

In the Matter of

RUBIN HONEYCUTT dba Mr. Ideal's

Case No. 14-02

Final Order of the Commissioner Jack Roberts

Issued June 27, 2002

SYNOPSIS

Where Claimant performed labor, occasionally sold cars for Respondent, and was paid minimum wage for hours worked and Respondent claimed he was an independent contractor, the forum found that Claimant was an employee covered by state minimum wage and overtime provisions. Additionally, the forum found no wages were owed to Claimant due to the lack of reliable evidence establishing the dates and hours Claimant worked and dismissed the charges. ORS 652.140(2); ORS 652.150

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 21, 2002, at the Oregon Employment Department, located at 201 NE 8th, Grants Pass, Oregon.

Peter McSwain, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Randy Rush ("Claimant") was present throughout the hearing and was not represented by counsel. Rubin Honeycutt ("Respondent") was present for part of the hearing and was not represented by counsel.

In addition to Claimant, the Agency called as witnesses: Stanley Wegat, Respondent's friend; Toni Rush, Claimant's wife; Dale Durboraw, former Respondent employee; and Milo Shier, Claimant's brother.

Respondent called no witnesses, but testified on his own behalf.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-6;

- b) Agency exhibits A-1 through A-13 (filed with the Agency's case summary);
- c) Respondent exhibits R-1 through R-12 (filed with Respondent's case summary).

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

FINDINGS OF FACT – PROCEDURAL

1) On January 19, 2001, Claimant filed a wage claim form stating Respondent had employed him from November 5, 1999, until March 17, 2000, and failed to pay him a 25% commission on cars he sold and \$6.50 per hour for all hours worked.

2) At the time he filed his wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent.

3) On April 6, 2001, the Agency issued an Order of Determination, numbered 01-0250. The Agency alleged Respondent had employed Claimant during the period December 22, 1999, through March 16, 2000, and failed to pay Claimant at least \$6.50 per hour for each hour worked in that period, and was liable to Claimant for \$3,480 in unpaid wages. The Agency also alleged Respondent's failure to pay all of Claimant's wages when due was willful and Respondent, therefore, was liable to Claimant for \$1,560 as penalty wages, plus interest. The Order of Determination gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) On May 11, 2001, the Agency sent Respondent a letter stating its intent to issue a Final Order by Default if the Agency did not receive an answer and request for hearing or court trial by May 21, 2001.

5) On May 12, 2001, Respondent filed an answer that stated in its entirety:

“Dear Susan Dix,

“Please find enclosed copies of Randy Rushes [sic] pay checks. Some of these checks have draws on them, pending being paid back if he sold a vehicle.

“We would like to request any copies and or proof of evidence against Mr. I Deal’s.

“We are requesting a hearing in this matter.”

“Rubin Honeycutt”

6) On May 15, 2001, the Agency advised Respondent that his answer “must include an admission or denial of each fact alleged in the [Notice or Order] and a statement of each relevant defense to the allegations” and granted Respondent additional time until May 25, 2001, to file a supplemental answer.

7) On May 24, 2001, Respondent filed a supplemental answer that stated in its entirety:

“This is an answer from the Order of Determination section 2 that was filed by Randy Rush. Randy Rush was an Independent Contractor for Mr. Ideals. Randy started with Mr. Ideals 12-28-99 to 3-01-00. Mr. Rush did not work all the hours indicated. Mr. Rush worked a total of 192 hours @ \$6.50 hr. & 80 hours @ \$8.75 hr. for the year 2000. Mr. Rush was paid in the amount of \$160 on December 28, 1999 for Transportation Consultant. Mr. Rush he would come and go as he felt like it. The time he was there was to sell cars if he sold we paid, if he did not sell we paid for the time that he was there. He never sold a car that the profit was more than the hours that was [sic] worked. If Mr. Rush took out a draw and if he sold a car if commission was more than the hours that he had in the difference would have been paid. Mr. Rush was paid for the hours he put in and agreed at the time. Randy Rush only put in a 40 hour week when I was out of town for business purposes and who knows if he worked the full 40 but was paid for the 40 and I paid it @ \$8.75 an hour. I am disputing the hours that he has claimed and I am requesting a hearing in this matter.

“Sincerely, Rubin Honeycutt, Owner”

8) On January 31, 2002, the Agency requested a hearing. On February 5, 2002, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:00 a.m. on May 21, 2002. With the Notice of Hearing, the forum included a copy of the Order of Determination, a "Summary of Contested Case Rights and Procedures" and a copy of the forum's contested case hearing rules, OAR 839-050-0000 to 839-050-0440.

