

In the Matter of
STAFF, INC.
and Barrett Business Services, Inc., Respondents.

Case Number 15-97
Final Order of the Commissioner
Jack Roberts
Issued July 29, 1997.

SYNOPSIS

Respondents, a farm labor contractor and an employee leasing company, were joint employers who took unauthorized deductions from wage claimant's wages and failed to pay all wages due upon termination, in violation of ORS 652.140(1) and 652.610(3). The Commissioner held each respondent jointly and severally liable for wages due and owing. Respondents' failure to pay the wages was willful, and the Commissioner ordered Respondents to pay civil penalty wages, pursuant to ORS 652.150. ORS 652.140(1), 652.150, 652.610(3).

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Administrative Law Judge by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 5, 6, and 12, 1996, and April 22 and 23, 1997, at the Oregon State Employment Department office, 119 N. Oakdale Street, Medford, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. In response to a motion for summary judgment from Staff, Inc. and a motion to dismiss from Barrett Business Services, Inc., the Agency was represented by Assistant Attorney General Wendy Robinson. Debbie Martinez

(Claimant) was present throughout the hearing. Staff, Inc. (Respondent Staff) was represented on November 5, 1996, by Anthony Albertazzi, Attorney at Law. Marguerite (Micki) Bivens, Respondent Staff's representative, was present at the hearing on November 5, 1996. Barrett Business Services, Inc. (Respondent Barrett) was represented on April 22 and 23, 1997, by Scott Terrall, Attorney at Law.

The Agency called the following witnesses: Gumaro Diaz, a former employee of Staff, Inc.; Daniel Hatfield, branch manager for Barrett Business Services, Inc.; Debbie Martinez, Claimant; and Raul Ramirez, a compliance specialist with the Wage and Hour Division of the Agency. Milo Salgado, appointed by the forum and under proper affirmation, acted as an interpreter for Mr. Diaz. Respondent Staff called no witness. Respondent Barrett called the following witnesses: Marguerite (Micki) Bivens, secretary for Staff, Inc.; and Manuel M. Galan, president of Staff, Inc. Gabriela Castro, appointed by the forum and under proper affirmation, acted as an interpreter for Mr. Galan.

Administrative exhibits X-1 to X-35, Agency exhibits A-1 to A-15 and A-20, and Respondent Staff exhibits R-1 to R-27 were offered and received into evidence. The ALJ did not receive A-21. The record closed on April 22, 1997.

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 11, 1994, Claimant filed a wage claim with the Agency. She alleged that she had been employed by Respondent Staff and that Respondent Staff had failed to pay wages earned and due to her.
- 2) At the same time that she filed the wage claim, Claimant assigned to the

Commissioner of Labor, in trust for Claimant, all wages due from Respondent Staff.

3) On August 20, 1996, the Agency served on Respondent Staff, Erlinda Almoroz Galan, and Manuel Mosqueda Galan an Order of Determination based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent Staff owed a total of \$1,091.27 in wages and \$285 in civil penalty wages. The Order of Determination required that, within 20 days, Respondent Staff either pay these sums in trust to the Agency or request an administrative hearing and submit an answer to the charges.

4) On September 3, 1996, Respondent Staff, through its attorney, filed an answer to the Order of Determination and requested a contested case hearing. Respondent Staff's answer denied that it owed Claimant unpaid wages and set forth as an affirmative defense that the claim was barred by the equitable doctrine of laches.

5) On September 10, 1996, the Agency sent the Hearings Unit a request for a hearing date. The Hearings Unit issued a Notice of Hearing to Respondent Staff, the Agency, and the Claimant indicating the time and place of the hearing scheduled for November 5, 1996. Together with the Notice of Hearing, the forum sent a document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the forum's contested case hearings rules, OAR 839-50-000 to 839-50-420.¹

6) On September 30, 1996, the Administrative Law Judge issued a discovery order directing each participant to submit a summary of the case, including a list of the witnesses to be called and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-50-210(1). The Agency and Respondent Staff each submitted a summary.

7) At the start of the hearing, Respondent Staff's attorney said he had reviewed the "Notice of Contested Case Rights and Procedures" and had no questions about it.

8) Pursuant to ORS 183.415(7), the Administrative Law Judge explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing. Pursuant to OAR 839-50-150(3)(a), the ALJ excluded witnesses.

9) At the beginning of the hearing, Respondent Staff's attorney raised the affirmative defense of claim preclusion. The ALJ heard arguments on the issue and reserved ruling on the issue until the proposed order.

10) During the Agency's case in chief, Respondent Staff's attorney, Mr. Albertazzi, its representative in the hearing, Micki Bivens, and its two witnesses, Manuel Galan and Erlinda Galan, left the hearing. Before they left, the ALJ made it clear that if they left, the hearing would continue to allow the Agency the opportunity to present a prima facie case on the record. When they left, Respondent Staff's attorney said, "We're not going to be appearing for the remainder of the hearing, and we're submitting the matter on the record only, and the testimony and cross-examination that's been given so far as well as the documents that have been admitted into evidence. We're also submitting it on our affirmative defenses."

11) Following the Agency's examination of Daniel Hatfield, the Agency made three motions: (1) to postpone the completion of the hearing; (2) to add Barrett Business Services, Inc. as a Respondent; and (3) to amend the Order of Determination to conform to the evidence, increasing the wages alleged due from \$1,091.27 to \$2,934.54 and the civil penalty wages from \$285 to \$3,281. At hearing, the ALJ granted the motion to postpone the completion of the hearing. The ALJ notified Respondent Staff of

the motions to add Barrett Business Services, Inc. as a respondent and to amend the Order of Determination. The ALJ gave Respondent Staff an opportunity to respond to those motions and to file a motion for summary judgment regarding its affirmative defense of claim preclusion. Respondent Staff did not respond to the Agency's motions and the ALJ granted them.

12) On around November 26, 1996, Respondent Staff filed a motion for summary judgment on the claim preclusion issue.

13) On December 12, 1996, Respondent Barrett filed an answer to the Amended Order of Determination. Respondent Barrett denied the allegations in the order and complained that the process by which Respondent Barrett was added as a party denied it due process. It alleged that the Agency had unclean hands in using that process.

14) On December 20, 1996, the ALJ set a briefing schedule regarding the motion for summary judgment. Following briefing by both the Agency and Respondent Barrett,² the ALJ denied the motion. See the Opinion section of this order. In addition, Respondent Barrett moved to dismiss the case against it due to an alleged lack of due process and unclean hands by the Agency. Respondent Staff did not reply to either the Agency's responsive brief on the motion for summary judgment or Respondent Barrett's motion to dismiss. Following a reply brief from the Agency, the ALJ denied the motion to dismiss.

15) On March 6, 1997, the forum sent an Amended Notice of Hearing to Respondents, the Agency, and Claimant setting the hearing to continue on April 22, 1997.

16) On March 6, 1997, the ALJ issued a discovery order directing Respondent Barrett to submit a summary of the case and giving the Agency and

Respondent Staff an opportunity to supplement their summaries. Respondent Barrett submitted a summary and the Agency submitted a supplement to its summary.

