

**In the Matter of
PETWORKS LLC**

Case No. 44-07

Final Order of Commissioner Dan Gardner

Issued May 29, 2008

SYNOPSIS

Claimant worked 161 hours as an employee of Respondent between November 21 and December 19, 2005, including eight hours of overtime. Claimant was entitled to be paid the minimum wage of \$7.25 per hour, plus overtime wages at one and one-half times the regular rate of pay and was not paid any wages. Respondent was ordered to pay Claimant \$1,167.25 in unpaid, due and owing wages. Respondent's failure to pay the wages was willful, and Respondent was ordered to pay \$1,740.00 in penalty wages. Based on Respondent's failure to pay the minimum wage or overtime wages to Claimant, Respondent was ordered to pay a civil penalty of \$1,740.00. ORS 652.140(1), ORS 652.150, ORS 653.025, ORS 653.035, ORS 653.055, ORS 653.261; OAR 839-020-0004(17), OAR 839-020-0030, OAR 839-020-0035.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 22, 2008, at the office of the Oregon Employment Dept, located at 2075 Sheridan Ave., North Bend, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Patrick Plaza, a case presenter employed by the Agency. Wage claimant Qynne McKibben ("Claimant") was present throughout the hearing and was not represented by counsel. Respondent did not appear at hearing and was held in default.

The Agency called as witnesses: Claimant, Sherry Eisenbarth, Christopher Partee, Kriston Robertson, Nikki Puckett, McClain Altman, Lawanda Hadnott, Michael

Slaska, and Margaret Pargeter (telephonic), Wage and Hour Division compliance specialist.

The forum received into evidence:

a) Administrative exhibits X-1 through X-9 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-22 (submitted prior to hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On January 6, 2006, Claimant filed a wage claim with the Agency alleging that Respondent “Pet Works, LLC” had employed her and failed to pay wages earned and due to her. Specifically, Claimant alleged that she earned \$1,428.25 in gross wages, that she was paid \$20.00, and that she had received \$450.00 as the “dollar value of non-wage good, property or services * * * received from employer: (rent, tools, meals, etc.).” At the time she filed her wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent.

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

3) On May 30, 2006, the Agency issued Order of Determination No. 06-0008 based upon the wage claim filed by Claimant. The Order of Determination alleged that claimant had been employed in Oregon by Respondent from August 8, 2005, to December 18, 2005, at the rate of \$7.25 per hour, and that “no part of which [had] been paid except the sum of \$470.00, leaving a balance due and owing in the sum of \$958.25.” The Order also alleged that Respondent willfully failed to pay those wages,

that more than 30 days had elapsed since the wages became due and owing, that a written notice was sent to Respondent, that Claimant's daily rate of pay was \$58.00 per day, and that Respondent owed Claimant \$1,740.00 in penalty wages. Finally, the Agency alleged that Respondent paid Claimant less than the wages to which she was entitled under ORS 653.010 to 653.261 and was therefore liable to Claimant for ORS 653.055(1)(b) civil penalties in the amount of \$1,740.00. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law. The Order did not refer to overtime wages.

4) On June 15, 2006, Charlene Cuddy filed an answer on behalf of Petworks, LLC. Cuddy stated that Claimant never worked for her or Respondent and requested a hearing. On July 5, 2006, the Agency sent Cuddy a notice stating that her answer was insufficient because it was not filed by an attorney or authorized representative. On July 10, 2006, Petworks LLC sent a letter to the Agency authorizing Cuddy to represent Respondent.

5) On February 12, 2008, the Agency filed a "BOLI Request for Hearing" with the forum.

6) On February 22, 2008, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimant stating the time and place of the hearing as April 22, 2008, at 9 a.m., at the office of the Oregon Employment Dept, 2075 Sheridan Avenue, Coos Bay, 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 839-050-0440.

7) On March 19, 2008, the ALJ issued an interim order noting that the hearing location was 2075 Sheridan Avenue, North Bend, Oregon.

