 (\$6.60 x 82.5 hours). The forum reserved ruling until the Proposed Order and found therein, and now holds, that the Order of Determination should not be amended. The method of computation, agreed to by Claimant and Employer, to compute the wages earned and unpaid is reflected by the sums set out in the Order of Determination. (See Findings of Fact *infra*.)

15) On October 6, 1986, Employer filed his "Exceptions to Proposed Order." All of the arguments raised therein were previously raised by the

Employer in this proceeding and are addressed in this Final Order.

FINDINGS OF FACT – THE MERITS

1) The wage claim filed by Eileen B. Cayo concerns work performed from August 1 to August 15, 1985. During this time (hereinafter referred to as the wage claim period), Claimant was employed by Edward Arnold, an accountant, as a tax preparer. Employer's business was located in Portland, Oregon.

2) Claimant was hired by the Employer himself and worked as office manager. In that capacity, she was responsible for overseeing accounting and general office procedures, research and computations, and prepared the payroll. She was also working for John Bell, a tax consultant, and had previously worked for H & R Block. Claimant is licensed by the State of Oregon Board of Tax Examiners as a tax preparer.

3) Claimant began working for Employer on May 13, 1985. At that time, she was working part time for Employer and part time for John Bell; however, the agreement with Employer was that she would begin working full time for him as soon as possible.

4) When Claimant began working for Employer, the agreement she made with him was that she would be paid \$6.00 per hour. After June 6, 1985, when Claimant became a full time employee, Employer advised her that he could no longer pay Claimant \$6.00 per hour, but that he would pay her \$1000.00 per month. Claimant agreed to this monthly salary.

5) Pursuant to a discussion Claimant had with Employer, she understood that her wages were to be computed based on a 40 hour work week at \$1000 a month. Based on her conversations with Employer, Claimant understood her wages were to be computed as follows: Claimant would first determine her hourly rate by multiplying her monthly salary by 12 months, dividing that figure by 52 weeks, and then dividing that figure by the 40 hour work week. She would then multiply the number of hours she worked in a month by that hourly rate to determine the wages owed to her.

6) This method of computation was the same method Claimant had used at other jobs. Employer had paid her wages previously based on this type of computation, and to her understanding, there was no disagreement regarding the use of this type of computation for wages.

7) After Claimant began working full time, Employer prepared a written employment contract for Claimant to sign. The contract indicated that the employee was to be paid an annual salary. Claimant refused to sign the contract as she believe it to be an infringement on her rights. Claimant discussed with Employer the possibility of making amendments to the contract. One of those amendments was to continue paying Claimant a monthly salary rather than putting Claimant on an annual salary. Employer agreed to modify the contract, but failed to do so. Claimant continued to work for Employer during this time as she believed the amended contract would be prepared. This explains why Claimant checked the box indicating there was a

written agreement for wages on her wage claim form. Although Employer made statements indicating that this employment agreement had been signed, and offered a statement of his wife, dated August 29, 1986, who did not appear at the hearing, stating she had seen a signed contract, the Claimant's testimony was accepted as a fact as Claimant was found to be a credible witness, and the fact that Employer could not support his position by producing the signed contract. When questioned regarding the whereabouts of the signed contract, Employer stated that it had been stolen or taken out of the office. In any case, the employment contract submitted by Employer does not address the method of computation to be used in determining wages.

8) Claimant advised Douglas McKean of the Wage and Hour Division that she was on a monthly, not annual, salary. The monthly salary was \$1010 beginning August 1, 1985, and was to be based on a 40 hour work week.

9) On August 1, 1985, Claimant received a raise in salary to \$1010 a month. Based on a discussion she had with Employer, Claimant believed that her increased wages would be computed in the same manner as had been done previously. (See Finding of Fact 5.)

10) In order to be paid her wages, the procedure followed was that Claimant would turn in the number of hours she worked, set forth her computations on an adding machine tape, and then list her gross wages and withholdings. These computations were turned into

Employer, who would approve and issue a check.

11) Claimant's last day of work was Friday, August 15, 1985. She arrived at work at the usual time of 9:00 a.m. Employer called about a half hour later, as usual, to discuss any office problems. Without any discussion of her employment status, Employer suddenly advised Claimant as follows: "turn in your hours and get the hell out of here." Claimant said she would do so and did. Claimant's testimony has been accepted as a fact over Employer's statements that implied that Claimant had quit for the reasons that Claimant was found to be a credible witness (see Findings of Fact 33, 34, 35) and that this accounting of the conversation is completely consistent with Employer's erratic and offensive behavior at the hearing.

12) Claimant indicated she was "discharged" as opposed to having "quit" on her wage claim form. She also told Douglas McKean of the Wage and Hour Division that she had been fired.

13) During the telephone conversation of August 15, 1985, when Employer fired Claimant, Employer had advised Claimant to leave and figure up her time later.

14) A conversation had occurred between Claimant and Employer in the evening on August 14, 1985, regarding her request for two weeks of leave without pay. Employer's statements imply that once Employer told Claimant she could not take this leave time, that she then did so anyway without his authorization, and effectively quit. Claimant's testimony that she agreed to forego the leave time has been

accepted as a fact over Employer's statements for the reasons that she was a credible witness and that she did in fact come into work the following day, August 15, 1985, as usual.

15) After the conversation with Employer, on August 15, 1985, Claimant was concerned about leaving the office unattended and about leaving the key. She called Mrs. Arnold, Employer's wife who worked occasionally as a secretary or receptionist, and asked her to come to the office. When she arrived, Claimant advised Mrs. Arnold of the computations of her wages and asked that Mrs. Arnold write a check. Mrs. Arnold refused to do so. Claimant left the office about 10:45 a.m. After this conversation, Claimant had no further conversations with Employer, his wife, or any other employee regarding this case.

16) Claimant would have submitted the computation, as shown in an exhibit, on August 15, 1985, on an adding machine tape to Mrs. Arnold. This is the same computation that appears on the right side of the wage claim form. In her haste and upset state, Claimant forgot to advise the Wage and Hour Division of her \$10 a month raise, and therefore, the computations originally made were based on \$1,000 a month. This is corrected on the right side of the form reflecting her \$10 raise.

17) Claimant maintained a record of her hours. She worked 82.5 hours during the wage claim period as indicated on her wage claim form. The form entitled "E. W. Arnold Employee Time Record" indicates that Claimant worked 82.5 hours between August 1 and 15, 1985, the wage claim period. This collection of documents also

indicates the amount of time Claimant spent on each of the accounts of Employer's clients for billing purposes. Further, although Employer disputed it at hearing, Employer's Statement of Defense submitted to the Agency indicates that Claimant was paid for 82.5 hours worked during this period.

18) On August 20, 1985, Claimant received a letter from Employer and a check, both dated August 20, 1985, in the amount of \$277.58 (net) for gross pay of \$350.82. The check was signed by the Employer and contained a statement that the check was conditioned on the attached letter. The letter indicated that the check was issued pursuant to three conditions with which Claimant did not agree:

1. In payment "for any and all moneys due;"
2. That the check was based upon two mutually agreed upon contracts; and
3. That Claimant quit.

The letter also contained an adding machine tape showing that Employer had not computed the wages by the same method as had Claimant.

19) Claimant was advised by Mary Moss of the Wage and Hour Division that since there was a condition on the check she should not accept it. As a result, Claimant wrote a note on a copy of Employer's letter stating there were no "mutually agreed upon contracts," that she would not accept a conditional check, and explaining her computations together with an adding machine tape so indicating. This notation indicates that Claimant's gross figure was stated as \$480.72. This varies by 26 cents (\$480.98 - \$480.72) from the

figure on her wage claim form and in the Order of Determination due to the rounding off mechanism in her machine.

20) Claimant wrote "void" over a copy of the check, cut off the signature line, and returned this copy, together with the letter and tape by certified mail to Employer. It was received by Edith Arnold on August 23, 1985.

21) A demand letter was sent by the Wage and Hour Division on August 29, 1985, requiring that Employer either pay \$483.90 for wages from August 1 to 15, 1985, or contact the office, submitting the employer's position in writing and send supporting documents or records. The letter also advised that otherwise, penalties would be imposed. The figure of \$483.90 varies from the \$480.98 in the Order of Determination as originally 1½ hours were computed at the rate for overtime. The Agency later discovered that there was no agreement to pay overtime wages and that Claimant was exempt from the requirement to pay overtime wages. Mrs. Arnold responded to the letter and spoke to Merle Erickson regarding this claim.

22) Claimant received no response after returning the copy of the check and letter, and called the Wage and Hour Division. She was told that Employer would send her a new check if she would return the check dated August 20, 1985 to Employer. Claimant sent the check to Employer by certified mail. It was received by Edith Arnold on September 4, 1985.

23) Claimant left town on September 5, 1985, and returned during the first week of December of 1985. During this time, Claimant had her mail

delivery stopped and her mail collected at the post office.

24) On November 4, 1985, Merle Erickson, the investigator assigned to the case, requested that Employer send any documents he had regarding the Claimant's salary. Erickson spoke to Edith Arnold on November 11, 1985, again requesting any relevant documents. On December 5, 1985, Erickson had another conversation with Employer regarding Claimant's salary; however, Employer still refused to discuss how he had calculated the sum of \$443.39 in gross wages.

25) On December 10, 1985, Claimant picked up a letter, that had been held at the Post Office, to her from Employer. The letter was dated August 28, 1985, and contained a check for \$338.55 (net) based on gross pay of \$443.39, and a tape showing Employer's computations. The post mark on the envelope was September 28, 1985.

26) The letter of August 25, 1985, from Employer to Claimant also contained a tape indicating how Employer had computed the wages. These computations are explained in Employer's "Statement of Defense," beginning by determining the hourly wage as follows:

The annual salary is based on working 2,000 hours per year; the number of hours not worked by an employee in a week are subtracted; the annual salary of \$12,120.00 was divided by 2,000 resulting in an hourly rate of \$6.06. Had Claimant worked the full month of August, she would have worked 176 hours. Since she worked 82.5 hours, that leaves

93.5 that she did not work. Employer then multiplied 93.5 by \$6.06 and subtracted this sum, \$566.61, from one-twelfth her annual salary, \$1010, resulting in gross pay of \$443.39. Payroll deductions were subtracted making her net pay \$338.55.

27) On September 5, 1985, the Agency received a letter, dated September 3, 1985, from Employer to Karen Ritter of the Wage and Hour Division. The letter stated that when Claimant returned the first check, that Employer would send her the second check.

28) When Claimant returned to Portland, she decided to cash the check from Employer dated August 28, 1985. Although she did not agree with the Employer's computations or amount of the check, she decided to cash it since the difference in net pay between Claimant's computations and that of Employer was small. When Claimant inquired about cashing the check at the US Bank, she was advised the check could not be honored. Claimant advised Merle Erickson, the investigator assigned to the case, that the check could not be honored. On December 11, 1985, Erickson called Employer and asked that he issue a replacement check. Employer refused to do so and stated that Claimant should try again to cash the check.

29) On December 16, 1985, Claimant attempted to cash the check dated August 28, 1985, at the US National Bank, but was again told the check could not be honored. Claimant did not attempt to cash the check again until February 12, 1986. At that time, Claimant spoke to a woman named

"Beth" at the Metro Branch of the US National Bank, who advised Claimant that the account on which the check had been written was closed. Claimant made notes of her conversation.

30) Employer's bank account was open in August of 1985 and would have had sufficient funds to cover the check to Claimant until September 17, 1985. With the exception of a short time period in October of 1985, there would not have been sufficient funds to cover the check through the time that the account was closed on March 7, 1986.

31) Penalty wages were assessed in the Order of Determination for a period of thirty days. The Agency bases the assessment of penalties on the following facts. First, Claimant was fired on August 15, 1985. ORS 652.140 requires that all wages due be paid immediately. Employer failed to make any attempt to pay Claimant until August 20, 1985. Second, over and above the fact that payment was not timely, the check, dated August 20, 1985, was conditional, that is, it could not be cashed until Claimant accepted the condition in the attached letter. ORS 652.160 requires that in the case of a dispute over wages, Employer must pay without condition all wages conceded to be due. This check was, therefore, not payment of wages. Finally, the second check sent to Claimant, although dated August 28, 1985, was in an envelope postmarked September 28, 1985, and was, therefore, thirty (30) days beyond the date the wages were due. The US National Bank confirmed that had a check been written in the amount owed to Claimant on August 15, 1985, there would have

been sufficient funds to cover the check.

32) The policy of the Wage and Hour Division is to compute penalties as follows by first determining the average daily rate of pay:

Divide the entire amount earned during the wage claim period (\$480.98) by the number of days worked during that period (11); this results in an average daily rate of pay that is multiplied by 30 (for 30 days of wages) under ORS 652.150. The average daily rate of pay pursuant to this method is \$43.73, multiplied by 30 results in an assessment of penalty wages of \$1311.90.

This is the figure set forth in the Order of Determination and computed by the Agency on the Wage Transcription and Computation Sheet. Claimant is owed \$1,311.90 in penalty wages.

33) Employer was, during the hearing, rude and demanding. He showed little respect for the forum. While this does not necessarily reflect upon his credibility, it lends much credence to the Claimant's accounting of the circumstances surrounding her discharge and the discussion of the written employment contract. Employer failed to present any reliable evidence to support his position, and on at least one occasion, disputed his own previously written statement submitted to the Agency. Employer also denied having received the Order of Determination, although he had a copy of it in his possession at the hearing and had responded to it. He also contradicted himself regarding the procedure for computing Claimant's wages in that he testified he told Claimant, on August

15, 1985, to leave and "figure up her wages later."

34) Employer submitted a number of papers, marked as exhibits, some of which are his employee time records. Claimant was asked to review the documents and initial those that she prepared. In her review, she found two documents that belonged to another employee which were removed and are not a part of this exhibit. The forum's analysis of these records is relevant to the issue of credibility:

a) Claimant did not initial the first page of this exhibit. This page apparently relates to the number of hours Claimant worked in August of 1985 and shows the total as "8250." Claimant did initial page 3 of the exhibit and identified it as her own. This page also relates to the number of hours and shows the total as "82.50." Other documents, such as page 8 of this same exhibit and another exhibit submitted by Claimant show she generally wrote figures like "82.50" rather than "8250." The forum accepts as a fact that Claimant did not prepare page 1 of Respondent's exhibit, and finds that this further supports the Claimant's credibility in that Employer alleged the document was Claimant's, and reflects poorly, on the Employer.

b) Claimant did initial page 8 of this exhibit and identified it as her own. This page documents her hours worked and wages paid in June of 1985. The computation at the bottom of the page establishes that the wages paid in June to Claimant were based on the agreed monthly salary of \$1000 and was computed pursuant to the method described by Claimant. This establishes that Claimant was paid, as

she testified, based on her method of computation. Again, this documentation supports her credibility.

c) Claimant indicated, and this forum finds as a fact, that pages 4 and 5 of this exhibit were not in her handwriting. (Page 5 was an index card submitted by Employer of which the forum made a copy.) These pages purport to compute Claimant's wages for July of 1985. The method of computation used is that asserted by Employer. This computation is shown at the bottom on page 7, Claimant's time record for July of 1985. Claimant stated that this was not her handwriting and that the computation of page 7 was not done by her. She did, however, identify page 6 of the exhibit which is identical, but for the computation. The documents indicate that page 7 consists of a copy of page 6 with the computation added at the bottom. This computation for July also is mistakenly based on a salary of \$1010 per month which was not effective until August 1, 1985. The forum has concluded that these documents, pages 4, 5 and 7, are not those of Claimant, but were concocted and submitted by Employer to support his position, and reflect adversely on his credibility.

35) Claimant was calm, responsive, and straight-forward. She responded to questions without hesitation and made no effort to avoid any issue. Her testimony was consistent and supported by reliable documentation. Where an inconsistency appeared in the documents, Claimant was able to explain the circumstances and clarify the situation. Moreover, Claimant showed no malice toward Employer, and when questioned by Employer

about their working relationship hesitated to answer because of, as she stated, how it would reflect upon him. Therefore, for all the reasons stated in Findings of Fact 32 and 33 and those herein, where the Claimant's testimony differed from that of Employer, her accounting was accepted as a fact.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Employer, a person, did business as an accountant in Portland, Oregon, and engaged the services of one or more employees in that business.

2) Claimant worked for Employer from May 13, 1985, until August 15, 1985. She was employed as an office manager and tax preparer, and was responsible for accounting procedures, computations, and preparing the payroll.

3) There was no signed written agreement between Claimant and Employer. The oral agreement between Claimant and Employer was that Claimant would be paid a monthly salary of \$1000 beginning on June 6, 1985. Her monthly salary was raised to \$1010 on August 1, 1985. Based on a discussion with Employer, Claimant understood her salary was to be based on a 40 hour work week and computed based on her monthly salary as follows:

$$\begin{aligned} \$1010 \times 12 &= && \$12,120 \\ \$12,120 \text{ div. by } 52 &= && \$233.08 \\ \$233.08 \text{ div. by } 40 &= && \$ 5.83 \\ \$5.83 \times 82.5 &= && \$480.98 \end{aligned}$$

4) Claimant worked 82.5 hours between August 1 and 15, 1985, and Employer's records so reflect this time.

5) The procedure followed for Claimant to be paid was that she would compute her wages, subtract the appropriate deductions, and submit this figure to Employer who would issue a check. Claimant used the same method of computation to compute the wages due her for her work from August 1 to 15, 1985, as she had since she began working for Employer. He had always paid her based on this method of computation, and had not expressed any disagreement with it.

6) Employer fired Claimant on the morning of August 15, 1985, and did not pay her wages at the time of her discharge. Employer advised her to leave and compute her hours at a later time.

7) Employer sent a conditional check to Claimant on August 20, 1985, for the sum of \$277.58 (net), based on a gross figure of \$350.82, an amount that was less than what Claimant was owed pursuant to their agreement.

8) Claimant refused the check, noted the appropriate method of computation, and later returned the check.

9) Employer issued a second check to Claimant, dated August 28, 1985, in the amount of \$338.55 (net) based on gross wages of \$433.39 a sum less than she was owed. The envelope containing this check was post-marked September 28, 1985, and therefore, Claimant could not have received the check until on or after that date.

10) Employer knowingly, intentionally, and voluntarily failed to pay Claimant the wages due to her at the time she was discharged on August 15, 1985, and has not yet paid Claimant

the wages owed to her. Employer owes Claimant \$480.98 in gross earned wages.

11) The policy of the Wage and Hour Division is to compute penalty wages by multiplying the average daily rate of pay, \$43.73, by 30, the number of days in the accrual period. Pursuant to this method, Claimant is owed \$1,311.90 in penalty wages.

12) Employer has made no showing that he was financially unable to pay the wages owed Claimant at the time they accrued. Employer had sufficient funds in his bank account, on August 15, 1985, to cover a check in the amount owed to the Claimant.

CONCLUSIONS OF LAW

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

2) Before the commencement of the contested case hearing, this forum complied with ORS 183.413(2) by informing Employer of the matters described in that provision. The forum complied with ORS 183.415(7) by providing the information required therein at the commencement of the hearing.

3) During all times material herein, Employer was an employer, and Claimant was his employee, subject to the provisions of ORS 652.110 to 652.200 and ORS 652.310 to 652.405.

4) There was an agreement between Claimant and Employer regarding the rate of pay and method of computation. This agreement for wages is enforceable.

5) Pursuant to ORS 652.140, the \$480.98 in gross wages which Claimant earned and Employer had not paid

became due and payable immediately upon Employer's discharge of Claimant on August 15, 1985. Employer failed to pay Claimant at the time of discharge the \$480.98 in earned, due, and payable gross wages which he owed her and is, therefore, in violation of ORS 652.140.

6) Employer is charged with knowledge of the law regarding his obligations to pay wages and has a duty to know the wages due to an employee.

7) Employer sent a check to Claimant on August 20, 1985, for the sum of \$277.58 (net) based on gross wages of \$330.82. The check contained a condition that it was based on the acceptance of terms in an attached letter. Pursuant to 652.160, where there is a dispute over wages, an employer must pay the amount conceded to be due the employee "without condition." This check was therefore invalid under this statute. This check was also in contravention of the agreed method of computation.

8) Employer sent a second check, dated August 28, 1985, to Claimant. The envelope containing this check was postmarked September 28, 1985. The check was for \$330.55 (net) based on gross wages of \$443.39, which was less than Claimant was owed pursuant to the agreed rate of pay and method of computations. Even if Employer submitted this check pursuant to ORS 652.160, that is, as payment for those wages conceded by Employer to be due to Claimant, the check would not have been available to Claimant until September 28, 1985, or thereafter. Therefore, Claimant was not paid, in any case, within 30 days of

the due date of August 15, 1985, for purposes of ORS 652.150.

9) Employer knew he had not paid the wages owed Claimant at the time he discharged her on August 15, 1985. His actions were intentional and voluntary. Therefore, as a matter of law, Employer willfully failed to pay Claimant the wages earned and due, and is subject to the penalty provisions of ORS 652.150.

10) Employer failed to make payment to Claimant of the wages due her within 30 days of the due date, of August 15, 1985. Pursuant to ORS 652.150, as a penalty for that non payment, the Claimant's wages continue from the due date thereof for 30 days. These penalty wages total \$1,311.90, a sum computed by multiplying the Claimant's average daily wage rate of \$43.73 by thirty, the number of days in the accrual period.

11) Employer has not avoided liability for this penalty as he has not shown that he was financially unable to pay the wages that he owed Claimant at the time those wages accrued. Employer did have sufficient funds in his bank account on August 15, 1985, to cover a check for the total amount due to Claimant.

12) 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 Employer to pay Claimant the earned, due, and payable wages in the sum of \$480.98, and penalty wages of \$1,311.90, plus interest on those wages and penalty wages.

OPINION

There is no dispute that Claimant was an employee of Employer or that she worked during the wage claim period. There are three issues in this matter:

1. The number of hours Claimant worked during the wage claim period;
2. The appropriate method of computation for payment of Claimant's wages; and
3. The applicability of ORS 652.150 regarding penalty wages.

1. Hours Worked

Although Employer disputed at the hearing that Claimant worked and should be paid for 82.5 hours, the evidence, including his own statements and records, confirms that Claimant did work 82.5 hours during the wage claim period. Employer's Statement of Defense likewise establishes that Employer paid Claimant, although in the wrong amount, for 82.5 hours of work.

2. Computation of Wages

The method of computation is the pivotal issue in this case. While it was agreed at the hearing that Claimant was to be paid \$1010 per month as of August 1, 1985, there was disagreement as to how the Claimant's wages were to be computed, particularly where she worked less than an entire month. Employer explained what he alleged to be his method of computation for all his employees in his Statement of Defense. It is an elaborate system that subtracts a sum representing the hourly rate for the number of hours not worked from the monthly salary. However, the evidence establishes that it was not the

method to which Claimant and Employer agreed.

Claimant had discussed the method of computation with Employer himself. He had paid her in the past based on this method of computation, and had never expressed disagreement with this method. Claimant understood this to be the agreement between her and Employer, and this forum has found that it was in fact their agreement. Her credibility on this issue, in addition to those reasons set forth in the Findings of Fact, is bolstered by the fact, as admitted by Employer, that Claimant was in charge of accounting procedures, research, computations, and the payroll. Since her salary was raised in August of 1985, it seems obvious that Employer trusted and approved of her work. Even on the day she was fired, Employer told her to figure up her hours. Those facts constitute an agreement to use the computation set forth by Claimant. The agreement is enforceable.

3. Penalty

Employer fired Claimant on the morning of Friday, August 15, 1985. At that time he told her to leave and figure her hours later. This action is in violation of ORS 652.140 requiring payment immediately at the time of discharge. Clearly, he knew she was not being paid, intended that she not be paid, and took this action voluntarily. This renders his conduct willful for purposes of ORS 652.150 and subjects Employer to the penalty provided therein.

The Agency imposed a penalty based on 30 days of penalty wages. Pursuant to ORS 652.150, penalty

wages continue from the due date until paid. Employer sent Claimant a check on August 20, 1985, for an amount substantially less than she was owed. Furthermore, the check was conditional. For both these reasons, the check did not constitute payment to the Claimant. Employer then sent a second check, dated August 28, 1985, to Claimant. This check was again less than Claimant was owed pursuant to the agreed method of computation. The facts indicate Employer had not yet mailed the check as late as September 3, 1985, as he sent a letter to Karen Ritter of the Agency so indicating. In any case, the envelope containing the check was postmarked September 28, 1985. Therefore, Claimant could not have received the check, and consequently, could not have been paid until after that date, a date more than 30 days from the due date of August 15, 1985. For this reason, it is not necessary to determine whether in fact the check was negotiable at the time it was written. Based on these facts, the Agency was correct in assessing a penalty based on 30 days.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders EDWARD W. ARNOLD to deliver to the Hearings Unit of the Bureau of Labor and Industries, 1400 S.W. Fifth Avenue - Room 309, Portland, Oregon 97201, a certified check payable to the Bureau of Labor and Industries IN TRUST FOR EILEEN B. CAYO for earned, due, and payable wages in the amount of FOUR HUNDRED EIGHTY DOLLARS and NINETY EIGHT CENTS (480.98), less

any legal deductions previously made by Employer, plus interest at the rate of nine percent per year for the period September 1, 1985, on that sum until paid; and ONE THOUSAND THREE HUNDRED ELEVEN DOLLARS and NINETY CENTS (\$1,311.90) in penalty wages, plus interest at the rate of nine percent per year, for the period from October 1, 1985, on that sum until paid.

employer has a legal duty to know the amount of wages due to an employee. Respondent could not deduct wages for alleged theft, where claimant denied the charge, and the allegation was not substantiated by a police investigation. Respondent failed to show that she was financially unable to pay the wages at the time they accrued, and thus was liable for civil penalty wages. ORS 652.140, 652.150, 652.610, 653.045, 653.261; OAR 839-20-030, 839-20-050.

**In the Matter of
JUDITH IRENE WILSON,
dba 12th Street Cafe, Respondent.**

Case Number 04-86
Final Order of the Commissioner
Mary Wendy Roberts
Issued October 15, 1986.

