

WAGE COLLECTION

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1.0 COMMISSIONER'S AUTHORITY

1.1 --- Generally; Discretion

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

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

1.2 --- To Investigate

1.3 --- To Order Payment of Wages/Penalties

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

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

1.4 --- To Fashion Remedy

2.0 EMPLOYMENT RELATIONSHIP

2.1 --- Generally

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

2.2 --- Partnerships

2.3 --- Independent Contractors

2.3.1 --- Generally

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

□ This forum applies an "economic reality" test to distinguish an employee from an independent contractor under Oregon's minimum wage and wage collection

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

2.3.2 --- Degree of Control Exercised by Alleged Employer

□ The fact that (1) respondent assigned and directed claimant's work and (2) claimant used a computerized time clock set up by respondent to sign in and out work were indicia of an employment relationship. ---- *In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI Orders 263, 269 (2014).*

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

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

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

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

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

2.3.6 --- Permanency of the Relationship

2.3.7 --- Independent Contractor Agreement

2.3.8 --- Industry Tradition

2.3.9 --- Other

2.4 --- Termination of Relationship

2.5 --- Volunteers

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

3.0 RESPONDENTS/EMPLOYERS

3.1 --- Generally

□ Although ORS 653.010 does not include an express definition of "employee," by contextual implication and for purposes of chapter 653, a person is an "employee"

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of another if that other "employs," i.e., "suffer[s] or permit[s]" the person to work. ---- *In the Matter of Susan C. Steves, 32 BOLI 43, 53 (2012).*

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

3.2 --- Corporations/Shareholders

3.2.1 --- Generally

3.2.2 --- Piercing the Corporate Veil

3.3 --- Agents

3.4 --- Joint Employers

3.5 --- Partners

3.6 --- Successors in Interest (ORS 652.310) (see also Ch. III, sec. 73.13)

3.6.1 --- Generally

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

3.6.2 --- Name or Identity of Business

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

3.6.3 --- Location of Business

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

3.6.4 --- Lapse in Time Between Operations

3.6.5 --- Same or Substantially the Same Work Force

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

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

4.0 HOURS WORKED

4.1 --- Generally

4.2 --- Burden of Proof; Evidence

4.2.1 --- Burden of Proof

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

4.2.2 --- Evidence

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

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

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

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

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

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Steves, 32 BOLI 43, 53 (2012).

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

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

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

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

4.2.3 --- Amount and Extent of Work

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

□ One claimant earned \$6030.00 based on a calculation of (1) 652 straight time hours x \$9.00 straight time wage plus (2) 12 overtime hours x overtime wage of \$13.50 per hour. ---- *In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI Orders 189, 203 (2014)*.

□ One of the claimants earned \$1161.00 based on a calculation of 129 straight time hours x \$9.00 straight time hourly wage. ---- *In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI Orders 189, 203 (2014)*.

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

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

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

□ Based on paystubs, the forum concluded that one of the claimants was only paid \$4,011.95 for work when

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

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

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

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

4.3 --- Work Time

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

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

5.0 MINIMUM WAGE AND OVERTIME

5.1 --- Minimum Wage

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

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

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

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

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5.2 --- Overtime

5.2.1 --- Generally

5.2.2 --- Computation

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

5.3 --- Posting Requirements

5.4 --- Excluded Employees

5.4.1 --- Generally

5.4.2 --- Agricultural Workers

5.4.3 --- White-Collar Workers

5.4.4 --- Other Specific Categories of Excluded Workers

6.0 DEDUCTIONS FROM WAGES

6.1 --- Generally

6.2 --- Authorization of Deductions

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

6.4 --- Specific Deductions and Setoffs

6.4.1 --- Draws, Advances, Loans

6.4.2 --- Meals, Lodging, Facilities

6.4.3 --- Tools, Equipment, Uniforms

6.4.4 --- Breakage, Damage

6.4.5 --- Other Deductions, Setoffs, or Counterclaims

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

7.0 PAYMENT OF WAGES

7.1 --- Agreed Rate (see also 12.1)