17) On April 7, 1997, the ALJ sent each participant a transcript of the proceedings on November 5, 6, and 12, 1996.

18) On April 16, 1997, the ALJ conducted a prehearing telephone conference with Ms. Lohr for the Agency, Mr. Albertazzi for Respondent Staff, and Mr. Terrall for Respondent Barrett. Mr. Albertazzi said that he still represented Respondent Staff, despite statements to the contrary earlier to Mr. Terrall, and that Respondent Staff would not appear at the hearing on April 22, 1997. Mr. Terrall requested an extension of time to submit Respondent Barrett's case summary. He moved for a postponement of the hearing because he had not received documents from Respondent Staff as promised, he did not think he had all of the participants' exhibits, and he had had the transcript for only one week. Following argument from all participants, the ALJ denied the motion for postponement.

19) At the beginning of the hearing on April 22, 1997, Respondent Barrett's attorney said he had reviewed the "Notice of Contested Case Rights and Procedures" and had no questions about it.

20) Respondent Barrett renewed its motion for a postponement of the hearing in order to obtain and review additional discovery from Respondent Staff. The Agency opposed the motion. The ALJ denied the motion because it was untimely and Respondent Barrett had not demonstrated adequate efforts to complete discovery or review the discovery it already had during the four-plus months leading up to the hearing date in April 1997.

21) On July 8, 1997, the ALJ issued a Proposed Order. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions to

the Proposed Order. On July 18, 1997, the Hearings Unit received Respondent Barrett's timely exceptions, which the forum has addressed in the Opinion section of this Final Order.

FINDINGS OF FACT -- THE MERITS

1) During all times material herein, Respondent Staff was an Oregon corporation engaged in reforestation work. Respondent Staff employed one or more persons in the State of Oregon. Manuel Mosqueda Galan (Galan) was its president.

2) During all times material herein, Respondent Barrett was a Maryland corporation engaged in employee leasing. Respondent Barrett employed one or more persons in the State of Oregon. Daniel Hatfield was a branch manager in Salem.

3) Off and on from May 28, 1991, to July 21, 1993, Respondent Staff employed Claimant as a foreman. Galan hired Claimant and was her immediate supervisor. Her duties included recruiting and hiring crew members, transporting the crew, supervising and inspecting their work, keeping track of hours worked, and scouting work areas. During her employment, Claimant became a licensed herbicide and pesticide applicator and her duties included mixing and applying these chemicals and supervising others in these duties.

4) In February 1992, Claimant signed a WH-153 form that said that Respondent Staff did not give draws against payroll or personal loans; however, during all times material Galan often gave draws to Claimant and other workers with checks from a "Staff, Inc. Field Account." Respondent Staff (and later, Respondent Barrett) deducted draws from employee payroll checks. Claimant signed a form entitled "Authorization for Deductions" dated February 24, 1992, that stated, "During the period of my employment in 1990 I hereby authorize the deduction from the wages I earn beginning in 1990 (1) Any loans made to me by STAFF, INC. (2) Any lodging costs paid

for me." Claimant did not work for Respondent Staff in 1990. She never received a personal loan from Galan or Respondent Staff, although she received advances (draws) on wages. Claimant believed a loan was different from a draw on wages. During each period of Claimant's employment with Respondent Staff, Galan agreed to pay Claimant's (and the other foremen's) lodging expenses, and these were never to be deducted from her pay.³ During the period of employment covered by this wage claim, that is, from September 7, 1992, to July 21, 1993, Claimant never signed an authorization allowing Respondent Staff to take deductions from her payroll checks. Claimant never signed an authorization allowing Respondent Barrett to take deductions from her payroll checks. Until November 1992, Respondent Staff used a "Staff, Inc. Operation Account" for payroll checks. Thereafter, Claimant's payroll checks came from Respondent Barrett, and were either hand delivered to her by Galan or mailed to her home address. Respondent Barrett never issued checks for draws on wages.

5) During July or August 1992, Claimant worked in Medford for Harry and David, a pear packing company. She ran into a man named Guadalupe Zamora, who said that Galan was looking for her. In early September 1992, Claimant contacted Galan, who wanted to employ her again as a foreman.

6) From September 7 to 16, 1992, Claimant worked for Respondent Staff on a United States Forest Service (USFS) contract (Solicitation No. R6-4-92-46) applying big game repellent in the Malheur National Forest.⁴ Claimant and Galan had an oral agreement that Claimant would be paid \$11.00 per hour for performing her regular duties as a foreman, including mixing the repellent chemicals.⁵ Claimant performed these duties for 6 hours on September 8, 8 hours on September 9, 8.5 hours on September 10, 6 hours on September 11, 9 hours on September 13, 6.5 hours on September 14, 9.5 hours on September 15, and 10 hours on September 16, 1992, for a

total of 63.5 hours of work time. Galan paid Claimant \$4.75 per hour for driving time, that is, for her time spent transporting workers.⁶ Claimant drove for 8.5 hours on September 7, 3.5 hours on September 9, 3.5 hours on September 10, 3 hours on September 11, 1 hour on September 12, 2.5 hours on September 13, 3 hours on September 14, 3 hours on September 15, and 3 hours on September 16, 1992, for a total of 31 hours of driving time. Accordingly, Claimant earned \$698.50 for time worked as a foreman and \$147.25 for driving, for total gross earnings of \$845.75. Respondent Staff paid Claimant net wages of \$473.47 (a check for a net amount of \$322.47 plus a \$151 draw) for 75.75 hours worked as a foreman and driving.⁷

7) During this time, Respondent Staff deducted around 11.6 percent from Claimant's gross wages for federal and state withholding tax, FICA, and workers' compensation insurance. Accordingly, Respondent Staff paid Claimant gross wages of around \$535.64 for her services from September 7 to 16, 1992.

8) From September 17 to October 1, 1992, Claimant worked for Respondent Staff on a USFS contract (Solicitation No. R6-1-92-2506) applying big game repellent in the Deschutes National Forest.⁸ Her agreed rate of pay was \$11.00 per hour for foreman duties and \$4.75 per hour for driving. Claimant worked as a foreman for 7.5 hours on September 18, 4 hours on September 20, 9 hours on September 21, 9.5 hours on September 22, 6 hours on September 23, 6.25 hours on September 25, 9.5 hours on September 26, 8.5 hours on September 27, 9 hours on September 28, 6 hours on September 29, 4.5 hours on September 30, and 1 hour on October 1, 1992, for a total of 80.75 hours of work time as a foreman. Claimant drove for 6 hours on September 17, 3 hours on September 18, 1.5 hours on September 19, 3.5 hours on September 20, 3.25 hours on September 21, 3 hours on September 22, 4 hours on September 23, 3 hours on September 25, 2.5 hours on September 26, 2.5 hours on September 27, 2.5

hours on September 28, 2.5 hours on September 29, 4.5 hours on September 30, and 2 hours on October 1, 1992, for a total of 43.75 hours of driving time. Accordingly, Claimant earned \$888.25 for time worked as a foreman and \$207.81 for time worked driving, for total gross earnings of \$1,096.06. Respondent Staff calculated Claimant's gross wages to be \$973.50. Respondent Staff deducted \$30 from her wages for "loans."

