

In the Matter of
J & S MOVING & STORAGE, INC.,

Case No. 68-11

Final Order of Commissioner Brad Avakian

Issued March 19, 2012

SYNOPSIS

Respondent employed Claimant as a truck driver between April 5 and May 1, 2010. Claimant worked for two different agreed rates, \$9 per hour and \$.25 per mile. Respondent fired him, paying him nothing for his work, and alleged that Claimant had stolen money from Respondent that exceeded the amount of wages due. The Commissioner held that this was not a defense to a wage claim and ordered Respondent to pay Claimant \$2,205.75 in unpaid, due and owing wages and \$2,160.00 in penalty wages. ORS 652.140(1), ORS 652.150.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 7-8, 2012, at the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Chet Nakada, an employee of the Agency. Wage claimant Pablo Sandoval was present throughout the first day of the hearing and was not represented by counsel. Respondent J & S Moving & Storage, Inc. was represented at hearing by Chang Cho, its authorized representative. Philip Guttman, an Oregon court-certified Spanish language interpreter, and Kasey Yim, an Oregon court registered Korean language interpreter, interpreted the entire hearing.

The Agency called the following witnesses: Claimant Sandoval; BOLI Wage and Hour Division compliance specialist Robert McArthur; Daniel Hinkle, owner of a business located next door to Respondent; and Chang Cho, Respondent's corporation president and authorized representative.

Respondent called Chang Cho and Jaime Pacheco, a former employee of Respondent, as witnesses.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-11 (submitted or generated prior to hearing);
- b) Agency exhibits A-1 through A-11 (submitted prior to hearing) and A-12 (submitted at hearing);
- c) Respondent exhibits R-1 through R-9 (submitted prior to hearing) and R-10 and R-11 (submitted at hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On October 22, 2010, Claimant filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him. At the same time, Claimant assigned to the Commissioner of BOLI, in trust for himself, all wages due from Respondent.

2) On January 12, 2011, the Agency issued Order of Determination No. 10-2661 ("OOD") based on Claimant's wage claim and the Agency's investigation. The OOD specifically alleged that Claimant worked for Respondent from "April 5, 2010 through May 1, 2010 at the rate of \$9.00 per hour and \$0.20 per mile, of which no

amount has been paid, leaving a balance due and owing \$2,360.50," with interest. The OOD further alleged that Respondent willfully failed to pay the wages, that Claimant's daily rate of pay was \$101.06, and that Respondent owes Claimant \$3,031.77 penalty wages, with interest.

3) On February 1, 2011, Respondent, through its president Chang Cho, filed an answer in which Respondent admitted that Claimant worked for Respondent "from Jan 2010 to end of April, 2010." The answer also included the following statement:

"He was my pre-employed for our company, So I did not want to report to small claim. I was waiting for him to return the money with over \$2,000. Mr PABLO SANDOVAL when he bring money from client who paid for moving work. I was gonna pay him with it., but he did not returned money from client for moving goods and Mr PABLO SANDOVAL took company's assets with navigation, tools and damaged or misused equipment the value was greater than two thousand dollars."

4) On February 10, 2011, in response to the Agency's notification that Respondent needed to specifically request either a contested case hearing or a court trial, Respondent filed a request for a contested case hearing.

5) On August 12, 2011, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimant stating the time and place of the hearing as February 7, 2012, beginning at 10:00 a.m. and continuing on successive days thereafter until concluded at the office of the Oregon Bureau of Labor and Industries, W. W. Gregg Hearing Room, 1045 State Office Building, 800 NE Oregon St., Portland, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445.

6) On January 11, 2012, the ALJ issued an interim order that required Respondent to provide a letter authorizing Chang Cho to appear as its authorized representative at hearing and stated that the forum would disregard any motions, filings, or other communications from Respondent unless they were filed by an attorney or authorized representative.

7) On January 19, 2012, the ALJ was informed that Chang Cho had telephoned Mr. Nakada and stated that he needed a Korean interpreter at the hearing. In response, the ALJ telephoned Cho that same day to confirm that Cho wanted an interpreter. Cho told the ALJ that he planned to testify in Korean and needed an interpreter to translate his testimony and that he also wanted an interpreter to interpret the entire proceedings to him. In addition, Cho told the ALJ that he did not understand everything in the ALJ's interim orders. The ALJ told Cho that all of the orders related to Respondent's case and that it was important for Cho to find someone to explain those orders to him, particularly the case summary order and order requiring Respondent to officially appoint an authorized representative or obtain the services of an attorney.