SYNOPSIS

Respondent willfully failed to pay three Claimants' wages immediately upon termination. Respondent was not exempt from the requirement to pay overtime for hours over 40 in a week. Respondent had the legal duty to maintain payroll records, and had the burden of producing all appropriate records to prove the precise amounts due. Rest periods are not deducted from an employee's hours worked, and meal periods are not deducted from an employee's hours worked when the employee is not completely relieved from duty during the meal period. An

The above-entitled case came on regularly for hearing before Susan T. Venable, designated as Hearings Referee by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on September 15, 1986, in Room 311 of the State Office Building, 1400 SW 5th Avenue, Portland, Oregon. The Hearings Referee called the following as witnesses for the Bureau of Labor and Industries (hereinafter the Agency): Douglas McKean, Program Coordinator for the Wage and Division of the Agency; Margaret Trotman, Compliance Specialist for the Wage and Hour Division; and Claimant Sharon Godfrey. Claimants Brenda Hamlin and Robin Johnson were not present.

Employer Judith Wilson, after being duly noticed of the time and place of this hearing, failed to appear.

Having fully considered the entire record in this matter, I, Mary Roberts, the 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) Wage Claims were filed with the Wage and Hour Division of the Agency as follows: Sharon Godfrey on August 13, 1985; Brenda Hamlin on October 15, 1985; and Robin Johnson on December 6, 1985. Each alleged that they had been employees of Employer and that Employer had failed to pay wages earned and due to each Claimant.

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

3) On February 7, 1986, the Commissioner of the Bureau of Labor and Industries served on Employer an Order of Determination based upon the wage claims filed by the Claimants and the Agency's investigation. The Order of Determination found that Employer owed a total of \$1,288.49 in wages and \$2,500.80 in penalty wages as follows:

	<u>Wages</u>	<u>Penalty</u>	<u>Wages</u>
Sharon Godfrey	\$194.94	\$	\$1,005.00
Brenda Hamlin	\$187.55	\$	351.60
Robin Johnson	\$906.00	\$	\$1,144.20

The Order of Determination required that, within 20 days, either these sums be paid in trust to the Agency or the Employer request an administrative hearing and submit an answer to the charges contained therein.

4) On February 25, 1986, Employer filed a request for an administrative hearing and an answer to the

charges. That answer alleged as follows:

a) Sharon Godfrey – Employer stated that Godfrey had taken breaks and had been paid for all hours worked.

b) Brenda Hamlin – The hours Hamlin claims to have worked are correct; however, Employer stated she believed Robin Johnson had been paying Hamlin. After the cafe closed, Employer stated that Hamlin told her she had not been paid. Employer stated she advised Hamlin that she would pay her when she could.

c) Robin Johnson – Employer stated that Johnson had stolen money from the till and checks that she forged. She also stated that the cafe closed on September 9, 1985, and that Johnson only worked six hours each day.

5) On August 15, 1986, this forum sent a Notice of Hearing to Employer indicating the time and place of the hearing. That notice was also sent to the Agency and each Claimant. Together with the Notice of Hearing, the Forum sent a document entitled "Information Relating to Civil Rights or Wage and Hour Contested Case Hearings" containing the information required by ORS 183.413.

6) On September 11, 1986, Employer called the Hearings Referee to request a continuance. The Hearings Referee denied that request, advising Employer that she should appear at the hearing; and if so, procedural accommodations could be made to enable her to present any further evidence.

7) At the commencement of the hearing, the Hearings Referee explained the issues involved herein and the matters to be proved or disproved.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Employer, a person, did business as the 12th Street Cafe, a restaurant located in Salem, Oregon, and employed one or more persons in the State of Oregon.

1. Sharon Godfrey

2) Claimant Godfrey worked as a cook for Employer from March 18, 1985, to August 3, 1985. Her hourly rate of pay was as follows:

a) \$3.35 for the week ending March 22, 1985;

b) \$3.65 for the weeks ending March 29, 1985, and April 5, 1985; and

c) \$4.00 for the week ending April 12, 1985, to the week ending August 9, 1985.

3) Employer advised Godfrey that she was to work eight hours each day from Monday through Friday and nine hours on Saturday. Employer not only established this schedule but was also present during most of the working hours and knew the number of hours that Godfrey worked.

4) Employer never discussed with Godfrey that she should take a lunch break or meal periods. Since there were always customers in the cafe, Godfrey was never completely relieved of her duties for a lunch break or rest periods.

5) Sharon Culley, a former employee of the Employer, verified Godfrey worked with no rest or meal periods, and was never completely

relieved of her duties; and further stated that "there was no one there to relieve them."

6) On Saturday, August 3, 1985, Godfrey went to work as usual. When she arrived, she realized there were no supplies as she had previously requested Employer to order. As a result, she could not prepare the food. Godfrey and another waitress attempted to call Employer to discuss the matter, but were unable to contact her. At 10:30 a.m., Godfrey put a sign on the cafe door advising that the restaurant would be closed due to an emergency.

7) On Monday, August 5, 1985, Godfrey returned to the cafe and asked Employer if she should continue working. Employer advised her that there was no work for her and that it was the Employer's fault. Godfrey was not certain what Employer meant by this statement.

8) Employer gave Godfrey, as payment for her wages, three checks that bounced. Eventually, Godfrey was paid for the hours of work she performed each week; however, she was not paid at the overtime rate required by law for the hours worked over 40 in each week.

9) Employer advised Godfrey that she was owed nothing and that Employer was not required to pay overtime since she operated a small business. Sharon Culley was present when Employer so advised Godfrey and confirmed the Employer's statement.

10) Godfrey worked 18 hours of overtime during the weeks ending March 29, 1985, and April 5, 1985,

when her rate of pay was \$3.65 per hour. The additional amount owed for those overtime hours worked is 18 (hours) multiplied by \$1.83 (1/2 the hourly rate of \$3.65) for a total of \$32.94. Godfrey worked 81 hours of overtime during the weeks between the weeks ending April 12, 1985, and that ending August 9, 1985, when her rate was \$4.00 per hour. The additional amount owed for those overtime hours worked is 81 (hours) multiplied by \$2.00 (1/2 the hourly rate of \$4.00) for a total of \$162.00. These two sums equal a total amount of \$194.94 owed to Godfrey.

11) Margaret Trotman advised Employer of Godfrey's Claim by letters dated August 22, September 9, and October 1, 1985. The letters requested Employer to respond and provide documents supporting her position. Employer failed to respond in any way.

12) Employer has failed to pay the wages earned and due Godfrey for her overtime work.

13) Penalty wages were assessed by the Agency in the Order of Determination for the Employer's knowing failure to pay Godfrey, as Employer was subject to the law requiring payment of overtime wages and there was no applicable exemption. Employer has not yet paid Godfrey the wages due, and therefore, penalty wages continued, and were assessed, for 30 days under ORS 652.150.

14) Penalty wages for Godfrey were computed, in accordance with Agency policy, on the Wage Transcription and Computation Sheet as follows: \$3684.64 (the total wages earned including overtime) divided by 110 (the number of days worked during the

claim period) equals \$33.50 (the average daily rate of pay). This figure of \$33.50 is multiplied by 30 (the number of days for which penalty wages continued to accrue) for a total of \$1005.00 in penalty wages. This figure is set forth in the Order of Determination.

2. Brenda Hamlin

15) Claimant Hamlin was employed as a dishwasher and food preparer by Employer from July 6, 1985, until August 30, 1985. Hamlin's rate of pay during the wage claim period was \$3.10 per hour. Hamlin was to work from three to five hours each day, about 18 hours per week.

16) Hamlin filed her wage claim form on October 15, 1985, stating Employer owed her wages for 60 hours of work from August 6, 1985, to August 30, 1985, at \$3.10 per hour.

17) After the wage claim was filed, Trotman requested, pursuant to Agency procedure, that Hamlin submit records showing her hours worked. Those hours were transcribed onto a calendar form prepared by the Agency. Hamlin first submitted a compilation of her hours noted on a sheet titled "12th St. Cafe Judi Wilson" and signed by Brenda Hamlin. The calendar form is based on this sheet and indicates that Hamlin worked 60½ hours. Hamlin later submitted her personal calendar. The hours worked on August 21, 22, and 23, 1985, are higher than noted on the "12th St. Cafe" document, and since the discrepancy was not resolved, were not used by the Agency.

18) Hamlin quit working for Employer on August 30, 1985. Hamlin worked 60½ hours at \$3.10 per hour and is owed \$187.55 by the Employer.

Employer has not yet paid Hamlin the wages due her.

19) Trotman sent a notice to Employer advising of Hamlin's claim on October 31, 1985. The notice requested that Employer respond and provide documents supporting her position. Employer failed to respond in any way.

20) The Agency assessed penalty wages in the Order of Determination for the reasons that Employer knew Hamlin was owed wages and knew that those wages had not been paid. Although Employer stated in her answer that she believed Robin Johnson had paid Hamlin, the Agency assessed a penalty as this does not relieve Employer of her obligation to pay wages and she, Employer, is responsible for such payment. In that Employer has not yet paid Claimant, the penalty wages continued, and were assessed for 30 days under ORS 652.150.

21) Penalty wages were computed based on Agency policy on the Wage Transcription and Computation Sheet as follows: \$187.55 (total wages earned) divided by 16 (number of days worked) equals \$11.72 (average daily rate of pay). This sum, \$11.72, was multiplied by 30 (days the penalty wages continued to accrue) for a total of \$351.60 in penalty wages. This figure is set forth in the Order of Determination.

3. Robin Johnson

22) Claimant Johnson was employed as a waitress and a cook for Employer from August 5, 1985, to September 17, 1985. As part of her responsibilities, Johnson also did some

of the Employer's shopping for the cafe. Her rate of pay was \$4.00 per hour.

23) On December 6, 1985, Johnson filed a wage claim with the Agency stating she was owed wages for hours worked between August 12, 1985, and September 17, 1985. On December 30, 1985, the wage claim was amended to reflect overtime hours that Johnson had failed to note, showing that Johnson was owed a total of \$906.00 in wages for 257 hours of work. This figure was computed as follows: 218 hours of work at \$4 per hour equals \$872, plus 39 overtime hours at \$6 (1½ times the rate of \$4) equals \$234. These figures total \$1106 in wages.

Johnson was paid \$200, leaving \$906 in earned, due, and unpaid wages. Employer has not yet paid Johnson the wages due her.

24) Employer stated in her answer that the cafe closed on September 9, 1985. Edith Hickman, the owner of the property upon which the 12th Street Cafe is located, verified that Johnson worked until September 17, 1985. She recalls this date as the rent was due on September 15, 1985, and Johnson worked two days after that date.

25) To determine the hours worked by Johnson, Trotman reviewed the personal calendar prepared and submitted by Johnson. Trotman compared this personal calendar to the calendar of hours prepared based on Johnson's statement to the Agency regarding her hours and found the information to be the same. These records show that Johnson worked 257 hours between August 5, 1985, and September 17,

1985, 39 hours of which were overtime hours.

26) Employer stated in her answer that she failed to pay Johnson for the reason that Johnson had stolen money from the cash register and the Employer's checks which she forged. Virgil Anderson of the Salem Police Department confirmed that there has been no verification of such theft. One of the checks, which Employer alleges was forged, was to IGA food distributor. Johnson was allowed by Employer to write checks for food and supplies for the restaurant.

27) The Agency determined wages were due Claimant for the reason that where an employer raises a defense, as in this case, of theft by the claimant, any deduction by the employer would be considered illegal under ORS 652.610. Where an employee admits a debt to the employer, the Agency would allow a set off. In this case, the employee/Claimant denies the theft, Employer has made no showing of its truth, and the Police Department has not verified the accuracy of the charge.

28) Trotman notified Employer by letter dated December 30, 1985, of Johnson's claim and requested therein that Employer respond and submit documents to support her position. Employer failed to respond.

29) Penalty wages were assessed by the Agency for the reason that Employer had knowledge that the wages were owed and unpaid and had no legitimate reason to withhold wages. Since the wages owed have not yet been paid to Claimant, the penalty wages continued, and were assessed, for 30 days.

30) Penalty wages were computed in accordance with Agency policy on the Wage Transcription and Computation Sheet as follows: \$1106 (total wages earned) divided by 29 (days worked) equals \$38.14 (average daily rate of pay). This sum, \$38.14 was multiplied by 30 (days for which the penalty continued to accrue) for a total of \$1144.20 in penalty wages. This figure is set forth in the Order of Determination.

31) After Employer requested a hearing, Trotman sent another letter, dated March 25, 1986, requesting that Employer submit records regarding the three claims to the Agency. Employer again failed to respond.

32) Employer did not keep records of the time worked by the Employees as required by ORS 653.045.

33) The testimony of Sharon Godfrey was found to be credible. She had the facts readily at her command and her statements were supported by both documentation and the written statements of Sharon Culley. Although Claimants Johnson and Hamlin did not appear, it should be noted that their statements regarding the hours and wages made to the Agency were supported by their personal records. Johnson's statement regarding the closure of the cafe was supported by the written statement of Edith Hickman, the property owner. As regards Hamlin, Employer herself actually verified the accuracy of Hamlin's claims in her answer. There is no reason to determine the testimony of Claimant Godfrey or the written statements of Claimants Hamlin and Johnson to be anything except reliable and credible.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Employer was a person doing business as the 12th Street Cafe in the State of Oregon, and employed one or more persons in the operation of that restaurant.

2) Claimant Sharon Godfrey was employed as a cook by Employer from March 18, 1985, to August 3, 1985. During that time period, Employer knowingly failed to pay her for 99 hours of overtime work: 18 hours at \$1.83, and 81 hours at \$2.00, for a total of \$194.94 in earned, due, and payable wages. The Employer has not paid Godfrey the wages owed to her and more than 30 days have elapsed from the due date of those wages.

3) Claimant Brenda Hamlin was employed as a dishwasher and food preparer for Employer from July 6, 1985, to August 30, 1985. Between August 6, 1985, and August 30, 1985, Employer knowingly failed to pay Hamlin for 60.5 hours worked at the rate of \$3.10 per hour for a total of \$187.55 in earned, due, and payable wages. Employer has not paid Hamlin and more than 30 days have elapsed from the due date of those wages.

4) Claimant Robin Johnson was employed as a waitress and cook by Employer from August 5, 1985, to September 17, 1985. Employer knowingly failed to pay Johnson for 218 hours of work, for the period August 12, 1985, to September 17, 1985, at the rate of \$4.00 per hour, and 39 hours of overtime work during the same period at \$6.00 per hour, for a total of \$906.00 in earned, due, and payable wages. Employer has not paid Johnson and more

than 30 days have elapsed from the due date for the wages.

5) Employer has made no showing that she was financially unable to pay at the time wages accrued.

CONCLUSIONS OF LAW

1) During all times material herein, Employer was an employer and the Claimants were 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 of Employer herein.

3) Employer was notified of her rights as required by ORS 183.413(2).

4) OAR 839-20-030 provides that all work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half the regular rate of pay. Employer is obligated by law to pay Claimants Godfrey and Johnson one and one-half times their regular hourly rate for all hours worked in excess of 40 hours in a week.

5) ORS 653.045 requires an employer to maintain payroll records. Where the forum concludes that the claimant was employed and was improperly compensated, it becomes the burden of Employer to produce all appropriate records to prove the precise amounts involved. *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946); *In the Matter of Marion Nixon*, 5 BOLI 82 (1986). Based on these rulings, the forum may rely on the evidence produced by the Agency regarding the number of hours worked and rate of pay for each Claimant.

6) OAR 839-20-050 requires businesses to provide each employee with meal periods and rest periods. Appropriate rest periods are not to be deducted from an employee's wages. Appropriate meal periods may not be deducted from the employee's wages when the employee is not completely relieved from duty. Employer herein is obligated by law to pay wages to Godfrey for the time worked during meal periods and rest periods when she was not completely relieved from duty.

7) Employer has a duty to know the amount of wages due to an employee. *McGinnis v. Keen*, 189 Or 445 (1950); *In the Matter of Jack Coke*, 3 BOLI 238 (1983).

8) The actions or inactions of Robin Johnson, as an employee of the Employer, are properly imputed to the Employer. Therefore, Employer is responsible for Johnson's failure to pay Claimant Hamlin, and is in any case, ultimately responsible for payment of wages.

9) Employer's failure to pay the wages owed to Claimants Godfrey, Hamlin, and Johnson, was knowing, intentional, and voluntary, and therefore constitutes a willful failure to pay for purposes of ORS 652.150.

10) Employer has not avoided liability for this penalty, as she has not shown that she was financially unable to pay the wages owed to the Claimants at the time they accrued.

11) 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 Employer to pay the Claimants their earned, unpaid, due, and payable

wages and the penalty wages, plus interest on both sums.

OPINION

Employer failed to appear at the hearing, and thus has defaulted as to the charges set forth in the Order of Determination. In a default situation, pursuant to ORS 183.415(5) and (6), the task of this forum is to determine if a prima facie case supporting the Agency's Order of Determination has been made on the record. The Agency has in fact made a prima facie case. It should be noted that Claimants Hamlin and Johnson did not appear at the hearing; however, in that they both assigned their claims to the Commissioner, they are merely witnesses for the Agency and their presence was not required.

1. Sharon Godfrey

Godfrey testified that she worked 99 hours of overtime for which she did not receive compensation at the required overtime rate. Her testimony is supported by her work schedule; that is, Employer assigned her to work eight hours Monday through Friday, and nine hours on Saturday. This, quite obviously, results in working over 40 hours each week, and an employer can be held to such knowledge. *In the Matter of Booker Pannell*, 5 BOLI 228 (1986). Employer was aware that Godfrey worked overtime as she assigned her that schedule. Furthermore, although Employer failed to appear at the hearing, she stated in her answer that she did not owe overtime as she ran a small business. She likewise made this statement to Godfrey and Sharon Culley. Employer's ignorance of the law regarding overtime is no defense to her obligation to pay wages.

Claimant Godfrey was credible, the Employer offered no legitimate defense, and therefore the wages and penalty wages as set forth in the Order of Determination are due to Claimant Godfrey.

2. Brenda Hamlin

Hamlin's personal calendar supports her claim for wages due to her from the Employer. Again, although Employer failed to appear at hearing, her position regarding this claim was made clear in her answer. That is, Employer claimed that she believed Robin Johnson was paying Hamlin. Whether or not she actually believed this is not relevant, as Employer has the ultimate responsibility to insure that wages are paid to employees. An employer cannot be insulated from liability for wages, or for penalty wages, by delegating the task of payment to an employee. Hamlin's claim was supported by reliable documentation. Employer has offered no defense to the claim, and therefore the wages and penalty wages as set forth in the Order of Determination are due to Claimant Hamlin.

3. Robin Johnson

Johnson's claim, just as Hamlin's, was supported by reliable documentation and the statement of Edith Hickman, the property owner who has no financial interest in this case. Employer claimed in her answer that she had not paid Johnson because she alleged Johnson had stolen money and checks from her. The Police Department has not substantiated these charges. In that one check of which the forum is aware was written to IGA food distributor, and Johnson was allowed by Employer to write checks for

supplies, the truth of the theft charge is most suspect. Moreover, unless an employee admits such a charge and agrees to a set off in wages owed, any deduction by Employer is unlawful. Therefore, since Johnson's claim was supported by reliable evidence and Employer has offered no legitimate defense, the wages and penalty wages in the Order of Determination are due to Claimant Johnson.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders JUDITH WILSON to deliver to the Hearings Unit of the Bureau of Labor and Industries, 309 State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon 97201, the following:

1) A certified check payable to Bureau of Labor and Industries IN TRUST FOR SHARON L. GODFREY in the amount of ONE THOUSAND ONE HUNDRED NINETY NINE DOLLARS and NINETY-FOUR CENTS (\$1,199.94), representing \$194.94 in gross earned, unpaid, due, and payable wages, less legal deductions previously taken by the Employer, and \$1,005 in penalty wages, plus interest at the rate of nine percent per year on the sum of \$194.94 from September 1, 1985, until paid and nine percent interest per year on the sum of \$1005 from October 1, 1985.

2) A certified check payable to Bureau of Labor and Industries IN TRUST FOR BRENDA HAMLIN in the amount of FIVE HUNDRED THIRTY NINE DOLLARS and FIFTEEN CENTS (\$539.15) representing \$187.55 in gross earned, unpaid, due

and payable wages, less legal deductions previously taken by the Employer; and \$351.60 in penalty wages, plus interest at the rate of nine percent per year on the sum of \$187.55 from October 1, 1985, until paid and nine percent interest per year on the sum of \$351.60 from November 1, 1985, until paid.

3) A certified check payable to Bureau of Labor and Industries IN TRUST FOR ROBIN JOHNSON in the amount of TWO THOUSAND FIFTY DOLLARS and TWENTY CENTS (\$2050.20) representing \$906 in gross earned, unpaid, due, and payable wages, less legal deductions previously taken by the Employer; and \$1144.20 in penalty wages, plus interest at the rate of nine percent per year on the sum of \$906 from October 1, 1985, until paid and nine percent interest per year on the sum of \$1144.20 from November 1, 1985, until paid.

**In the Matter of
BOOKER T. PANNELL,
dba Booker T's Auto Detailing and
Walnut Park Service Center,
Respondent.**

Case Number 09-85
Amended Final Order of the
Commissioner
Mary Wendy Roberts
Issued October 20, 1986.

SYNOPSIS

Respondent willfully failed to pay Claimant's wages for some regular and all overtime hours immediately upon termination. Meal periods are considered work time when an employee is not completely relieved from duty during the meal period. Employers are required to keep records of the actual hours worked each week by each employee. Respondent was liable for civil penalty wages. ORS 652.140, 652.150, 653.045, 653.261; OAR 839-21-017.

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on October 3, 1985, in Room 311 of the State Office Building, 1400 SW Fifth Avenue, Portland, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Betty Smith, Assistant Attorney General of the Department of Justice of the State of Oregon. Booker T. Pannell, dba

Booker T's Auto Detailing and Walnut Park Auto Service Center (hereinafter the Employer), represented himself. George L. Jones (hereinafter the Claimant) was present throughout the hearing.

The Agency called as witnesses Eddie Mack Simmons, co-worker of the Claimant during some times material; the Claimant; and the Employer. The Employer called himself as his sole witness.

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

**FINDINGS OF FACT –
PROCEDURAL**

1) At a time not specified in the record, the Claimant filed with the Wage and Hour Division of the Agency a wage claim which alleged, in effect, that the Employer was his former employer and that the Employer had failed to pay wages due to the Claimant.

2) At a time not specified in the record, the claimant assigned all wages due him from the Employer to the Commissioner of the agency in trust for the Claimant.

3) On March 8, 1985, the Commissioner of the Agency issued an Order of Determination based upon the above-cited wage claim. The Order of Determination found that the Employer owed the Claimant \$758.71 in regular and overtime wages for work the Claimant had performed while employed by the Employer, and \$881.10

in penalty wages, plus interest on both of those sums.

4) On or about April 12, 1985, the Employer through a letter by his bookkeeper requested a hearing on the Order of Determination.

5) On September 3, 1985, this forum transmitted to the Employer, the Agency, and the Claimant a notice of the time and place of the hearing of this matter.

6) This forum sent a document entitled "Information Relating to Civil Rights or Wage and Hour Contested Case Hearings" with the Notice of Hearing. At the commencement of the hearing, the Claimant stated that he had received this document, that Ms. Smith, counsel for the Agency, had read it to him, and that he had no questions about it. At the commencement of the hearing, the Employer stated that he had also received and read this document and had no questions about it.

7) At the start of the hearing, the Agency moved to amend the Order of Determination to accurately reflect the Agency's position at the time of hearing. The Employer informed the Presiding Officer that he did not object to this motion or need more time to prepare his defense in response to the proposed amendments. Accordingly, the Presiding Officer granted the motion and admitted (including handwritten interlineations) the Amended Order of Determination.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Booker T. Pannell was the sole owner of a business called Booker T's Auto Detailing, which the Employer has

owned (in his own words) "quite awhile." (This business also has been called Walnut Park Auto Service Center. However, during times material herein, the Employer used that name only for purposes of the business's bank account. For all other purposes, including registration with the State of Oregon, Mr. Pannell's business was called Booker T's Auto Detailing during all times material herein.)

In this business, located in Portland, Oregon, the Employer offered automobile detailing services to automobile dealers and individuals. Those services included shampooing, polishing, and waxing automobiles and steam-cleaning their engines. In this business, the Employer employed one or more persons in the State of Oregon during all times material herein.

2) From January 30, 1984, through June 13, 1984, the Employer employed the Claimant to rack automobiles for his above-described business. This job involved washing and cleaning automobiles which had been detailed and filling their tanks with gasoline. The Claimant also picked up and delivered automobiles. When there were no automobiles for the Claimant to rack, pick up or deliver, the Claimant did odd jobs such as cleaning up the Employer's premises, picking up supplies, or washing towels. As the Claimant testified, he was "real busy" in his job for the Employer.

3) The Employer hired the Claimant himself.

4) According to the Claimant, the Employer told him at hiring that he would pay the Claimant "\$4.00 an hour." The Claimant further testified that the Employer never told the

Claimant, during his employment, that he would pay the Claimant any less than \$4.00 per hour.

5) The Employer testified that he did not give the Claimant a specific rate of pay when he hired him; that he told the Claimant he would be paid the "minimum wage" (The amount of which the Employer had to ascertain from his bookkeeper, Doris Duncan). The Employer testified that he did not tell the Claimant at the time what he thought the minimum wage rate was, because he did not know. (In his September 26, 1985, deposition, the Employer seemed to state that he told the Claimant at hiring that he thought it was \$3.65 per hour.) The Employer testified that after he found out from Ms. Duncan what the minimum wage rate was, he told the Claimant what it was, using the figure Ms. Duncan had given him, and representing to the Claimant that was what the Claimant would be paid per hour of work. At hearing, the Employer did not remember what figure he gave the Claimant, but guessed it was \$3.35 per hour, since that is the rate at which Ms. Duncan calculated the Claimant's pay. The Employer testified that as far as he knows, that (minimum wage figure) is what the Claimant was paid throughout his employment.

According to a letter from Ms. Duncan to the Agency dated April 5, 1985, which the Employer testified correctly represents his position herein, the Claimant "was hired at the minimum wage of \$3.35 per hour."