9) During times material (September 1992 to July 1993), Galan used the Staff, Inc. Field Account to pay bills, reimburse expenses, and give draws on wages.⁹ When Galan was present at a work site, he would pay motel, gas, and other expenses from the field account. When he was not present, Galan and Claimant had an agreement whereby she would pay expenses out of her pocket and turn in the receipts to him. He would then give her a check from the field account to reimburse her. Galan gave Claimant oral authority to give draws to her crew members. Sometimes she paid draws from her own money, got the signatures of the workers acknowledging the draws, and then got reimbursed by Galan from the Staff, Inc. Field Account. Other times, if she knew the workers wanted draws and knew the total amount, she would get a field account check for the total from Galan, cash it, give out the draws, and get the signatures of the workers acknowledging the draws. Galan used these "draw sheets" with the workers' signatures to determine the amount of deductions to take from the workers' pay checks for the draws. Galan wrote field account checks to Claimant that would reimburse her for both expenses and draws she had paid out, or that would include both reimbursement money and a draw for her on her wages. Galan kept the records regarding draws and, starting in October 1992, turned this information over to Respondent Barrett. On December 23, 1992, Galan gave Claimant a \$500 bonus for the year (1992) from the field account.

10) In October 1992, Claimant obtained a license to apply, and to supervise the application of, herbicides and pesticides. Claimant and Galan agreed that she would receive \$17.00 per hour when she performed work that required her license.

11) On October 28, 1992, Respondent Staff and Respondent Barrett entered into a written "Employee Leasing Agreement." Under the agreement, Respondent Barrett and Respondent Staff entered into a "co-employer" or "joint employer relationship."

"Under the terms of this Agreement, Barrett agrees to maintain the employment of those persons recommended by Client [Respondent Staff], provided that Barrett receives the necessary personnel information for each applicant in order to properly complete the requisite personnel and payroll documentation. It is the intention and understanding of the parties that, by this Agreement, Barrett is the leasing employer and that Barrett and Client have entered into a joint employer relationship with respect to the employees covered under this Agreement under Internal Revenue Code ('IRC') § 414(n)."

Respondent Staff recruited the employees and Respondent Barrett had the contractual authority to hire, discipline, direct, control, and fire the employees. Respondents were joint employers of those individuals leased to Respondent Staff for the purposes of, among other things, "implementation of policies and practices relating to the employer-employee relationship such as recruiting, interviewing, testing, selection, orientation, training, evaluation, replacing, supervising, disciplining, and terminating employees." Respondent Staff was responsible for the "day-to-day supervision and control of the joint employees[.]" Respondent Barrett provided the workers' compensation insurance, prepared the payroll (including making deductions from payroll), and paid the payroll taxes for the employees. According to Hatfield, Respondent Staff and Respondent Barrett were "co-responsible" for compliance with OSHA regulations. Employees filled out Respondent Barrett's employment applications and information from these applications was then entered into Respondent Barrett's computer system. Respondent

Barrett's staff reviewed the employment applications for items such as signatures and completion of I-9 and W-4 forms, and the staff made sure the employment packets were put together properly and filed. Under the agreement, Respondent Staff,

"acknowledges and understands that Barrett relies on Client to provide accurate, timely, and verifiable hours worked information for the purposes of calculating accurate payroll and benefits. It is Client's responsibility to inform Barrett of any individual job's status as 'exempt' or 'non-exempt' under federal or state wage-hour law."

Hatfield was aware that USFS contracts required minimum wage rates for classes of workers; however, Respondent Barrett required Respondent Staff to give Respondent Barrett the number of each contract it was working on, with the pay rates and fringe benefit amounts. Respondent Barrett would then put this information into the computer, run the payroll, pay the employees, and bill Respondent Staff. Under the agreement, Respondents agreed that,

"compliance with government imposed record-keeping requirements is an essential component of the employment relationship and this Agreement. Each party to this Agreement specifically assumes the record-keeping obligations associated with its respective employment duties."

However, Hatfield believed it was Respondent Staff's responsibility to obtain and keep employees' written authorizations for deductions from wages. Respondent Staff submitted draw (or loan) amounts to Respondent Barrett, which then took deductions from the employees' pay checks and issued the paychecks to Respondent Staff. Respondent Barrett did not question the draw amounts submitted by Respondent Staff. Under the leasing agreement, the leased employees were Respondent Staff's for the purpose of compliance with the "Fair Labor Standards Act, and similar state law requirements[.]" However, Hatfield believed both "co-employers" were responsible for complying with state and federal wage and hour laws.

12) In late October or early November 1992, Galan had Claimant and her crew members each fill out an employment application for Respondent Barrett. Galan

told Claimant that Respondent Barrett was his new payroll company and that Respondent Barrett needed employment applications from each employee. Claimant and each crew member also filled out W-4 and I-9 forms, which Respondent Staff turned in to Respondent Barrett. Galan told Claimant to talk with him, not Respondent Barrett, if she had a complaint about her pay. Claimant never contacted Respondent Barrett concerning her wages until after Galan discharged her in July 1993.

13) During 1992, Claimant kept a diary of her and her crew's hours on each job. At Galan's request, Claimant kept her driving hours and her other work hours separate. She put these hours on a chart for payroll and gave the chart to Galan. There were discrepancies between Claimant's diary of hours worked and the chart Galan accepted from her because Galan refused to pay for some hours and directed her to subtract them. For example, on November 15, 1992, Claimant drove from Medford to Madras to pick up a company vehicle and then drove back to Medford. On November 16, 1992, Claimant picked up a crew in Medford and drove them to the next job site at Shaver Lake, California. She performed this work at Galan's direction. However, Galan told Claimant not to report this time on her payroll chart because he would not pay her for this time. He told her that if she wanted the job, she would do this. She then prepared new payroll charts until he finally would accept one. Another example of time that Galan refused to pay for occurred when there was "down time" while a broken piece of machinery was being repaired, even though Galan required Claimant and the crew to stay at the work site.