8) On March 20, 2008, Cuddy filed another request for contested case hearing and answer in which she stated that Claimant has never been employed by Respondent.

10) On April 7, 2008, the Agency filed a motion to amend its Order of Determination to correct the caption spelling of Respondent's name from "Pet Works, LLC" to "Petworks, LLC" and increase the amount of unpaid wages sought from \$958.25 to \$987.25. On April 17, 2008, the ALJ issued an interim order granting the Agency's motion.

11) At the time set for hearing, Respondent did not appear and had not previously notified the forum that it would not appear. Pursuant to OAR 839-050-0330(2), the ALJ waited 30 minutes before commencing the hearing. When Respondent did not appear or contact the hearings unit by telephone during that time, the ALJ declared Respondent in default at 9:30 a.m. and commenced the hearing.

12) 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.

14) At the end of the evidentiary portion of the hearing, and before the Agency rested its case, the Agency moved to amend the Order of Determination to increase the amount of wages sought by \$450.00. The ALJ reserved ruling on the Agency's motion until the Proposed Order. The Agency's motion is **DENIED** for reasons stated in the Opinion.

15) On May 9, 2008, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) In 2005, Oregon's minimum wage rate was \$7.25 per hour.

2) In the spring of 2005, Charlene Cuddy acquired an ownership interest in Cuddly Critters, a pet store with locations in Coos Bay and North Bend.

3) In April 2005, Cuddy hired Claimant to work as an administrative assistant/manager in the Cuddly Critter stores. Claimant did inventory and helped to organize offices in Cuddy's North Bend and Coos Bay stores. Claimant left Cuddy's employ that same month and was paid for all her work.

4) On August 8, 2005, Claimant was rehired by Cuddy and returned to work at Cuddly Critters as an administrative assistant. Claimant worked until August 19, 2005, working a total of 36 hours, then quit after Cuddy pushed her to the ground. Claimant was not paid for any of her work.

5) On August 25, 2005, Respondent Petworks LLC registered as a limited liability company with the Oregon Secretary of State, Corporation Division, designating Cuddy as its registered agent at the following address: "276 S 2nd Court., Coos Bay, Oregon 97420."

6) From August 25, 2005, through December 19, 2005, Respondent was a limited liability company doing business in Coos Bay, North Bend, and Reedsport, Oregon that employed one or more persons and had two members – Charlene Cuddy and Deanna Mason.

7) In November 2005, Cuddy rehired Claimant. Claimant and Cuddy did not discuss the rate that Claimant would be paid. Claimant's first day of work was November 21, a Monday. During her first week of work, Claimant painted signs for

Respondent's stores on November 21, 22, 23, and 26. On November 27, she trained to be manager of Respondent's new Reedsport store. In all, she worked a total of 33 hours during her first week of employment, earning \$239.25 in gross wages (33 hours x \$7.25 per hour).

8) During Claimant's employment with Respondent, Cuddy created weekly work schedules for Claimant and her other employees.

9) In the week beginning November 28, 2005, claimant worked as manager of Respondent's newly opened Reedsport store. Claimant worked with Chris Partee, another employee of Respondent, and worked eight hours each day on November 28-30 and December 2-4, for a total of 48 hours. She earned a total of \$377.00 (40 hours x \$7.25 per hour = \$290.00; 8 hours x \$7.25 per hour x 1.5 = \$87.00; \$290.00 + \$87 = \$377.00).

10) In the week beginning December 5, 2005, Claimant continued to manage Respondent's Reedsport store. Claimant worked eight hours each day on December 6-7 and 9-11, for a total of 40 hours. She earned a total of \$290.00 (40 hours x \$7.25 per hour = \$290.00).

11) In the week beginning December 12, 2005, Claimant continued to manage Respondent's Reedsport store on December 12-13 and 15, then worked at Respondent's Coos Bay store on December 17-18. Claimant worked eight hours each day, for a total of 40 hours. She earned a total of \$290.00 (40 hours x \$7.25 per hour = \$290.00).