In her deposition, Ms. Duncan stated that she remembered that the Employer had called her in connection with the Claimant and asked her what

the minimum wage was, and that she had told him \$3.35 per hour.

6) The Employer did not discover until hearing that in fact the minimum wage rate applicable to the Claimant's employment was \$3.10 per hour. (See Conclusion of Law 4 below.)

7) During the Claimant's employment, he was the Employer's only employee paid on an hourly basis; all his other employees worked on a piece work basis, by the car. Accordingly, the forum finds that during the Claimant's employment, the Employer was not accustomed to paying employees by the hour.

8) In the Employer's employ, the Claimant worked each Monday through Friday. He did not miss one day of work while in the Employer's employ, and he did not ever work on a Saturday or Sunday.

9) The Claimant testified that he believed that the Employer told him, when he hired him, to come in at 8 a.m. the first day of work. The Claimant also testified that he assumed his hours would be the same as those of his co-workers, from 8 a.m. to 5 p.m. (Later, the Claimant testified that all the Employer's other employees, working on a piece work bases, "worked as long as they wanted.") The Claimant testified that throughout his employment for the Employer, the Claimant usually worked at least from 8 a.m. to 5 p.m., but although these were his "regular, working, paying" hours, he sometimes worked longer.

The Employer testified that the Claimant's work hours were "from 8 to 5," the hours the Employer's business was open. He also testified that he

paid the Claimant for eight hours of work each workday, even though the Claimant sometimes did not work the "full eight" hours, for personal reasons. According to an exhibit, the Employer states that his employees never work overtime, but that there were times the Claimant "hung around just shooting the breeze: which did not constitute work hours." In sum, the Employer testified, in effect, that to this knowledge, he paid the Claimant for eighty hours of work every two weeks during his employment; that there were no days the Claimant was absent or docked time.

10) The Claimant testified that the Employer never told him he could take time off every day for work breaks and for lunch. The Claimant further testified that, because the Employer never told him to and because he was so busy, the Claimant could not and did not stop working and take off any time to eat lunch. The Claimant asserted that if he got hungry, he ate while he was working. He also testified that other employees at the shop worked while he was working during the "lunch hour."

The Claimant testified, and this forum finds, that he never complained to the Employer about not getting any time off to eat lunch, because he feared that the Employer might discharge him. Because the Claimant had not had a regular job for three years before starting work for the Employer, it was very important to the Claimant to keep his job with the Employer.

The Claimant testified that the Employer came to the Claimant's place of work every working day, but

sometimes not until 2 or 3 p.m. The Employer could see the claimant at work when the Employer was on the premises, even though the Employer (and all his other employees) worked inside while the Claimant worked outside. The Claimant testified that the Employer never told him to stop working and take a lunch break.

11) Eddie Mack Simmons worked for the Employer as an auto buffer from about March 24, 1984, to about May 18, 1984. Mr. Simmons testified, and this forum finds, that although he usually worked inside while the Claimant worked outside, Mr. Simmons could see the Claimant working throughout the day. Mr. Simmons further testified that he never saw the Claimant stop work for an hour or a half hour to eat his lunch; that he saw the Claimant eating when he could, and that he saw the Claimant eating while the Claimant was working.

12) The Employer testified that when he hired the Claimant, he told the Claimant his daily starting and quitting time, and the Claimant asked the Employer when he could eat lunch. The Employer testified that he told the Claimant that he had a half hour for lunch, but that he did not give the Claimant a specific time to take his lunch; i.e., that the Claimant could take a half hour every day for lunch at a time convenient for the Claimant (given the difficulty of stopping for lunch in the middle of certain tasks the Claimant would perform, such as delivering cars).

When asked if the Claimant actually took a half hour for lunch, the Employer testified that the Claimant had "his freedom to" do so, and he stopped

to take his lunch whenever he felt like it. The Employer further testified that the Claimant's time for taking lunch varied, and the Employer did not go to him and tell him to stop and go to lunch. The Employer testified that he "would see the Claimant taking his lunch at different times during the day." The Employer denied ever conveying to the Claimant that he could not, should not, or better not take a lunch break.

In the Employer's deposition, the Agency asked the following questions and the Employer gave the following responses:

Agency:

"When was lunch time for him (the Claimant)? What did you tell him?"

Employer:

"At 12 til 12:30."

(Note of the forum: the Employer indicated at hearing that he had discovered further information about that point after his deposition.)

Agency:

"Did Mr. Jones take lunch breaks from 12 to 12:30?"

Employer, in part:

"Whenever he wanted to."

Agency:

"So you tell me you saw him between 12 and 12:30 not working but eating lunch?"

Employer:

"I've done that on a lot of occasions, yes, most of the time, yes."

Agency:

"Are there any other people who worked there who would be able to be witnesses that Mr. Jones took lunch every day or almost everyday at 12 o'clock?"

Employer:

"*** I'm sure there is, but to tell you, I can't."

13) When asked if it is correct that the Claimant worked and should have been paid for at least 8.5 hours each day, since the Employer maintains that he worked from 8 a.m. to 5 p.m. and took off one-half hour for lunch each day, the Employer answered affirmatively. The Employer then agreed that, accordingly, although he did not realize it at the time, he owed (and owes) the Claimant wages for an additional one-half hour of work for each day the Claimant worked. The Employer testified unequivocally that his compensating the Claimant for eight rather than 8.5 hours of work each day was a mistake; he "never even thought about the lunch hour being part of the eight hours;" he never sat down and calculated that there were nine hours between 8 a.m. and 5 p.m. and that the Claimant only worked 8.5 of them. The Employer stated that he was not aware of his oversight until the Agency brought it to his attention during his deposition.

14) During the Claimant's employment, the Employer kept records of the Claimant's daily work hours. At the end of each two week pay period, the Employer reported to Ms. Duncan (what he thought were) the Claimant's total work hours for the period. Ms. Duncan then had her son put this information in a computer, which calculated the amount of the deductions to be

made from the Claimant's gross pay. Ms. Duncan then reported to the Employer by telephone what the Claimant's gross and net wages were for the period. The Employer subsequently paid the Claimant, and his other employees, the net amount due each, by check every other Friday, the last day of each pay period. Copies of all the Claimant's paychecks from the Employer are in the record.

The Employer testified that within three workdays after each payday, he got from Ms. Duncan and gave to his employees stubs for their last paychecks which itemized the deductions made from those paychecks and which had been generated by Ms. Duncan's computer.

The Claimant testified that he does not recall ever getting any papers or information, when he got his paychecks, which showed his hourly rate of pay, number of hours worked or tax deductions. The forum does not consider this contrary to the Employer's testimony cited in the previous paragraph, because the Employer did not testify that he gave this information to the Claimant when he gave him his paycheck. Mr. Simmons testified that the Employer never gave him any information showing tax deductions, hours worked during the pay period, or his hourly rate. However, the forum gives little weight to this testimony, as Mr. Simmons was not paid on an hourly basis.

15) During the Claimant's employment, the Employer paid him total gross wages of \$2617.40, on the basis of \$3.35 per hour for eight hours per work day. (On his May 2, May 18, and June 1, 1984, paychecks, as a result of

an error by (apparently) the Employer's bookkeeper, the Claimant was underpaid by \$3.00 (\$9.00 totally) in gross wages.)

16) The Claimant testified, and this forum finds, that he cannot read and write well, and that he has a friend do, because he cannot, all his reading, writing, and mathematical calculations. The Claimant testified that he had never worked for \$4.00 per hour before his employment by the Employer. He testified, and this forum finds, that he did not realize how much money he was supposed to be earning until, at some point after his employment with the Employer ended, the Claimant told a friend how many hours he had worked per day, and the friend calculated his total time per pay period as ninety hours and informed him he was not getting paid for that amount of time.

17) The Employer testified, and this forum finds, that none of the reasons he failed to pay the Claimant whatever amount the forum determines he owes the Claimant was an inability to pay.

18) The Employer's demeanor at hearing was very credible; articulate (without being glib), convincing and gentle. He demonstrated at hearing that he accepts responsibility which he feels is his, even when, in this proceeding, doing that meant making an admission against interest. The Employer testified that he has a good reputation in his community. He stated that he has never missed a payroll or had anyone say he cheated him or her before this, never "had the police in" or any investigation of his business, and has always paid his taxes. The Employer stated that he has worked very hard at being a good citizen. The

forum finds the testimony recited in this paragraph above to be fact, as it is uncontroverted and credible.

19) At hearing, the Claimant impressed the Presiding Officer as credible; he seemed straightforward and guileless.

20) The verbal interaction between the Claimant and the Employer at the hearing clearly demonstrated, and this forum finds, that it is very difficult for the Claimant and the Employer to communicate effectively with, i.e., to listen to and understand, each other.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, the Employer was a person who in the State of Oregon directly engaged the personal services of one or more employees in the operation of his business, an automobile detailing service.

2) From January 30, 1984, through June 13, 1984, the Claimant was an individual who (other than as a co-partner of the Employer or as an independent contractor) rendered personal services as an automobile racker, wholly in the State of Oregon, to the Employer in his below-described business. The Employer agreed to pay the Claimant at the fixed rate of \$3.35 for each hour the Claimant spent in the performance of these services.

3) The Claimant worked for the Employer each Monday through Friday from January 30 through June 13, 1984, for a total of 98 days (or 19 weeks and three days). His work hours were from 8 a.m. to 5 p.m. Because the Employer failed to make clear to the Claimant that he was entitled to take a one-half hour break for lunch and that he would be paid as if

he took that break, and because the Claimant had so much work to do, the Claimant did not take lunch breaks. Consequently, the Claimant worked nine hours per day during his employment by the Employer.

4) The Employer paid the Claimant total gross wages of \$2617.40 (based upon eight hours per day for 98 days at \$3.35 per hour) for the services the Claimant rendered the Employer between January 30 and June 13, 1984.

5) The Employer discharged the Claimant as of the conclusion of his work on June 13, 1984.

6) The Employer knew that the Claimant worked from 8 a.m. to 5 p.m. on his workdays. The Employer assumed that the Claimant took one-half hour for lunch. Nevertheless, the Employer paid the Claimant for just eight hours of work each day. At best, the Employer's failure to pay the Claimant for at least 8½ hours of work each day was due to the Employer's failure to heed the obvious arithmetic facts that there are nine hours between 8 a.m. and 5 p.m., and nine hours minus one-half hour equals 8½ hours.

7) The Claimant did not know that the Employer had underpaid him, because the Claimant was unable to do the reading and make the arithmetic computations necessary to ascertain his gross wages, until a friend did this for him after his termination from the Employer's employ.

CONCLUSIONS OF LAW

1) During all times material herein, the Employer was an employer, and the Claimant was his employee, sub-

ject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

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

3) Before the commencement of the contested case hearing, this forum complied with ORS 183.413 by informing the Employer and the Claimant of the matters described in ORS 183.413(2)(a) through (i).

4) The Agency has stipulated, and this forum has concluded, that the minimum wage rate applicable to the Claimant's employment by the Employer was \$3.10 per hour. (The federal minimum wage rate of \$3.35 per hour set forth in the Fair Labor Standards Act was not applicable to that employment.)

5) Having agreed to pay the Claimant \$3.35 per hour for his work from January 30 through June 13, 1984, the Employer was and is legally obligated to pay the Claimant at that rate.

6) During the 19 full weeks the Claimant worked for the Employer, he worked 45 hours per week. OAR 839-21-017 required the Employer to pay the Claimant at an overtime rate equal to at least one and one-half times his regular rate of pay, or \$5.03 per hour, for the five hours he worked in excess of 40 hours during each of those 19 weeks.

7) Accordingly, during his employment by the Employer, the Claimant worked eight hours per day for 98 days at the regular, straight time rate of \$3.35 per hour, earning total regular, straight time wages of \$2626.40, plus

a total of 95 hours at the overtime rate of \$5.03 per hour, earning total overtime wages of \$477.85. In sum, the Claimant earned total gross wages of \$3104.25 while working for the Employer. As the Employer paid the Claimant a total of only \$2617.40 in wages, \$486.85 of the wages the Claimant had earned were unpaid when the Employer terminated the Claimant's employment effective at the end of the Claimant's workday on June 13, 1984.

8) The above-cited \$486.85 in earned and unpaid wages became due and payable immediately upon the Claimant's termination.

9) The Employer willfully failed to pay the above-cited due and payable wages to the Claimant. There is no assertion or evidence that his failure by Employer to pay wages due was the result of financial inability to pay wages at the time they accrued. ORS 652.150 authorizes a penalty in the form of continuing wages for a period not to exceed 30 days. Accordingly, the Employer has incurred penalty wages under ORS 652.150 for his non-payment of the Claimant's earned, due, and payable wages.

10) 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 the Employer to pay the Claimant the above-cited earned, unpaid, due, and payable wages; a penalty for the willful failure to pay those wages, plus interest on both sums.

OPINION

1. Credibility

As noted in Finding of Fact 18 above, the Employer's demeanor at hearing and his uncontroverted testimony as to his reputation in his community made a strong impression that he was credible upon the Presiding Officer. Likewise, but in different ways, the Claimant impressed the Presiding Officer as a forthright witness who presented the truth as he saw it to the forum.

On the other hand, as demonstrated above in Findings of Fact 5, 9, and 12, the testimony of both the Employer and the Claimant was inconsistent at times. In addition, the Agency presented evidence that the Employer had been uncooperative with the Agency and habitually cursed the Claimant at work, and the Employer maintained in effect that the Claimant was a hot-tempered liar.

However, none of this carried enough weight to effectively controvert contrary evidence or was sufficiently probative to significantly alter the favorable impressions described in the previous paragraph. What did most help this forum understand how two credible witnesses could offer contradictory testimony as to the seemingly simple terms of their relationship was the vivid demonstration, during the exchanges between the Employer and the Claimant at the hearing, of their inability to communicate with each other, as they stubbornly and persistently engaged in verbal disagreements which they did not appear able to resolve. Accordingly, this forum concludes that the dispute between the Employer and the Claimant is borne not of conscious

dishonesty on either part, but of misunderstanding between the two of them, a failure of communication most probably occasioned by the Employer's not being accustomed to having an hourly employee, the Claimant's inability to detect and correct the underpayment of his wages during his employment and, most importantly, the inability of these two people to listen to each other.

2. Factual Issues

There are two basic factual questions in this matter: what hourly wage was the Employer legally required to pay the Claimant, and how many hours did the Claimant work each day.

A. Hourly Rate

The Claimant maintains that the Employer agreed to pay him \$4.00 per hour for his work. The Employer maintains that he agreed to pay the Claimant at the minimum hourly wage rate, and that he paid the Claimant at the rate of \$3.35 per hour. The Employer testified that when he hired the Claimant, he told him he would pay him at the minimum wage rate, but that he did not tell the Claimant what that rate was until later, when he had ascertained it from his bookkeeper. The forum believes the Employer, because his position is corroborated by his bookkeeper, who testified in deposition that the Employer called her in connection with the Claimant and asked her what the minimum wage rate was and that she told the Employer \$3.35 per hour. This is in fact the rate at which the Employer paid the Claimant throughout his employment. In light of this corroboration and the Employer's general credibility, this forum finds the discrepancy between the Employer's testimony at

hearing that he told the Claimant at hiring that he thought the minimum wage rate was and his deposition statement to the contrary indicative of nothing more than the Employer's confusion of that particular point. At the same time, even though this forum has concluded, therefore, that the Claimant's testimony that the Employer told him he would pay him \$4.00 per hour is not accurate, in light of the Claimant's general credibility, the forum does not conclude that the inaccuracy of his testimony on this point is the result of anything other than the Claimant's confusion on this point.

The Employer did tell the Claimant that the minimum wage rate was \$3.35 per hour after his bookkeeper gave him that information. This was the federal minimum wage rate, and only the state minimum wage rate of \$3.10 per hour was applicable to the Claimant's employment. However, the Employer did not discover this until the hearing, and he did pay the Claimant at the rate of \$3.35 per hour. Therefore, this forum concludes that even though the Employer was misinformed as to what was the applicable minimum wage rate, he did agree to pay the Claimant \$3.35 per hour. Having told the claimant, in effect, that the applicable rate of pay was \$3.35 per hour, and having paid him at this rate, the Employer agreed and is legally obliged to pay him at this rate. The Employer cannot now successfully assert that he should be allowed to correct his bookkeeper's mistake and, for purposes of this proceeding, owe the Claimant only \$3.10 per hour for his work.

B. Number of Daily Hours of Work

The Claimant testified that because the Employer never told him he could take time off for lunch and because he had a busy work load, the Claimant never stopped and took time off to eat lunch while he worked for the Employer.

The Claimant maintained that he merely ate what he could while working. The Employer, on the other hand, testified that he told the Claimant when he hired him that he had one-half hour for lunch (at no specified time of day), that the Claimant did stop to eat whenever he wished, and that the Employer saw the Claimant taking his lunch at different times of day. The forum believes that the testimony of the Claimant is more accurate than that of the Employer on this point. First, the Employer contradicted his above-cited testimony at deposition, where he stated that he saw the Claimant eating lunch and not working between 12:00 noon and 12:30 most of the time. Second, the Claimant's testimony was corroborated by Eddie Mack Simmons, who worked for the Employer during part of Claimant's employment. Mr. Simmons testified that the Claimant did not take a regular lunch break, that he never saw the Claimant stop working for an hour or half-hour break, and that the Claimant ate when he could, including while working. Third, the forum does not believe the Employer paid much attention to how much time the Claimant took for lunch, much less whether he took it. After all, the Claimant was his only hourly employee; since his other employees were paid on a piece work (i.e., volume rather than time) basis, it may well be that the

Employer was not accustomed to thinking in terms of how much time his employees took for lunch (and he was accustomed to his employees not necessarily taking the full break provided to them). Since the Claimant obviously did not take more time than allowed for lunch, the Employer's attention was not drawn to the Claimant's lunch breaks. The Employer evidenced his failure to think about the existence or length of the claimant's actual lunch breaks, and his assumption that the Claimant was taking lunch breaks, by his paying the Claimant as if he took a one hour break for lunch, when (even) the Employer maintains he took just one-half hour. Thus, even by Employer's own testimony, he believed Claimant took only one-half hour for lunch. Therefore, Claimant worked, according to Employer's apparent assumption, at least 8½ hours each day. This forum concludes that the Employer failed to make clear to the Claimant that he was entitled to a one-half hour break for lunch, that he would be paid as if he took that break, and that consequently the Claimant did not take a lunch break, i.e., did not stop working to eat lunch. Accordingly, the Claimant worked the entire nine hours between his 8 a.m. starting time and 5 p.m. quitting time.

The evidence establishes that Employer failed to make it clear to Claimant that he was to take a lunch break. The evidence also establishes that the Employer allowed Claimant to work from 8 a.m. to 5 p.m. Employer is presumed to know that there are nine hours between 8 a.m. and 5 p.m. While Employer assumed that Claimant took one-half hour for lunch, even if

this were a fact, Claimant would have still worked 8½ hours out of the nine hours between his 8 a.m. to 5 p.m. workday. Employer's failure to pay Claimant for at least 8½ hours per day was, therefore, willful as that term is used in ORS 652.150.

Even if this failure to pay was the result of an oversight, Employer would still be subject to the penalty set forth in ORS 652.150, since an oversight of such an obvious fact does not negate a conclusion of willfulness.

In fact, the Claimant worked nine hours per day for the Employer, at a rate of \$3.35 per hour, for an average daily rate of pay of \$30.15. Pursuant to ORS 652.150, the Commissioner may assess a penalty for an employer's willful failure to pay wages, by continuing a claimant's average daily rate of pay for 30 days. Accordingly, the forum has imposed a penalty totally \$904.50 upon the Employer herein, for his above-described willful failure to pay the Claimant wages the Claimant had earned.

3. Penalty Wages Under ORS 652.150

The evidence establishes that Employer told Claimant his hours of work were 8:00 a.m. to 5:00 p.m. The evidence also establishes that Employer did not make it clear that Claimant was to take a lunch break. At the hearing, Employer maintained that Claimant took one-half hour for lunch. Even if this were a fact, Claimant would have worked 8½ hours out of the Employer's scheduled nine hour work day. The evidence also indicates that the Employer could observe the Claimant working during times that would have been, according to the Employer's own

testimony, the lunch period. Therefore, the Employer intended that Claimant work in excess of eight hours, and Employer failed to pay Claimant wages due for that time worked. As a result, the Employer's failure to pay the Claimant for all hours worked constitutes a willful failure to pay under ORS 652.150. The Claimant worked an average work day of nine hours at a rate of \$3.35 per hour. Pursuant to ORS 652.150, the Commissioner may assess a penalty in the form of wages not to exceed 30 days. Based upon the facts of this case, a penalty in the amount of \$904.50 has been assessed.

AMENDED ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Booker T. Pannell, doing business as Booker T's Auto Detailing and Walnut Park Auto Service Center, to deliver to the Hearings Unit of the Bureau of Labor and Industries, Room 309, 1400 S.W. Fifth Avenue, Portland, Oregon 97201, a certified check payable to the Bureau of Labor and Industries in the amount of ONE THOUSAND THREE HUNDRED NINETY ONE DOLLARS and THIRTY-FIVE CENTS (\$1391.35) which represents \$486.85 in wages and \$904.50 in penalty wages, plus interest at the rate of nine per cent per year for the period from July 1, 1984, until paid.

**In the Matter of
SHEILA R. WOOD
dba Special Touch Salon,
Respondent.**

Case Number 05-86
Amended Final Order of the
Commissioner
Mary Wendy Roberts
Issued November 14, 1986.

SYNOPSIS

Respondent willfully failed to pay Claimant minimum wages due immediately upon termination. Ignorance of the minimum wage law was no defense. Any agreement between an employer and an employee, where the employer is subject to Oregon's minimum wage law, to compensate the employee at less than the minimum wage rate is unlawful. The Agency had the burden of proving that claimant performed work for which she was not properly compensated. The Commissioner allowed an offset for goods and services Claimant acknowledged receiving from Respondent. Respondent proved she was financially unable to pay claimant's wages at the time those wages accrued, and thus was not liable for civil penalty wages. ORS 652.140, 652.150, 652.610(4), 653.025.

The above-entitled case came on regularly for hearing before Susan T. Venerable, designated as Hearings Referee by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on September

19, 1986, in Room 402 of the City Hall, City of Portland, 1220 S.W. Fifth Avenue, Portland, Oregon. The Hearings Referee called as witnesses for the Bureau of Labor and Industries (hereinafter Agency) the following: Douglas McKean, Program Coordinator for Wage and Hour Division (hereinafter WHD) of the Agency; Margaret Trotman, Investigator for the WHD of the Agency; Katryna L. Wilt, (hereinafter Claimant); Carol Wilt, Claimant's mother; and Steve Walker, a self-employed hair dresser who had previously worked in the Special Touch Salon with Employer.

Employer Sheila R. Wood, dba Special Touch Salon, was present, testified, and was given an opportunity to question witnesses for the Agency. Employer called as witnesses the following: Theresa Puckett; Shannon Lee, Puckett's sister; Stephanie Mann; and Sandra Asbury, Employer's sister.

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

**FINDINGS OF FACT –
PROCEDURAL**

1) On August 5, 1985, Claimant filed a wage claim with the WHD of the Agency claiming that she had been employed by Employer and that Employer had failed to pay her \$411.84 in wages due her for 154.5 hours of work performed between June 18, 1985, and July 31, 1985.

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

3) On April 1, 1986, through the Multnomah County Sheriff's Office, the Agency served an Order of Determination upon Employer. The Order of Determination was based on Claimant's wage claim and investigation by the Agency. The Order of Determination required Employer to pay \$411.84 in wages, plus interest thereon, and \$598.80 as penalty wages, plus interest thereon, or to request an administrative hearing and submit an answer to the charges within twenty days.

4) On April 18, 1986, the Agency received a request for hearing from Employer and an answer. In that answer, Employer stated that Claimant had not been hired, that there was an agreement to trade service, such as hair cuts and products, for the services of Claimant around the salon; that Claimant did not work the number of hours she has claimed; and, that Employer had given Claimant \$147.11 worth of goods and services.

5) In Employer's answer dated April 18, 1985, Employer made the following statement:

"Trina and her mother new (sic) I could not afford to hire Trina as an employee. I was open and honest."

Employer was not at that time or at the hearing represented by counsel, as she stated in that letter:

"No I do not have counsel because I cannot afford one."

It is evident from the above cited statement and other documents submitted by Employer, that Employer had trouble with her grammar and her grasp of the issues in this case. Furthermore, Employer offered her financial records to the Agency during the investigation.

Under these circumstances, the above cited statement is more than sufficient to comply with OAR 839-01-010(2) requiring that all defenses be raised in the answer. The statement made clear that Employer's financial circumstances were an issue in this case, and therefore, Employer was allowed to raise her inability to pay wages at the time those wages accrued as a defense to the assessment of penalty wages.

This forum further notes that in a letter to Margaret Trotman, received by the Agency on September 13, 1985, Employer stated that Claimant was advised that she "could not afford to hire anyone at that time," and repeated that she, Employer, was "not in a financial position to hire a receptionist." On December 12, 1985, during a telephone conversation with Trotman, Employer stated she was "starving." The Agency therefore, had clear notice that Employer was making her financial circumstances an issue in the case, and also, the meaning of her statement in the answer.

6) On August 15, 1986, the forum sent a Notice of Hearing to Employer advising of the time and place for the hearing. Together with this notice, the forum sent a document entitled "Information Relating to Civil Rights or Wage and Hour Contested Case Hearings" containing the information required by

ORS 183.413(2). At the commencement of the hearing, Employer indicated that she had read that document and had no questions.

7) At the commencement of the hearing, the Hearings Referee explained the issues involved herein and the matters to be proved or disproved.

8) The Order of Determination was issued to "Sheila R. Wood and Elizabeth A. Austin, partners dba Special Touch Salon." At the hearing, the Agency indicated that it was withdrawing the cause against Elizabeth Austin as she had provided sufficient documentation to establish she was not a partner during the wage claim period. The forum amended the Order of Determination to delete the name of Elizabeth A. Austin.

9) No exceptions or other documents were filed by either the Employer or the Agency in this matter.