14) From November 15 to December 6, 1992, Claimant worked on USFS contract number 53-9A40-3- 1P02 (Solicitation No. R5-15-93-01) to control gophers in the Sierra National Forest.¹⁰ Her agreed rate was \$17.00 per hour for foreman and licensed applicator duties and \$4.75 per hour for driving.¹¹ Claimant worked as a

foreman and licensed applicator for 7 hours on November 17, 8 hours on November 18, 8 hours on November 19, 8 hours on November 20, 6.5 hours on November 21, 7.5 hours on November 23, 8 hours on November 24, 8 hours on November 25, 5 hours on November 27, 6.5 hours on November 28, 8.5 hours on November 30, 8 hours on December 1, 8.5 hours on December 2, 4.5 hours on December 3, 3.25 hours on December 5, and .75 hours on December 6, 1992, for a total of 106 hours of work time. Claimant drove for 8 hours on November 15, 11 hours on November 16, 3 hours on November 17, 3 hours on November 18, 4 hours on November 19, 3 hours on November 20, 2 hours on November 21, 2 hours on November 23, 4.5 hours on November 24, 4 hours on November 25, 5.5 hours on November 27, 5.75 hours on November 28, 2 hours on November 30, 1 hour on December 1, 2.5 hours on December 2, 1 hour on December 3, 3.75 hours on December 5, and 1 hour on December 6, 1992, for a total of 67 hours of driving time. Accordingly, Claimant earned \$1,802 for time worked as a foreman and applicator and \$318.25 for time worked driving, for total gross earnings of \$2,120.25. Respondents paid Claimant \$2,067.94 (gross).

15) From December 15 to 29, 1992, Claimant worked on USFS contract number 53-9JHA-3-1R11 to control gophers in the Six Rivers National Forest.¹² Her agreed rate was \$11.00 per hour for foreman duties and \$4.75 per hour for driving. Claimant worked as a foreman for 8 hours on December 15, 8 hours on December 16, 4.5 hours on December 17, 7 hours on December 18, 4 hours on December 21, 8 hours on December 28, and 6 hours on December 29, 1992, for a total of 45.5 hours of work time. Claimant drove for one hour each on December 15, 16, 17, 18, 21, 28, and 29, 1992, for a total of seven hours of driving time. Accordingly, Claimant earned \$500.50 for time worked as a foreman and \$33.25 for driving time, for total gross earnings of

\$533.75. Respondents calculated gross wages of \$527.01. Respondents deducted \$100 from Claimant's pay as a "CUST ADV." Respondent Barrett showed draws and purchases as customer advances on its statement of itemized deductions. Accordingly, Respondents paid Claimant net wages of \$385.97 rather than \$485.97. Claimant did not receive a draw of \$100 during this period.

16) Claimant made no claim for wages for the period January through March 1993.

17) From April 29 to May 2, 1993, Claimant worked on a USFS contract (Solicitation No. RFQ 4-93-30) to install, maintain, and remove tree netting in the Malheur National Forest. Her agreed rate was \$11.03 per hour for foreman duties and \$4.75 per hour for driving. Claimant worked as a foreman for 8 hours on April 29, 9.5 hours on April 30, 6.25 hours on May 1, and 3.75 hours on May 2, 1993, for a total of 27.5 hours of work time. Claimant drove for one hour each on April 29 and 30 and May 1 and 2, 1993, for a total of four hours of driving time. Accordingly, Claimant earned \$303.33 for time worked as a foreman and \$19.00 for time worked driving, for total gross earnings of \$322.33. With a check from the field account marked "loan" dated April 31 [*sic*], 1993, Galan gave Claimant a draw on her wages of \$500. Respondents calculated Claimant's gross wages as \$308.08, based on 27.5 hours worked and including \$4.75 in "Sal."¹³ Respondents deducted \$273.94 from Claimant's pay as a "CUST ADV." Accordingly, Respondents paid Claimant net wages of \$10.00 rather than \$283.94. When Claimant asked Galan about the deduction, he said it was part of the \$500 draw, but because she had not earned very much, Respondents could not deduct the whole \$500. Galan said that's just the way Respondent Barrett did this.

18) From June 1 to 3 and June 7 to 13, 1993, Claimant worked on a USFS contract (Solicitation No. R5-16-92-22) to apply herbicide in the Stanislaus National

Forest. Her agreed rate for foreman duties while Galan was on site on June 1, 2, and 3, 1993, was \$13.00 per hour. Claimant worked as a foreman for 5.5 hours on June 1, 8 hours on June 2, and 8.75 hours on June 3, 1993, for a total of 22.25 hours of work time. Claimant earned \$289.25 at \$13.00 per hour for time worked as a foreman. Respondents calculated her gross earnings at \$308.93, based on 22.5 hours of work. Respondents deducted \$137 from Claimant's pay as a "CUST ADV." This \$137 was for clothing and equipment (hard hats, safety glasses, coveralls, gloves, and boots) that the USFS required Respondent Staff's workers to wear. Galan gave each worker this clothing and equipment. Claimant did not keep the clothing or equipment after the crew completed the contract. Galan never told Claimant or the other workers that he was going to charge them for the clothing and equipment. Galan told Claimant that the \$137 deduction was for part of the \$500 draw she had received in April 1993. Accordingly, Respondents paid Claimant net wages of \$147.87 rather than \$284.87. From June 7 to 13, 1993, Claimant's agreed rate was \$17.00 per hour for licensed herbicide application. She worked as a licensed herbicide applicator for 3.75 hours on June 8, 4.5 hours on June 9, 8.75 hours on June 10, 5.25 hours on June 11, .5 hour on June 12, and 2.5 hours on June 13, 1993, for a total of 25.25 hours of work time. Her agreed rate for driving was \$4.75 per hour. Claimant drove for 11.5 hours on June 7, 3.5 hours on June 8, 3.25 hours on June 9, 2.5 hours on June 10, 3.75 hours on June 11, 10 hours on June 12, and 4.5 hours on June 13, 1993, for a total of 39 hours of driving time. Accordingly, she earned \$429.25 at \$17.00 per hour as a licensed herbicide applicator and \$185.25 at \$4.75 per hour for driving time, for total gross earnings from June 7 to 13, 1993, of \$614.50. Respondents calculated her gross earnings as \$510.98 for 25.25 hours at \$12.90 per hour (\$325.73¹⁴) and 39 hours of driving time at \$4.75 (\$185.25). Respondents deducted \$263.06 from Claimant's pay as a "CUST ADV." Accordingly,

Respondents paid Claimant net wages of \$207.38 rather than \$470.44. When Claimant questioned Galan about this deduction, he said it was part of her \$500 draw from April 1993. Claimant disputed the deduction and Galan said he would have to check with Respondent Barrett. Claimant never found out what the \$263.06 deduction was for. Claimant did not receive a draw during this period.

19) Toward the end of her employment, Claimant and Galan were working on different contracts in different locations. Galan called motels and arranged with them to accept Claimant's personal checks for her crew's lodging expenses. Galan made three deposits into Claimant's personal checking account between June 7 and June 16, 1993, to reimburse her for expenses (including a reel, hose, and coupling repair) and lodging that Claimant paid with her personal checks.