12) In total, Claimant earned \$1,167.25 in straight time wages (161 hours x \$7.25 per hour = \$1,167.25) and \$29.00 in overtime wages (8 hours x \$7.25 per hour x .5 = \$29.00) while employed by Respondent.

13) From November 21 through December 18, 2005, Claimant and Partee lived in a travel trailer owned by Cuddy, at Cuddy's request, when they worked in Reedsport. Cuddy's trailer had no running water and only half of it had electrical power. During this time, Claimant also worked at a video store in North Bend on the days she did not work in Reedsport. On those days, Claimant slept on a recliner at Cuddy's house in North Bend.

14) Cuddy did not ask Claimant to pay rent in exchange for sleeping in the trailer or at Cuddy's house. Cuddy and Claimant did not have an agreement that Respondent would deduct money from Claimant's wages in exchange for lodging. Claimant never signed a written agreement authorizing Cuddy to deduct money from her wages in payment for lodging.

15) While Complainant and Partee worked at the Reedsport store, they took \$20 as a "payout" from the till to buy food because they had no food and no money to buy food because Respondent had not paid them anything.

16) Claimant spent the night of December 18, 2005, sleeping at Cuddy's house. At that time, Respondent had not paid her anything for her work. The next morning, Cuddy was very upset at Claimant and yelled at her, telling Claimant she had to pick up her things and Hadnott's things that were also stored at Cuddy's house. Cuddy told her to "get out." Claimant asked for her wages, telling Cuddy she would file a complaint with the "labor board" if Cuddy didn't pay her. Cuddy hit her, threw her to the floor, and sat on her until she was pulled off by Partee, who was also staying at Cuddy's house. Claimant called the police and filed a police report. Claimant never worked again for Respondent.

17) Respondent did not pay any wages to Claimant at any time during her employment and has not paid any wages to Claimant since Claimant was discharged.

18) On January 20, 2006, the Agency mailed a "NOTICE OF WAGE CLAIM" to Respondent that was addressed to: "Charlene Cuddy, Pet Works, LLC, 276 S 2nd Court., Coos Bay, OR 97420." The notice read:

"NOTICE OF WAGE CLAIM"

"You are hereby notified that QYNNE MARIE MCKIBBEN has filed a wage claim with the Bureau of Labor and Industries alleging:

"Unpaid statutory minimum wages of \$958.25 at the rate of \$7.25 per hour from November 20, 2005 to December 18, 2005.

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

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

"If your response to the claim is not received on or before FEBRUARY 3, 2006, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

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

20) Penalty wages are computed for Claimant, in accordance with ORS 652.150, by multiplying Claimant's hourly wage x 8 hours x 30 days ($\$7.25 \times 8 \times 30 = \$1,740.00$).

21) Civil penalties are computed for Claimant, in accordance with ORS 653.055, by multiplying Claimant's hourly wage x 8 hours x 30 days ($\$7.25 \times 8 \times 30 = \$1,740.00$).

22) The Agency's witnesses were all credible.

ULTIMATE FINDINGS OF FACT

1) Beginning on August 25, 2005, and continuing throughout Claimant's employment, Respondent Petworks LLC did business in Oregon and employed one or more persons.

2) Respondent suffered or permitted Claimant to work from November 21, 2005, until December 19, 2005. Respondent discharged Claimant on December 19, 2005.

3) Claimant did not work for an agreed rate of pay and was entitled to be paid \$7.25 per hour, Oregon's minimum wage in 2005, for her work, plus overtime at the rate of \$10.88 per hour.

4) Claimant worked a total of 161 hours for Respondent, of which eight hours were overtime hours. Respondent paid Claimant \$10.00 for her work, leaving a total of \$1,167.25 in straight time unpaid wages and \$19.00 in overtime unpaid wages due and owing to her.