FINDINGS OF FACT – THE MERITS

1) During all times material herein Employer operated a beauty salon known as the Special Touch Salon, leased on the premises of a mall in Salem, Oregon. The business was operated by Employer as a sole proprietorship.

2) Prior to receiving any documentation from the Agency, Employer had been made aware, by individuals outside the Agency who had knowledge of this matter, that Claimant had filed a claim. Knowing this, Employer on her own volition, contacted the Agency and cooperated from that time through the investigation.

3) The Special Touch Salon was located in a mall. The mall opened at 10 a.m.; however, individuals

employed in the mall could enter the mall prior to that time. The doors of the mall closed at 6 p.m. everyday except Friday, when the doors were locked at 9 p.m. While no one could enter the mall after these times, those still in the mall could exit after the doors of the mall were locked.

4) The salon doors closed at 6 p.m. Occasionally, operators would stay beyond that time to complete a lengthy procedure like a permanent wave, but in general, everyone left the salon by 6 p.m.

5) The atmosphere at the Special Touch Salon was very casual, such that customers would stay to converse and friends would stop by, staying anywhere from 30 minutes to several hours, to visit with Employer and those who worked at the salon. Often, the atmosphere was "too casual," those who worked in the salon would drink beer and smoke cigarettes with the customers.

6) Elizabeth Austin, Employer's former partner, operated an ice cream parlor in the same mall as the Special Touch Salon. There were some personal difficulties between Employer and Austin. During the day, Claimant would frequent the ice cream parlor, and eventually, decided to work for Austin at the ice cream parlor. Claimant advised Employer she was going to begin working at the ice cream parlor on July 31, 1985.

7) Employer's sister, Cherrie, was living with Claimant and Claimant's mother. Employer, Claimant, and Claimant's mother have known each other for quite some time.

8) Employer had never hired anyone as an employee prior to Claimant. The other hairdressers who worked in the salon were self-employed and worked as independent contractors. During the period that Claimant worked at the salon, there were two such independent contractors, Kathy Files and Steve Walker.

9) Kathy Files generally worked Tuesday and Thursday, and Employer worked the remaining days. The salon was closed on Sunday. Employer came in on most days, however, including Tuesday and Thursday so that she could monitor the operation of the salon.

10) After being terminated from his previous employment, Steve Walker worked in the Special Touch Salon as an independent contractor during the month of August. He left the salon under less than pleasant circumstances, and in fact, on several occasions during his testimony, he launched into personal remarks directed at Employer regarding his working situation at the salon. Mr. Walker worked about six to eight hours a day on days he worked. He kept his own appointments and marked them off in the appointment book maintained at the salon.

11) Employer kept a key outside the door to the salon in the event that she or someone working at the salon forgot their key. Claimant did not have a key of her own. Generally, Employer or Kathy Files would open up the salon in the morning.

12) Claimant was fifteen years old during the wage claim period of June 18, 1985, to July 31, 1985.

13) An agreement was made on June 18, 1985, between Claimant, Claimant's mother, and Employer that Claimant would work for Employer performing clean up duties around the salon. The original agreement was that Claimant would work on Saturdays, and if Employer had a busy upcoming week scheduled, Claimant might work one day during that week.

14) During this meeting of June 18, 1985, it was further agreed by Claimant, her mother, and Employer that Claimant would work for Employer in exchange for products and services from the salon. There was no specific agreement, that is, Employer did not establish any sort of pay scale, such as \$4.00 worth of products and services for every hour of work by Claimant. Whether a certain product or service was to be considered compensation to Claimant was to be determined on an individual basis. Generally, goods or services were given to Claimant on an as needed basis. The agreement to work for goods and services was made as Employer advised Claimant and Claimant's mother that her finances would not permit otherwise. Employer further advised that if Claimant expected wages, she should not consider working for Employer. Services to Claimant included haircuts, for Claimant and Claimant's family; that is, Employer could give a haircut to a family member of Claimant's and then Employer would ask that person to give Claimant the cash rather than to Employer.

15) Employer, as well as the other hairdressers, cleaned their own stations at the salon, leaving little cleaning for Claimant to do.

16) Employer was aware that Claimant had personal family problems, particularly that Claimant did not get along well with her father. Employer wanted to help Claimant and felt that she was acting as a sister would. Employer described herself and felt that, as regards her position in this working relationship, she was little more than a "glorified baby sitter."

17) Shannon Lee had a conversation with Claimant after July 31, 1985. When Lee asked Claimant why she was "suing Sheila" (the Employer), Claimant advised Lee that Claimant's mother had told her she deserved pay for her work. However, on a previous occasion, Claimant had told Lee that Claimant was working for haircuts and permanents.

18) Claimant and her mother felt it was necessary to tell Cherrie, Employer's sister who was living with them, that Claimant was being paid money to work for Employer so that they could justify buying Claimant new clothes for school. Claimant and her mother felt this was necessary since Cherrie was made to buy her own clothes. Claimant and her mother felt this may avoid a fight.

19) Carol Wilt, Claimant's mother, operates a water bed store. The business hours at the store began at 10 a.m. On the days that Claimant went to the salon, her mother would drop Claimant off at the mall on her way to the store. Since Wilt had to be at work at 10 a.m., and the store was across town from the mall, she would drop Claimant off prior to 10 a.m. Wilt would generally pick Claimant up from the mall in the afternoon about 5:30 or 6

p.m. Occasionally, Employer brought Claimant home.

20) Claimant had no regular schedule or established hours to work. Employer would have asked her to work an entire day on Saturday; however, Claimant never came in to do work on any Saturday during the wage claim period.

21) Claimant would ask whether she should come in the next day and the Employer would generally respond that it was up to her whether she wanted to come in to the shop.

22) Soon after June 18, 1985, despite the fact that the agreement was to work on Saturdays and possibly one week day, Claimant began coming into the shop for a period each day. Claimant did not stay in the shop long, leaving to walk around the mall and go to the ice cream parlor, and rarely did any work. Claimant was free to leave the shop at any time she so desired. After Claimant began to come to the shop everyday, Employer called Claimant's mother, Ms. Wilt, and advised her that it was not necessary for Claimant to come in everyday as there was no work for her.

23) Carol Wilt prepared a list of hours indicating the number of hours claimed to have been worked by Claimant. Ms. Wilt showed this list to Employer on July 31, 1985. After this time, during the Agency's investigation, Ms. Wilt submitted this list to the Agency. Ms. Wilt could not submit the calendar from which she stated she prepared this list.

24) Employer wrote Claimant's name in her appointment book on June 18, 1985, to remind herself that

Claimant was coming in to talk to her about working there. Claimant did not work that day. Employer wrote Claimant's name in for June 19, 1985. Claimant was in for a few hours that day. Employer wrote Claimant's name in for June 20, 1985. Claimant was there only while Claimant's mother got her hair cut. The appointment book reflects that appointment. Employer also wrote Claimant's name in for June 21, 1985. Claimant was in the salon part of that day. Employer did not write Claimant's name in for any other dates.

25) Claimant was observed writing her name across the top of pages in the appointment book. At the time, Employer did not know why Claimant had done this.

26) Claimant worked sporadic hours between June 19, 1985, and July 30, 1985. On days when Claimant came in the salon, she was generally present in the shop a total of approximately 1½ hours.

27) On several occasions, Employer asked Claimant to leave the salon, or allow Employer to drive her home, as there was no work to be done and the salon was not busy. Claimant would refuse to do so.

28) Sandra Asbury went to the salon three to four times each week, spending two to three hours there each time. During all these visits, when Claimant was in the salon, she observed Claimant working, wiping off a counter, on only one occasion. On at least three occasions, Ms. Asbury heard Employer state that the salon was not busy and that Claimant should call her mother to pick her up or that Employer would take Claimant home.

29) On at least one occasion, Theresa Puckett was in the salon when Employer asked Claimant to leave the salon and offered to drive Claimant home.

30) Claimant had no regular hours to work at the salon, she was not required to be on the premises, nor did she need Employer's permission to leave the salon after she had arrived.

31) Claimant's last day of work was July 30, 1985, at which time Employer asked her to leave. Claimant did come into the shop on July 31, 1985, and asked to use Employer's telephone. She did no work on this day. Claimant's services were terminated on July 30, 1985.

32) During both the investigation by the Agency and the hearing, Employer maintained that Claimant worked 41.25 hours. Based on the credibility findings set forth below, this forum accepts that Claimant worked 41.25 hours, and only that amount, during the wage claim period, as a fact. The applicable minimum wage rate during the wage claim period was \$3.10 per hour.

33) During the Agency's investigation of this matter, Claimant advised the Agency that she received the following goods and services:

3 haircuts @ \$10	\$30.00
1 fingernail kit	\$17.56
Ears pierced	\$ 7.50
1 can of mousse	\$ 7.50
1 dinner	\$ 4.55
Total	\$67.11

The Agency allowed these goods and services, valued at \$67.11, to be considered compensation to Claimant.

At the hearing, Claimant indicated that she actually received two free haircuts from Employer and \$10.00 from Claimant's mother for a haircut she received from Employer; that is, Claimant's mother paid Claimant rather than Employer at Employer's direction.

34) Claimant also agrees that she received a false fingernail application valued at \$35.00. The Agency did not allow this to be considered compensation as Employer was not, as is apparently required by law to perform this application, a licensed manicurist. At the hearing, the Agency through Margaret Trotman advised the forum that this sum was disallowed as there had been no agreement between Claimant and Employer that it be considered compensation. This forum finds as fact (for reasons set forth below in Finding of Fact 38) that there was an agreement to consider this application as compensation. However, the Agency also stated that compensation, to be considered as a set off, must be "legal tender." The Summary of the Case shows that the fingernail application was disallowed as it was unlawful for Employer to have performed the task.

35) The policy of the Agency is to allow a set off, under ORS 652.610, from the employee's wages where employee acknowledges receipt of the compensation to be set off.

36) Employer closed the salon during the last days of August of 1985. Prior to that time, she had to put "every cent made into the shop" and "money from home went into the shop."

37) Employer's business records establish that, based on her income and expenses, Employer lost in

excess of \$350 in the month of June and over \$200 in the month of July. The business closed on August 28, 1985; however, Employer had not been taking appointments for the two weeks prior to that date while she got her affairs in order. Employer's 1985 tax return, filed for a sole proprietorship, shows a net loss for the Special Touch Salon of \$854. All of these documents were offered to the Agency during the investigation.

38) This forum has found the testimony of Claimant and her two witnesses, her mother and Mr. Walker, not credible in this matter. The testimony presented by each was fraught with inconsistencies that only became magnified as they attempted to offer explanations. For the reasons set forth below, their testimony was accepted only on points that did not bear directly on the issues in this matter and only to the extent that their testimony did not conflict with witnesses whose testimony was found to be credible.

a) Claimant

A) Rate of Pay:

One of the main points of controversy herein, although it is not relevant to liability, was whether Employer agreed, during their conversation on June 18, 1985, or thereafter, to pay Claimant the minimum wage. Even so, Claimant and Claimant's mother, who witnessed Claimant's testimony, could not agree on this point. Claimant testified that Employer told her she would be paid "minimum wage and some trade." Claimant's mother testified, directly after Claimant, that there had been no discussion of minimum wage, that she had just "assumed" this to be the case. Again, whether or not

Employer stated she would pay minimum wage, she is liable for it; however, the discrepancy on this major point of controversy weighs heavily against Claimant.

B) Appointment Book

Claimant did have access to Employer's appointment book. Claimant originally testified that she was hired to be a receptionist, part of those duties being to set appointments. Moments later she stated she had only made one appointment. Just after that, Claimant reviewed the copy of the appointment book submitted by Employer and pointed out several appointments she had made. Claimant next testified that no one except Claimant wrote in the appointment book. Claimant's witness, Steve Walker, testified that he wrote in the appointment book. With this kind of inconsistent testimony, the forum must conclude that Claimant did not, nor was it part of her duties, to set appointments, and can give little weight to her testimony regarding her reasons for writing in the appointment book.

At the forum's request, Claimant reviewed each page of the appointment book. Claimant advised the forum that she had written her name in for 28 days and claims to have worked five other days where either Employer wrote her name or there is no entry, for a total of 33, yet she stated on her wage claim form that she worked only 24 days during the wage claim period. Likewise, the list prepared by Ms. Wilt shows Claimant claimed 24 days of work. Claimant's testimony again conflicts with her own previous statements as well as that of her mother. Claimant's testimony that she wrote her

name in for 28 days would, however, be consistent with Employer's testimony, supported by the testimony of Sandra Asbury, that Claimant deliberately wrote her name at the top of pages on her last day in Employer's salon. This forum finds that, since Claimant has been found less than credible on other points, and since the forum has found the testimony of Employer and her witnesses to be credible, Claimant did in fact deliberately write her name in on these days and that it is indicative of nothing more; that is, the fact that Claimant's name appears in the appointment book on those days does not establish she worked on those days.

C) Hours Worked

Claimant testified that she would ask Employer whether she should come in the next day and Employer would state that it was up to Claimant to decide. This is hardly consistent with Claimant's testimony that she was responsible for opening the shop each morning, or her contention that she needed Employer's permission to leave the premises. Therefore, Employer's testimony that Claimant had no regular hours and was free to come and go as she pleased was accepted as a fact, and supported by Claimant's own statements, over Claimant's testimony to the contrary.

Claimant, in testifying that she worked entire days, initially stated that she was not allowed lunch breaks. Moments later she testified that she did in fact take one hour lunch break every day that she worked. When asked whether the list, prepared by Claimant's mother representing the number of hours Claimant claims to have

worked, included lunch periods, Claimant did not know.

Claimant also testified that she worked until 8 p.m. on most of the days that she worked. This seems highly unlikely since the shop, as well as the mall, closed at 6 p.m. Moreover, she later testified that she could not say how often she worked beyond 6 p.m. This testimony conflicts with that of Claimant's witness, Steve Walker, who testified that everyone generally left by 6 p.m. It also conflicts with the testimony of Claimant's mother, who stated she picked Claimant up from the mall around 5:30 or 6 p.m. Claimant's testimony cannot, therefore, be accepted to establish that she worked until 8 p.m. each day, or even that she was in the salon for any reason until 8 p.m. Moreover, this testimony again weighs heavily against Claimant.

This forum would further note that Claimant had something of an argumentative attitude. While this does not directly reflect on her credibility, it lends great weight to Employer's testimony that Claimant would come to the salon even when asked not to do so, would stay when requested to leave the salon, and would take deliberate action such as summarily writing her name across pages of the appointment book.

b) Carol Wilt

Unlike Claimant, who could not recall whether the list of hours included a one hour period for lunch, Ms. Wilt could so recall. It is rather difficult to understand how Ms. Wilt could have such knowledge when Claimant, who allegedly reported her hours to Ms. Wilt, did not know. Ms. Wilt bases this deduction on her knowledge of when

she would drop Claimant off and when she would pick her up; however, Ms. Wilt did not always transport Claimant, and furthermore, she was not at the salon — or the mall — during most days.

It seems odd that Claimant, or her mother who kept this record of hours, never asked Employer for wages in the six week period of these alleged services. As stated above, Claimant and her mother disagree as to whether Employer mentioned wages. Their failure to ask for these wages until July 31, 1985, would be consistent with Employer's testimony that none were promised. That failure to ask for wages would also be consistent with and gives support to the testimony of Employer and her witnesses that the talk of wages was to keep peace in the Wilt household, where Employer's sister was living.

The discrepancy regarding when Claimant left the salon at night weighs heavily against this witness as well as Claimant.

c) Steven Walker

Mr. Walker could not recall, after reviewing two calendars, when he was fired from his last job and when he began working at Employer's salon, yet he asks this forum to believe that he was aware of, and remembers, what Claimant did everyday that he was at work. Specifically, Mr. Walker stated he was fired from his previous job around June 25, 1985, and began working at the salon around July 2, 1985. He also testified he took 30 days off between these two jobs. He reviewed a calendar supplied by the Agency and stated he needed "a real calendar" to determine the situation. When offered another calendar, he still

could not establish the facts. This weighs heavily against his ability to remember the details of this period as regards Claimant as well as his credibility.

Mr. Walker testified that he scheduled and marked off his own appointments. This is inconsistent with Claimant's testimony that only she wrote in the appointment book. It is, however, consistent with Employer's testimony that the hairdressers set their own appointments in the book.

According to Mr. Walker, Claimant was constantly busy, bringing lunch and refreshments to customers, running errands, and cleaning up. It seems odd and completely unlikely that a struggling business with such a scant appointment list would require such constant work. It should be noted that Claimant did not testify that she brought lunch to customers. Moreover, the appointment book, as scant as it is, has, according to Mr. Walker, been "doctored." He did not feel that Employer or Kathy Files were as busy as is indicated in this appointment book. Thus, if the forum accepted that testimony, it would have to conclude that the salon was even less busy than it appears. This forum concludes that there is no support for the testimony of Mr. Walker, and that this combined with the conflicts in his testimony and that of Claimant, renders his testimony regarding Claimant's diligent work efforts not credible.

Finally, during his testimony, Mr. Walker complained about his own working conditions with Employer, specifically, certain fees he had to pay and other matters regarding his work at the salon. The fact that Mr. Walker left

Employer's premises under less than pleasant circumstances, combined with the fact that he made several pointed personal remarks at Employer during his testimony, leads this forum to conclude that his presence at the hearing was motivated by something more than an altruistic quest for the truth.

d) Employer

The forum was impressed by Employer's apparent sincerity. It was most evident, as she listened to Mr. McKean's very articulate statement of the operation of the minimum wage law, that she was truly surprised and that she had not clearly understood it prior to that time. While this does not relieve her of liability, it provides some insight into her attitude. The forum notes that even when Claimant and her witnesses would launch unnecessary personal remarks at Employer, she rarely responded, and if she did, certainly not in the same manner. Employer described herself as a person who was not good with words, but good with her hands and that she had offered her services to help others. This forum has found her to be sincere in that regard; that is, sincere in her effort to offer her knowledge to others, rather than, as Claimant would have this forum believe, a person who attempted to work people for little or no pay.

As stated, both Claimant and Employer agree that Claimant would ask whether Employer wanted her to come in to the shop the next day and Employer would generally respond that it was up to Claimant. It seems unlikely that an Employer in such a serious financial predicament would leave it in

an employee's discretion to determine when and how much the employee would work. This is likewise consistent with Employer's testimony that Claimant had no regular hours and was not required to stay on the premises at any time.

Claimant testified that in her original discussion with Employer regarding her working at the salon, at which time her mother was present, Employer stated she would pay Claimant the "minimum wage." Claimant's mother, who was present in the room during this testimony, testified that Employer never mentioned the "minimum wage," that she just "assumed" it would be paid. This is the major point of dispute with Employer in this case, and Claimant and her mother could not even agree. Their dispute gives great weight to Employer's credibility on this point, and in turn, this lends support to Employer's credibility on other issues. Also, Employer stated that the original agreement was that Claimant was to work on Saturdays, and if Employer was to be busy, one day during the week. Ms. Wilt confirmed this agreement. Again, Ms. Wilt's testimony actually supports that of Employer on this point.

While Claimant and her witnesses were not able to corroborate the testimony of each other, their testimony often corroborates the testimony of Employer. Therefore, for these reasons, considered together with the overall demeanor of the witness, the testimony of Employer was accepted as establishing facts in this matter.

e) Employer's Witnesses

The witnesses were Sandra Asbury, Theresa Puckett, Shannon Lee,

and Stephanie Mann. Each of these witnesses presented testimony that was internally consistent. There was no dispute of fact among them. Shannon Lee, Theresa Puckett, and Stephanie Mann were not related to Employer and had no personal stake in this matter. All were straight forward with their answers. The witnesses offered specifics when they could, but did not, and made no attempt at fabrication when their memories failed. Sandra Asbury is Employer's sister. For this reason the forum scrutinized her testimony. In so doing, the forum has found her statements consistent with all her other statements, and consistent, where a common situation was discussed, with the testimony other witnesses.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Employer was an individual doing business as Special Touch Salon, an establishment located in Salem, Oregon, a business at which she hired at least one person, Claimant herein.

2) Claimant did agree to work for Employer cleaning up the salon in exchange for products and services of the salon. Claimant worked sporadic hours in the salon between June 19, 1985, and July 30, 1985. Claimant's services were terminated on July 30, 1985, and therefore, wages owed Claimant were due immediately.

3) Claimant had no regular days to work at the salon and no set hours to work in a day. Claimant was free to come to the salon if she so wanted or free not to do so. Claimant was under no requirements to stay at the salon once she arrived, was free to leave at any time, and did not need the

Employer's permission to do so. Claimant was not, therefore, waiting to work.

4) Claimant received the following goods and services from Employer:

2 hair cuts (\$10.00) each	\$20.00
Cash from Claimant's	
mother for haircut	\$10.00
1 fingernail kit	\$17.56
Pierced ears	\$ 7.50
1 can of mousse	\$ 7.50
1 dinner	<u>\$4.55</u>
Total	\$67.11

5) The policy of the Agency is to allow a set off, under ORS 652.610, from the employee's wages where the employee acknowledges receipt of the compensation to be set off, and such compensation is lawful.

6) Claimant worked 41.25 hours for Employer between June 19, 1985, and July 30, 1985. The applicable minimum wage rate during this period was \$3.10 per hour. Claimant received \$67.11 in goods and services from Employer. Based on the Agency's policy of allowing a set off from wages for compensation an employee has received, Employer owes Claimant \$60.76 pursuant to the following computation: 41.25 (hours) x \$3.10 (Minimum Wage) = \$127.87; \$127.87 minus \$67.11 = \$60.76.

7) Employer was financially unable to pay Claimant the wages owed at the time those wages accrued.

8) The testimony offered by Claimant, Ms. Wilt, and Steve Walker was not found to be credible where it conflicted with that of Employer or her witnesses. Employer and her witnesses were found to have offered credible testimony to the forum.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter of the case and Employer herein.

2) Before the commencement of the hearing, the forum complied with ORS 183.413(2) by informing Employer of the matters set forth in that provision. Employer had no questions and advised the forum she was ready to proceed with the hearing. The forum also complied with ORS 183.415(7) by making a statement of the issues and the matters to be proved or disproved.

3) During all times material herein, Employer was an Employer, and Claimant was her employee, subject to the provisions of ORS 652.110 to 652.200 and ORS 652.310 to 652.405.

4) ORS 653.025 required an employer, subject to that statute, to pay an employee \$3.10 an hour for hours worked during all times material herein. Therefore, Employer herein is obligated by law to pay Claimant at least \$3.10 for each hour worked. Any agreement between an employer and an employee, where employer is subject to the provisions of ORS 653.025, to compensate at less than the minimum wage rate is unlawful. Therefore, Employer owes Claimant \$3.10 for 41.25 hours, less any lawful set off.

5) The Agency, as assignee of Claimant's wage claim, has the burden of proving that Claimant performed work for which Claimant was not properly compensated. Where Employer has failed to keep proper and accurate records, the Agency can carry the burden of proof by proving that Claimant

has in fact performed the work for which Claimant was improperly compensated and by producing sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946). The Agency has failed to establish with credible testimony that Claimant worked the total number of hours she claimed. The Agency has proved that Claimant worked 41.25 hours.

6) ORS 652.610(4) allows as a lawful set off, on due legal process, against the compensation due an employee any compensation already made by the employer to the employee that the employee admits to have been due and the employee has received. Therefore, Employer herein is allowed a set off of \$67.11 from Claimant's wages.

7) Pursuant to ORS 652.140, the gross wages earned by Claimant while working for Employer become due and payable immediately upon Employer's discharge of Claimant. Therefore, Employer was obligated to pay Claimant \$60.76 on July 30, 1985.

8) Pursuant to ORS 652.150, a penalty may be assessed for Employer's willful failure to pay wages due to Claimant. Employer's failure to pay is willful under *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976) for purposes of that statute. However, Employer has avoided liability for this penalty by showing that she was financially unable to pay the wages owed to Claimant at the time the wages accrued.

9) Under the facts and circumstances of the record, and according to

the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order the Employer to pay Claimant \$60.76 in earned, unpaid, due, and payable gross wages, less any legal deductions, plus interest on those wages.

OPINION

This case is in the nature of a family squabble. While that fact does not put this situation outside the operation of the law, it does shed light on how this situation came about. Employer described herself as a "glorified baby sitter." This forum finds that to be an apt description of her position in this working relationship. The evidence supports the fact that Employer was aware of Claimant's personal problems and desired to help her. The evidence also supports the fact that this controversy appears to be linked to the fact that Employer's sister, Cherrie, was living with Claimant and her mother. It is the strict liability effect of the minimum wage laws, and the legal principle that ignorance of the law is no defense to a charge, that governs this matter.

For all the reasons stated above, this forum has found the testimony of Claimant and her witnesses not to be credible. While ORS 10.095(3) deals generally with the duty of jurors, the provision is instructive to this forum as a fact finder.

"That a witness false in one part of the testimony of the witness is to be distrusted in others;"

It is clear that each of these witnesses contradicted the other, and therefore, their testimony, as a whole, has not been found trustworthy. The

testimony of Claimant and her witnesses was accepted only on issues not in dispute, and where it did not conflict with testimony of Employer or her witnesses, whose testimony was found credible. The issue of credibility was the deciding factor in this matter.

Hours Worked

The testimony indicates that Claimant did not want to be at home during the day, and that Employer allowed Claimant to come to the salon. However there is no support for Claimant's contention that she worked all day, was required to work all day, or even that she was in the salon all day. To the contrary, the evidence establishes that Claimant came to the salon when she wanted, left when she wanted, and was free to do either. She had no regular hours, there was no requirement that she stay in the salon, or that she return to the salon if she left. Claimant was not, therefore, waiting to work.

Although ORS 653.045 requires an employer to maintain records of the hours and wages of an employee, this forum cannot operate in a vacuum. The Agency has indicated that one of the controlling policies applicable to this case is derived from *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946). The Supreme Court stated therein that the employee has the "burden of proving that he performed work for which he was not properly compensated." In setting forth the proper standard for the employee to meet in carrying his burden of proof, the court analyzed the situation as follows:

"But we believe that the Circuit Court of Appeals, as well as the master, imposed upon the

employees an improper standard of proof, a standard that has the practical effect of impairing many of the benefits of the Fair Labor Standards Act. An employee who brings suit under 16(b) of the Act for unpaid minimum wages or unpaid overtime compensation, together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated. The remedial nature of this statute and the great public policy which it embodies, however, militate against making that burden an impossible hurdle for the employee. Due regard must be given to the fact that it is the employer who has the duty, under 11(c) of the Act, to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however,

is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with 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. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." 328 US at 686-688.