9) On February 28, 2002, the forum sent Respondent a copy of the amended contested case hearing rules and a revised Summary of Contested Case Rights and Procedures, effective February 15, 2002.

10) On April 29, 2002, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a brief statement of any agreed or stipulated facts; and any wage and penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by May 10, 2002, and advised them of the possible sanctions for failure to comply with the case summary order. Both participants filed timely case summaries.

11) At the start of hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

12) At the start of hearing, after the ALJ advised the participants of procedural matters, Respondent stated he could not be present for the duration of the hearing due to the press of business. At the Agency's suggestion, Respondent was allowed to present his evidence before the Agency began its case in chief. After testifying and

submitting his exhibits, Respondent affirmatively waived his right to cross-examine the Agency's evidence and left the hearing room.

13) The ALJ issued a proposed order on May 31, 2002 that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On June 5, 2002, the Agency filed exceptions to the proposed order. Those exceptions are addressed in the opinion section of this order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Rubin Honeycutt operated a used car lot under the assumed business name of Mr. Ideal's and employed one or more individuals in Oregon.

2) Respondent employed Claimant from approximately December 22, 1999 until approximately March 1, 2000.

3) Claimant's duties primarily involved detailing cars and doing some occasional car repair. He also made keys for cars, did some paperwork, and occasionally sold cars.

4) Claimant and Respondent agreed that Claimant would receive \$6.50 per hour, not to exceed \$200 per week, as wages. Respondent expected Claimant to work only the number of hours necessary to arrive at \$200 per week, computed at the minimum wage rate of \$6.50 per hour. Respondent also agreed to pay Claimant a 25 per cent commission on any used cars he sold for Respondent.

5) The car lot was usually open six, sometimes seven, days per week, from about mid-morning until approximately 5 p.m. If Respondent was still on the premises or driving by the car lot after 5 p.m. and noticed people looking at the cars for sale, Respondent used the opportunity to try and sell a car. Likewise, Claimant, who lived nearby, returned to the car lot to attempt a sale if he happened to observe potential customers looking at cars after hours.

6) During some weeks of Claimant's employment, Respondent spent two days and one night in Sacramento purchasing used cars at an automobile auction. Respondent's friend Stan Wegat usually accompanied Respondent on buying trips because he was helping Respondent launch his business and had been helping him buy cars since October 1999. On those occasions, Respondent left Claimant behind to handle the car lot while he was away.

7) Between December 1999 and March 2000, Respondent paid Claimant gross wages totaling \$2,110. Respondent paid Claimant by check and noted on each check the number of hours Claimant worked. For example, on Claimant's January 14, 2000 check, Respondent made the notation "30 hrs" in the memo section of the check. On a check for \$350, dated February 24, 2000, Respondent made the notation "2/18 to 2/24 draw, 40 hrs." Respondent usually asked Claimant at the end of a week how many hours he worked and after Claimant told him, he brought out his checkbook and wrote a check, deducting any draws Claimant had taken. The checks date from December 28, 1999, to March 1, 2000. Claimant cashed all of the checks. Other than the notations on each check, Respondent did not maintain a record of Claimant's hours worked.

8) Claimant filed a wage claim in November 2000 and claimed Respondent owed him wages dating from November 5, 1999, until March 17, 2000. At the time he filed the claim, he noted the hours he worked each day on a calendar provided by the Agency. The calendar shows a minimum of 10 hours worked every day in November and December 1999 (except Thanksgiving and Christmas) and every day in January and February 2000. The calendar does not include any work hours for March 2000.

9) Stan Wegat's testimony as a whole was credible. Although he was a friend of Respondent's and helped Respondent start his business in October 1999, Wegat did not testify in a manner that was slanted for or against Respondent or

Claimant. For reasons not pertinent to this proceeding, Wegat has kept notes of his daily activities since 1980. During the wage claim investigation, he went over his notes with an Agency compliance specialist who then summarized each entry pertaining to Claimant. The summary is not a verbatim transcript of Wegat's notes. However, Wegat credibly testified that the Agency's summary accurately reflects the content of his notes pertaining to Claimant's employment with Respondent. Wegat readily acknowledged, and his summarized notes reflect, that he did not know what hours Claimant worked or whether Claimant worked every day of the week. Wegat testified that he was at the car lot at all hours with Respondent and sometimes Claimant was present. He logged most of his observations concerning Claimant in his notebook, usually in the context of other events that were taking place at the time. His summarized notes show that he observed Claimant at the car lot for the first time on December 22, 1999, and at various times on 19 days thereafter until February 14, 2000. Wegat acknowledged that his notes do not show Claimant's start or stop times or whether he was actually working on the dates Wegat noted his presence at the car lot. For instance, the summarized entry on January 2, 2000 reads: "Randy called [from] lot." There is no additional information regarding hours worked or actual work performed. The forum credits Wegat's testimony, which is corroborated by his contemporaneous notes, in its entirety.