20) From June 14 to 29, 1993, Claimant worked on USFS contract number 53-9A40-3-1P27 (Solicitation No. R5-15-93-21) to apply herbicides in the Sierra National Forest.¹⁵ Her agreed rate was \$17.00 per hour for foreman and licensed applicator duties and \$4.75 per hour for driving. Claimant worked as a foreman and licensed applicator for 10 hours on June 14, 7.5 hours on June 15, 2 hours on June 16, 7.75 hours on June 17, 8.25 hours on June 18, 9.75 hours on June 19, 4 hours on June 20, 5.25 hours on June 21, 8 hours on June 22, 7.25 hours on June 23, 5.5 hours on June 24, 7 hours on June 25, 6.75 hours on June 26, 8 hours on June 27, 7.25 hours on June 28, and 2 hours on June 29, 1993, for a total of 106.25 hours of work time. Claimant drove for 4.75 hours on June 14, 6 hours on June 15, 3.5 hours on June 16, 3.5 hours on June 17, 3.5 hours on June 18, 4.5 hours on June 19, 4 hours on June 20, 5 hours on June 21, 5 hours on June 22, 5 hours on June 23, 5.75 hours on June 24, 6.75 hours on June 25, 7.25 hours on June 26, 5 hours on June 27, 5 hours on June 28, and 5.5 hours on June 29, 1993, for a total of 80 hours of driving time. Accordingly,

Claimant earned \$1,806.25 for time worked as a foreman and applicator and \$380 for time worked driving, for total gross earnings of \$2,186.25. Respondents calculated her gross earnings as \$1,452.02. This included 97 hours at \$9.57 per hour¹⁶ (plus 83 cents per hour as a fringe benefit, or "cash in lieu of benefits" -- "CLB"), 7.25 overtime hours at \$14.36 per hour (plus the fringe benefit), and 69.5 hours at \$4.75 per hour for driving time. Respondents deducted \$100 from Claimant's pay as a "CUST ADV." Accordingly, Respondents paid Claimant net wages of \$1,199.05 rather than \$1,299.05. Claimant never received a \$100 cash advance or draw from Galan. When Claimant argued with Galan about the hourly rate she was paid and about the \$100 deduction, he said it was an error due to Respondent Barrett's bookkeeping. In another argument in July 1993 about Claimant's rate of pay when she used her applicator's license (\$17.00 per hour), Galan said that he did not have to pay her that rate, they had only an oral agreement, and she had no proof of the agreement. He agreed to pay her and Gumaro Diaz \$13 per hour and to contact Respondent Barrett to raise their wages to that amount. He said the wage difference would show up in her next pay check. Claimant continued to argue that her wage rate was \$17.00 per hour.

21) From July 6 to 21, 1993, Claimant worked on USFS contract number 53-91VS-3-1620 (Solicitation No. IFB R5-03-93-31) to apply herbicides in the El Dorado National Forest.¹⁷ Her agreed rate was \$17.00 per hour for foreman and licensed applicator duties and \$4.75 per hour for driving. Claimant worked as a foreman or licensed applicator for 8.25 hours on July 6, 9.5 hours on July 7, 10 hours on July 8, 8.5 hours on July 9, 7.5 hours on July 10, 5.5 hours on July 12, 11.5 hours on July 13, 4.5 hours on July 14, 8.5 hours on July 15, 7 hours on July 16, 10 hours on July 17, 8.25 hours on July 19, 5.75 hours on July 20, and 3.75 hours on July 21, 1993, for a total of 108.5 hours of work time. Claimant drove for 5 hours on July 6, 3.5 hours on July 7, 4.5

hours on July 8, 5 hours on July 9, 3.75 hours on July 10, 4 hours on July 12, 3.75 hours on July 13, 3.75 hours on July 14, 7 hours on July 15, 5.5 hours on July 16, 6.75 hours on July 17, 5.75 hours on July 19, 3.75 hours on July 20, and 4.75 hours on July 21, 1993, for a total of 66.75 hours of driving time. Accordingly, Claimant earned \$1,844.50 for time worked as a foreman or applicator and \$317.06 for driving time, for total gross earnings of \$2,161.56. Respondents calculated her gross pay at \$1,914.13, including 69.75 hours at \$12.00 per hour, 64.75 hours at \$11.06 per hour, and 76 hours at \$4.75 per hour for driving time. Respondents deducted \$170 on July 16 and \$794.20 on July 30 (for total deductions of \$964.20) from Claimant's wages for "CUST ADV." Accordingly, Respondents paid Claimant net wages of \$682.23, rather than \$1,646.43. Claimant disputed the amount of her July 16 paycheck with Galan. He said he knew the check was small and he would add \$30. Neither Respondents nor Galan ever paid Claimant additional wages. Later, after he had terminated her, Galan told Claimant that \$794.20 was deducted from her last pay check (leaving a net amount of \$10.00) because Claimant owed him money for the reel and hose repair and Respondent Barrett would not let him deduct any more than that. Claimant did not owe Galan money and did not receive a draw of \$170.

22) During the performance of the El Dorado National Forest contract, Claimant refused to mix the herbicide chemicals as Galan directed because Claimant believed his formula was contrary to federal regulations and would jeopardize her license. Thereafter, Galan no longer let Claimant mix her own formulas and gave that responsibility to his nephew. This, along with the on-going dispute about her rate of pay, caused a breakdown in Galan and Claimant's relationship. USFS and the US Department of Labor began investigating Respondent Staff apparently because some workers had complained to the USFS about not getting paid. After Claimant was

interviewed during the investigation, Galan terminated her employment and sent her home. Claimant had receipts for expenses, but Galan refused to reimburse her. Claimant's last day of work was July 21, 1993.

23) In order to comply with Oregon law requiring an employer to pay its employee all wages due immediately upon discharge, Respondent Barrett made the following arrangement with its clients. When a client discharged an employee, the client would notify Respondent Barrett of the discharge and give Barrett payroll information, such as the hours worked and the rate of pay. Respondent Barrett then calculated the gross and net wage amounts and told the client to pay the employee the net amount, minus \$10.00, with the client's check. Finally, Respondent Barrett would run the payroll through its normal process and mail its final paycheck for \$10.00 that day (with the itemized statement of deductions). The amount of the client's check to the employee (for the net wages less \$10.00) showed up as a "Cust Adv" (a draw) on Respondent Barrett's itemized statement of deductions to the employee. Respondent Barrett used this final paycheck arrangement because it could not be on site to hand the employee a final paycheck immediately upon discharge. This arrangement permitted the joint employers to pay all but \$10.00 of the employee's final wages immediately upon discharge and allowed Respondent Barrett to avoid issuing a zero-dollar final paycheck, which, according to Hatfield, drove Barrett's auditors crazy because employees never cashed such checks.

24) Galan added up several field account checks that he had written to Claimant, plus the three deposits he had made to her personal checking account to pay for lodging and other expenses, and \$500 for motel expenses and reported these amounts to Respondent Barrett as draws or loans to Claimant. As a result, Respondent Barrett's records showed Claimant having a "one-shot" deduction of \$2,620. Following

the deduction of \$794.20 from Claimant's final paycheck, a report by Respondent Barrett's staff indicated that Claimant "still owed" \$1,905.80 to Respondent Staff.

25) At some time after January 11, 1994, Claimant sued Galan and Respondent Staff for her reimbursable expenses. The matter went to arbitration and Claimant received an arbitration award in her favor against Galan and Respondent Staff in the amount of \$1,118.02. The judgment was docketed on May 31, 1995. As of October 24, 1996, the judgment was unsatisfied.