5) Respondent willfully failed to pay Claimant her earned, due, and payable wages not later than the end of the first business day after Claimant was discharged and more than 30 days have elapsed since her wages were due. The Agency sent a written notice of Claimant's wage claim to Respondent in January 2006 and Respondent has not paid any of Claimant's unpaid wages. Penalty wages, computed in accordance with ORS 652.150, equal \$1,740.00

6) Respondent failed to pay the minimum wage or overtime wages earned by Claimant. Civil penalties, computed in accordance with ORS 653.055(1)(b), equal \$1,740.00.

CONCLUSIONS OF LAW

1) Beginning August 25, 2005, Respondent Petworks LLC was an employer subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and 653.010

to 653.261. Respondent employed Claimant Qynne McKibben to work from November 21, 2005, through December 18, 2005.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414, ORS 653.040, ORS 653.256, ORS 653.261.

3) Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid not later than the end of the first business day after Claimant's discharge. Respondent owes Claimant \$1,167.25 in unpaid, due and owing wages.

4) Respondent's failure to pay Claimant all wages due and owing was willful and Respondent owes Claimant \$1,740.00 in penalty wages. ORS 652.150.

5) Respondent is liable for a \$1,740.00 civil penalty to Claimant based on Respondent's failure to pay the minimum wage or overtime wages earned to Claimant. ORS 653.055.

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

OPINION

INTRODUCTION

Respondent defaulted when it failed to make an appearance at the hearing. When a respondent defaults, the Agency must present a prima facie case on the record to support the allegations of its charging document in order to prevail. *In the Matter of Okechi Village & Health Center*, 27 BOLI 156, 161 (2006). This consists of credible evidence of the following: 1) Respondent employed Claimant; 2) The pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) Claimant

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

THE AGENCY'S AMENDMENT TO INCREASE CLAIMANT'S WAGE CLAIM BY \$450

At the conclusion of the evidentiary portion of the hearing, but before the Agency rested its case, the Agency moved to increase the wages sought in the Order of Determination by \$450.00. The Agency based its motion on the fact that the amount of wages sought in the Order of Determination was understated by \$450.00 because Claimant, on her wage claim form, had subtracted \$450.00 from her wages for a lodging and utilities deduction that was not allowed by Oregon law.

OAR 839-050-0140 governs amendments in BOLI contested case hearings. In pertinent part, it provides:

“(2)(a) Once the hearing commences, issues other than affirmative defenses not raised in the pleadings may be raised and evidence presented on such issues, provided there is express or implied consent of the participants. Consent will be implied when there is no objection to the introduction of such issues and evidence or when the participants address the issues. Any participant raising new issues must move the administrative law judge, before the close of the evidentiary portion of the hearing, to amend its pleading to conform to the evidence and to reflect issues presented. The administrative law judge may address and rule upon such issues in the Proposed Order.”

The Agency presented evidence on Claimant's entitlement to an additional \$450.00 in wages, and raised the issue and moved to amend before the close of the evidentiary portion of the hearing. However, the forum must deny the Agency's motion because there could be no express or implied consent by Respondent due to Respondent's absence from the hearing.ⁱ

CLAIMANT WAS EMPLOYED BY RESPONDENT

In its Order of Determination, the Agency alleged that Claimant was employed by Respondent Petworks LLC from August 8 to December 19, 2005. In its answer,

Respondent raised the defense that “claimant has **NEVER** been employed with PetWorks, LLC,” but offered no evidence to support that claim.ⁱⁱ Through Claimant’s credible testimony, her contemporaneous time records, and the credible testimony of other Agency witnesses, the Agency proved that Claimant was employed by Petworks LLC from November 21 until December 19, 2005. Claimant was not employed by Petworks LLC during her work from August 8 to August 19, 2005, because Petworks did not exist as a legal entity before August 25, 2005.ⁱⁱⁱ

CLAIMANT WAS ENTITLED TO BE PAID THE MINIMUM WAGE

Claimant testified that she and Respondent did not discuss the wage she would be paid for her work in November and December 2005. When there is no agreed upon rate of pay, an employer is required to pay at least the minimum wage. *In the Matter of Toni Kuchar*, 23 BOLI 265, 274 (2002). Pargeter, the Agency’s compliance specialist, testified that the minimum wage rate in 2005 was \$7.25 per hour.