Pursuant to this analysis then, the employee, or in this case, the Agency, has the burden of first proving that the employee "performed work for which he was improperly compensated." The burden of proving the amount and extent of that work can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. This forum has previously

accepted, and will accept, the testimony of a claimant as sufficient evidence to prove such work was performed and from which to draw an inference of the extent of that work where that testimony is credible.

In the matter herein, however, the forum has found the testimony of Claimant and Claimant's two witnesses not credible. Therefore, the Agency has failed to prove that Claimant performed all the work she has claimed.

Employer's admissions, however, made to the Agency during the investigation of this matter can be used to prove Claimant worked hours for which she was not properly compensated. That is, Employer's statement that Claimant worked 41.25 hours, when she was paid only \$67.11 in lawful compensation, proves that Claimant was not compensated at the minimum wage rate. The second part of the *Anderson* analysis, that is the amount and extent of work for which Claimant was improperly compensated is answered the same way. Again, Claimant and her witnesses failed to offer credible testimony from which a reasonable inference regarding the amount and extent of work could be drawn. However, Employer's own statements to the Agency that Claimant worked 41.25 hours provides the basis for a reasonable inference. This testimony, combined with the fact that Employer gave Claimant \$67.11 in lawful compensation, establishes that Employer paid Claimant for approximately 21.5 hours: \$67.11 (lawful set off) divided by \$ 3.10 (minimum wage) equals 21.60 hours. Therefore, based on Employer's own statements, and by operation of law, Employer owes

Claimant the minimum wage for the remaining hours worked, a sum of \$60.76.

The Penalty

There are two statutory elements to consider in the assessment of a penalty under ORS 652.150: whether Employer's conduct was willful; and, whether Employer has avoided liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued.

The facts of this case, analyzed under the decision in *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976), support a finding of willful conduct. In that case, the court reaffirmed the definition of "willful" as follows:

"In civil cases the word 'willful,' as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent." 276 Or at 1093.

To have acted "willfully" does not necessarily mean, as set forth in *Sabin*, to have acted with malice. Clearly, this Employer was not malicious. Nevertheless, under the strict standard established by the Oregon Supreme Court, the conduct of Employer herein was willful for the reasons that her conduct was knowing, intentional, and voluntary; that is,

Employer intended to pay Claimant as she did, and her ignorance of the law is not relevant.

The second part of the statute must now be discussed. Employer herein has avoided liability as she has shown her financial inability to pay at the time the wages or compensation accrued. In her answer, Employer stated that she could not afford to hire Claimant as an employee. Prior to that time, during the investigation, she had told Margaret Trotman that she was "starving," and had stated in a letter to Trotman that she, the Employer, could not afford to hire anyone. During the hearing, Employer stated that she had "put every cent made into the shop" and "money from home went into the shop." Employer finally had to cease business on August 28, 1985.

Employer has the burden of proving an inability to pay wages at the time these wages accrued. Testimony of an employer, even where such testimony is credible, would not ordinarily be sufficient, in and of itself to constitute an inability to pay, and would not therefore, serve to meet Employer's burden of proof. In this case, however, Employer was able to substantiate her position with her financial records. Those records indicate that Employer's expenses exceeded her income by over \$350.00 in June and \$200.00 in July of 1985. As stated, the business was closed in August of 1985. These facts, considered together with the fact that Employer used her personal funds to support the business, are sufficient, in this case and limited to these facts, to establish an inability to pay at the time the wages or compensation accrued. Employer herein has met the

burden of proof. Therefore, no penalty wages are assessed against Employer.

AMENDED ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders SHEILA R. WOOD to deliver to the Hearings Unit of the Bureau of Labor and Industries, 309 State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon 97201, the following:

1) A certified check payable to the Bureau of Labor and Industries in trust for TYRNA L. WILT in the amount of SIXTY DOLLARS and SEVENTY-SIX CENTS (\$60.76) in gross earned, unpaid, due, and payable wages, less any legal deductions, plus interest at the rate of nine percent per year on the sum of \$60.76 from August 1, 1985, until paid.

**In the Matter of
Leonard H. Collin, Jr., dba
COUNTRY AUCTION,
Respondent.**

Case Number 11-85
Final Order of the Commissioner
Mary Wendy Roberts
Issued December 9, 1986.

SYNOPSIS

Respondent willfully failed to pay Claimant minimum wages due

immediately upon termination. Respondent was required by law to make and keep open for the Agency's inspection a record of the hours Claimant worked each week. Any agreement between an employer subject to Oregon's minimum wage law and an employee to compensate the employee at less than the minimum wage rate is unlawful. A temporary shortage of cash does not constitute financial inability to pay wages. Where an employer continues to operate a business and chooses to pay certain debts and obligations in preference to employee wages, there is no financial inability to pay wages. Respondent failed to show that he was financially unable to pay the wages at the time they accrued, and was liable for civil penalty wages. ORS 652.140, 652.150, 653.025, 653.035, 653.045, 653.055(2).

The above-entitled contested case same on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on February 26, 1986, in the Conference Room of Umatilla National Forest Service Building in Pendleton, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Allen L. Fallgren, Assistant Attorney General of the Department of Justice of the State of Oregon. Leonard H. Collin, Jr., dba Country Auction, (hereinafter the Employer) represented himself. Betty Jean Kammerzell (hereinafter the Claimant) was present throughout the hearing.

The Agency called as its witnesses the Claimant; Cheryl Borman Peck, former co-owner of Country Auction; and Stephen J. Baker, Compliance Specialist for the Wage and Hour Division of the Agency. The Employer called himself as his only witness.

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

FINDINGS OF FACT – PROCEDURAL

1) On or about July 23, 1984, Claimant filed with Wage and Hour Division of the Agency a wage claim which alleged, in effect, that Employer was the Claimant's former employer and that Employer had failed to pay wages due to Claimant.

2) On or about July 23, 1984, Claimant assigned all wages due her from Employer to the Commissioner of the Bureau of Labor and Industries for Claimant.

3) On or about August 22, 1984, Claimant authorized the Agency to act upon her claim against Employer by means of the administrative process set forth in ORS 652.310 to 652.405.

4) On February 20, 1985, the Commissioner of the Bureau of Labor and Industries issued an Order of Determination based upon Claimant's wage claim. That Order of Determination found that the Employer owed the Claimant a total of \$606.00 in unpaid wages for work she had performed in the Employer's employ, and \$661.80 in

penalty wages, plus interest on both of those sums.

5) On or about April 29, 1985, the Employer requested a hearing on the Order of Determination. That request included an answer to the factual allegations contained in the Order of Determination.

6) On September 3, 1985, this forum transmitted to the Employer, the Agency, and the Claimant a notice of the time and place of hearing of this matter. On September 26, 1985, the forum sent to the Employer, the Agency, and the Claimant a notice of a change in the place of the hearing.

Due to inclement weather, the forum postponed the first scheduled date of hearing. On December 10, 1985, the forum transmitted to the Employer, the Agency, and the Claimant a notice of the new date of hearing.

7) This forum sent a document entitled "Information Relating to Civil Rights or Wage and Hour Contested Case Hearings" with each of the three notices of hearing described in the previous Finding. At the commencement of the hearing, the Employer stated that he had received and read this document and that he had no questions about it. The Claimant made these same statements at the commencement of the hearing.

8) At the commencement of and throughout the hearing, the Presiding Officer explained, in effect, the issues involved herein and the matters that had to be either proved or disproved.

FINDINGS OF FACT – THE MERITS

1) During the winter of 1984, Cheryl Borman Peck (then Cheryl Borman) and the Employer, a person,

owned and operated Country Auction as partners. During all times material herein, Country Auction (hereinafter the Auction) was a business located in Hermiston, Oregon, which accepted, on a consignment basis, miscellaneous merchandise from members of the public which it subsequently offered for sale, at auctions, to the public. The Auction returned to the consignor's merchandise and retained the remainder of that price as its consignment commission.

2) At some point in late January or early February 1984, Ms. Peck asked the Claimant to come to work for the Auction. She told the Claimant that her job would be to "sign in" consigned goods; that it would be part-time; and that the Claimant would be paid once a week, at the rate of \$2.00 per hour, for her work. The Claimant accepted this offer and became an employee of the Auction on or about February 7, 1984.

3) Between the time the Claimant started working at Auction and March 18, 1984, she was paid according to her above-described agreement with Ms. Peck.

4) On March 18, 1984, Ms. Peck transferred her interest in the Auction to the Employer, and the Employer assumed complete control of and sole responsibility for the Auction. The Employer employed one or more persons at the Auction from March 18, 1984, until sometime in August 1984.

5) The Claimant performed the same duties for the Auction after March 18, 1984, as she had before that date. She signed in consigned merchandise, noting the items consigned and the name of the consignor. She shelved consigned merchandise

and answered customer questions as to what merchandise was available. After Ms. Peck left the business, the Claimant allowed her telephone number to be shown as the Auction's telephone number on its business card.

Throughout her employment at the Auction, the Claimant performed her work satisfactorily.

6) The Claimant and the Employer did not specifically discuss the Claimant's continued employment after Ms. Peck left the Auction: both assumed that she would continue working at the same rate of pay.

7) The Claimant's wage claim concerns the period from March 22, 1984, the Claimant's first day of work after the Employer assumed sole responsibility for the Auction, through July 14, 1984, when the Claimant terminated her employment there.

8) In a calendar she maintained just for that purpose, the Claimant kept a record of her daily work times at the Auction. She gave that calendar to the Agency when she filed the instant wage claim, and it has been admitted herein as an exhibit.

9) During the period of her wage claim, the Claimant regularly worked at the Auction on Thursdays, Fridays, and Saturdays. She worked five hours on Thursday, five hours on Fridays, and 12 hours on Saturdays. (The auctions themselves were held on Saturday nights.)

The Claimant maintains that she worked the hours shown on her calendar, or a total of 370 hours, on 52 days, during the period of her wage claim. This assertion is based totally on the information in her calendar.

10) The meaning of the entries in the calendar, concerning April 21, 1984, is unclear, as they consist of both a "12" (denoting hours worked) and a notation which appears to say "not work." As that calendar is the Claimant's sole record of the hours she worked on April 21, 1984, it is not clear whether she worked any hours that day.

11) Through the following assertions, the Employer apparently denies that the Claimant worked 64 of the 248 hours she claims she worked from March 18, 1984, through June 2, 1984. The Employer testified that there was no auction on April 21, 1984, because it was Easter weekend, and that, therefore, the Claimant did not work 12 hours that day. Asserting that there was no auction on Sunday, May 6, 1984, the Employer contested the Claimant's claim that she worked nine hours that day. The Employer testified that the Auction was closed for Memorial day on May 26 and 27, 1984, when the Claimant claims she worked 21 hours. The Employer further stated that there was no auction thereafter until June 2, 1984, and intimated that, therefore, the Claimant did not work the 22 hours she claims from May 28 through June 2, 1984.

The Employer denies owing the Claimant any wages for work on any of the dates noted in the previous paragraph.

Although the Employer states that he could get verification for his assertions described in the first paragraph of this Finding, the Employer declined the Presiding Officer's repeated invitations to keep the record open after the hearing so that he could submit that

verification. The Employer admitted that he did not keep a record specifically showing the hours the Claimant worked each day or pay period, and that his only other information as to the hours the Claimant worked would be obtained by extrapolating, from his weekly record of what he paid her, the number of work hours she must have worked each week.

12) Aside from the hours and days noted in the previous Finding, the Employer agrees that the Claimant worked the hours and days noted on her calendar concerning March 22 through June 2, 1984.

13) The Employer compensated the Claimant, at the rate of \$2.00 per hour, for the hours she worked from March 22 through June 2, 1984. He paid her in cash each Saturday or Sunday during that period.

14) After June 2, 1984, the Employer stopped paying the Claimant wages, and she was not compensated for the 122 hours she worked for the Employer after that date.

15) The Claimant testified that after she stopped receiving any pay from the Employer, she repeatedly asked him for her wages. In response, the Employer gave her two draws against what he owed her, in the amount of \$20.00 (on June 30, 1984) and \$25.00 (on July 7, 1984), and told her that was "all he had."

16) The Claimant received total compensation of \$541.00 from the Employer for her work between March 18 through June 2, 1984, and draws totaling \$45.00 against what she earned for her work thereafter.

17) The Employer does not disagree with the Claimant's work hours noted on an exhibit in the record for dates after June 2, 1984. The Employer does deny, however, that he owes the Claimant any money for her work after that date.

18) According to the Employer, he was "very short of funds" during the Claimant's employment after June 2, 1984. The Employer intimated that, around that time, he had conversations with his employees to the general effect that the Auction was "doing poorly," that he did not have funds to maintain their pay status and that he was going to have to "cut everyone back." The Employer thinks that he told the Claimant in such a conversation that she could sell her own yard sale items at the Auction in exchange for some of her wages, and that his only other option would be to cut her work time to one day per week.

The Employer testified that he does not think, but that it is possible, that he overlooked the Claimant in these conversations. Although he apparently did not at hearing specifically recollect having the above-described conversation with the Claimant, the Employer testified that he assumed that he did convey the above-cited information to the Claimant, because she did, on her first work days after June 2, 1984, bring her yard sale merchandise to the Auction and keep it there, she did sell some of it, and he did not charge her a consignment commission on those sales. The Employer testified that because the Claimant had not done these things before, the Employer took these actions as indications that she was acting in terms of their new understanding.

The Employer, accordingly, asserts that the Claimant worked for him on a "consignment" basis, rather than for wages, after June 2, 1984. The Employer testified that he believes that the space and "everything" the Claimant utilized and the money she made from selling her yard sale items at the Auction were full compensation for the work she performed after June 2, 1984.

19) The Claimant referred in her testimony to the Employer's having told her that he lacked funds and the Auction was "going downhill." However, the Claimant denied ever agreeing to forego all or some wages in exchange for being allowed to sell personal items at the Auction without paying the Employer a consignment commission on those sales.

The Claimant lent the Employer \$300 on June 5, 1984. The Claimant testified that she agreed to help the Employer repay her this loan by allowing him to sell her private yard items at the Auction and to remit to her, apparently, their full sale price. The Claimant testified that to get her \$300 back, she brought some of her merchandise to the Employer and helped him have a yard sale. However, the Claimant asserted, the Employer never offered to give her any of the money he received for the sale of her items.

20) After working two hours on July 14, 1984, the Claimant resigned her employment at the Auction, because the Employer was allowing another person to do her job. As there is no indicating that the Claimant gave the Employer 48 hours' notice of her resignation, the forum finds that she did not. When she resigned, the Claimant

asked the Employer for all the wages he owed her. The Employer said he did not have that sum at that time.

21) After her resignation, the Claimant telephoned the Employer and asked him when he was going to pay her the wages he owed her. The Employer said that he felt he did not owe her anything. He did not say why he felt that way.

22) The Employer asserts that he was not aware, when he employed the Claimant, that he was legally obligated to pay the Claimant at least \$3.10 per hour for her work.

23) Shortly after July 26, 1984, the Employer received a letter from the Agency stating, in pertinent part, that the Employer owed the Claimant \$3.10 for each hour she had worked for him, or a total of \$760. This letter also stated:

"Should the employer willfully (intentionally) fail to pay the wages due, the wage will continue, as a penalty, at the * * * rate (of \$3.10) per hour until paid, or until lawsuit is filed or for thirty days, whichever is sooner."

24) On August 8, 1984, in response to its July 26 letter, the Agency received a letter from the Employer denying that he owed the Claimant "any arrears." This letter also stated, in pertinent part, that an attorney had informed him that the "burden of proof" was on the Claimant.

25) In subsequent letters dated August 6, August 29, and December 28, 1984, the Agency again apprised the Employer of the wages he (allegedly) owed the Claimant and asked him to pay those wages.

26) On January 2, 1985, the Agency received a letter from the Employer stating that he was "in no way obligated" to the Claimant for "back wages." The Employer testified that he wrote this because he was not then aware of his legal obligation to pay the Claimant at least \$3.10 per hour. The Employer denied that the attorney who had informed him that the Claimant bore the burden of proof herein (see Findings of Fact 24 above) had told him about this minimum wage requirement.

27) The February 20, 1985, Order of Determination herein stated in pertinent part that:

"the employer was required to compensate the wage claimant at the rate not less than \$3.10 per hour for each hour worked * * * by the provisions of ORS 653.025."

It further stated that at that rate the Employer still owed the Claimant \$606.00 for the 370 hours she worked during the claim period.

28) The Employer has not ever offered to pay all or part of the unpaid wages claimed by the Agency on the Claimant's behalf.

29) The Employer testified that during June, July, and August 1984, he was "financially strapped." He stated that he lived off his military retirement checks and had no other assets. He testified that, in fact, he lived in the Auction's facility for a couple of months because he had no home. The Employer maintained that after June 2, 1984, he "cut" the compensation of all the Auction employees except his clerk. He testified that because the Auction was not even nearly

supporting itself, he closed it in August 1984.

The Claimant asserts that the Employer could afford to pay her wages for June and July 1984 when they accrued, because he was able to afford to entertain himself in downtown Hermiston every night during that time.

30) The Employer testified that he will be able to pay the wages the Claimant has claimed if ordered to do so by this forum. He further stated that he will timely pay in full any sum this forum orders him to pay herein. However, he declined to disclose his current employment or his current street address.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, the Employer was a person who in the State of Oregon directly engaged the personal services of one or more employees in the operation of his consignment auction business called the Auction.

2) From March 18, 1984, through July 14, 1984, the Claimant, an individual, other than as a co-partner of the Employer or as an independent contractor, satisfactorily rendered personal services, wholly in the State of Oregon, to the Employer in his above-described business.

3) From March 18, 1984, through June 2, 1984, the Employer paid the Claimant for these services at a fixed rate of \$2.00 for each hour she spent performing these services.

4) The Claimant has claimed that she worked a total of 248 hours for the Employer from March 18 through June 2, 1984. The Employer's denial that the Claimant worked 64 of those hours

is based solely upon his recollection at hearing of when his business held auctions. In the absence of any records verifying his recollection, and in light of the Claimant's credible contemporaneous record of her daily times and hours of work, and the undisputed fact that the Claimant regularly worked at least two days each week on which the Employer's business held no auction, this forum finds that the Claimant did work 236 hours for the Employer during this period. The forum cannot find that the Claimant worked the other 12 hours she has claimed, because her own records and recollection are unclear as to whether she worked 12 or any hours on April 21, 1984. (See Section 1 of the Opinion below.)

5) As the Employer compensated the Claimant \$2.00 per hour for the 236 hours she worked from March 18 through June 2, 1984, he must have paid her total wages of \$472.00 for that work.

6) From June 3 through July 14, 1984, the Employer did not pay the Claimant for the 122 hours of service which he does not dispute, and this forum finds, she rendered as an employee of the Country Auction during that time. He did give her, at her request, two draws totaling \$45.00 against what he owed her.

7) The Employer claims that, pursuant to an agreement he thinks he made with the Claimant, he compensated her for her June 3 through July 14, 1984, services by allowing her to sell personal items at the Auction without charging her the consignment commission he charged his customers. The Claimant denies making any agreement to forego wages in

exchange for being given this opportunity, and claims that she agreed to allow the Employer to sell her personal items only to help him pay back \$300 she lent him on June 5, 1984. The Claimant further claims that she did not receive any proceeds from the sale of her personal items at the Auction.

For the following reasons, the forum believes, and finds as fact, the Claimant's assertions in the last two sentences. The Employer is not certain that he made the agreement with the Claimant which he asserts. He indicated that although he had no specific recall of any conversation in which such an agreement was made, he assumed it was made because the Claimant brought personal items to the Auction and sold them there. However, the Claimant has offered a credible explanation for these actions which has no bearing upon her wages. The Employer has produced no evidence that he kept any record of, or knew, the actual value of the benefits he alleges he provided the Claimant pursuant to his alleged agreement with her. The Employer has not produced, or asserted he ever had, any record indicating that he gave to the Claimant any proceeds from the sale of other personal items at the Auction. (See Section 2 of the Opinion below.)

8) The Claimant quit her employment with the Employer on July 14, 1984.

9) The Employer was obligated by law to pay the Claimant at the minimum wage rate of \$3.10 per hour for each hour she worked for him from March 18 through July 4, 1984. For her 358 hours of such work, therefore, the Claimant earned \$1109.80 in gross

wages. The Employer has paid the Claimant a total of \$517.00 of this amount.

10) On August 7, 1984, the Employer acknowledged his receipt of the Agency's July 26, 1984, letter apprising him of his legal obligation to pay the Claimant at least \$3.10 per hour for her work for him after March 18, 1984 (through at least June 2, 1984). By at least August 7, 1984, therefore, the Employer knew of this legal obligation.

11) The Employer has paid the Claimant no wages since June 2, 1984, and given her no draws since July 7, 1984.

12) Accordingly, since no later than July 14, 1984, when the Claimant quit his employ, the Employer has owed the Claimant a total of \$592.80 in earned and unpaid wages.

13) The Employer asserts that he was financially unable to pay the Claimant the wages he owes her when they accrued. The Claimant asserts that the Employer could have paid her with the money he expended for his personal entertainment during that time.

The Employer has made no showing, or specific assertion, that he was financially unable to pay any of the wages he did not pay the Claimant for her work done from March 18 through June 2, 1984, when those wages accrued.

For the period during which the Claimant's wages earned thereafter (from June 3 through July 14, 1984) accrued, the Employer has shown that he was in difficult financial condition. However, this general showing of financial trouble does not constitute a

showing that the Employer was financially unable, in the strict sense in which this forum interprets that phrase, to pay any of the \$378.20 in wages the Claimant earned during this period, beyond the \$45.00 draw he gave her. That showing would require specific information as to the financial resources and requirements of both the Auction and the Employer personally during that period, as well as submission of the records from which that information came.

14) The Claimant earned a total of \$1109.80 during the 51 days she worked for the Employer, or an average daily wage of \$21.76.

CONCLUSIONS OF LAW

1) During all times material herein, the Employer was an employer, and the Claimant was his employee, subject to the provisions of ORS 652.110 to 652.200, ORS 652.310 to 652.405 and ORS 653.010 to 653.261.

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

3) Before the commencement of this contested case hearing, the forum complied with ORS 183.413 by informing the Employer and the Claimant of the matters described in ORS 183.413(2)(a) through (i). The forum complied with ORS 183.415(7) by providing the information described therein.

4) For each hour of work time that the Claimant was gainfully employed by the Employer, ORS 653.025 required the Employer to employ the Claimant at wages computed at an hourly rate no lower than \$3.10.

Accordingly, the Employer was required to pay the Claimant at least \$3.10 for each of the 358 hours she worked for him from March 18 through July 14, 1984, or a total of \$1109.80.

5) Any agreement between the Claimant and the Employer for the Claimant to work at less than the wage rate recited in the preceding Conclusion of Law is no defense to the instant claim for the wages to which the Claimant was entitled pursuant to ORS 653.025. ORS 653.055(2).

6) As the Employer paid the Claimant a total of \$517.00 for her work for him from March 18 through July 14, 1984, \$592.80 of the wages the Claimant earned were unpaid at the time the Claimant quit her employment with the Employer on July 14, 1984. Pursuant to ORS 652.140, these unpaid wages became due and payable 48 hours after Claimant quit (excluding Saturday, July 14, and Sunday, July 15, 1984), or on July 18, 1984.

7) The Employer has not paid the Claimant the \$592.80 in earned, due, and payable wages which he owes her.

8) The Employer is charged by ORS chapter 653 with knowing the hours the Claimant worked for him, and he admits that he knew of 306 of those hours. The Employer is also charged by ORS chapter 653 with knowing the minimum wage rate he was required by law to pay the Claimant. As the Employer knowingly and intentionally did not pay her at least that rate of \$3.10 for any of the hours she worked for him, even the (306) hours he admits she worked, this forum concludes that the Employer

knowingly and intentionally failed to pay the Claimant the wages he owed (and owes) her for her work. Accordingly, the Employer has willfully failed to pay the Claimant the \$592.80 in earned, due, and payable wages he owes her. (See Section 3 of the Opinion below.)

For that reason, pursuant to ORS 652.150, the Claimant's wages continued from the due date thereof for 30 days, as a penalty for the Employer's non-payment of the Claimant's earned, due, and payable wages. These penalty wages total \$652.80, a sum computed by multiplying Claimant's average daily wage rate of \$21.76 by 30.

9) In determining whether an employer had a financial inability to pay wages, assets other than cash must be considered. Therefore, a temporary shortage of cash does not necessarily constitute financial ability. Where an employer continues to operate a business, and in so doing chooses to pay certain debts and obligations in preference to an employee's wages, there is no financial inability. Therefore, the Employer herein has not avoided liability for this penalty, as he has not shown that he was financially unable to pay the \$259.60 in wages which he owed the Claimant for her work from March 18 through June 2, 1984, at the times those wages accrued. (Moreover, although the conclusion in the previous sentence makes it unnecessary for this forum to make any further conclusion concerning a showing of financial inability to pay, this forum notes that the Employer has not shown that he was financially unable to pay the \$333.20 in

unpaid wages he owed the Claimant for her work from June 3 through July 14, 1984, at the times those wages accrued.)

10) 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 the Employer to pay the Claimant the above-cited earned, unpaid, due, and payable wages and the above-cited sum in penalty wages, plus interest on those wages and penalty wages.

OPINION

The Employer's defenses herein consist of his:

- 1) Denial that the Claimant worked for him during 64 of the hours she claimed for the period from March 18 through June 2, 1984;
- 2) Denial that the Claimant worked on a wage basis for him from June 3 through July 14, 1984;
- 3) Denial that he willfully failed to pay her any wages he owed her;
- 4) Assertion of his financial inability to pay wages owed; and
- 5) Assertion that the Agency has failed to meet its statutory responsibility to investigate and equitably adjust the Claimant's claim against him.