8) On January 19, 2012, the ALJ issued an amended case summary order and an amended order requiring Respondent to file a letter of authorization for an authorized representative. They differed from the original orders in that they acknowledged Cho's statement that he needed a Korean interpreter and were accompanied by a cover sheet that contained the following statement translated into Korean and six other languages:

"Warning! Enclosed are important documents concerning your legal rights and responsibilities. You may need to respond to these documents within a limited time. If you do not read English, you should have a qualified person interpret them for you as soon as possible."

9) On January 19, 2012, the ALJ also issued an interim order regarding Respondent's prospective responsibility with regard to payment of a Korean interpreter. In pertinent part, it stated:

"OAR 839-050-0300(3)(a) requires the ALJ to appoint a qualified interpreter 'whenever it is necessary to interpret the proceedings to a party unable to speak or understand English language or to interpret the testimony of the party unable to speak or understand the English language.' Accordingly, the forum will appoint a Korean interpreter for this purpose.

"OAR 839-050-0300(3)(b) regulates the payment of ALJ-appointed interpreters. It reads as follows:

'No fee will be charged to any person for the appointment of an interpreter to interpret the testimony of a party or witness unable to speak or understand the English language, or to assist the administrative law judge in performing the duties of the administrative law judge. No fee will be charged to a party unable to speak or understand the English language who is unable to pay for the appointment of an interpreter to interpret the proceedings to the party unable to speak or understand the English language. No fee will be charged to any person for the appointment of an interpreter if an appointment is made to determine whether the person is unable to pay or is a person unable to speak or understand the English language.'

"Based on this rule, it is the forum's responsibility to pay the interpreter fees generated while Chang Cho and any other witnesses who are unable to speak or understand the English language are testifying. However, if Respondent J & S Moving & Storage, Inc. wants the entire hearing interpreted from English to Korean, J & S Moving & Storage, Inc. must pay the interpreter fees generated during the parts of the hearing except when Cho or any other witnesses who are unable to speak or understand the English language are testifying ***unless J & S Moving & Storage, Inc. is unable to pay those interpreter fees.*** I estimate that those fees may amount to a maximum of \$1000, but will be probably be less. If J & S Moving & Storage, Inc. is able to pay those fees, I will likely require J & S Moving & Storage, Inc. to post a bond or cashier's check in that amount prior to hearing to insure that those fees are in fact paid.

"If J & S Moving & Storage, Inc. wants to have the entire proceeding interpreted from English to Korean and believes it is unable to pay the interpreter fees described above, J & S Moving & Storage, Inc. must provide me with a verified statement and other information in writing under oath showing a financial inability to pay for an interpreter. I have the authority to determine whether J & S Moving & Storage, Inc. is unable

to pay for an interpreter. No interpreter fee will be charged to J & S Moving & Storage, Inc. if an interpreter is necessary to assist me in determining whether J & S Moving & Storage, Inc. is unable to pay. OAR 839-050-0300(3)(c).”

10) On January 20, 2012, the Hearings Unit received a case summary filed by Chang Cho. On the same day, Chang Cho, acting as in his capacity as Respondent's president, filed a letter authorizing himself to represent Respondent at the hearing.

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

12) Throughout the hearing, the entire proceedings were interpreted into Korean for Cho and Respondent's benefit.

13) Respondent offered Exhibit R-12 at hearing, which was a two-page chart showing trip expenses by Respondent's drivers in December 2010 that was not included with Respondent's case summary. The Agency objected to its admission. The ALJ accepted the chart and testimony concerning it as an offer of proof and stated he would rule on its admissibility in the Proposed Order. The Agency's objection is GRANTED on the grounds that Exhibit R-12 is properly part of Respondent's case-in-chief, it has no probative value with regard to the number of hours Claimant worked, the amount of wages Claimant earned, or whether Respondent's failure to pay Claimant the wages he is owed was willful, and Respondent failed to offer a satisfactory reason for including it in Respondent's case summary.

14) After the evidentiary part of the hearing was concluded, the Agency moved to amend its OOD to lower the amount of wages sought to \$2,088.90. The Agency's motion was granted.