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

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

□ When there was evidence of complainants' agreed pay rates, the forum would not compute some categories of work at the minimum wage rate when (1) the respondent denied complainants' entitlement to pay for non-client work and (2) there was no evidence of an accurate record of the distinction between two types of work. Calculating all earnings at minimum wage would

reward respondent for its failure to fulfill its statutory obligation. ---- *In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI Orders 189, 202 (2014).*

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

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

7.2 --- Reimbursable Expenses

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

7.3 --- Paydays, Pay Periods

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

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

7.5 --- Employers' Duty to Pay

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

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

7.6 --- Dispute About Wages Due (see also 10.0)

7.7 --- Final Paycheck

7.7.1 --- Generally

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

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7.7.2 --- Seasonal Farmworkers

7.7.3 --- Strikes

7.8 --- Method of Payment, Legal Tender

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

7.9 --- Vacation Pay

7.10 --- Interest

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

8.0 WORKING CONDITIONS

8.1 --- Meal Periods and Rest Periods

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

8.2 --- Rest Periods to Express Milk

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

8.2.2 --- Undue Hardship

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

8.2.4 --- Private Location

8.2.5 --- Close Proximity

8.2.6 --- Public Restrooms & Toilet Stalls

9.0 RECORDS

9.1 --- Personnel

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

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

□ The forum found no violation of requirements to keep or provide records under OAR 839-020-0080 or 839-020-0083, when the agency's notice of intent failed to identify any records that respondents were required to

keep and failed to keep, and no evidence was presented at the hearing to assist the forum in identifying how respondents were deficient. ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., et al, 32 BOLI 185, 198-99 (2013).*

10.0 WAGE CLAIMS (see also 7.6 and Ch. I - Admin. Proc.)

10.1 --- Generally

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

10.2 --- Assignment of Wage Claim

□ Penalty wages are recoverable by the commissioner when liability is established and the commissioner has an assignment of wages from the wage claimant. ---- *In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI 209, 214 (2014).*

10.3 --- Agency's Prima Facie Case

□ To establish claimant's wage claim, the agency must prove the following elements by a preponderance of the evidence: 1) respondent employed claimant; 2) The pay rate upon which respondent and claimant agreed, if other than the minimum wage; 3) The amount and extent of work claimant performed for respondent; and 4) claimant performed work for which she was not properly compensated. ---- *In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI Orders 263, 268 (2014).* See also, *In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI Orders 253, 260 (2014); In the Matter of Giants, Inc., George T. Comalli, Hollywood Fitness, LLC, and Hollywood Fitness Center, LLC, 33 BOLI 53, 56 (2014); In the Matter of Aaron Alexander dba Currinsville Deli, 33 BOLI 60, 63 (2014); In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI 209, 214 (2014); In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI 189, 201 (2014); In the Matter of Bruce Crisman, dba Nu West Painting Contractors, 32 BOLI 209, 214 (2013); In the Matter of Dan Thomas Construction, Inc., 32 BOLI 174, 180 (2013); In the Matter of E. H. Glaab, General Contractor, Inc., 32 BOLI 57, 61 (2012); In the Matter of Susan C. Steves, 32 BOLI 43, 51-52 (2012).*

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

□ When respondents admitted that the wages claimed

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

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

□ In a wage claim default case, the Agency needs only to establish a prima facie case supporting the allegations of its order of determination in order to prevail. ---- *In the Matter of E. H. Glaab, General Contractor, Inc., 32 BOLI 57, 61 (2012).*

11.0 AFFIRMATIVE DEFENSES

11.1 --- Claim and Issue Preclusion (see also Ch. III, sec. 93.0)

11.2 --- Laches (see also Ch. III, sec. 90.0)

11.3 --- Financial Inability to Pay Wages

12.0 OTHER MATTERS CLAIMED AS DEFENSES

12.1 --- Contract Exempting Employer from Wage and Hour Laws/Agreed Rate Less than Minimum Wage (see also 7.1)

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

12.2 --- Ignorance or Misunderstanding of the Law (see also 7.4)