10) On key points, Claimant's testimony conflicted with his prior statements to the Agency, was internally inconsistent, and reflected his apparent propensity for exaggeration. For instance, on the wage claim form he filed with the Agency, he stated he sold six cars during his employment with Respondent from November 5, 1999, until March 17, 2000. During his testimony, however, he claimed he sold 11 cars in December 1999 and January 2000. Later, he testified he sold 13 cars during that same time period. He also testified that the 70 hour work weeks he recorded on the Agency's

wage claim calendar were a “conservative estimate” of the hours he worked each week, indicating that on many occasions he worked many more hours than he claimed on that calendar. During his testimony, however, he insisted he kept track of his daily hours on a personal calendar at home that he used when recording his hours on the Agency calendar. He did not explain why he estimated the hours he worked if he had, at hand, a contemporaneous record of the actual hours he worked. He also did not account for the absence of his personal calendar at hearing.

Significantly, Claimant tried to evade questions pertaining to principal issues and the answers he ultimately provided either contradicted his earlier testimony or previous statements he made to the Agency. As an example, Claimant initially testified that Respondent agreed to pay him \$6.50 per hour and a 25 per cent commission on each car he sold. Later, he testified that the agreement was for \$200 per week, which is consistent with his statement on his wage claim form. Moreover, although Claimant’s reported hours show he worked every day except Thanksgiving and Christmas, he testified that Respondent often gave him days off whenever he requested one and Wegat’s summarized notes show he was “taking some time away” from the car lot in February 2000. Finally, Claimant admitted he “probably started working for [Respondent] on December 21 or 22 [1999],” in contrast to his previous statements that he was employed by Respondent from November 5, 1999, until March 16, 2000. Claimant repeatedly equivocated about the number of hours and days he worked, the dates he was employed by Respondent, the number of cars he sold, and the amount of pay he received from Respondent. The ALJ carefully observed Claimant’s demeanor. Beginning with his oath to testify truthfully, Claimant repeatedly averted his eyes and physically shifted his position in the witness chair as often as he shifted his stories. As

a result, the forum did not believe any of his testimony unless other reliable evidence corroborated it.

11) There is no reliable evidence to determine how many hours or what days Claimant worked.

12) There is no reliable evidence to determine that Claimant performed work for which he was not properly compensated.

ULTIMATE FINDINGS OF FACT

1) Respondent at all times material herein conducted a business in the state of Oregon and engaged the personal services of one or more employees in the operation of that business.

2) Respondent employed Claimant between December 22, 1999, and February 29, 2000.

3) Respondent and Claimant agreed Claimant would be paid \$6.50 per hour for 30 hours per week, plus a 25 per cent commission for any cars Claimant sold during his employment.

4) At all times material herein, the state minimum wage was \$6.50 per hour.

5) Respondent paid Claimant \$2,110 for hours Claimant worked between December 22, 1999, and February 29, 2000.

6) The forum is unable to determine the dates and hours Claimant worked, due to a lack of credible evidence.

7) The forum is unable to determine whether Claimant sold any cars or earned any commission during his employment with Respondent.

8) The forum is unable to compute what Claimant earned during the wage claim period, due to a lack of credible evidence establishing the dates and hours Claimant worked.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

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

3) ORS 652.140(2) provides in part:

“When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours’ notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs.”

At times material herein, ORS 653.025 required, in pertinent part:

“ * * * for each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages computed at a rate lower than:

“ * * *

“(3) For the calendar years after December 31, 1998, \$6.50.”

Claimant was paid wages totaling \$2,110 during his employment with Respondent. There were no wages due Claimant at the time he ceased employment with Respondent.

4) 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 dismiss the Claimant’s wage claim and Agency’s Order of Determination filed against Respondent.

OPINION

The Agency was required to prove: 1) that Respondent employed Claimant; 2) any pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) that Claimant performed work for which he was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230 (2000). In his answer, Respondent asserted that, although Claimant performed primarily general labor and was paid an hourly rate for all hours worked, he was an independent contractor and was paid for all hours worked. The forum found that Respondent failed to prove his affirmative defense and determined that Claimant was Respondent's employee and covered by Oregon's minimum wage and overtime provisions. Additionally, the forum found the Agency failed its burden of proving Claimant performed work for which he was not properly compensated.