15) The ALJ issued a proposed order on February 22, 2012, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was an Oregon corporation that conducted a moving and storage business from its principal place of business in Beaverton, Oregon, and Chang Cho was its corporate president and managed the business.

2) Cho hired Claimant to work as a truck driver for Respondent. Claimant drove truck for Respondent during the period extending from early January 2010 through May 1, 2010.

3) Cho agreed to pay Claimant \$9 per hour for all of his work except for a trip Claimant took to Los Angeles in late April 2010. For that trip, Cho agreed to pay Claimant \$.25 per mile instead of \$9 per hour.

4) Claimant was paid for all the work he performed through April 4, 2010.

5) When Claimant reported to work at Respondent's business or returned from a trip, he registered his arrival time on Respondent's time clock. Respondent's time clock often did not work and Claimant handwrote his arrival time on those occasions.

6) Claimant worked the following days and hours per day from April 5 through April 25, 2010:

<u>Date</u>	<u>Hours Worked</u>
April 5	19.0
April 6	6.0
April 7	6.5
April 8	1.5
April 9	10.5
April 11	18.5

April 12	8.5
April 14	21.5
April 15	17.0
April 17	13.5
April 19	8.0
April 20	8.0
April 21	8.0
April 22	8.0
April 23	11.0
April 24	14.0
April 25	9.0
TOTAL:	188.5

6) At \$9 per hour, Claimant earned \$1,696.50 between April 5 and April 25 (188.5 hours x \$9 = \$1,696.50).

7) Claimant drove to Los Angeles and back between April 26 and April 29, driving a total of 2,037 miles. He arrived back in Portland at 8 a.m. on April 29. Calculated at \$.25 per mile, he earned \$509.25 for this trip.

8) Claimant worked an undetermined number of hours on April 29-30 and May 1 driving a truck to Washington and back for Respondent at the agreed rate of \$9 per hour.ⁱ

9) Claimant returned from his trip to Washington late in the afternoon on May 1, Respondent's payday. Upon Claimant's return, Cho demanded the return of credit cards that he had given Claimant to use on the trip and Claimant demanded to be paid his wages. Each refused. Cho fired Claimant and called the police. Claimant gave the cards to the police and the police told Cho they would arrest him if he called again.

10) During Claimant's employment, Respondent paid its employees every two weeks.

11) Claimant earned a total of \$2,205.75 in wages between April 5 and May 1, 2010. Respondent did not pay Claimant any wages for the work he performed between

April 5 and May 1, 2010, and was aware, through Cho, that Claimant was owed wages for his work during that time period.

12) On November 1, 2010, the Agency mailed a document entitled “Notice of Wage Claim” to Respondent that stated:

“You are hereby notified that PABLO SANDOVAL has filed a wage claim with the Bureau of Labor and Industries alleging:

“Unpaid wages and statutory overtime wages of \$2,500 at the rate of \$9.00 per hour from April 5, 2010 to May 1, 2010.

“IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address.

“IF YOU DISPUTE THE CLAIM, complete the enclosed ‘Employer Response’ form and return it together with the documentation which supports your position, as well as payment of any amount which you concede is owed the claimant to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.

“If your response to the claim is not received on or before November 15, 2010, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees.”

13) Chang Cho’s testimony was only partly credible. He claimed he did not pay Claimant anything when he fired Claimant because Claimant did not give him the \$2,000 plus in checks and cash he collected on his trip to California and Washington. This claim conveniently ignores the fact that he did not pay Claimant any of his earned wages on Respondent’s mid-April payday, when no such alleged offset existed. The forum finds Cho’s testimony that he gave Claimant \$1,000 in cash to take to California implausible, given Cho’s testimony about the importance he attached to recordkeeping and the fact that he made no record of his payment to Claimant. The forum finds Cho’s testimony that Claimant used his own credit cards to pay for all Respondent’s expenses on the California trip to be equally implausible, given Cho’s claims that he gave Claimant \$1,000 in cash to pay for those expenses and that Claimant refused to return the two credit cards Respondent had given him at the end of the trip. The forum has

only credited Cho's testimony when it was corroborated by credible documentation or other credible testimony.