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

12.3 --- Unconstitutionality

12.3 --- Arbitration Agreements

12.5 --- Other

13.0 PENALTY WAGES (ORS 652.150)

13.1 --- Generally

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

□ Claimant was entitled to penalty wages from respondent on account of the failure to receive all wages

due at termination. ---- *In the Matter of Charlene Marie Anderson dba Domestic Rescue, 33 BOLI Orders 253, 256 (2014).*

□ The forum may award penalty wages when a respondent's failure to pay wages was willful. ---- *In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI Orders 263, 270 (2014).* See also *In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI Orders 189 (2014); In the Matter of Dan Thomas Construction, Inc., 32 BOLI 174, 183 (2013); In the Matter of E. H. Glaab, General Contractor, Inc., 32 BOLI 57, 62 (2012).*

□ An employer is liable for penalty wages when it willfully fails to pay any wages or compensation of any employee whose employment ceases. Willfulness does not imply or require blame, malice, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. ---- *In the Matter of Giants, Inc., George T. Comalli, Hollywood Fitness, LLC, and Hollywood Fitness Center, LLC, 33 BOLI 53, 56 (2014).* See also *In the Matter of Aaron Alexander dba Currinsville Deli, 33 BOLI 60, 64 (2014); In the Matter of Susan C. Steves, 32 BOLI 43, 55 (2012).*

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

13.2 --- Willful Failure to Pay Wages

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

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

□ The Agency established by a preponderance of the evidence that respondent's president and claimants' supervisor was in charge of respondent's payroll and aware of the work that claimants performed. The stated excuse of respondent's president for not paying claimants for all hours worked was that claimants signed

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

□ Willfulness does not imply or require blame, malice, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. ---- ***In the Matter of Farwest Hatchery LLC, 33 BOLI 176, 180 (2014). Id. at 185. See also In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI 209, 215 (2014).***

□ Respondents' continued failure to pay wages known and acknowledged to be due was a willful failure to pay those wages. ---- ***In the Matter of Grant and Leslie Hamilton dba MacGregors, 33 BOLI 209, 216 (2014).***

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

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

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

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

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

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

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

□ Respondent's failure to pay wages to claimant was willful when the agency proved that respondent knew that claimant was performing work on respondent's behalf and chose not to pay her all wages due and owing on the basis of her belief that claimant was a volunteer and not entitled to any wages, and there was no evidence that respondent intended to pay claimant an amount other than the amount claimant was actually paid or that respondent was not acting as a free agent in choosing not to pay claimant the rest of her wages. ---- ***In the Matter of Susan C. Steves, 32 BOLI 43, 55 (2012).***

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

13.3 --- Liability of Certain Respondents

13.4 --- Computation

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

□ The forum has previously held that the commissioner has the authority to award penalty wages exceeding those sought in the OOD when penalty wages are awarded as compensation for statutory wage

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violations alleged in the charging document. ---- *In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI Orders 263, 271 (2014).*

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

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

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

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

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

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

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

□ When a written notice of nonpayment submitted on behalf of a wage claimant and the proposed civil penalty did not exceed 100 percent of a claimant's unpaid wages, penalty wages were computed by multiplying a claimant's hourly wage x eight hours per day x 30 days. ORS 652.150(1) & (2); OAR 839-001-0470. Claimant's penalty wages equaled \$2,160 (\$9 x 8 hours x 30 days).

---- *In the Matter of Giants, Inc., George T. Comalli, Hollywood Fitness, LLC, and Hollywood Fitness Center, LLC, 33 BOLI 53, 57 (2014).*

□ Penalty wages, when the hourly rate is \$10, are \$2400. When the rate is \$9 per hour, penalty wages are \$2160. ---- *In the Matter of Bruce Crisman dba Nu West Painting Contractors, 32 BOLI 209, 217 (2013).*

□ When respondent failed to pay the full amount of claimant's unpaid wages within 12 days after receiving written notice, the forum assessed penalty wages at the maximum rate set out in ORS 652.150(1) (hourly rate x eight hours per day x 30 days = penalty wages), or \$4,080 (\$17 per hour x eight hours x 30 days). ---- *In the Matter of E. H. Glaab, General Contractor, Inc., 32 BOLI 57, 63 (2012).*

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

13.5 --- Amount Claimed in Order of Determination (see also Ch. I, sec. 9.2)

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

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

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

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

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

13.6 --- Financial Inability to Pay Wages (see 11.3)

□ Inability to pay wages at the time the wages accrued is an affirmative defense that, if proven, relieves an employer of all liability for ORS 652.150 penalty wages. However, affirmative defenses are waived if not plead in a respondent's answer. In this case, respondent did not raise this defense in its answer, thereby waiving it. ---- *In the Matter of Farwest Hatchery LLC, 33 BOLI 176,*

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187 (2014).