CLAIMANT PERFORMED WORK FOR WHICH SHE WAS NOT PROPERLY COMPENSATED

Claimant’s credible testimony and contemporaneous time records established that she worked a total of 161 hours during the wage claim period. She was entitled to be paid at least \$7.25 per hour for every hour she worked, but received no pay whatsoever other than a share of the \$20 in till cash that she and Chris Partee used to buy food for themselves while they were staying in Respondent’s travel trailer while working at Reedsport store. This is far less than the amount she earned.

THE AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT.

The final element of the agency’s prima facie case requires proof of the amount and extent of work performed by claimant. The agency’s burden of proof can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. A claimant’s credible testimony may be sufficient evidence. *In the Matter of Ilya*

Simchuk, 22 BOLI 186, 196 (2001). When the forum concludes that an employee was employed and improperly compensated, the burden shifts to the employer to produce evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. *In the Matter of David Creager*, 17 BOLI 102, 109 (1998). In this case, Claimant provided a contemporaneous record of her work hours and credibly testified that it accurately reflected the hours she worked. This evidence was supported by the credible testimony of the Agency's other witnesses and established that Claimant worked a total of 161 hours, including eight hours of overtime. In contrast, Respondent provided no records or evidence whatsoever concerning the number of hours worked by Claimant other than the unsworn, generic denial in its answer that it never employed Claimant. The forum concludes that Claimant worked a total of 161 hours, including eight overtime hours.

WAGES OWED TO CLAIMANT

The forum has concluded that Claimant earned a total of \$1,167.25 in straight time unpaid wages and \$29.00 in overtime unpaid wages while employed by Respondent. The only "wages" she received was a share of the \$20 in till cash that she and Chris Partee used to buy food. However, four issues remain before the forum can determine the amount of unpaid wages due and owing to Claimant.

A. In a default case, the forum can award more unpaid wages than were sought in the Order of Determination when they are awarded as compensation for statutory wage violations alleged in the charging document.

The Agency sought unpaid wages of \$987.25 in its amended Order of Determination. The forum has found that Claimant earned a total of \$1167.25 in straight time wages and \$29.00 in overtime wages, for a total of \$1196.25. As noted earlier, the Agency moved to amend its Order of Determination at hearing to increase the unpaid wages sought by \$450, for a total of \$1437.25, and the forum denied the

motion because there was no express or implied consent by Respondent. Despite this denial, the Claimant does not lack a remedy for any additional wages she may be entitled to in excess of \$987.25, assuming the forum finds she is entitled to those wages. In a 2002 default case involving a single wage claim, the forum held that the commissioner has the authority to award monetary damages, including penalty wages, exceeding 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 Westland Resources, Inc.*, 23 BOLI 276, 286 (2002). In *Westland*, the forum awarded more penalty wages than were sought in the Order of Determination based on evidence presented at hearing. *Id.* The same principle applies to earned, unpaid wages. The forum follows the precedent established in *Westland* and concludes that, despite denying the Agency's motion to amend, the forum may award all unpaid wages that fall within the scope of the statutory wage violations alleged in the charging document.

B. Respondent is not entitled to a \$450.00 lodging deduction.

On her wage claim form, Claimant deducted \$450.00. At hearing, she testified that she deducted the \$450.00 from her wage claim as a voluntary deduction for lodging and utilities provided by Respondent from November 21 through December 18, 2005. The forum has found that Claimant and Respondent did not have an agreement that any money would be deducted from Claimant's wages to pay for lodging and utilities.