14) Claimant's testimony regarding his work hours from April 25 to May 1 was exaggerated and confusing. For example, he testified that on his trip to Los Angeles he drove 51 hours straight from 9 p.m. on April 25 to midnight on April 27, then worked 37 hours straight from 11 a.m. on April 28 until 2 a.m. on April 30. Claimant testified he was able to accomplish this with the aid of energy drinks and coffee. Although this may have been physically possible, the forum finds it highly improbable in light of Claimant's written and oral testimony that he worked 16 hours on April 31, a nonexistent date. However, the forum has credited Claimant's testimony concerning his hours worked from April 5 through April 25 because Claimant testified credibly as to his work hours and Respondent did not provide any credible evidence, such as Claimant's time cards, to the contrary. The forum has also credited Claimant's testimony regarding his hourly rate of pay of \$9 per hour and his claim that he drove 2,037 miles to California and back. Finally, the forum has credited his testimony that Cho agreed to pay him \$.25 per mile based on Claimant's credible testimony and Respondent's failure to produce any records to support Cho and Pacheco's testimony that he was paid \$.20 per mile.

15) Jaime Pacheco contradicted himself on several key issues during his testimony. When asked when he worked for Respondent, he said it was April in 2010 or 2009 and looked to Cho for assistance with his answer. He also testified that Claimant did not work for Respondent in April 2010. He testified he was present on Claimant's last day of work, which he thought was in April, and that Claimant wasn't fired, contrary to the testimony of both Claimant and Cho. He testified that he was present when the police arrived after he and Claimant returned from Washington, then subsequently testified that he did not talk to the police because he "had left the office." He testified

that Claimant was not paid his salary upon their return from Washington, then subsequently testified that he did not know if Claimant was paid. Based on these contradictions, the forum has only credited Pacheco's testimony when it was corroborated by other credible evidence.

16) Robert McArthur was a credible witness and the forum has credited his testimony in its entirety.

17) Daniel Hinkle was a credible witness; however, the forum has only relied on his testimony concerning the immediate circumstances of Claimant's termination.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent was an Oregon corporation. Chang Cho was Respondent's corporate president and his actions are imputed to Respondent.

2) Claimant was employed by Respondent as a truck driver during the wage claim period of April 5 through May 1, 2010.

3) Except for a trip to California between April 26-29, 2010, Claimant was employed at the agreed rate of \$9 per hour.

4) Claimant worked 188.5 hours at the agreed rate of \$9 per hour during the wage claim period, earning gross wages of \$1,696.50.

5) Claimant was employed at the agreed rate of \$.25 per mile during his trip to California and drove 2,037 miles, earning \$509.25.

6) Claimant was fired at the end of his work day on May 1, 2010, and has not been paid anything for the work he performed for Respondent between April 5 and May 1, 2010.

7) On November 1, 2010, the Agency mailed a notice to Respondent that notified Respondent of Claimant's wage claim and demanded that Respondent pay the unpaid, due, and owing wages if the claim was correct. Respondent has not paid any

additional wages to Claimant and still owes Claimant \$2,205.75 in unpaid, due and owing wages.

8) Respondent's failure to pay Claimant his unpaid, due and owing wages was willful. Penalty wages are computed as follows for Claimant, in accordance with ORS 652.150: \$9 per hour x 8 hours x 30 days = \$2,160.00.ⁱⁱ

CONCLUSIONS OF LAW

1) At all times material herein, Respondent J & S Moving & Storage, Inc. was an Oregon employer that directly engaged the personal services of one or more employees and Claimant was Respondent's employee, subject to the provisions of ORS 652.110 to 652.200 and ORS 652.310 to 652.405.

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

3) Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid by the end of the first business day after his discharge. Respondent owes Claimant \$2,205.75 in unpaid, due, and owing wages.

4) Respondent willfully failed to pay Claimant all wages due and owing for work that Claimant performed for Respondent and owes \$2,160.00 in penalty wages to Claimant. ORS 652.150.

6) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent J & S Moving & Storage, Inc. to pay Claimant his earned, unpaid, due and payable wages and penalty wages, plus interest, on all sums until paid. ORS 652.332.

OPINION

CLAIMANT'S WAGE CLAIMS

To establish Claimant's wage claim, the Agency must prove the following elements by a preponderance of the evidence: 1) Respondent employed Claimant; 2) The pay rate upon which Respondent and Claimant agreed, if other than the minimum wage; 3) The amount and extent of work Claimant performed for Respondent; and 4) Claimant performed work for which he was not properly compensated. *In the Matter of Letty Lee Seshier*, 31 BOLI 255, 261 (2011).