26) Claimant's testimony was credible. The Administrative Law Judge carefully observed her demeanor during the hearing. Her demeanor was forthright, even when her memory was deficient. She usually had the facts readily at her command and documentary records supported her statements. There is no reason to determine the testimony of Claimant to be anything except reliable and credible.

27) Manuel Galan's testimony was not reliable or credible. The Administrative Law Judge carefully observed his demeanor during the hearing. Galan's bias was obvious and he demonstrated animus for Claimant and the Agency. His testimony was inconsistent on important points. It was often contradicted by Claimant's credible testimony and by his own records. In addition, the transactions summary produced by Respondent Staff was unreliable. In it, Galan treated many field account checks to Claimant as advances or draws on her wages, when credible evidence showed that these checks were reimbursements for expenses or were draws for her crew members. For example, Galan gave Claimant check number 8990, dated January 26, 1993, for \$130.43. None of Respondent Staff's records covering that period suggest that Claimant received a draw for that amount, and her pay check covering that period does not show a deduction for such a draw. However, the transaction summary lists that check as a draw paid to Claimant. The forum disregarded the information in the

summary and disbelieved all of Galan's testimony except that which was corroborated by other credible evidence.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent Staff was an Oregon corporation that engaged the personal services of one or more employees in the state of Oregon. Manuel Galan was Respondent Staff's president.

2) During all times material herein, Respondent Barrett was a Maryland corporation that engaged the personal services of one or more employees in the state of Oregon.

3) From September 7, 1992, to July 21, 1993, Respondent Staff employed Claimant. Manuel Galan hired Claimant and was her direct supervisor during all times material.

4) From October 28, 1992, to July 21, 1993, Respondent Staff and Respondent Barrett had a joint employment relationship, and as such both Respondents employed Claimant.

5) From September 7 to 16, 1992, Claimant earned \$845.75 (gross). Respondent Staff paid her around \$535.64 (gross). Respondent Staff owes Claimant \$310.11 in earned and unpaid gross wages for this period.

6) From September 17 to October 1, 1992, Claimant earned \$1,096.06 (gross). Respondent Staff paid her \$973.50 (gross). Respondent Staff gave Claimant a draw of \$30.00 during this period and deducted \$30.00 from her net wages without written authorization from Claimant. Respondent Staff owes Claimant \$122.56 in earned and unpaid gross wages for this period.

7) From November 15 to December 6, 1992, Claimant earned \$2,120.25 (gross). Respondents paid her \$2,067.94 (gross). Respondents owe Claimant \$52.31

in earned and unpaid gross wages for this period.

8) From December 15 to 29, 1992, Claimant earned \$533.75 (gross). Respondents paid her \$527.01 (gross). Respondents deducted \$100 from Claimant's net wages without written authorization from Claimant. Claimant did not receive a draw during this period. Respondents owe Claimant \$6.74 in gross earned and unpaid wages and \$100 in net earned and unpaid wages for this period.

9) From April 29 to May 2, 1993, Claimant earned \$322.33 (gross). Respondents paid her \$308.08 (gross). Respondents owe Claimant \$14.25 in gross earned and unpaid wages for this period. Respondents gave Claimant a \$500 draw during this period. Respondents deducted \$273.94 from Claimant's net wages without written authorization from Claimant. Claimant owes Respondents \$226.06 from this period.

10) From June 1 to 13, 1993, Claimant earned \$903.75 (gross). Respondents paid her \$819.91 (gross). Respondents deducted \$400.06 from Claimant's net wages without written authorization from Claimant. Claimant did not receive a draw during this period. Respondents owe Claimant \$83.84 in earned and unpaid gross wages and \$400.06 in earned and unpaid net wages for this period.

11) From June 14 to 29, 1993, Claimant earned \$2,186.25 (gross). Respondents paid her \$1,452.02 (gross). Respondents deducted \$100 from Claimant's net wages without written authorization from Claimant. Claimant did not receive a draw during this period. Respondents owe Claimant \$734.23 in earned and unpaid gross wages and \$100 in earned and unpaid net wages for this period.

12) From July 6 to 21, 1993, Claimant earned \$2,161.56 (gross). Respondents paid her \$1,914.13 (gross). Respondents deducted \$964.20 from Claimant's net wages without written authorization from Claimant. Claimant did not

receive a draw during this period and did not owe Respondents or Galan money for a reel and hose repair. Respondents owe Claimant \$247.43 in earned and unpaid gross wages and \$964.20 in earned and unpaid net wages for this period.

13) Respondents discharged Claimant on Wednesday, July 21, 1993.

14) From September 7 to October 1, 1992, Claimant earned \$1,941.81 in gross wages from Respondent Staff. She worked 25 days during this period. Respondent Staff paid her a total of \$1,509.14 (gross). Respondent Staff owes Claimant \$432.67 in earned and unpaid gross wages for this period.

15) From November 15, 1992, to July 21, 1993, Claimant earned \$8,227.89 in gross wages from Respondents. She worked 73 days during this period. Respondents paid her a total of \$7,089.09 (gross). Respondents owe Claimant \$1,138.80 in earned and unpaid gross wages. In addition, Respondents owe Claimant \$1,338.20 for unauthorized deductions from her net wages; this amount is the sum of deductions taken for draws Claimant did not receive, reduced by the \$226.06 that remained of the \$500 draw in April 1993 and that Respondents did not deduct from Claimant's May 1993 pay.

16) During the period September 7, 1992, to July 21, 1993, Claimant worked 98 days and earned \$10,169.70. Her average daily rate of pay was \$103.77.

17) Respondents willfully failed to pay Claimant \$1,571.47 in earned, due, and payable gross wages, plus they wrongly deducted 1,338.20 in net wages. Respondents have not paid Claimant the wages owed and more than 30 days have elapsed from the due date of those wages.

18) Civil penalty wages, computed pursuant to ORS 652.150 and Agency policy, equal \$3,113.10 (Claimant's average daily rate, \$103.77, continuing for 30 days).

CONCLUSIONS OF LAW

1) During all times material herein, Respondents were employers and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.414.

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

3) The actions or inactions of Manuel Galan, an agent or employee of Respondent Staff, are properly imputed to Respondent Staff.

- 4) *Former* ORS 652.140(1) (1991) provided:
"Whenever an employer discharges an employee or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge shall become due and payable immediately."

Respondents violated *former* ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid immediately upon discharging her from employment on Wednesday, July 21, 1993.

- 5) *Former* ORS 652.150 (1991) provided:
"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondents are jointly and severally liable for a civil penalty under *former* ORS 652.150 for willfully failing to pay Claimant all wages when due as provided in ORS 652.140.

- 6) *Former* ORS 652.610 (1981) provided in part:
"(3) No employer may withhold, deduct or divert any portion of an employee's wages unless:

"(a) The employer is required to do so by law;

"(b) The deductions are authorized in writing by the employee, are for the employee's benefit, and are recorded in the employer's books;

"(c) The employee has voluntarily signed an authorization for a deduction for any other item, provided that the ultimate recipient of the money withheld is not the employer, and that such deduction is recorded in the employer's books; or

"(d) The deduction is authorized by a collective bargaining agreement to which the employer is a party."