1) Hours the Claimant Worked From March 18 through June 2, 1984

The Claimant produced a record of her daily work times and hours which she kept during the time she worked for the Employer. The Employer has

produced no record or other documentation of the hours the Claimant worked in his employ. The Employer was required, by ORS 653.045, to make and keep open for the Agency's inspection a record of the hours the Claimant worked each week. The Employer's evidence as to the hours the Claimant worked consists of his testimony recollecting that the Auction did not hold auctions on certain dates from March 18 through June 2, 1984, on which the Claimant asserts she worked. The record establishes, however, that the Claimant regularly worked at times and on days when the Auction did not hold auctions.

According, the Employer's evidence as to the Claimant's work hours falls far short of meeting his statutory record-keeping duties, and falls short of what this forum considers probative evidence of when the Claimant worked. The Claimant's detailed calendar, reflecting a consistent work schedule, is entirely credible. For those reasons, this forum has found that the Claimant's calendar establishes when the Claimant worked for the Employer during the wage claim period, and the forum has deleted from the hours claimed herein only 12 hours concerning which the entries on that calendar are unclear.

2) The Basis on Which the Claimant Worked from June 3 through July 14, 1984

The Employer asserts that the Claimant agreed to forego wages for this period in exchange for the right to sell, and keep the process from the sale of, her personal merchandise at the Auction. The Claimant denies this, stating that she brought and allowed

the Employer to sell that merchandise only so that he could repay her for a personal loan which the record establishes that she made to him.

The Employer's evidence as to this agreement is very equivocal. He admitted, at one point, that he was not certain that he made any such agreement with the Claimant. Apparently, he did not specifically remember the making of the agreement, but he assumed it existed because the Claimant appeared to be acting on its terms, when she submitted and allowed the Auction to sell her personal items. The Claimant has offered an uncontroverted and credible explanation for those actions which does not involve her foregoing any wages. Accordingly, this forum cannot find that the Claimant ever agreed to, in effect, allow the sales commission on her items, which the Employer argues he was to forego, to be her sole compensation for her work for the Employer.

The forum notes that even if such an agreement was made, it did not release the Employer from his obligation to pay the Claimant at least the minimum wage rate. ORS 653.055(2). Such an agreement would be relevant herein only if

a) the commissions which the Claimant actually did not have to pay the Employer were considered, in effect, commission payments to be deducted from the Claimant's minimum wage earnings, and equaled or exceeded those earnings, or

b) the Employer furnished facilities or services for the private benefit of the Claimant which equaled or exceeded the Claimant's minimum wage earnings. ORS 653.035.

The record does not support the first possibility, as it includes no evidence or assertion that the Employer kept any record of such commission payments (if any) or any evidence to substantiate a conclusion that those payments equaled or exceeded the Claimant's minimum wage earnings. The record does not support the second possibility, as it includes no evidence as to the fair market value of any facilities or services the Employer furnished for the Claimant's private benefit. Moreover, the record does not establish that the Employer in fact waived his commission on, or even gave the Claimant the rest of the sales price of, any of the personal items she submitted for sale. For these reasons, this defense fails.

3) Whether the Employer's Failure to Compensate Was Willful

The Employer argues that he cannot be found to have willfully failed to pay the Claimant at the minimum wage rate because he was unaware that the law imposed a minimum wage rate requirement on him. The Employer is charged with knowing the hours the Claimant worked, and he admits that he knew that the Claimant worked at 306 of the 370 hours she claims. The Employer admits that he knew he paid the Claimant \$2.00 for each of the hours she worked from March 18 through June 2, 1984, and \$45.00 for the hours worked thereafter. (The forum disregards the Employer's assertion that he compensated the Claimant in kind for her work after June 2, because the forum has found that the record does not support that assertion. See Section 2 above.) These facts establish that the Employer willfully failed

to pay the Claimant \$3.10 for each of those hours. That he did not actually know of the legal requirement that he pay her at least \$3.10 per hour is irrelevant, because the Employer, like all employers, is charged with knowing the wage and hour law governing his activities as an employer. In other words, even if he did not actually know, he is charged under the law with knowing, of this requirement. Accordingly, the Employer cannot escape liability for penalty wages with this defense.

4) Employer's showing of Financial Inability to Pay

The forum's findings and conclusions concerning this defense are fully explained above.

5) Agency's Duty to Investigate and Equitably Adjust a Wage Claim

ORS 652.330 empowers the Commissioner to "investigate and attempt equitably to adjust controversies between employers and employees in respect of wage claims or alleged wage claims." This statute, in conjunction with ORS 652.332, also allows the Commissioner to take assignments of wage claims and seek collection of such claims through administrative proceedings such as this. However, ORS 652.330 allows, rather than requires, the Commissioner to investigate and attempt to equitably adjust a controversy, and there is no requirement that she take either of these actions before she seeks collection through administrative proceedings. Therefore, whether or not the Commissioner investigated and attempted equitably to adjust the instant controversy between the Employer and the Claimant is not for this forum to determine in this Order. Whether the

Commissioner performed activities which are discretionary, rather than mandatory, in handling this claim is irrelevant to the forum's decision as to the merits of this claim.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders LEONARD H. COLLIN, JR. to deliver to the Hearings Unit of the Bureau of Labor and Industries, 1400 S.W. Fifth Avenue - Room 309, Portland, Oregon 97201, a certified check payable to the Bureau of Labor and Industries in trust for BETTY JEAN KAMMERZELL in the amount of ONE THOUSAND TWO HUNDRED FORTY-FIVE DOLLARS AND SIXTY CENTS (\$1245.60), (representing \$592.80 in gross earned, unpaid, due, and payable wages and \$652.80 in penalty wages) plus interest at the rate of nine per cent per year, for the period from September 1, 1984, until paid on \$592.80, and for the period from October 1, 1984, until paid on \$652.80.

**In the Matter of
ART "BUTCH" FARBEE
or Farrabee, aka Arthur Sagaser,
Respondent.**

Case Number 17-85

Final Order of the Commissioner

Mary Wendy Roberts

Issued December 10, 1986.

SYNOPSIS

Respondent willfully failed to pay four Claimants' piece rate wages (for cutting timber) immediately upon termination by mutual agreement. Respondent, who defaulted by failing to appear at hearing, failed to show he was financially unable to pay the wages at the time they accrued, and thus was liable for civil penalty wages. ORS 652.140, 652.150.

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Office by Mary Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on April 24, 1985, in the Conference Room of Suite 240 at 700 S.E. Emigrant, Pendleton, Oregon. The Bureau of Labor and Industries (hereinafter the Agency) was represented by Allen L. Fallgren, Assistant Attorney General of the Department of Justice of the State of Oregon. Art "Butch" Farbee or Farrabee, also known as Arthur Sagaser, (hereinafter the Employer) did not appear at the hearing either in person or through a representative. Edward C. Gill, George G. Gill, (James) Elmer Gill

and Paul S. Gill (hereinafter Claimants Edward, George, Elmer, and Paul, respectively) were all present throughout the hearing. The Agency called each Claimant as a witness. Not appearing at the hearing, the Employer did not present any evidence.

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

FINDINGS OF FACT - PROCEDURAL

1) On or about August 21, 1984, each Claimant filed with the Wage and Hour Division of the Agency a wage claim which alleged, in effect, that the Employer was the Claimant's former employer and that the Employer had failed to pay wages due to the Claimant.

2) On or about August 23, 1984, each claimant assigned all wages due him from the Employer to the Commissioner of the Agency, in trust for that Claimant.

3) On April 29, 1985, the Commissioner of the Agency issued an Order of Determination based upon the Claimants' above-cited wage claims. The Order of Determination found that the Employer owed the Claimants a

total of \$603 in unpaid wages for work they had performed in the Employer's employ and \$20,040 in penalty wages, plus interest on both of those sums.

4) On or about June 7, 1985, the Employer requested a hearing on the Order of Determination. That request included an answer to the factual allegations contained in the Order of Determination.

5) On January 8, 1986, this forum transmitted to the Employer, the Agency, and the Claimants a notice of the time and place of the hearing of this matter.

6) This forum sent a document entitled "Information Relating to Civil Rights or Wage and Hour Contested Case Hearings" with the Notice of Hearing. At the commencement of the hearing, each Claimant stated that he had received and read this document and that he had no questions about it.

7) On April 22, 1986, for the convenience of the forum and the Employer, the forum changed the location of the hearing from John Day, Oregon, to Pendleton, Oregon, and the starting time from 9:30 a.m. to 11:00 a.m. The Agency and the Employer had been consulted by the Hearings Unit Manager prior to these changes, and neither had objected to them. Because of the timing of the changes, the Agency and the Employer were given notice of them by telephone."

* When the forum's Hearings Unit Manager notified the Employer by telephone that the forum proposed making these changes, the Employer commented that the date of hearing, which he had known since January 1986, "really did not fit into (his) schedule," but he did not ask for postponement of that date. This was not an objection to the proposed changes to the time and place of hearing, as those changes did not include any change in the date of hearing.

** The forum noted at the start of the hearing that if the Employer made no

8) Although the Employer was given, and received, due notice of the time and place of the hearing, the Employer failed to appear at the hearing in person or through a representative.

FINDINGS OF FACT -- THE MERITS

1) During all times material herein, the Employer, a person, engaged in the business of logging. In that business, the Employer employed one or more persons in the State of Oregon during all times material herein.

2) During all times material herein, the Claimants, who are four brothers, worked together as loggers, doing timber falling. During all times material herein, they were each highly experienced in this work.

3) During the summer of 1984, the Claimants were regularly employed as timber fallers by Morris and Martin Logging. In July of that summer, the Employer approached Claimant Elmer and asked whether Claimants would cut some logs for him for two or three days around July 10, 1984. The Claimants had not previously met the Employer or known him to hire timber fallers in the area.

4) Because they were between jobs for Morris and Martin Logging, and therefore had a few days off, the Claimants agreed to do this work for the Employer. As is usual in the Claimants' experience, none of the

appearance at the hearing, the forum would admit as an administrative exhibit the affidavit of the Hearings Unit Manager recounting the circumstances of her notice to the Employer of the hour and place of the hearing. The forum has admitted that affidavit, a copy of which has been sent to the Agency and the Employer, as an exhibit.

* A "piece" is a log which is between 8 1/2 and 33 feet long. A timber faller reduces the size of whatever timber topples to the ground, in response to his or her falling work, to a length within that range. A timber faller might be able to cut one tall tree, therefore, into two or three pieces.

terms of their agreement with the Employer, which was made by the Employer and Claimant Elmer, were put in writing.

5) The Employer and Claimants agreed that the Claimants would do the work described in Finding of Fact 3 above for a specified rate of pay.

In his answer, the Employer has alleged that when he discussed wages with Claimant Elmer at the time they made this agreement, the Employer told Claimant Elmer that he "was paying" \$15 per thousand board feet cut. The Employer has further alleged that Claimant Elmer asked him how much that equaled per "piece," and the Employer told him that on the average of 100 board feet per piece, it would equal \$1.50 per piece.

Claimant Elmer testified that when he discussed wages with the Employer at the time they made their agreement, Claimant Elmer asked the Employer "what he paid and how he paid," and the Employer clearly and unequivocally told Claimant Elmer that he would pay the Claimants \$1.50 a piece for their work. Claimant Elmer testified that he was certain that the Employer said nothing about a "per thousand" rate at that time.

6) \$1.50 per piece was not an unusual rate for falling timber in that area at that time. Then, and currently,

timber fallers generally were, and are, paid by the piece, rather than by the thousand board feet.

7) The Employer agree to pay the Claimants when they had finished their work for him.

8) On July 10, 1984, the Employer met three of the Claimants at the job site and told them where to work. He said nothing at the time about any change in the rate of compensation he would pay the Claimants for their work.

9) Claimants Paul, Elmer, and Edward worked for the Employer on July 10, 11, and 12, 1984. Claimant George worked for the Employer on July 11 and 12, 1984. Although they each worked separately, they all worked in fairly close proximity. All their work for the Employer was done in Grant County in the State of Oregon.

10) While working, each Claimant kept his own record of the number of pieces he was cutting, by pushing a counter fastened to his garment each time he cut a piece. At the end of each day, each Claimant noted on a piece of paper the total number of pieces shown on his counter.

11) On the afternoon of July 12, 1984, the Claimants' last day of work for the Employer, the Employer inspected their work. With him on this inspection was a representative of the entity with whom the Employer had contracted to perform the work the Claimants were doing. After this inspection, the Employer asked Claimant George if the Claimants would be interested in being paid \$15 per thousand board feet for the work they had done. Claimant George said no, that as far as he was concerned, he would

not be interested in that. Claimant George added that he could talk to his brothers, but he was sure that they would not agree to that compensation. Claimant George testified that the Employer was fully aware at that time that he had agreed to pay the Claimants \$1.50 per piece.

According to the Claimants, this was the Employer's first reference to a pay rate of \$15 per thousand board feet.

12) The Claimants stopped working for the Employer when they had completed the work they had agreed to do. Thereafter, Claimant Elmer gave the Employer the totals of the daily piece counts each Claimant had recorded. The Employer did not question these counts; he told Claimant Elmer what day the Employer would be paid for the timber the Claimants had cut, and stated that he would pay them at that time.

13) The Claimants claim (and testified) that Claimant Paul cut a total of 407 pieces for the Employer; Claimant Elmer cut 346; Claimant Edward cut 328; and Claimant George cut 255.

14) The Employer has paid the Claimants a total of \$1400.70 for their above-described work for him. Of this total, Claimant Paul has received \$381.95; Claimant Edward \$350; Claimant Elmer \$350, and Claimant George \$318.75.

15) When the Employer paid the Claimants, he gave Claimant Elmer the three pages of note sheets shown on an exhibit. All the writings on those sheets are the Employer's.

16) In his answer, the Employer has alleged that he paid the Claimants

in full at the rate of \$15 per thousand board feet. He has asserted that the Claimants cut a total of 1326 pieces which averaged 81 board feet each, totaling 10,740.6 board feet, and that he paid them \$15 for each thousand of those board feet.

However, the Employer's own calculations on the three sheets shown in the exhibit indicate that the Employer calculated the Claimants' compensation at the rate of \$13 per thousand of these board feet (and paid them, for some unknown reason, \$4.50 more than this calculation). The Employer's explanation (on the exhibit) for what he paid the Claimants states that he had "dropped (Claimants') pay" (in some unspecified way) because of certain flaws in their work.

Claimant Elmer testified that the Employer did not state that he was going to pay the Claimants \$15 per thousand board feet until he paid them for their work. Claimant Elmer testified that at that time, the Employer said,

"Well you guys are not going to be too happy the way this turned out, because the money was not there."

Claimant Elmer testified that when he asked the Employer what he meant, the Employer said,

"I just didn't receive that kind of money (\$1.50 per piece) for it. It didn't turn out to what I thought it was going to be, and I can't afford to pay you for something I didn't receive."

Claimant Elmer testified that, thereby, the Employer acknowledged that he was changing the \$1.50 per piece pay rate to which he had agreed.

When Claimant Elmer offered to accept \$1.25 a piece if the Employer was "really in a bind," the Employer refused to negotiate at all and told him the Claimants would never get one cent more from him.

17) In his answer, the Employer has alleged that he paid the Claimants the full agreed-upon rate despite the fact that the Claimants failed to do all that he had requested on this job. Specifically, he has alleged that the Claimants were supposed to fall all culls (trees which from which one cannot get any lumber) and buck them into forty foot lengths; fall all little trees and slash their tops; keep the timber in lead with the rest of the timber; carry a marking crayon and mark all stumps, and keep a piece count.

The Employer has alleged in his answer that of these five tasks, the Claimants did only the latter. He has further stated therein that the Claimants' piece count was "greatly exaggerated," given the fact that 899 fewer pieces were delivered to the mill than the total which the Employer and another person cut plus the total that the Claimants purported to have cut. The Employer has alleged that he knows that the 899 other pieces the Claimants purportedly cut were culls. The Employer has alleged that "in the beginning," when he told the Claimants not to include culls in their piece counts, the Claimants told him they did not want to cut culls for nothing. The Employer has alleged that he then told the Claimants not to do the job if they were going to count culls.

The Employer also has alleged in his answer that he spent 1½ days cleaning up the Claimants' "mess."

18) At hearing, Claimant Elmer agreed, and so this forum finds, that the Claimants were to fall culls and buck them into forty foot lengths unless they broke, and he asserted that the Claimants followed this direction. Claimant Elmer further agreed, and so this forum finds, that the Claimants were not to include culls in their piece counts, and he stated that they did not do so.

Claimant Elmer testified that the Employer told the Claimant that they could fall any little trees which had one piece in them and, if it was handy, they could slash the tops out of such tress if they did not have to limb them. Claimant Elmer testified the Claimants did these things.

Claimant Elmer testified that the Employer did not tell the Claimants to keep the timber in lead with the rest of the timber or to mark all stumps with a marking crayon.

Claimant Elmer agreed, and so this forum finds, that the Employer told the Claimants to keep a piece count.

Claimant George testified, and this forum finds, that after the Employer inspected the Claimant's work on June 12, 1984, the Employer said that work "looked fine." Claimant George added that the Employer asked them just to try, during the rest of their work, to cut a few more tops out of the types of trees whose tops they had been slashing up to that point. From this testimony, the forum infers that the Employer made no other comments concerning the Claimants' work.

Claimant George denied that the Claimants left any "mess" at the job site.

19) The forum finds each of the Claimants to be very credible. The Presiding Officer found their demeanor at hearing to be forthright and without guile, and the testimony of each was internally consistent and consistent with the rest of the Agency's evidence.

The forum has had no opportunity to assess the Employer's credibility, except by evaluating the consistency of his only contributions to the record, one exhibit and part of another. The Employer contradicted himself in at least one pertinent respect in those documents, as noted in the first two paragraphs of Finding of Fact 16 above. Accordingly, the forum cannot find that the Employer is credible, and certainly must find him much less credible than any of the Claimants.

Therefore, the forum has given much greater weight to the testimony of each of the Claimants than to any contribution of the Employer to this record. For that reason, the forum finds all the above-noted testimony by any Claimant to be fact.

20) During times material herein, the Employer used the last name "Sagaser" sometimes, and the last name "Farbee" other times. One was his last name at birth, and the other is the last name of his stepfather. The Claimants knew the Employer by the name Arthur "Butch" Farbee or Farrabee.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, the Employer was a person who in the State of Oregon directly engaged the personal services of one or more employees in the operation of his logging business.

2) From July 10 through July 12, 1984, the Claimants were four individuals who (other than as copartners of the Employer or as independent contractors) rendered personal services, wholly in the State of Oregon, to the Employer in his above-described business. The Employer agreed to pay the Claimants for these services at a fixed rate, based upon the number of log pieces the Claimants cut in performing these services.

3) Subsequently, in performing these services for the Employer, the Claimants cut the following total number of log pieces:

Claimant Paul :	407
Claimant Elmer :	346
Claimant Edward:	328
Claimant George:	255

4) The fixed rate at which the Employer had agreed to pay the Claimants for these services was \$1.50 per log piece. Accordingly, by rendering the above-described services, Claimant Paul earned \$610.50, Claimant Elmer earned \$519, Claimant Edward earned \$492, and Claimant George earned \$382.50.

5) The Employer has not paid the Claimants the following amounts of the above-cited earned compensation:

Claimant Paul :	\$ 228.55
Claimant Elmer :	\$ 169.00
Claimant Edward:	\$ 142.00
Claimant George:	\$ 63.75

6) The Claimants' employment by the Employer was terminated by mutual agreement when they completed the work which the Employer hired them to do.

7) The Employer's assertions in his answer, that he paid the Claimants what he had agreed to pay them, are not supported by any evidence and are refuted by the Employer's own statements in the exhibits. The Employer's assertion that he did not agree to pay the Claimants at a piece rate is not supported by any evidence and is refuted by credible evidence that he agreed to pay them \$1.50 per piece. The Employer's assertion that the Claimants did not cut the pieces which he admits he knew they claimed to have cut is refuted by the weight of the credible evidence. The Employer's assertion that the Claimants did not follow his directions in performing their work for him is directly contradicted by the weight of the credible evidence, and any assertion that the Employer believed that the Claimants had not followed his direction is effectively controverted by the weight of the credible evidence that the Employer himself deemed their work "fine" just before it was finished.

Accordingly, this forum has concluded that the Employer agreed to pay the Claimants on a piece rate, that the Claimants satisfactorily cut the number of pieces noted in Ultimate Finding of Fact 3 above, and that the Employer failed to pay them fully for the compensation he owed them at the agreed-upon piece rate for those pieces. The forum further concludes that the Claimants reported to the Employer the piece totals noted in Ultimate Finding 3, and that the Employer knew then that he owed the Claimants the amount of compensation which he owed them. Accordingly, the forum finds that the Employer knowingly and

intentionally failed to pay the Claimants all that he owed and owes them for their work.

8) The Employer has not asserted or shown that he was financially unable to pay any of the above-cited wages due the Claimants at the time they accrued.

9) Claimant Paul earned a total of \$610.50 for his three days of work for the Employer, or an average daily rate of pay of \$203.50. Claimant Elmer earned a total of \$519 for his three days of work for the Employer, or an average daily rate of \$173. Claimant Edward earned a total of \$492 for his three days of work for the Employer, or an average daily rate of \$164. Claimant George earned a total of \$382.50 for his two days of work for the Employer, or an average daily rate of pay of \$191.25.

CONCLUSIONS OF LAW

1) During all times material herein, the Employer was an employer, and the Claimants were his 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 of the Employer herein.

3) Before the commencement of this contested case hearing, the forum complied with ORS 183.413 by informing the Employer and the Claimants of the matters described in ORS 183.413(2)(a) through (i).

4) Having agreed to pay the Claimants \$1.50 for each piece of timber they cut, the Employer was and is legally obligated to pay them the

amounts cited in Ultimate Finding of Fact 4 above.

5) All of the wages cited in Ultimate Finding of Fact 4 above which the Claimants had earned in the Employer's employ were unpaid, and became immediately due and payable, when the Claimants' employment by the Employer ended by mutual agreement at the end of the Claimants' workday on July 12, 1984. The earned, due, and payable wages cited in Ultimate Finding of Fact 5 above remain unpaid.

6) The Employer willfully failed to pay the Claimants the amounts of earned, due, and payable wages cited in Ultimate Finding of Fact 5 above. Accordingly, and because the Employer had not shown that he was financially unable to pay those wages at the time they accrued, the wages of the Claimants continued, as required by ORS 652.150, at the average daily rates recited in Ultimate Finding of Fact 9 above from the due date thereof for thirty days, as penalty for the Employer's nonpayment of the Claimants' earned, due, and payable wages. These penalty wages total \$6,105 for Claimant Paul, \$5,190 for Claimant Elmer, \$4,920 for Claimant Edward, and \$5,737.50 for Claimant George. These sums were computed by multiplying each Claimant's average daily rate of pay by thirty, the maximum number of days in the accrual period.

7) Under the fact 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 the Employer to pay the Claimants the above-cited sums in penalty

wages, plus interest on those wages and penalty wages.

OPINION

Neither the Employer nor any representative of his appeared at the hearing of this matter. In fact, the Employer's request for a hearing and the portion of an exhibit showing the Employer's notes to the Claimants comprise the Employer's total contribution to the record herein. His answer contains nothing but unsworn assertions concerning the merits of this matter, and therefore cannot be considered substantive evidence herein. Having failed to appear at hearing, and thereby having failed to offer any evidence in support of the assertions in the answer or otherwise participate in a necessary step in this proceeding, the Employer has defaulted in this matter.

In a default situation, the task of this forum is to determine if a prima facie case supporting the Agency's allegations has been made on the record. ORS 183.415(5) and (6). Herein, the evidence on the record shows that the Employer has willfully failed to pay the Claimants those wages. This evidence is complete, credible, and persuasive and the best evidence available, give the Employer's failure to present any evidence, and it clearly constitutes therefore the requisite prime facie case. This prima facie case is not rebutted by the evidence written by the Employer, which is contained in the Employer's notes to the Claimants, because to the extent that evidence conflicts with the sworn testimony of the Claimants, and the documentary evidence supported by that testimony, that exhibit is unsubstantiated and rebutted by more credible

evidence. (Interestingly enough, that evidence is also contradicted in one pertinent part by the Employer's own assertion in his answer.) To the extent that the evidence written by the Employer which is contained in the notes agrees with the other evidence, it supports the Agency's case.

Accordingly, the record clearly establishes that the Employer has violated ORS 652.140 as alleged, and that he owes the Claimants penalty wages pursuant to ORS 652.150.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Arthur "Butch" Farbee or Farrabee, also know as Arthur Sagaser, to deliver to the Hearings Unit of the Bureau of Labor and Industries, Room 309, 1400 S. W. Fifth Avenue, Portland, Oregon 97201, the following documents:

1) a certified check payable to the Bureau of Labor and Industries in trust for Paul S. Gill in the amount of SIX THOUSAND THREE HUNDRED THIRTY-THREE DOLLARS AND FIFTY-FIVE CENTS (\$6,333.55), (representing \$228.55 in gross earned, unpaid, due, and payable wages and \$6,105 in penalty wages) plus interest at the rate of nine percent per year, for the period from August 1, 1984, until paid on \$228.55, and for the period from September 1, 1984, until paid on \$6,105.

2) a certified check payable to the Bureau of Labor and Industries in trust for Edward C. Gill in the amount of FIVE THOUSAND SIXTY-TWO DOLLARS (\$5,062), (representing \$142 in

**In the Matter of
LOIS L. SHORT,
dba Northwoods Restaurant &
Lounge, Respondent.**

Case Number 22-85
Final Order of the Commissioner
Mary Wendy Roberts
Issued December 11, 1986.

SYNOPSIS

Respondent was Claimants' employer and willfully failed to pay the Claimants' wages, including overtime, immediately upon termination. Respondent failed to show that she was financially unable to pay the wages at the time they accrued, and thus was liable for civil penalty wages. ORS 652.140, 652.150, 652.310, 653.261; OAR 839-21-017.