RESPONDENT EMPLOYED CLAIMANT

Respondent admitted in its answer that it employed Claimant and stipulated to that fact at the hearing.

THE PAY RATE UPON WHICH RESPONDENT AND CLAIMANT AGREED

Respondent and the Agency stipulated that Claimant's agreed rate of pay, except for the trip that Claimant took to Los Angeles, was \$9 per hour. Claimant testified that his rate of pay for the Los Angeles trip was \$.25 per mile, the same amount that he wrote on his wage claim. In contrast, Cho testified that he agreed to pay \$.20 per mile to Claimant, and Pacheco testified that Cho paid him \$.20 per mile until he complained, at which time the amount was raised to \$.25 per mile. Pacheco did not testify as to the time he made his complaint that resulted in a raise, and neither Respondent nor the Agency provided any records to assist the forum in determining the correct rate per mile. There was no evidence offered to show whether Respondent's payroll records that would presumably show how much per mile was paid to Respondent's drivers at the time of Claimant's employment still exist. Based on Claimant's more credible testimony and the absence of any records to the contrary, the forum concludes that Cho agreed to pay Claimant \$.25 per mile for his trip to California.

AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT

April 5-April 23, 2010

The Agency produced Claimant's time cards showing the hours he worked from April 5 through April 17, 2010. Those cards included additional handwritten notes made by Claimant that showed the total hours he worked each day, plus the hours he worked on April 25. Respondent offered a copy of what Cho claimed were Claimant's original time cards for April 5 through 17. Except for Claimant's handwritten notes, they contain no significant differences except for the handwritten note "NOT DRIVE" that appears under the printed timeⁱⁱⁱ "10 APR 5 5:52 AM" in the block related to hours worked by Claimant on April 5, 2010. There was no testimony about who wrote that note, but does not appear to be Claimant's handwriting. Another printed time -- "10 APR 6 1:08 AM" -- appears in the block related to hours worked by Claimant on April 6, 2010, that corresponds to Claimant's claim that he worked 19 hours on April 5. There are no time cards in evidence showing the hours Claimant worked from April 18 through April 25. Based on Claimant's credible testimony and the time cards that were produced, the forum concludes that Claimant worked the hours shown in Finding of Fact #5 – The Merits from April 5-23, 2010.

April 24, 2010

Claimant claims he worked 23 hours on April 24, 2010. Respondent countered this with an invoice representing work done in Marysville, Washington^{iv} that shows Claimant moved Benny Byun between 9:16pm and 11:17pm on that day. The forum is skeptical of the 23 hours claimed by Claimant, based largely on his exaggerations about the hours he worked beginning April 24 and continuing through May 1. However, there is no evidence that Claimant did not work straight through April 24 from approximately 9 a.m. until 11 p.m., and Claimant's testimony and documentary evidence provided by

Respondent in Exhibits R-7 and R-9 that show Claimant checked out a truck from Penske-Tacoma on Respondent's behalf at 9:07 a.m. on April 24, 2010, and worked until 11:17 p.m. that same day for Byun^v support that theory. Absent any other evidence to show when Claimant started work that day, the forum credits him with working from 9:07 a.m. to 11:17 p.m., for a total of 14 hours.

April 25

Claimant credibly testified he worked nine hours at the hourly rate of \$9 per hour on April 25, 2010, and Respondent has provided no records to the contrary. When the employer produces no records, the forum may rely on evidence produced by the agency from which "a just and reasonable inference may be drawn." *In the Matter of Kilmore Enterprises*, 26 BOLI 111, 122 (2004). A claimant's credible testimony may be sufficient evidence to show the amount of hours worked by the claimant and amount owed. *In the Matter of Joseph Francis Sanchez*, 29 BOLI 211, 221 (2007). Lacking contrary evidence, the forum relies on Claimant's credible testimony to conclude that he worked nine hours on April 25, 2010.

April 26-29, 2010

Although Respondent disputes the rate per mile at which Cho agreed to pay Claimant on the California trip that occurred on these dates, Respondent does not dispute that Claimant drove 2,037 miles on that trip. Because Claimant was paid by the mile instead of by the hour, the forum need not determine the number of hours he worked on his California trip.