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

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

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

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

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

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

□ Penalty wages were awarded when the evidence was that notice of nonpayment was sent to the Respondent, as required by ORS 652.150(2) and that payment was still not made, within 12 days as required by the statute, or at any other time. ---- *In the Matter of Hey Beautiful Enterprises, Ltd.*, 33 BOLI Orders 189, 205 (2014). See also *In the Matter of Bruce Crisman dba Nu West Painting Contractors*, 32 BOLI 209, 217 (2013).

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

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

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

□ Penalty wages were awarded when the evidence was that notice of nonpayment was sent to the Respondent, as required by ORS 652.150(2) and that payment was still not made, within 12 days as required by the statute, or at any other time. ---- *In the Matter of Bruce Crisman dba Nu West Painting Contractors*, 32 BOLI 209, 217 (2013).

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

13.8 --- Interest

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

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

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

□ Pre-judgment interest is only recoverable in certain circumstances. The forum was unable to award pre-judgment interest without a specific claim for pre-

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judgment interest referencing the statutory basis for awarding pre-judgment interest, and without a specific date from which pre-judgment interest can be calculated.

---- *In the Matter of Grant and Leslie Hamilton dba MacGregors*, 32 BOLI 209, 212 (2014).

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

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

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

14.1 --- Under ORS 653.256

14.1.1 --- Generally

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

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

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

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

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

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

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

□ The maximum civil penalty for a violation of OAR

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

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

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

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

14.2 --- Under ORS 653.055

14.2.1 --- Generally

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

14.2.2 --- Failure to Pay Minimum Wage

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

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

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

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

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

WAGE COLLECTION

C. Steves, 32 BOLI 43, 56 (2012).

□ When claimant's wage rate was the minimum wage, she was not paid all wages earned, due, and owing after she quit, and there was no applicable statutory exception, claimant was entitled to an ORS 653.055 civil penalty in the amount of \$2,016.00. ---- *In the Matter of Susan C. Steves, 32 BOLI 43, 56 (2012).*

14.2.3 --- Failure to Pay Overtime Wages

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

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

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

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

14.2.4 --- Computation

□ After concluding that claimant was not paid for overtime hours earned, the forum assessed a total of \$2,016.00 in civil penalties. (\$9.00 per hour x eight hours x 30 days). ---- *In the Matter of Hey Beautiful Enterprises, Ltd., 33 BOLI Orders 189, 207 (2014).*

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

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

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

□ The forum assessed ORS 653.055(1)(b) civil

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

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

14.3 --- Under ORS 653.077

14.3.1 --- Generally

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

15.0 WAGE SECURITY FUND

15.1 --- Generally

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

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

15.2 --- Prima Facie Case

15.3 --- Presumptions

15.4 --- Liability

15.5 --- Repayment

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

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

15.6 --- Penalty

WAGE COLLECTION

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

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

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

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

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

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

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

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

□ The forum awarded to the agency the penalty under ORS 652.414 when respondent admitted its liability for the wages, and its answer and response to the agency's motion for summary judgment denied a penalty was owed because the business' owner took his own life and

the personal representative did not have access to funds to make payroll. ---- ***In the Matter of KC Systems, Inc. fdba The Machine Shop, 32 BOLI 205, 207 (2013).***

16.0 FEDERAL LAW

16.1 --- Fair Labor Standards Act

16.2 --- Other

17.0 STATUTORY INTERPRETATION

18.0 AGENCY RULE INTERPRETATION

19.0 BANKRUPTCY

20.0 CONSTITUTIONALITY