Respondents violated ORS 652.610(3) by deducting portions of Claimant's wages without written authorization from her.

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

OPINION

JOINT EMPLOYMENT RELATIONSHIP

Respondent Staff stipulated that Claimant was its employee at the time this claim arose. Neither Respondent disputes that between October 28, 1992, and July 21, 1993, they had a written agreement whereby they were joint employers of Claimant. In the agreement, Respondents described their relationship this way:

"It is the intention and understanding of the parties that, by this Agreement, Barrett is the leasing employer and that Barrett and Client have entered into a joint employer relationship with respect to the employees covered under this Agreement under Internal Revenue Code ('IRC') § 414(n)."

There's no real dispute that Respondent Staff and Respondent Barrett were Claimant's joint employers. Respondent Barrett retained hiring and firing rights, had the authority to administer discipline to the employees, handled payroll matters (including the

payment of state and federal taxes), provided workers' compensation insurance, and made various fringe benefits available to its employees. Respondent Barrett was not a mere payroll agent and did not merely provide administrative services. At the same time, Respondent Staff maintained day-to-day supervision of the employees and retained the right to hire, fire, and discipline them. Respondent Staff's president, Galan, set the pay rates, obtained the contracts the employees worked on, set the work schedule, arranged for the employees' lodging, and gave them advances on wages. The forum concludes that each Respondent retained for itself sufficient control of the terms and conditions of employment to be considered a joint employer of Claimant.

The issues then are (1) whether each joint employer is required to comply with the wage and hour laws that govern employers in Oregon, and (2) whether each joint employer is liable for any violation of those laws. The forum finds that each joint employer is required to comply with Oregon's wage and hour laws and each employer is liable, both individually and jointly, for any violation of those laws.

Neither Respondent cited any law that relieves it of responsibility to comply with ORS 652.140 or 652.610. ORS 652.360 states that "[n]o employer may by special contract or any other means exempt the employer from any provision of or liability or penalty imposed by ORS 652.310 to 652.414 or by any statute relating to the payment of wages[.]" In other words, an employer may not make an agreement whereby the employer is not required to comply with the wage collection law. Neither Respondent can by its agreement relieve itself of its obligations under the law. The employee leasing agreement between Respondents is no defense to a failure to pay final wages when due to Claimant. All joint employers are responsible, both individually and jointly, for compliance with all the applicable provisions of Oregon's wage and hour laws.¹⁸

However, Respondent Barrett contends that it is not liable for any wages due

Claimant. It argues that it relied on information from Respondent Staff when it paid Claimant and it satisfied its administrative obligations to Respondent Staff and Claimant. It claims that it could not police Respondent Staff. It denies that Respondent Staff or Galan was its agent or employee, and it asserts that Respondent Staff is responsible for any failures by Galan to pay Claimant properly or to report her payroll information to Barrett.

By virtue of their employee leasing agreement, Respondents were like partners who employed Claimant. They intended to and did associate to carry on a joint enterprise for profit, and they became co-employers of Claimant and the other employees. They each share joint and several liability for any debt to their employees for wages and penalties. Each employer may, of course, take credit toward wage payments, including any required minimum wage and overtime, made to an employee by the other joint employer.¹⁹ How and whether Respondents divide their liability or indemnify each other is for them or another forum to decide.

In its exceptions, Respondent Barrett again argues that it should not be responsible for the alleged wrongdoing of Galan and Respondent Staff. It takes exception to the reference that it and Respondent Staff were "like partners," and states that Galan and Respondent Staff were not Barrett's employees, agents, or representatives. Respondent Barrett minimizes its joint employment relationship with Respondent Staff (characterizing their agreement as "a services contract") and argues that the forum should not impute Respondent Staff's actions to Respondent Barrett. It argues that Respondent Staff "could have just as easily contracted with a payroll company and/or a workers' compensation insurance carrier which would not have been responsible for any wrongs of Staff, Inc." Respondent Barrett also repeatedly makes the point that, although Barrett was Claimant's employer and accepted her application

and paid her wages and provided her workers' compensation insurance, it did not direct, control, or supervise her work activities. It argues that Respondent Staff set Claimant's rate of pay and hours, and provided the payroll records Respondent Barrett used to produce the pay checks.

The weakness in Respondent Barrett's position, and the reason the forum rejects it, is that it is contrary to the facts, the law, and the terms of its joint employment agreement, which show, among other things, that: Respondents entered into a joint employment agreement; Respondent Barrett became Claimant's employer; it retained "direction and control over the employees covered by [the] Agreement, including hire, discipline, and fire;"²⁰ it retained the authority to implement "policies and practices relating to the employer-employee relationship such as recruiting, interviewing, testing, selection, orientation, training, evaluation, replacing, supervising, disciplining, and terminating employees;"²¹ it agreed to conduct itself in accordance with state laws regarding payroll;²² it assumed the record keeping obligations associated with its employment duties;²³ it did not have written authorization from Claimant to take deductions from her pay; it did not pay Claimant all her earned wages due and owing upon termination; and Oregon law prohibits Respondent Barrett from exempting itself by any means from any provision of or liability or penalty imposed by state statutes relating to the payment of wages.²⁴ Under the facts found and the law applicable in this matter, Respondent Barrett is responsible for the failure to pay Claimant's earned, due, and payable wages. It may not escape liability by complaining that the other party to its agreement (the co-employer) had a hand in the supervision of Claimant and the payroll record keeping process.

HOURS WORKED

In wage claim cases such as this, the forum has long followed policies derived

from *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946). The US Supreme Court stated therein that the employee has the "burden of proving that he performed work for which he was not properly compensated." In setting forth the proper standard for the employee to meet in carrying this burden of proof, the court analyzed the situation as follows:

"An employee who brings suit under 16(b) of the [Fair Labor Standards] Act for unpaid minimum wages or unpaid overtime compensation, together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated. The remedial nature of this statute and the great public policy which it embodies, however, militate against making that burden an impossible hurdle for the employee. Due regard must be given to the fact that it is the employer who has the duty under 11(c) of the Act to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and amount of work performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

"When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." 328 US at 686-688.

On the basis of Claimant's credible testimony and the records in evidence in this

case, the forum has concluded that she was employed and improperly compensated.²⁵ Where the forum concludes that an employee was employed and improperly compensated, it becomes the burden of the employer to produce all appropriate records to prove the precise amounts involved. *Id.*; *In the Matter of Dan's Ukiah Service*, 8 BOLI 96, 106 (1989).

Thus, it became Respondents' burden to produce all appropriate records to prove the precise amounts involved. ORS 653.045 requires an employer to maintain payroll records. Respondents did not maintain sufficient records of the hours or dates worked by Claimant or the agreed upon rates of pay. They did not produce reliable records to prove that Claimant took the draws or owed the money upon which they allegedly based their unauthorized deductions from her wages.