April 29-May 1, 2010

In Finding of Fact #8 – The Merits, the forum concludes that "Claimant worked an undetermined number of hours on April 29-30 and May 1 driving a truck to Washington and back for Respondent at the agreed rate of \$9 per hour." The forum reached this

conclusion based on the lack of reliable evidence in the record that would allow the forum to hazard even an approximate guess as to Claimant's work schedule on those three days. There are no contemporary time records to assist the forum. The unreliable evidence is summarized below. In brief, it consists of Claimant's testimony as to the occurrence of an impossible event and his inconsistent and contradictory testimony, illustrated below in the forum's transcription of Claimant's answers to questions asked by the ALJ.

As to the impossible event, Claimant wrote on the calendar that he completed and gave to the Agency when he filed his wage claim that he worked "17" hours on "April 29-30," "16" hours on April 31, and "16" hours on May 1. Claimant also testified that he worked 16 hours on April 31. April 31 does not exist, and the forum takes judicial notice of that fact.

When questioned by the ALJ about his specific schedule those days, Claimant testified to the following:

Questions by ALJ; Answers by Claimant

Q: "Is A-1, page 4, * * * does that accurately show the hours you worked?"

A: "Yes.

Q: "Would you please tell me which dates on this schedule you were to be paid by the hour, and then I'm going to ask you which dates you were to be paid by the mile.

A: "From the 4th 'til the 24th it was by the hour.

Q: "So through the 25th was by the hour?"

A: "Yes.

Q: "Alright. What about the rest of the time?"

A: "By the mile.

Q: "And what dates does that cover? You said you were paid by the hour April 4 through April 25. That leaves April 26 through May 1. From April 26 through May 1, were you paid by the hour on any of those days?"

A: "I was paid by the hour and by the mile.

Q: "For April 26 through May 1?"

A: "Yes.

Q: "So, April 26th, 27th, and 28th, how many hours did you work on those three days?"

A: "I don't remember; I have them written down.

Q: "And your calendar shows that was the LA trip and you drove 2,037 miles? Is that right?"

A: "Yes.
Q: "Did you drive to LA and back in those three days?
A: "No, I went to Los Angeles and I was working and I did some deliveries in that area.
Q: "What dates did you come back from LA?
A: "Tuesday at night.
Q: "The 27th?
A: "Yes.
Q: "So, what day did you drive to LA?
A: "Sunday night.
Q: "Do you remember when you arrived in LA?
A: "Monday night with Mr. Cho.
Q: "So then you did work in LA during the day on April 27th?
A: "I went to pick up more freight in Los Angeles and I drove to Willow, California, near Valencia.
Q: "Was that north or south?
A: "South.
Q: "So the night of April 27th you started to drive back from California?
A: "Yes.
Q: "Do you remember about what time you left?
A: "About 7 p.m.
Q: "And do you remember what time you arrived back in Portland?
A: "I arrived Thursday at 8 a.m.
Q: "So that's April 29?
A: "Yes.
Q: "Do you remember about what time you left for LA on April 25, Sunday April 25?
A: "At 9 p.m.
Q: "Had you already worked other hours that day?
A: "Yes, I had worked in Tacoma.
Q: "When you were in LA, did you spend Monday and Tuesday night in a hotel or motel or something?
A: "Just Monday.
Q: "Can you estimate at all for me how many hours you worked between midnight April 25; that's Sunday, and midnight April 28?
A: "The 25th I started around 8 a.m. And until about midnight of Tuesday when we got to the hotel.
Q: "Alright. So you left Portland Sunday night at 9 p.m.?
A: "Yes.
Q: "And you arrived at the motel midnight on Tuesday or Monday?
A: "Tuesday.
Q: "Okay. So were you driving nonstop from 9 o'clock Sunday until midnight Tuesday to LA?
A: "Yes, he obligated me to drive like that.
Q: "So that's 51 hours straight driving?
A: "That's what I drove and worked.

Q: "Okay, your calendar shows that you worked 17 hours on the 29th and the 30th of April?"

A: "I worked from Wednesday at 10 o'clock or 11 o'clock in the morning 'til Friday at 2 a.m. I worked and drove. I made a mistake here where I wrote 2300 miles. I made a mistake on the hours."

Q: "Okay, so I've got from your hours worked it's from 9 o'clock April 25th until midnight April 27th. Is that correct?"