ORS 653.035(1) provides:

“Employers may deduct from the minimum wage to be paid employees under ORS 653.025 * * *, the fair market value of lodging, meals or other facilities or services furnished by the employer for the private benefit of the employee.”

OAR 839-020-0035(1) echoes the statute. OAR 839-020-0025(5) provides, in pertinent part, that “[t]he provisions of section (1) of this rule apply only when the following

conditions are continuously met: (a) The employer has met the conditions of ORS 652.610(3)[.]” In turn, ORS 652.610(3) sets out additional requirements that must be satisfied before an employer can “deduct * * * any portion of an employee’s wages” and lists five circumstances in which deductions are allowed. Subsection (b) is the only circumstance applicable to this case. It allows deductions if they “are authorized in writing by the employee, are for the employee’s benefit, and are recorded in the employer’s books.” OAR 839-020-0025(3) interprets ORS 652.610(3)(b) in the following language:

“In order for the employer to be able to claim credit toward the minimum wage for providing meals, lodging or other facilities or services furnished to an employee, the deduction of these costs must have been authorized by the employee in writing, the deduction must have been for the private benefit of the employee, and the deduction must be recorded in the employer’s books * * * in accordance with the provisions of ORS 652.610.”

There is no evidence that Claimant made a written authorization for Respondent to deduct expenses for lodging and utilities from her wages or that those deductions were recorded in Respondent’s books. Accordingly, Respondent could not legally deduct those expenses from Claimant’s wages and the forum will not subtract \$450.00 from Claimant’s award of earned and unpaid wages.

C. Claimant is not entitled to recoup her overtime wages.

The Agency proved that Claimant worked eight overtime hours on December 4, 2005, earning one and one-half times her regular rate of pay, or an extra \$29.00, for her work that day. In its Order of Determination, the Agency sought recovery of Claimant’s unpaid wages at the minimum wage rate of \$7.25 per hour and did not specifically cite ORS 652.261 or OAR 839-020-0300, the statute and rule requiring overtime pay, as a basis for the recovery of any unpaid wages.

ORS 183.415(2)(c) requires that the notice in a contested case include “[a] reference to the particular sections of the statutes and rules involved.” The Oregon

Court of Appeals has interpreted this language to require a citation to all administrative rules and statutes that are substantially relevant, as well as to the statutes and rules allegedly violated. *Drayton v. Department of Transportation*, 186 Or App 1, 62 P3d 430 (2003). ORS 653.261 gives the Commissioner the power to adopt rules requiring overtime pay “at a rate [no] higher than one and one-half times the regular rate of pay” after 40 hours of work in one week. The Commissioner has adopted rules requiring overtime pay. Those rules are set out in OAR 839-020-0030, which states that “all work performed in excess of forty (40) hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay * * *.” There is no mention of ORS 653.261, OAR 839-020-0030, or the word “overtime” in the Agency’s Order of Determination in connection with Claimant’s earned, unpaid wages. Because the Agency’s Order of Determination lacks a citation to the overtime statute and rule allegedly violated, the forum may not award Claimant the \$29.00 in overtime wages that she earned. *In the Matter of Gary Lee Lucas*, 26 BOLI 198, 213 (2005).

D. The \$20 “till” payout.

The forum infers that Claimant and Partee split the \$20 they took as a till payout and credits the \$10 that Claimant received against the \$29 in overtime pay that the Claimant earned but cannot recover because of the Agency’s insufficient pleading.

E. Conclusion.

Claimant is entitled to recover all her earned and unpaid wages except for the eight hours of overtime pay calculated at $\$7.25 \text{ per hour} \times 8 \text{ hours} \times .5 = \29.00 . Those wages amount to \$1167.25.