1. Respondent employed Claimant.

Respondent bears the burden of proving Claimant was an independent contractor. *In the Matter of Leslie Elmer DeHart*, 18 BOLI 199 (1999). Respondent did not provide any evidence that supports this defense other than his bare assertion in his answer. In fact, at hearing, Respondent appeared to concede he employed Claimant by acknowledging that Claimant was hired to perform general labor and to occasionally sell cars for \$6.50 per hour up to \$200 per week, plus a 25 per cent commission for any car sold. Respondent contended Claimant could set his own hours, but he emphasized that Claimant's pay was for hours not to exceed \$200 per week at the minimum wage rate. Claimant testified that he was told he would receive \$6.50 per hour and later in his testimony stated that he was promised \$200 per week. Documentary evidence shows Claimant received numerous checks from Respondent in the amount of \$200 for 30 hours of work, until the last two weeks of his employment when Respondent paid him

\$350 for 40 hours of work. The forum infers from the evidence that Claimant and Respondent initially agreed Claimant would receive minimum wage for approximately 30 hours per week, along with a commission for any cars he sold. Respondent hired Claimant to perform general labor and some sales, paid him at an hourly rate, and limited the number of hours he worked per week. These are all indicia that Claimant was Respondent's employee.ⁱ The forum concludes from those facts that Claimant was an employee and covered by Oregon's minimum wage and overtime laws.

2. Respondent does not owe Claimant any wages.

Claimant bears the burden of proving he performed work for which he was not properly compensated. *In the Matter of Ann L. Swanger*, 19 BOLI 42, 56 (1999). Claimant's testimony was exaggerated and unbelievable on so many key points that the forum gave it no weight except where it was consistent with other reliable evidence. While there is no dispute that Claimant performed work for Respondent, there is no other evidence from which this forum can conclude Claimant worked hours over and above the hours for which he was paid. All of the witnesses verified Claimant's presence at the car lot at certain times, but not one had first hand knowledge that Claimant worked a "minimum" of 70 hours per week for the 12 weeks he claimed. Indeed, credible evidence showed he did not work every day and, more likely than not, was no longer employed by Respondent after he received his March 1, 2000, pay check. Accordingly, the forum finds the Agency did not prove its case by a preponderance of the evidence, and the Order below is the proper disposition of this matter.

AGENCY'S EXCEPTIONS

The Agency asserts that because several witnesses placed Claimant on Respondent's job site at various times on various days and on weekends and

Respondent did not produce contradictory evidence, logic dictates that Claimant was “regularly on the [car] lot morning[,] day, and evening, and on most weekends.” The Agency further posits that an inference may be drawn from those “random sightings” that Claimant worked more than a 30-hour workweek, despite Claimant’s “nervousness during testimony, a conversational tendency to exaggeration, or [his] poor memory.” The Agency concludes with the suggestion that the forum find Claimant worked at least a “regular work week and sixteen hour weekends.” There is no reliable evidence in the record to warrant such a finding. This forum has repeatedly declined to “speculate or draw inferences about wages owed based on insufficient, unreliable evidence.” *Id.* at 57, quoting *In the Matter of Burrito Boy*, 16 BOLI 1, 12 (1997). Claimant’s testimony was contradictory regarding the hours and days he worked; thus, he failed to establish he worked more than 30 hours per week. As a result, despite Respondent’s failure to maintain and keep records of Claimant’s hours worked, the Agency’s case must fail for lack of reliable evidence.ⁱⁱ

ORDER

NOW, THEREFORE, as Respondent has been found not to owe Claimant wages, the Commissioner of the Bureau of Labor and Industries hereby orders that Order of Determination 01-0250 against Rubin Honeycutt be and is hereby dismissed.

ⁱ See, e.g., *In the Matter of R.L. Chapman Ent. Ltd.*, 17 BOLI 277 (1999) (Claimants who were hired as hourly workers to perform tasks requiring no specialized training, received an hourly pay rate, and whose hours were controlled by respondent were employees, not independent contractors).

ⁱⁱ As a caution to employers, however, this opinion does not imply that employers may avoid their wage obligations to employees by violating ORS 653.045. The Commissioner is authorized to assess a civil penalty “not to exceed \$1,000 against any person who willfully violates * * * ORS 653.045 * * * or any rule adopted pursuant thereto.” See ORS 653.256.