A: "Yes. Because he wanted to finish the deliveries that we were taking from here down to there."

Q: "And then you worked straight through from 11 a.m. on April 28th until 2 a.m. on Friday, April 30?"

A: "Yes. I ended up in Lynnwood, Washington at 2 a.m."

Q: "And your calendar shows that you worked 16 hours on April 31?"

A: "Yes."

Q: "Do you remember about what the times of day were that you worked?"

A: "Started like at about 9 a.m. And I finished like around 7 or 8. It was 16 hours."

Q: "And then on May 1, you say that you worked 16 hours? Do you remember when you started and when you finished on that day?"

A: "It was from the 31st in the afternoon until the 1st in the afternoon."

Q: "I'm a little confused. You had just testified that you worked from 9 a.m. until 7 or 8 p.m. on April 31. What happened after 7 or 8 p.m. on April 31st for the rest of your work?"

A: "I had to drive on I-5 South to Tacoma to finish a delivery the following day."

Q: "Well, I guess what I need to know is you wrote on 31st of April and May 1st you worked 16 hours each of those days. Is that correct?"

A: "Yes."

Q: "And you said the California trip was supposed to be 25 cents a mile?"

A: "Yes."

Q: "Not \$9 an hour?"

A: "No."

Q: "On this schedule, on A-1, page 4, which dates does that cover?"

A: "From the 25th of April to the 29th. Until 8 a.m., and from then he was going to pay me by the hour to Washington until the last day that I worked for him."

A wage claimant always bears the burden of proving he performed work for which he was not properly compensated. *In the Matter of Rubin Honeycutt, 25 BOLI 91, 103 (2003)*. In the past, the forum has declined to speculate or draw inferences about wages owed based on insufficient, unreliable evidence. *In the Matter of Burrito Boy, Inc., 16 BOLI 1, 12 (1997)*.^{vi} Here, although there is no dispute that Claimant worked on April 29, 30, and May 1, the evidence as to the specific hours Claimant worked on April 29, 30, and May 1 is both insufficient and unreliable and Claimant's transcribed

testimony is not credible. Consequently, the forum follows its precedent and declines to construct an award of unpaid wages for those three days based on speculation.

CLAIMANT PERFORMED WORK FOR WHICH HE WAS NOT PROPERLY COMPENSATED

Claimant earned \$2,205.75 for his 188.5 hours of work between April 5 and April 25, 2010, at the agreed rate of \$9 per hour, and at the agreed rate of \$.25 per mile for the 2,037 miles he drove. Respondent has paid him nothing, and owes him \$2,205.75 in earned, unpaid, due and owing wages.

CONCLUSION

In total, Claimant earned \$2,205.75 during the wage claim period. As he was paid nothing, he is owed that entire amount. This remedy exceeds the \$2,088.90 in unpaid wages alleged to be due and owing in the Agency's amendment at hearing to its Order of Determination. In prior cases, the forum has held that the commissioner has the authority to award unpaid wages exceeding those sought in the Agency's Order of Determination when they are awarded as compensation for statutory wage violations alleged in the charging document. See, e.g., *In the Matter of Westland Resources, Inc.*, 23 BOLI 276, 286 (2002). The unpaid wages owed to Claimant in this case were earned within the wage claim period alleged in the OOD and are awarded as compensation for a statutory wage violation of ORS 652.140 alleged in the OOD. Accordingly, the forum awards Claimant the sum of \$2,205.75, the full amount of unpaid wages proved by the Agency at hearing.

CLAIMANT IS OWED PENALTY WAGES

The forum may award penalty wages when a respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission "willfully" if he or she acts (or fails to

act) intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

The Agency presented credible evidence that: (1) Claimant and Cho agreed that Claimant would work for the usual rate of \$9 per hour and at the special rate of \$.25 per mile on a trip to California; (2) Respondent, through Cho, its agent and Claimant's supervisor, set Claimant's driving schedule and was aware of Claimant's work; (3) Cho did not pay Claimant his earned wages on Respondent's mid-April payday or when he fired Claimant; and (4) Cho fired Claimant after Claimant's last trip, claiming he did not have to pay Claimant because Claimant allegedly stole checks, cash, and equipment from Respondent that exceeded the value of Claimant's earned and unpaid wages. There is no evidence that Cho, Respondent's agent, acted other than voluntarily and as a free agent in not paying Claimant and the forum concludes that Respondent, through Cho, acted willfully in failing to pay Claimant his wages and is liable for penalty wages under ORS 652.150.