PENALTY WAGES

An employer is liable for penalty wages when it willfully fails to pay any wages or compensation of any employee whose employment ceases. Willfulness does not imply

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

In its answer, Respondent denied any willful failure to pay based on the assertion that Claimant was never its employee. This defense fails because the Agency proved that Claimant was Respondent's employee. Claimant credibly testified that Cuddy, one of the Respondent LLC's two members, set Claimant's work schedule and was aware of the hours that Claimant worked, but paid Claimant nothing. This amounts to a willful failure to pay Claimant the wages she was owed.

ORS 652.150(2) provides that "[i]f the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 100 percent of the employee's unpaid wages * * * unless the employer fails to pay the full amount of the employee's unpaid wages * * * within 12 days after receiving the written notice." On January 20, 2006, the Agency sent a "Notice of Wage Claim" to Cuddy, Respondent's registered agent, at her correct address, alleging that Claimant was owed \$958.25 in unpaid wages. There is no evidence that Cuddy did not receive that Notice. By serving the Order of Determination, the Agency also gave written notice to Respondent of Claimant's wage claim in this proceeding. Respondent paid no wages after receiving the Notice of Wage Claim or being served with the Order of Determination. Therefore, penalty wages are not limited to 100% of Claimant's unpaid wages and are calculated pursuant to ORS 652.150(1). The forum calculates penalty wages for Claimant as follows: \$7.25 per hour x 8 hours x 30 days = \$1,740.00.

ORS 653.055 CIVIL PENALTIES

In its Order of Determination, the Agency alleged that Claimant is entitled to a civil penalty of \$1,740.00 based on Respondent's failure to pay Claimant "the wages to which Claimant was entitled under ORS 653.010 to 653.261." ORS 653.055 provides that the forum may award civil penalties to an employee when his or her employer pays that employee less than the wages to which he or she is entitled under ORS 653.010 to 653.261. "Willfulness" is not an element. *In the Matter of Captain Hooks, LLP, 27 BOLI 21, 225 (2006)*. Since Claimant did not work for an agreed rate of pay, she was entitled to be paid the minimum wage, including overtime wages for any work she performed in excess of 40 hours in a work week. She received only \$10 for 161 total hours of work, including eight hours of overtime.

The statutory requirement to pay the minimum wage is found in ORS 653.025, and the separate requirement to pay overtime wages is contained in ORS 653.261 and OAR 839-020-0030, the Agency rule interpreting ORS 653.261. As both of these statutes fall within the range of statutes set out in ORS 653.055, Respondent's failure to pay the minimum wage and overtime wages to Claimant entitles Claimant to a civil penalty in addition to the penalty wages awarded under ORS 652.150. The civil penalty is computed in the same manner as ORS 652.150 penalty wages (\$7.25 per hour x 8 hours x 30 days = \$1,740.00).

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages, penalty wages, and civil penalties Respondent owes as a result of its violations of ORS 652.140(1), the Commissioner of the Bureau of Labor and Industries hereby orders **Petworks LLC** 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 Qwynne McKibben in the amount of FOUR THOUSAND SIX HUNDRED FORTY SEVEN DOLLARS AND TWENTY FIVE CENTS (\$4,647.25), less appropriate lawful deductions, representing \$1,167.25 in gross earned, unpaid, due, and payable wages, \$1,740.00 in penalty wages, and \$1,740.00 in civil penalties, plus interest at the legal rate on the sum of \$1,167.25 from January 1, 2006, until paid, and interest at the legal rate on the sum of \$3,480.00 from February 1, 2006, until paid.

ⁱ See *In the Matter of Salem Construction Company, Inc.*, 12 BOLI 78, 79 (1993) (The implied consent to evidence elicited at hearing without objection, on which a motion to amend to conform to the evidence is based, is absent in default cases).

ⁱⁱ See *In the Matter of MAM Properties, LLC*, 28 BOLI 172, 187 (2007) (unsworn and unsubstantiated assertions contained in a respondent's answer may be considered, but are overcome whenever they are contradicted by other credible evidence in the record).

ⁱⁱⁱ See Finding of Fact #5 – The Merits.