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on July 16, 1986, in Room 311 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. Douglas McKean, Acting Compliance Specialist Supervisor of the Wage and Hour Division of the Bureau of Labor and Industries (hereinafter the Agency) presented a summary of the case for the Agency. Lois L. Short, doing business as Northwoods Restaurant & Lounge, (hereinafter the Employer) represented herself. Claimants Leslea Ann Brown, Rhonda Lea Christian, William R. Dalgarno, Lucille

gross earned, unpaid, due, and payable wages and \$4,920 in penalty wages) plus interest at the rate of nine percent per year, for the period from August 1, 1984, until paid on \$142, and for the period from September 1, 1984, until paid on \$4,920.

3) a certified check payable to the Bureau of Labor and Industries in trust for James Elmer Gill in the amount of FIVE THOUSAND THREE HUNDRED FIFTY-NINE DOLLARS (\$5,359), (representing \$169 in gross earned, unpaid, due, and payable wages and \$5,190 in penalty wages) plus interest at the rate of nine percent per year, for the period from August 1, 1984, until paid on \$169, and for the period from September 1, 1984, until paid on \$5,190.

4) a certified check payable to the Bureau of Labor and Industries in trust for George C. Gill in the amount of FIVE THOUSAND EIGHT HUNDRED ONE DOLLARS AND TWENTY-FIVE CENTS (\$5,801.25), (representing \$63.75 in gross earned, unpaid, due, and payable wages and \$5,737.50 in penalty wages) plus interest at the rate of nine percent per year, for the period from August 1, 1984, until paid on \$63.75, and for the period from September 1, 1984, until paid on \$5,737.

Eastman, Darla Denise Hill, and Lorine M. Taylor were present throughout all or most of the hearing. Claimants Jerry Monroe Maden and Anita Louise Sinclair were not present.

The Presiding Officer called as witnesses the six Claimants who were present; the Employer, Mr. McKean; Darrell Hutton, Inspector of the Enforcement Division of the Oregon Liquor Control Commission; and Renee Bryant Mason, Assistant Attorney General of the Department of Justice of the State of Oregon. The Employer called no witnesses.

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

FINDINGS OF FACT – PROCEDURAL

1) At various times between July 22 and July 29, 1985, each of the eight Claimants named in the Introduction above filed with the Wage and Hour Division of the Agency a wage claim which alleged, in effect, that the Employer was the Claimant's former employer and that the Employer had failed to pay wages due to the Claimant.

2) At the same time that each Claimant filed his or her wage claim, each assigned all wages due him or her from the Employer to the Commissioner of the Agency, in trust for that Claimant.

3) On March 5, 1986, the Commissioner of the Agency served on the Employer an Order of Determination

based upon the Claimants' wage claims. That Order of Determination found that the Employer owed the Claimants a total of \$2174.51 in wages and \$9157.80 in penalty wages, plus interest on both of those sums.

4) On or about March 20, 1986, the Employer, through an attorney, filed a demand for a contested case hearing on the Order of Determination, an answer to the factual allegations contained therein, and a statement that the Employer would represent herself at the hearing. The answer stated that the Employer was not the Claimants' employer during times material herein.

5) On or about April 24, 1986, this forum served a Notice of the time and place of the hearing of this matter on the Employer, the Agency, and each Claimant.

6) The forum sent a document entitled "Information Relating to Civil Rights or Wage and Hour Contested Case Hearings" with the notice of hearing. At the commencement of the hearing, the Employer, and each of the six Claimants present, stated that he or she had received and read this document and had no questions about it.

7) At the commencement of the hearing, the Presiding Officer explained the issues involved, and the matters that had to be either proved or disproved, herein.

FINDINGS OF FACT – THE MERITS

1) The instant wage claims concern work which the Claimants performed from June 30, 1985, through July 11, 1985. During this time (hereinafter referred to as the wage claim period),¹ each Claimant was employed at the Northwoods Restaurant

& Lounge (hereinafter the Northwoods), an establishment serving food and beverage which was located in Clatskanie, Oregon.

2) During all times material herein through July 10, 1985, the Northwoods was open for business seven days a week, from 6 a.m. until 10 p.m. One cook and one waitress worked there at all times during these hours. In addition, the following employees worked at the following times: after 11:00 each morning, a bartender; on Friday and Saturday evenings, a cocktail waitress; and each morning, a janitor.

3) The following facts as to the total number of hours and days each Claimant worked at the Northwoods during the wage claim period, their gross wage rates for that work and the type of work each did are not in dispute:

a) Claimant Brown, waitress/cashier, worked a total of 42 hours on six different days, earning \$4 per hour.

b) Claimant Christian worked a total of 27.5 hours at \$4 per hour as a cocktail waitress and a food waitress, and a total of 14.5 hours at \$4 per hour as a bartender, on six different days.

c) Claimant Dalgarno worked a total of 62.5 hours at \$5 per hour on seven different days, as a cook, and every day for two weeks at \$75 per two weeks, as a janitor.

d) Claimant Eastman, cook, worked a total of 58 hours on seven different days, earning \$5 per hour.

e) Claimant Hill, waitress, worked a total of 57.25 hours on seven different days, earning \$3.50 per hour.

f) Claimant Maden, bartender, worked a total of 64 hours on eight different days, earning \$5.50 per hour.

g) Claimant Sinclair, bartender, worked a total of 75.5 hours on nine different days.² She earned her regular rate of \$5 per hour for 71 of those hours. However, because she worked 44.5 hours during one workweek, she earned the statutorily-mandated overtime rate of time-and-one-half, or \$7.50 per hour, for her final 4.5 work hours that week. (See Conclusion of Law 5 below.)

h) Claimant Taylor, cook, worked a total of 40.5 hours on six different days, earning \$5.25 per hour.

4) No Claimant was paid anything for his or her above-cited work.

¹ There is one exception to the June 30, 1985, start date for the wage claim period: part of Claimant Dalgarno's wage claim is for janitorial work he performed starting two weeks before July 9 or 10, 1985. Accordingly, the wage claim period for just Claimant Dalgarno's janitorial work started June 25 or 26, 1985.

² The information on the wage claim forms filed by Claimants Hill and Sinclair differed from the information on the Agency's "Wage Transcription and Computation" Sheets for those Claimants. The forum has found the information on the latter documents to be more accurate, because it is based not only upon what these Claimants said on their wage claim forms, but on a calendar form they completed for the Agency, which itemized their dates worked and hours worked each date. An exhibit in the record shows the calendar form for Claimant Sinclair.

5) The issue herein is whether the Employer was responsible for payment of the wages the Claimants earned for their above-cited work. The Agency has determined that the Employer was responsible for payment of those wages. The Employer asserts that she was not responsible for those wages, because she divested herself of any such responsibility before they were earned.

6) The Employer purchased the real estate and business of the Northwoods in 1982, and owned it until on or about October 24, 1984, when she sold her interest in the real property to R & M Management, Inc. (hereinafter R & M). R & M's principals were and are Ruth Osborne, the Employer's son Michael Short, and Cher Lamonte, and the Employer asserts that she is not identified with R & M in any way.

7) After the sale to R & M, the Employer continued to own and operate the Northwoods business, leasing back from R & M the property she had sold to it. R & M's only relationship to the operation of the Northwoods, therefore, was that of landlord of its premises.

8) At hearing, the Employer asserted that since October 1984, R & M has owned both the real property and the business of the Northwoods. However, the documents on the record evidencing the sale to R & M, and the commercial lease whereunder the Employer leased back the property after that sale, refer only to transfer of the real property on which the Northwoods is located.

Furthermore, the Employer has held, in her own name, the only liquor dispenser's license for the Northwoods

since 1982. As Oregon Liquor Control Commission (hereinafter OLCC) rules require anyone who obtains an interest in such a business to be named on that license, the fact that only the Employer has been so named supports the conclusion that she has held all interests in the Northwoods business since 1982. On or about October 26, 1985, after the Employer had told OLCC Inspector Darrell Hutton that the interest she sold to R & M was just a real property interest, Mr. Hutton determined, based on that assertion and the sales and lease documents, that the Employer continued to own the Northwoods business after her transaction with R & M.

Moreover, since September 27, 1983, the Employer has been the only authorized representative and party of interest of the Northwoods Restaurant & Lounge (the assumed business name by which the Northwoods operated during all times material) registered with the Corporation Division of the Commerce Department of the State of Oregon.

Finally, neither in her answer nor in any of her contacts with the Agency described in Finding of Fact 23 below did the Employer assert that she had sold the Northwoods business to R&M.

For those reasons, the forum has determined that the Employer did not sell, and retained, ownership of the Northwoods business by and after her above-described sale transaction with R & M.

9) During the Spring of 1985, Stephen E. Schallhorn and Linda Woodward met several times with Michael Short, who said he was representing his mother, the owner of the

Northwoods. Pursuant to those meetings, on April 8, 1985, Mr. Schallhorn and a partner named Edward L. Canfield agreed to purchase the business of the Northwoods and an option to buy its real property. (When Ruth Osborne, for R & M, actually signed the earnest money receipt incamating that agreement, Mr. Short and the Employer told Mr. Schallhorn that "the property" had been transferred to Ms. Osborne for tax purposes.) As the same time, Mr. Schallhorn, through Ms. Woodward, put down \$1000 earnest money on this purchase. After Mr. Canfield dropped out, Mr. Schallhorn and Ms. Woodward formed Clatco Corporation to act as buyer in this transaction.

10) On April 8, 1985, after the above-mentioned earnest money receipt had been signed, and anticipating Mr. Schallhorn's purchase of the Northwoods, Mr. Schallhorn and the Employer signed a management agreement whereunder, starting April 15, 1985, Mr. Schallhorn would manage the Northwoods until close of escrow in this purchase, for a salary of \$40 per day. Pursuant to this agreement, Mr. Schallhorn agreed not to participate in any profits from the Northwoods until approval of his liquor dispenser's license and close of the purchase transaction. Mr. Schallhorn understood, and this forum finds, that the Employer was to receive any profits and make good any losses incurred during the term of this management agreement, and Mr. Schallhorn was to operate the business as an employee during that term. This agreement was in effect during the entire time Mr.

Schallhorn was involved in the operation of the Northwoods.

11) The Employer required Mr. Schallhorn to purchase the inventory of food, liquor, and cash on hand at the Northwoods when he began managing it. Accordingly, on April 15, 1985, through Ms. Woodward, Mr. Schallhorn gave the Employer a check in the amount of \$2875, of which \$205 paid for cash and \$2670 for inventory. Mr. Schallhorn was also responsible for paying all utilities while managing the Northwoods, but those expenses were to be taken into account when the Employer and Mr. Schallhorn settled on the profit or loss of the operation under Mr. Schallhorn's management.

12) The Employer has asserted that her management contract with Mr. Schallhorn applied only to that part of the Northwoods business involving the sale of food. She has further claimed that as of April 8, Mr. Schallhorn had, through \$1670 of the above-mentioned check for \$2875, purchased the entire food inventory (and some of the liquor inventory) and "taken over" the entire food service portion of the Northwoods.

By Findings of Fact 10 and 11 above, this forum has not accepted the assertions of the Employer contained in the previous paragraph. In formulating those Findings of Fact, the forum has accepted as fact Mr. Schallhorn's written statement, rather than the Employer's testimony, where they differ. This is because of the forum's general assessment of the Employer's credibility (see Finding of Fact 25 below), the corroboration of Mr. Schallhorn's version of the allotment of the \$2875 check by the notations thereon, and

the fact that in her statements to OLCC inspector Hutton and this forum on these disputed facts, the Employer has made totally inconsistent assertions.

13) Toward the end of the hearing, the Employer further claimed that, pursuant to her assertions described in the previous Finding, the Northwoods bar revenues were to be deposited in her account, and Mr. Schallhorn was to keep restaurant revenues, during Mr. Schallhorn's management of the Northwoods. The Employer asserted that Northwoods bar employees were to be paid out of the bar revenues, and the restaurant employees were to be paid out of the restaurant revenues. The Employer then admitted, and this forum finds, that she was responsible for paying the wages of the Northwoods employees who worked for its bar (i.e., those working as bartender or cocktail waitress) during the wage claim period.

14) The Employer admitted, and this forum finds, that there are no documents to support the Employer's claims described in (the first two sentences of) the previous Finding. In fact, there is no other evidence at all to support these claims. As noted above, the forum's findings concerning the scope of the management agreement between the Employer and Mr. Schallhorn and the forum's finding that Mr. Schallhorn purchased both the food and liquor inventory indicate that there was no division between the restaurant and bar portions of the Northwoods operation, for purposes of the arrangement between the Employer and Mr. Schallhorn during the pendency of his purchase of the Northwoods. This indication is buttressed by the forum's

below Finding that all employee paychecks were drawn on an account of the Employer.

For these reasons, and based upon the forum's general assessment of the Employer's credibility (see Finding of Fact 25 below), the forum concludes that the Employer's claims noted in (the first two sentences of) Finding of Fact 13 above are not accurate. The forum notes, furthermore, that it believes that the Employer's assertion that there was a differentiation between the restaurant and bar portion of the Northwoods operation during times material herein was a claim the Employer concocted to try to explain to the OLCC why she allowed Mr. Schallhorn to obtain an interest in the Northwoods' liquor inventory, through his above-noted inventory purchase, without prior OLCC approval.

15) The Employer operated the Northwoods from the time she purchased it in 1982 until on or about April 15, 1985, when Mr. Schallhorn assumed responsibility for management of its operation pursuant to his management agreement with the Employer. Ms. Woodward actually operated the business, as Mr. Schallhorn's employee, on a day-to-day basis through July 10, 1985, because Mr. Schallhorn had to operate a business in another part of Oregon. As there is not probative evidence that Mr. Schallhorn retained any profits the Northwoods made during his management, and as his management agreement with the Employer stated that he would not, the forum finds that Mr. Schallhorn did not retain any such profits.

16) As part of his management duties, Mr. Schallhorn had Ms.

Woodward make out, sign, and disburse payroll checks to all Northwoods employees for each pay period from April 15 to the wage claim period. All employees were paid on the same day by Northwoods checks signed by Ms. Woodward. Ms. Woodward told Claimant Taylor that these checks were on an account of the Employer's for which Ms. Woodward was allowed to write checks. The Employer denies that Ms. Woodward had this privilege. Because of this forum's assessment of the Employer's general credibility, and because it is consistent with the forum's other findings herein, this forum believes that Claimant Taylor's testimony is accurate and finds, accordingly, that during the term of Mr. Schallhorn's management, the Northwoods employees were paid from funds in the Employer's bank account.

17) Mr. Schallhorn's purchase of the Northwoods, a transaction originally to close in May 1985, still had not closed on July 10, 1985. On that date, the Employer decided that she was not willing to allow Mr. Schallhorn to continue operating the Northwoods for her any longer. Accordingly, just before the Northwoods' closing time that day, the Employer went to the Northwoods premises to "shut it down." As Ms. Woodward not there, the Employer telephoned her, informed her that the Northwoods was closed and demanded that the keys to the premises be returned to the Employer.

Later that evening, Mr. Schallhorn returned the keys to the Employer, after removing from the Northwoods' premises approximately \$1200 in food and liquor, part of the inventory he had purchased.

18) Not knowing that the Employer had closed the Northwoods, Claimants Brown and Taylor reported for work there on July 11, 1985, worked about two hours before they realized that there was no money and little food with which to operate, and left.

19) The sale of the Northwoods to Mr. Schallhorn or Clatco Corporation was never consummated.

20) After the Employer's closure of the Northwoods on July 10, 1985, Claimants Brown, Christian, Dalgarno, Eastman, Hill, and Sinclair asked Ms. Woodward and/or Mr. Schallhorn for their wages for the wage claim period, which normally would have been paid on or about July 12, 1985. They were ultimately told that they would have to obtain their wages from the Employer, because the Employer had taken the money from which they were to be paid and because the Employer was the owner of the Northwoods.

When Claimants Taylor and Dalgarno asked the Employer for their wages, the Employer said that she did not owe, and was not responsible for, those wages. Claimant Maden also requested his wages, apparently from the Employer.

21) The Employer first testified that she assumed the Northwoods' bar employees had been paid for their work up to July 11, 1985; then she testified that she has no knowledge as to whether they were paid before she took over the Northwoods; then she muttered that Mr. Schallhorn had not paid them, before correcting herself by stating that she did not know whether he had or not.

22) The Employer reopened and began directly operating the Northwoods on or about July 19, 1985, and she has operated it continuously since then. When she re-opened it, her employees were all people, including Claimants Christian, Dalgarno, and Sinclair, who were employed there when she closed it on July 10, 1985. In fact, the Northwoods' business was identical to what it had been before the July 10 closure, except that the Employer was operating it directly. Since re-opening, the Employer has on a regular basis paid all wages due on time.

23) On or about July 31, 1985, the Agency sent a letter to the Employer apprising her of the instant wage claims, giving their details (including the amounts of wages claimed) and asking her to pay those amounts, or provide the Agency with whatever documents the Employer had to substantiate any dispute she had with the claims.

Having received no response to its July 31 letter, the Agency sent eight separate demand letters (one for each Claimant), similar to the July 31 letter, to the Employer on August 16, 1985.

On August 26, 1985, the Employer apprised the Agency that she was having difficulties with her mail service and asked the Agency to send correspondence to a different address. At the same time, the Employer told the Agency that she had sold the Northwoods and so was not responsible for any wages claimed.

In response, the Agency, on August 27, 1985, sent to the Employer, at the address she had requested,

copies of its July 31 and August 16 letters.

On September 9, 1985, the Employer told the Agency that she had not received any Agency correspondence and that she had forgotten to, but would, send the Agency the documents it had requested. Accordingly, on September 9, 1985, the Agency again sent its July 31 letter to the Employer, asking the Employer to respond by September 19, 1985. The Agency did not receive any response from the Employer by that date.

In a conversation on September 26, 1985, the Employer told Mr. McKean, then a Compliance Specialist, that she still had not received anything from the Agency. Mr. McKean confirmed that the address the Agency had used was her correct mailing address. Mr. McKean and the Employer discussed the Claimants' wage claims generally, and he asked the Employer for any documents which would support her position that she was not the owner of the Northwoods during the wage claim period. The Employer told him she would send him what she had on October 8, 1985.

Not having received anything from the Employer by October 8, 1985, Mr. McKean again contacted her. The Employer told him that she had not sent anything yet, because she did not know Mr. McKean's address. The Employer stated that she would send what she had within a couple of days, and confirmed that she had received the Agency's demand letters.

The Agency received nothing from the Employer thereafter.

On May 21, 1986, the Employer told Renee Bryant Mason, the Assistant Attorney General then handling this matter, that the Northwoods business had been sold to Ms. Woodward and Mr. Schallhorn.

24) The Employer testified that she would not have been able, on or around July 11, 1985, to pay the wages claimed, because "they" took everything ("money, inventory and all") out of the Northwoods, and for 2½ months nothing had been deposited in her "bar account." The Employer stated that she did not have any other resources, even personal, with which she could have paid those wages.

The Employer asserts on July 10, 1985, she left the money in the Northwoods till and saw another person take it from there. In light of this forum's assessment of the Employer's credibility, and the unclear statements of the Claimants who worked on the evening of July 10, 1985, this forum concludes that the evidence on the record does not establish who took the money from the Northwoods till at the close of business on July 10, 1985.

Claimant Eastman stated that on July 10, two days before payday, Ms. Woodward told her that she had the "money in the bank account" to make the payroll.

25) In her contacts with the Agency before the hearing, in her testimony at hearing, and in her contact with OLCC Inspector Hutton concerning matters material herein, the Employer has repeatedly made statements which are diametrically contrary to each other, and she has disclosed information, if at all, in a piecemeal manner which has been anything but forthright. In fact,

she has been vague, evasive, and duplicitous, making statements which have proved either untrue or only partially true. She has not cooperated with repeated Agency attempts to apprise her of her apparent responsibilities herein and ascertain the validity of whatever defense she had to them. The Employer has evidenced no desire at all to determine whether or not she is legally responsible for the Claimants' unpaid wages. For all these reasons, the forum has found the Employer not at all credible.

At the same time, the forum has found the other witnesses herein credible. Accordingly, where the Employer's testimony or assertions have conflicted with any other testimony or evidence, the forum has given far greater weight to the latter.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, the Employer, a person, did business as Northwoods Restaurant & Lounge, an establishment located in Clatskanie, Oregon. At no time material did the Employer divest herself of her ownership of that business.

The Employer personally operated the Northwoods from 1982 until April 15, 1985, and from on or about July 19, 1985, to the present. On April 8, 1985, she entered into a management agreement with Stephen Schallhorn whereunder the (through his employee or agent Linda Woodward) operated the Northwoods, as the Employer's employee or agent, from April 15 through July 10, 1985, when the Employer terminated that agreement.

Based upon the nature of the agreements between Mr. Schallhorn

and the Employer, the fact that the tentative purchase of the Northwoods by Mr. Schallhorn or a corporation formed by him and Linda Woodward was never consummated, and the way the Northwoods actually operated under Mr. Schallhorn's management, (including the fact that (a) its employees were paid from the Employer's account during that management and (b) the Employer felt free to, and did, terminate his management at will), this forum has found that neither Mr. Schallhorn nor any corporation which he had formed purchased any interest in the Northwoods during times material herein. (Mr. Schallhorn's purchase of the food and liquor inventory, and cash, on hand when he began managing the Northwoods did not give him an ownership interest in anything more than, at best, that cash and inventory.)

2) In the operation of the Northwoods during all times material herein, therefore, the Employer directly or through an agent engaged the personal services of at least eight employees.

3) On or before June 30³ through July 11, 1985, each Claimant, an individual, other than as a copartner of the Employer or as an independent contractor, rendered personal services, wholly in the State of Oregon, to the Employer. The Employer, directly or through her employee or agent

Schallhorn, agreed to pay each Claimant at a fixed rate for each hour, or for each two week period, each Claimant spent in the performance of this work.

4) The Claimants performed the total hours of work noted below, at the rates of pay noted below, for the Employer from June 30⁴ through July 11, 1985, earning the total gross wages noted below:

Claimant	Hrs.	Hr Rate	Total
Brown	42	\$4.00	\$168.00
Christian	27.5	\$4.00	\$110.00
	14.5	\$4.50	\$65.25
		Total	\$175.25
Dalgamo	62.5	\$5.00	\$312.50
	(2 wk @		\$ 75.00)
		Total	\$387.50
Hill	57.25	\$3.50	\$200.38
Eastman	58	\$5.00	\$290.00
Maden	64	\$5.50	\$352.00
Sinclair	71	\$5.00	\$355.00
	4.5	\$7.50	\$33.75
		Total	\$388.75
Taylor	40.5	\$5.25	\$212.63

5) The Employer discharged the Claimants when she terminated Mr. Schallhorn's management and temporarily closed the Northwoods on July 10, 1985. However, Claimants Brown and Taylor worked for two hours on July 11, 1985, before they learned of that discharge, and wages for those two hours are included in their total

³ Although it is not necessary to the findings made herein, the forum notes that a copy of that commercial lease on the record, which appears by the January 1985 date mentioned therein not to be the first lease between R & M and the Employer, refers also to personal property listed in an Exhibit B. However, as that lease includes no such exhibit, the forum declines to find that that lease covered personal, as well as real, property.

⁴ As explained in footnote 1 above, Claimant Dalgamo's janitorial work is the one exception to this date: the two weeks of work noted in this Ultimate Finding of Fact 4 started on June 25 or 26, 1985.

earned wages recited in the previous Ultimate Finding.

6) The Employer admits that she is responsible for payment of the wages earned by those Claimants who worked for the Northwoods bar during the wage claim period. This includes all the wages of Claimants Maden and Sinclair cited in Ultimate Finding 4 above, \$312.50 of the wages of Claimant Dalgamo cited in that Ultimate Finding, and more than \$65.25 of the wages of Claimant Christian cited in that Ultimate Finding.

7) Despite her admission of responsibility noted in the previous Ultimate Findings, the Employer has paid none of the wages recited in Ultimate Finding of Fact 4 above to any of the Claimants. (No one else whom the Employer has cited as responsible for these wages has paid the Claimants any of the above-cited amounts.) Accordingly, the Employer owes the Claimants all these earned wages for their work during the wage claim period.

8) Each Claimant has asked Ms. Woodward, Mr. Schallhorn, or the Employer for his or her earned and unpaid wages. Since on or about July 31, 1985, the Agency repeatedly has apprised the Employer of the wages she owes to the Claimants. Even if the forum believed that the Employer did not receive any such notice from the Agency until her September 26, 1985, conversation with Mr. McKean, it is clear that the Employer knew, by no later than that conversation, what the Claimants had earned during the wage claim period, and that none of those earnings had been paid to any of them, even the "bar" employees.

9) The Claimants earned the following average daily wages during the claim period, computed as illustrated below by dividing their total wages earned during that period by the number of days they worked for the Employer during that period:

Brown:	\$168.00 / 6 =	\$28.00
Christian:	\$175.25 / 6 =	\$29.21
Dalgamo:	\$312.50 / 6 =	\$44.64
	\$ 75.00 / 6 =	<u>\$ 5.36</u>
Total Average Daily Wage = \$50.00		
Eastman:	\$290.00 / 6 =	\$41.43
Hill:	\$200.38 / 6 =	\$28.63
Maden:	\$352.00 / 6 =	\$44.00
Sinclair:	\$388.75 / 6 =	\$43.19
Taylor:	\$212.63 / 6 =	\$35.44

10) The Employer asserts that she was financially unable to pay the Claimants the wages she owes them when they accrued. The Employer alleges that she lacked funds to pay those wages because, she apparently alleges, Mr. Schallhorn and Ms. Woodward took the money out of the Northwoods till on July 10, and had not deposited any revenues in the "bar accounts" during their operation of the Northwoods, and the Employer had no other resources from which to pay those wages.

In the absence of any corroborating evidence, and in light of its assessment of the Employer's credibility, this forum cannot conclude that no revenues were deposited from April 15 through July 10, 1985. Even if that were the case, however, it is not indicative of the Employer's resources, as this forum has concluded that the Employer was entitled to the other net revenues of the Northwoods. There is no allegation that she did not receive those other net

revenues, and there is evidence that, on July 10, 1985, there were sufficient funds to pay the wages the Claimants earned during the wage claim period in the account from which those wages were to be paid (the Employer's account). The record does not establish what happened to such net revenues or bank account funds. For all these reasons, this forum has concluded that there has been no showing that the Employer did not receive all the April 15 through July 10, 1985, Northwoods revenues to which she was entitled.