ORS 652.150(1) and (2) provide, in pertinent part:

“(1) Except as provided in subsections (2) and (3) of this section, if an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 * * *, then, as a penalty for the nonpayment, the wages or compensation of the employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced.

“(2) If the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation unless the employer fails to pay the full amount of the employee's unpaid wages or compensation within 12 days after receiving the written notice. If the employee or a person on behalf of the employee fails to send the written notice, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation. * * *”

The Agency provided documentary and testimonial evidence that its investigative staff made the written demand contemplated by ORS 652.150(2) for Claimant's wages on

November 1, 2010. The Agency's OOD, issued on January 12, 2011, repeated this demand. Respondent failed to pay any of Claimant's unpaid wages within 12 days after receiving the written notices and has still not paid them. Consequently, the forum assesses penalty wages at the maximum rate set out in ORS 652.150(1) (hourly rate x eight hours per day x 30 days = penalty wages). Penalty wages for Claimant equal \$2,160.00 (\$9.00 per hour x eight hours x 30 days).

RESPONDENT'S DEFENSE THAT IT OWES NO WAGES BECAUSE CLAIMANT STOLE FROM RESPONDENT

Respondent admits that it did not pay wages to Claimant during the wage claim period, but contends it was justified in withholding wages because Claimant stole money and goods from Respondent that exceeded the value of the unpaid wages. As explained more fully below, the forum has not made findings of fact or conclusions of law concerning this issue because it is not a valid defense to Claimant's wage claim.

Oregon wage and hour laws severely limit the circumstances under which an employer may deduct money from an employee's wages. See ORS 652.610. An employer may not withhold an employee's wages based on allegations, even if confirmed, that the employee stole money from the employer. See *In the Matter of Robert N. Brown*, 20 BOLI 157, 162-63 (2000). See also *In the Matter of Richard R. Mabe*, 19 BOLI 223, 229 (2000) (the forum held that a respondent who withheld money from an employee's paycheck because the employee allegedly had damaged the respondent's truck owed claimant the withheld amount in unpaid wages because none of the circumstances in ORS 652.610 were applicable). In this case, Respondent was not entitled to withhold Claimant's wages based on Cho's belief that Claimant had stolen from Respondent. That belief, even if formed in good faith, is also not a defense as to whether Respondent's failure to pay wages was "willful" under ORS 652.150.

In short, Respondent's prospective remedy -- if any -- is in civil or criminal court.

ORDER

NOW, THEREFORE, as authorized by ORS 652.140(1), ORS 652.150, and ORS 652.332, and as payment of the unpaid wages and penalty wages, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **J & S MOVING & STORAGE, INC.**, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Claimant **Pablo Sandoval** in the amount of FOUR THOUSAND THREE HUNDRED SIXTY-FIVE DOLLARS AND SEVENTY-FIVE CENTS (\$4,365.75), less appropriate lawful deductions, representing \$2,205.75 in gross earned, unpaid, due and payable wages and \$2,160.00 in penalty wages; plus interest at the legal rate on the sum of \$2,205.75 from June 1, 2010, until paid, and interest at the legal rate on the sum of \$2,160.00 from July 1, 2010, until paid.

ⁱ The forum's reasons for concluding that "[c]laimant worked an undetermined number of hours" are set out in detail in the Opinion.

ⁱⁱ The forum has not used the "weighted" formula suggested by the Agency that incorporates the hours worked during Claimant's trip to California and overtime hours because the forum has not found it possible to accurately compute the number of hours Claimant worked during his trip to California or from April 29-May 1. Instead, the forum has relied on Claimant's undisputed agreed rate of pay of \$9 per hour for the majority of his employment.

ⁱⁱⁱ It was undisputed that printed times on Claimant's timecards were printed by Respondent's time clock.

^{iv} The forum takes judicial notice of the fact that Marysville is approximately 200 miles north of Portland.

^v Exhibits R-7 and R-9.

^{vi} See also *In the Matter of J. Guadalupe Campuzano-Cazares*, 30 BOLI 48, 59-60 (2008) (When claimant's testimony and the contemporaneous record he claimed to have maintained were not credible, the forum declined to speculate or draw inferences about wages owed to him.)