The evidence as to who took the money in the Northwoods tills at the close of business on July 10, 1985, is conflicting and confusing. In light of the forum's conclusion below, it is not necessary for the forum to resolve this question.

The forum assumes, purely for the sake of argument in this paragraph, that the Employer did not receive the July 10 till funds and had no financial resources other than whatever April 15 through July 10, 1985, net revenues the Northwoods generated. These facts would by no means constitute a showing that the Employer was financially unable, in the strict sense in which this forum interprets that phrase, to pay any of the \$2174.51 in wages which she owes the Claimants for their work during the claim period, at the time those wages accrued. Such a showing would require at least some specific information as to the financial resources and requirements of both the Northwoods and the Employer personally during that period, as well as submission of the records from which that information came.

CONCLUSIONS OF LAW

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

2) Before the commencement of the contested case hearing, this forum complied with ORS 183.413(2) by informing the Employer and the Claimants of the matters described in that provision. The forum complied with ORS 183.415(7) by providing the information described therein at the commencement of the hearing.

3) The actions, inactions, and knowledge of Linda Woodward, an employee or agent of Stephen Schallhorn, described herein, are properly imputed to Mr. Schallhorn. The actions, inactions, and knowledge of Mr. Schallhorn, an employee or agent of the Employer, described herein, are, in turn, properly imputed to the Employer.

4) During all times material herein, the Employer was an employer, and the Claimants were her employees, subject to the provisions of ORS 652.110 to 652.200 and ORS 652.310 to 652.405.

5) ORS 653.261 and OAR 839-21-017 establish, and this forum concludes, that Claimant Sinclair must be paid at a rate one and one-half times her regular rate of pay of \$5.00, or \$7.50, for the 4.5 hours over forty hours she worked during one week of her wage claim period.

6) For the Claimants' work from June 30⁵ through July 11, 1985, the Employer has not paid any of, and owes, the Claimants the total amounts

of gross wages they earned, as recited in Ultimate Finding of Fact 4 above.

7) Pursuant to ORS 652.140, the gross wages which the Claimants had earned in the Employer's employee and the Employer had not paid became due and payable immediately upon the Employer's discharge of the Claimants on July 10, 1985, (and on July 11, 1985, for work performed that day before Claimants learned of their discharge).

8) The Employer intentionally has not paid, and knows that neither she nor anyone else has paid, the Claimants any part of these wages, which she does not deny that they earned. The Employer has known, since no later than September 26, 1985, the amounts of the wages owed the Claimants. She knew that she was responsible for payment of at least the wages of those Claimants employed in the bar. Whether she actually knew it or not, the Employer is charged with knowledge (and had every reason to know) that, as the Employer of the remaining Claimants, she also owed (and owes) them their wages. Therefore, as a matter of law, the Employer's failure to pay the Claimants their earned, unpaid, due, and payable wages was willful.

Pursuant to ORS 652.150, as a penalty for that nonpayment, each Claimant's wages continued from the due date thereof for thirty days. These penalty wages total the following sums for the Claimants, which were computed by multiplying the sum of each Claimant's average daily wage rate by thirty, the number of days in the accrual period:

Claimant Brown:	\$ 840.00
Claimant Christian:	\$ 876.30
Claimant Dalgarno:	\$1500.00
Claimant Eastman:	\$1242.90
Claimant Hill:	\$ 858.90
Claimant Maden:	\$1320.00
Claimant Sinclair:	\$1295.70
Claimant Taylor:	\$1063.20

8) The Employer has not avoided liability for this penalty, as she has not shown that she was financially unable to pay the wages which she owed and owes the Claimants, at the time they accrued.

9) 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 the Employer to pay the Claimants the above-cited earned, unpaid, due, and payable wages and the above-cited sum in penalty wages, plus interest on those wages and penalty wages.

OPINION

The only issue herein was who was responsible for payment of the wages the forum has found that the Claimants earned for their work at Northwoods Restaurant & Lounge during the wage claim period. The forum has found, and fully explained above, that the Employer owned the Northwoods business, which Stephen Schallhorn operated as the Employer's employee or agent, during the wage claim period. Accordingly, the Employer directly or through her agent Schallhorn engaged the personal services which the Claimants rendered to the Northwoods operation during the

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See footnotes 1 and 4.

wage claim period. Therefore, the Employer was the Claimants' employer (as that term is defined for purposes herein by ORS 652.310) during the wage claim period, and was and is legally responsible (pursuant to ORS 652.140) for payment of the wages they earned during that period.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders LOIS L. SHORT, doing business as Northwoods Restaurant & Lounge, to deliver to the Hearings Unit of the Bureau of Labor and Industries, Room 309, 1400 S. W. Fifth Avenue, Portland, Oregon 97201, the following:

1) a certified check payable to the Bureau of Labor and Industries in trust for Leslea Ann Brown in the amount of ONE THOUSAND EIGHT DOLLARS (\$1008), (representing \$168 in gross earned, unpaid, due, and payable wages and \$840 in penalty wages) plus interest at the rate of nine percent per year, for the period from August 1, 1985, until paid on \$168, and for the period from September 1, 1985, until paid on \$840.

2) a certified check payable to the Bureau of Labor and Industries in trust for Rhonda Lea Christian in the amount of ONE THOUSAND FIFTY-ONE DOLLARS AND FIFTY-FIVE CENTS (\$1051.55), (representing \$175.25 in gross earned, unpaid, due, and payable wages and \$876.30 in penalty wages) plus interest at the rate of nine percent per year, for the period from August 1, 1985, until paid on \$175.25, and for the period from September 1, 1985, until paid on \$876.30.

3) a certified check payable to the Bureau of Labor and Industries in trust for William R. Dalgamo in the amount of ONE THOUSAND EIGHT HUNDRED EIGHTY-SEVEN DOLLARS AND FIFTY CENTS (\$1887.50), (representing \$387.50 in gross earned, unpaid, due, and payable wages and \$1500 in penalty wages) plus interest at the rate of nine percent per year, for the period from August 1, 1985, until paid on \$387.50, and for the period from September 1, 1985, until paid on \$1500.

4) a certified check payable to the Bureau of Labor and Industries in trust for Lucille Eastman in the amount of ONE THOUSAND FIVE HUNDRED THIRTY-TWO DOLLARS AND NINETY CENTS (\$1532.90), (representing \$290 in gross earned, unpaid, due, and payable wages and \$1242.90 in penalty wages) plus interest at the rate of nine percent per year, for the period from August 1, 1985, until paid on \$290, and for the period from September 1, 1985, until paid on \$1242.90.

5) a certified check payable to the Bureau of Labor and Industries in trust for Darla Denise Hill in the amount of ONE THOUSAND FIFTY-NINE DOLLARS AND TWENTY-EIGHT CENTS (\$1059.28), (representing \$200.38 in gross earned, unpaid, due, and payable wages and \$858.90 in penalty wages) plus interest at the rate of nine percent per year, for the period from August 1, 1985, until paid on \$200.38, and for the period from September 1, 1985, until paid on \$858.90.

6) a certified check payable to the Bureau of Labor and Industries in trust for Jerry Monroe Maden in the amount of ONE THOUSAND SIX HUNDRED

SEVENTY-TWO DOLLARS (\$1672), (representing \$352 in gross earned, unpaid, due, and payable wages and \$1320 in penalty wages) plus interest at the rate of nine percent per year, for the period from August 1, 1985, until paid on \$352, and for the period from September 1, 1985, until paid on \$1320.

7) a certified check payable to the Bureau of Labor and Industries in trust for Lorine M. Taylor in the amount of ONE THOUSAND TWO HUNDRED SEVENTY-FIVE DOLLARS AND EIGHTY-THREE CENTS (\$1275.83), (representing \$212.63 in gross earned, unpaid, due, and payable wages and \$1063.20 in penalty wages) plus interest at the rate of nine percent per year, for the period from August 1, 1985, until paid on \$212.63, and for the period from September 1, 1985, until paid on \$1063.20.

**In the Matter of
JOHN D. COWDREY,
dba Hometown Video, Respondent.**

Case Number 23-85
Final Order of the Commissioner
Mary Wendy Roberts
Issued December 11, 1986.

SYNOPSIS

Respondent willfully failed to pay Claimant's wages immediately upon termination. Respondent failed to

show that he was financially unable to pay the wages at the time they accrued, and thus was liable for civil penalty wages. ORS 652.140, 652.150.

The above-entitled contested case came on regularly for hearing before Leslie Sorensen-Jolink, designated as Presiding Officer by the Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted on July 22, 1986, in Room 311 of the State Office Building, 1400 S.W. Fifth Avenue, Portland, Oregon. Douglas McKean, Acting Compliance Specialist Supervisor of the Wage and Hour Division of the Bureau of Labor and Industries (hereinafter the Agency), presented a summary of the case for the Agency. John D. Cowdrey, doing business as Hometown Video, (hereinafter the Employer) did not appear at the hearing either in person or through a representative. Cheryl M. Lyon (hereinafter the Claimant) was present throughout the hearing.

The Presiding Officer called as witnesses the Claimant and Mr. McKean. Having fully considered the entire record in this matter, I, Mary Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

**FINDINGS OF FACT –
PROCEDURAL**

1) On or about July 12, 1985, Claimant filed with the Wage and Hour Division of the Agency a wage claim which alleged, in effect, that Employer

was Claimant's former employer and that Employer had failed to pay wages due to Claimant.

2) When Claimant filed that wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for the Claimant, all wages due her from Employer.

3) On or about October 23, 1985, the Commissioner of the Bureau of Labor and Industries served upon Employer an Order of Determination based upon Claimant's wage claim. That Order of Determination found that Employer owed Claimant a total of \$74.50 in wages and \$472.50 in penalty wages, plus interest on both of those sums.

4) On or about November 12, 1985, in response to the Order of Determination, Employer requested a contested case hearing. That request included an answer to the factual allegations contained in the Order of Determination and a statement that Employer would represent himself at the hearing. The answer asserted that Employer had paid Claimant all wages owed her.

5) On April 24, 1986, this forum served upon Employer, the Agency, and Claimant a notice of the time and place of the hearing of this matter.

6) The forum sent a document entitled "Information Relating to Civil Rights or Wage and Hour Contested Case Hearings" with the above-cited Notice of Hearing. At the commencement of the hearing, Claimant stated that she had received and read this document and that she had no questions about it.

7) At the commencement of the hearing, the Presiding Officer explained the issues involved herein and the matters that had to be either proved or disproved.

8) Although Employer was given, and received, due notice of the time and place of the hearing, Employer failed to appear at the hearing in person or through a representative.

FINDINGS OF FACT - THE MERITS

1) During all times material herein, Employer, a person, did business as Hometown Video, an enterprise located in LaGrande, Oregon, which rented videocassette films and records to the public. In that business, Employer employed one or more persons in the State of Oregon during all times material herein.

2) From May 4, 1985, through June 2, 1985, Employer employed Claimant as a clerk. Her main duty was to rent films and videocassette recorders to customers. Toward the end of her employment, Claimant began to perform some daily bookkeeping tasks.

3) Employer himself did not work at Hometown Video during times material herein, and Claimant has not ever met or spoken to him. Shelley Taylor, Employer's manager during all times material herein, hired Claimant, and Ms. Taylor and the assistant manager supervised her.

4) Pursuant to her agreement with Employer, through Ms. Taylor, Claimant was to be paid \$3.50 gross wages for each hour she worked for Employer. She was to receive her wages twice monthly, on the fifteenth of the month for her work that month through

that date, and on the last day of the month for her work from the sixteenth through the last day of the month.

5) The days and times Claimant worked for Employer varied, and she usually did not know when she would work until one or two days beforehand.

6) At Ms. Taylor's direction, each time Claimant left work, she noted her start and stop times and the number of hours she had worked that day, and signed that notation, on a calendar kept for that purpose at Employer's premises.

As far as Claimant knows, the only other record Employer caused to be kept of the hours his employees worked was in a "bookkeeping book." One type of page in this book contained daily notations of the amounts of money taken in during a one week period, and notation of the hours each employee had worked during, apparently, that week. An exhibit in the record shows an example of this type of page. Another type of page in that book, also shown in that exhibit, detailed the expenditures made during a week. The notations on the exhibit indicate that the weekly periods shown on these records started on a Sunday and ended the following Saturday.

7) Claimant also contemporaneously noted all her work hours in detail on her personal calendar. As far as Claimant knows, the hours she noted on Employer's calendar were the same as the hours she noted on her own calendar.

8) From May 4, 1985, through May 15, 1985, Claimant worked 26 hours, earning gross wages of \$91.

9) On May 15, 1985, Employer issued Claimant a paycheck for \$76.58, the net equivalent of the gross wages for her May 4 to May 15, 1985, work. That paycheck was returned because Employer's bank account lacked sufficient funds to pay it.

Thereafter, on May 22, 1985, Employer paid Claimant \$70 in cash, to compensate her for the \$76.58 he still owed her for her May 4 to May 15, 1985, work. As Claimant does not recall whether or not she ever received the remaining \$6.58, she has not included that sum in her claim. As far as Claimant is concerned, she has been fully paid for the work she did for Employer through May 15, 1985.

10) The period of Claimant's wage claim is from May 16, 1985, through June 2, 1985.

11) From May 16 through May 31, 1985, Claimant worked 31.5 hours for Employer, earning \$110.25. During this time, Employer gave Claimant a \$10 draw against the wages she was earning.

12) On June 1 and 2, 1985, Claimant worked 13.5 hours, earning \$47.25.

13) The Employer ceased operation after the close of business on June 2, 1985.

14) Other than by the \$10 draw noted in Findings of Fact 11 above, the Employer did not compensate the Claimant for any wages she earned from May 16 through May 31, 1985, until June 4, 1985. On that date, the Claimant went to the Employer's place of business and asked for the wages due her for her May 16 to May 31, 1985, work. Ms. Taylor gave the

Claimant \$40.17 in cash, and a "wage slip" on which the Employer acknowledged gross wages of \$96.25 earned by Claimant from May 16 through May 31, 1985, deductions therefrom in the amount of \$19.08 (including the above-mentioned \$10 draw) and net earnings of \$77.17. (The Claimant surmises that the gross wages noted on this slip fell \$14 short of the gross wages due because the Employer had not included the last four hours the Claimant worked on May 31, 1985, after the May 16 through May 31 payroll was done.)

15) When giving Claimant \$40.17 on June 4, 1985, Ms. Taylor told her that was all the Employer had to give her at that time and had asked her to return the next day. When Claimant did that, she received nothing and was told that the Employer did not have enough money to pay her.

16) On June 6, 1985, the Claimant returned to the Employer's premises, on her own initiative, for her wages. She found the Employer's son and another employee of the Employer packing video cassettes and other property of the Employer in boxes. The Employer's son explained that the Employer was moving to Portland. The Employer's son also told the Claimant that she would get her wages if she left him her address, which she did.

17) Until June 6, 1985, the Claimant assumed that the Employer was still doing business and that she was still employed by him. Upon visiting the Employer's premises on June 6, she learned, because the Employer had ceased doing business, she was no longer employed.

18) On June 7, 1985, the Employer's son came to the Claimant's residence and gave her a check for \$33, to partially compensate her for wages earned May 16 through May 31, 1985. The Claimant asked him why he could not pay her the other \$4 which the Employer had indicated, on her May 16 through May 31 wages slip, was due for that period. The Employer's son said the Employer must have misunderstood what his records said, and that the \$4 would be added to the wages owed the Claimant for June 1 through June 2 and paid.

Attached to the above-cited \$33 check was a memo from Linda Cowdrey, the Employer's wife, acknowledging that the Employer owed the Claimant, and representing that she would be paid, \$51.25 in wages. The record does not reveal how this sum was computed. Because this memo says that is the sum "the next check will be for," it appears to be an amount of net wages. The Claimant surmises that this \$51.25 equals the \$14.00 in gross wages then owed her for her May 31, 1985, work plus the \$47.25 in gross wages owed her for her June 1 through June 2 work, or \$61.25, minus deductions, and plus the \$4 in net wages yet owed her for her May 16 through May 31 work.

The Claimant gave the Employer's son an address to which to send the promised \$51.25 check.

19) On June 8, 1985, the Employer's son came to the Claimant's residence and asked for her address again, saying that he had lost it. He told the Claimant that she should have her unpaid wages by the end of that month.

20) Claimant has not received any wages from the Employer since June 7, 1985.

21) On August 20, 1985, the Agency sent the Employer a letter notifying him of the Claimant's wage claim and assignment, stating the amount of wages she claimed due from him and the period of work to which Claimant's claim pertained, and stating pertinent wage and hour law. This letter asked the Employer to pay immediately the full amount owing the Claimant, as shown by his records. It also asked him, if he disputed the Claimant's claim, to submit his position and any supporting documents.

22) Not having received any response to its August 20 letter, the Agency sent another letter to the Employer on or about August 30, 1985. This letter referred to the Agency's August 20 letter, stated the amount of wages the Claimant claimed and the period of work to which her claim pertained, and stated that the Agency had received no response from the Employer. The letter asked the Employer to pay the Claimant's wages to the Agency by September 30, 1985. The Agency received no response to this letter.

23) After the Order of Determination herein had been issued, the Agency received the Employer's answer, stating in pertinent part that the Employer had records reflecting that he had overpaid the Claimant \$7. On November 20, 1985, the Agency sent the Employer a letter apprising the Employer in detail of the period to which the Claimant's claim pertained, the hours and dates the Claimant claimed she had worked, the rate of pay she

claimed, and the amounts she claimed to have been paid therefore. Attached to this letter was a copy of the L. Cowdrey memo (shown on the bottom half of an exhibit) acknowledging that the Employer owed the Claimant additional wages. The Agency's letter stated the Agency's desire to resolve the claim and asked the Employer to submit the records mentioned in his answer, so that the Agency could confirm his allegation that the Claimant had been paid in full. The Agency did not receive any response to this letter.

24) On December 19, 1985, Agency counsel sent the Employer a letter asking the Employer to send him, by December 27, 1985, copies of any documents substantiating the Employer's assertion in his answer that he did not owe the Claimant any wages.

25) On December 27, the Employer sent the Agency a letter stating that Ms. Taylor's records indicated that the Claimant worked a total of 30 hours between May 15, 1985, and June 2, 1985 and earned \$105 gross wages for that work. This letter also asserted that those records reflected cash draws of \$110 by the Claimant. As substantiation, the Employer enclosed the bookkeeping book now in evidence.

The book does show cash draws totaling \$110 given to the Claimant on May 22 and June 4, 1985. However, as the Claimant's uncontroverted testimony indicated and this forum has found, only \$40 of those draws compensated Claimant for work performed during the period of this claim; the remaining \$70 draw compensated the Claimant for work performed before the period of the claim.

The book also indicates that the Claimant worked 30 hours during some time period, but the record does not establish when that time period was. The 30 hour entry is noted on a page of the book on which the dated entries concern the week of May 26 through June 1, 1985 (during which the Claimant worked 18.5 hours). Given that, the absence of any other information on that page as to the time period to which it pertains, and the Sunday through Saturday weekly organization of this book, this forum cannot agree with the Employer's assertion that this 30 hour notation denotes the Claimant's total work hours for Thursday, May 16 through Sunday, June 2, 1985.

26) On January 3, 1986, in response to the Employer's December 27, 1985, submission, Agency counsel sent the Employer a letter asking certain questions concerning the book and requesting specific documents substantiating the Employer's assertions concerning that exhibit. The Agency has received no answer to that letter.

27) During the ten days the Claimant worked for the Employer during the period of this claim, she worked a total of 45 hours.

28) There is no assertion or evidence that the Employer was financially unable to pay any wages he owes the Claimant, at the time they accrued.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, the Employer was a person who in the State of Oregon directly or through an agent engaged the personal services of one or more employees in the

operation of this video cassette rental business.

2) From May 4 through June 2, 1985, the Claimant, an individual, other than as a co-partner of the Employer or as an independent contractor, rendered personal services, wholly in the State of Oregon, to the Employer. The Employer agreed to pay the Claimant at a fixed rate of \$3.50 for each hour she spent in the performance of this work.

3) The Employer paid the Claimant \$3.50 per hour for the work she performed for him from May 4 through May 15, 1985.

4) The Claimant performed a total of 31.5 hours of work for the Employer from May 16 through May 31, 1985, earning \$110.25 in gross wages. The Employer has paid the Claimant \$73.17, plus a \$10 draw, for this work. Accordingly, the Employer owes the Claimant gross wages of \$27.08 for that period.

5) The Claimant worked a total of 13.5 hours for the Employer from June 1 through June 2, 1985, her last day of work for the Employer, earning \$47.25 in gross wages. The Employer has not paid the Claimant any wages for that work. Accordingly, the Employer owes the Claimant gross wages of \$47.25 for that period.

6) The Employer claims that he paid the Claimant \$70 more than what is mentioned above. This forum concludes that he did, but that sum was to compensate the Claimant for wages she had earned from May 4 through May 15, 1985, a period not included in this claim.

7) The Employer discharged the Claimant when he ceased doing business on June 2, 1985.

8) For the Claimant's work from May 16 through June 2, 1985, the Employer owes the Claimant a total of \$74.33 in gross earned, unpaid, and due wages.

9) The Employer had a record of the above-cited hours the Claimant worked from May 15 through June 2, 1985. The Employer knew what the Claimant's rate of pay was. On June 7, 1985, the Employer's wife, writing for the Employer, acknowledged that the Employer owed the Claimant \$51.25 in (apparently) net wages. The Claimant repeatedly asked the Employer, through his agents, for her wages dues, and repeatedly was assured by those agent that she would receive all those wages. Since August 20, 1985, the Employer repeatedly has been apprised by the Agency of the wages he owes to the Claimant.

The Employer has not paid the Claimant any of the gross wages he owes her, not even any of the \$51.25 net wages he acknowledge owing her on June 7, 1985.

10) The Claimant earned a total of \$157.50 during the ten days she worked for the Employer, or an average daily wage of \$15.75.

11) The Employer has made no showing that he was financially unable to pay the wages he owes the Claimant, at the time they accrued.

CONCLUSIONS OF LAW

1) During all times material herein, the Employer was an employer, and the Claimant was his 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 the Employer herein.

3) Before the commencement of the contested case hearing, the forum complied with ORS 183.413(2) by informing the Employer and the Claimant of the matters described in that provision. The forum complied with ORS 183.415(7) by providing the information described therein at the commencement of the hearing.

4) According to a preponderance of the evidence on the record, Linda Cowdrey (the Employer's wife) and the Employer's son appear to have been authorized by the Employer to take the actions and make the statements, on the Employer's behalf, which this forum has found that they took and made. The Employer has not contravened that evidence with any evidence (or even assertion) that either of these people lacked the authority. Accordingly, those actions and statements, and the knowledge they demonstrate, are properly imputed to the Employer, as Ms. Cowdrey and the Employer's son were authorized to act and speak for the Employer as they did in taking those actions and making those statements.

The actions and statements, and the knowledge they indicate, of the Employer's manager Shelley Taylor are properly imputed to the Employer.

5) Pursuant to ORS 652.140, the \$74.33 in gross wages which the Claimant had earned in the Employer's employ and the Employer had not paid

became due and payable immediately upon the Employer's discharge of the Claimant on June 2, 1985.

6) The Employer has not paid the Claimant the \$74.33 in earned, due, and payable gross wages which he owes her.

7) The Employer has not paid, and knows that he has not paid, Claimant any part of the \$51.25 in net wages which he acknowledge, and therefore knew, as of no later than June 7, 1985, that he owed the Claimant. Therefore, as a matter of law, the Employer willfully failed to pay the Claimant at least that amount in unpaid, due, and payable wages she earned during the period of her wage claim. (This conclusion renders it unnecessary for the forum to decide whether the Employer willfully failed to pay the Claimant any remaining net wages owed.)

Pursuant to ORS 652.150, as a penalty for that non-payment, the Claimant's wages continue from the due date thereof for 30 days. These penalty wages total \$472.50, a sum computed by multiplying Claimant's average daily wage rate of \$15.75 by 30.

8) The Employer has not avoided liability for this penalty, as he has not shown or made any allegation that he was financially unable to pay the wages which he owes the Claimant, at the time they accrued.

9) 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 the Employer to pay the Claimant the above-cited earned, unpaid, due, and payable wages and the above-

cited sum in penalty wages, plus interest on those wages and penalty wages.

OPINION

Neither the Employer nor any representative of him appeared at the time and place specified for the hearing of this matter. Because the Employer thereby failed to participate in a necessary step in this proceeding, the Employer has defaulted in this matter. In a default situation, the task of this forum is to determine if a prima facie case supporting the Agency's allegations has been made on the record. ORS 183.415(5) and (6).

Herein, the evidence on the record establishes that the Employer owes the Claimant the (\$74.33) amount of earned, unpaid, due, and payable wages claimed and that the Employer has willfully failed to say the Claimant at least \$51.25 of those wages. This evidence is complete, credible, persuasive, and the best evidence available, given the Employer's failure to appear at the hearing, and it clearly constitutes the requisite prima facie case. Having carefully considered all the evidence on the record, and especially the meager evidence the Employer submitted in response to the Agency's repeated requests for information, the forum has concluded that the prima facie case clearly has not been effectively contradicted or overcome. Accordingly, the record clearly establishes that the Employer has violated ORS 652.140 as alleged, and that he owes the Claimant penalty wages pursuant to ORS 652.150.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders JOHN D. COWDREY to deliver to the Hearings Unit of the Bureau of Labor and Industries, Room 309, 1400 S.W. Fifth Avenue, Portland, Oregon 97201, a certified check payable to the Bureau of Labor and Industries in trust for CHERYL M. LYON in the amount of FIVE HUNDRED FORTY-SIX DOLLARS AND EIGHTY-THREE CENTS (\$546.83), (representing \$74.33 in gross earned, unpaid, due, and payable wages and \$472.50 in penalty wages) plus interest at the rate of nine percent per year, for the period from July 1, 1985, until paid on \$74.33, and for the period from August 1, 1985, until paid on \$472.50.