Where an employer produces inadequate records, the Commissioner may rely on the evidence produced by the Agency "to show the amount and extent of the employee's work as a matter of just and reasonable inference," and "may then award damages to the employee, even though the result be only approximate." *Anderson v. Mt. Clemens Pottery Co.*, 328 US at 687-88. On the basis of these rulings, the forum may rely on the evidence produced by the Agency regarding the number of hours worked by Claimant and her rates of pay. The evidence showed that Claimant worked for Respondents for the hours and rates of pay listed in the Findings of Fact. Respondents did not produce persuasive "evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.*

DEDUCTIONS

Former ORS 652.610(3) (1981) described when an employer could withhold, deduct, or divert any portion of an employee's wages. Except as required by law or authorized by a collective bargaining agreement, nothing in that statute allowed for a

deduction from wages where the employee had not authorized the deduction in writing, and particularly where the ultimate recipient of the money withheld was the employer. See *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976); *In the Matter of SOS Towing and Storage, Inc.*, 3 BOLI 145, 148 (1982). Here, Claimant's only written authorization for deductions referred to deductions during employment in 1990 (a year when Claimant never worked for Respondent Staff). Thus, by its very terms, the authorization did not cover the period of this wage claim. Even if the forum were to read the authorization to cover years after 1990, Claimant apparently signed it during a period of employment with Respondent Staff (in February 1992) before the period at issue here. Claimant never signed an authorization for deductions from her wages after Galan rehired her in September 1992. Claimant never signed an authorization for deductions after Respondent Barrett became her employer. Respondents' unauthorized deductions from Claimant's wages to cover draws or debts allegedly owed to Respondent Staff were illegal under ORS 652.610.

SETOFF

Former ORS 652.610(4) (1981) provided in part that "Nothing in this section shall * * * diminish or enlarge the right of any person to assert and enforce a lawful setoff or counterclaim or to attach, take, reach or apply an employee's compensation on due legal process." While Respondents have not asserted a lawful setoff on due legal process for the draws they gave Claimant, she nonetheless agreed to allow a setoff from her wages due and owing for the draws she received. Accordingly, the forum reduced the amount of wages due by the amount of draws Claimant received from Respondents.

PENALTY WAGES

Awarding penalty wages turns on the issue of willfulness. 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. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondents, as employers, had a duty to know the amount of wages due to their employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983).

Here, evidence established that Respondents knew they were paying Claimant for the hours and at the rates they paid, knew they were deducting money from her wages, and intentionally paid her the amounts they paid. Evidence showed that Respondents acted voluntarily and were free agents. Respondents must be deemed to have acted willfully under this test, and thus are liable for penalty wages under ORS 652.150. Pursuant to Agency policy, civil penalty wages due under ORS 652.150 are rounded to the nearest dollar. *In the Matter of Waylon & Willies, Inc.*, 7 BOLI 68, 72 (1988).

Respondent Barrett argues in its exceptions that Claimant never contacted Barrett regarding her pay until after her termination. It claims that it had no knowledge of any problem with Claimant's wages and no motive to pay her less than her appropriate wage, since it received a fee from Respondent Staff based on overall payroll. Further, it asserts that Claimant's silence constitutes acquiescence and agreement with her wages and argues that the forum should not penalize Respondent Barrett for Claimant's inaction.

The facts show that Claimant was hardly silent and did not acquiesce or agree to the wages she received. Respondent Barrett relied on Respondent Staff to inform the employees of the joint employment relationship. Respondent Barrett apparently took no independent action to notify the employees, including Claimant, that it was now their

employer. Simultaneously, Galan misrepresented to Claimant that Respondent Barrett was merely a new payroll agent and specifically instructed her to bring any payroll problems to his attention, not to Respondent Barrett. Claimant complained many times to Galan about the amount of her wages, her rate of pay, and the deductions from her wages. Galan regularly put her off by claiming that Respondent Barrett's bookkeeping errors caused the problems, which he would investigate.

Respondent Barrett is not shielded from liability for a penalty wage under these facts. It has a legal responsibility to pay its employees properly and cannot hide behind the co-employer. It has a legal duty to keep appropriate records and to know the amount of wages due its employees. The delegation by contract of some of those duties to the co-employer does not relieve Respondent Barrett of its responsibilities or liabilities. To the extent that Respondent Staff had the contractual duty to maintain payroll records and give payroll information to Respondent Barrett, Respondent Staff was Barrett's representative and Galan's knowledge should be imputed to Respondent Barrett. Accordingly, the forum rejects Respondent Barrett's exceptions.

CLAIM PRECLUSION

As noted above in the procedural findings of fact, Respondent Staff filed a motion for summary judgment contending that the doctrine of claim preclusion barred this wage claim. Respondent Barrett joined in the motion and, after briefing by all participants, the Administrative Law Judge denied it. He ruled as follows:

"Staff contends that Debbie Martinez's (Claimant's) wage claim is precluded because she prosecuted another action (in Jackson County District Court) against Staff through to a final judgment binding on the parties. Staff argues the wage claim is based on the same factual transaction that was at issue in the court case, seeks a remedy additional or alternative to the one sought earlier, and is of such a nature as could have been joined in the court action. Staff relies on *Rennie v. Freeway Transport*, 294 Or 319, 656 P2d 919 (1982), and argues that Claimant unilaterally and impermissibly split her claim.

"In *Rennie*, the Oregon Supreme Court said:

'[A] plaintiff who has prosecuted one action against a defendant through to a final judgment * * * is barred [*i.e.*, precluded] * * * from prosecuting another action against the same defendant where the claim in the second action is one which is based on the same factual transaction that was at issue in the first, seeks a remedy additional or alternative to the one sought earlier, and is of such a nature as could have been joined in the first action.' *Rennie v. Freeway Transport*, 294 Or at 319, 656 P2d at 921.

"ORS 43.130(2) provides that a judgment is

'conclusive between the parties, their representatives and their successors in interest by title subsequent to the commencement of the action, suit or proceeding, litigating for the same thing, under the same title and in the same capacity.'

"The Agency is the assignee of Claimant's wage claim. She assigned her wage claim to the Agency before she commenced the court case against Staff. Although the Agency argues that the participants in this wage claim case are different than the parties in the court action (because here the Agency is making the claim, whereas in the court case Ms. Martinez made the complaint), I find that the participants are the same, for purposes of claim preclusion. I do not believe the principal purposes of claim preclusion -- prevention of harassment of defendants by successive legal proceedings as well as economy of judicial resources [citing *Dean v. Exotic Veneers, Inc.*, 271 Or 188, 192, 531 P2d 266 (1975)] -- can or should be easily circumvented through the assignment of a claim.

"Here, Claimant has prosecuted one action (for reimbursement of expenses) against Staff through to a final judgment. Her assignee (the Agency) would be precluded from prosecuting another action against Staff if the second action (this wage claim) is one which: (1) is based on the same factual transaction that was at issue in the first, (2) seeks a remedy additional or alternative to the one sought in the court action, and (3) is of such a nature as could have been joined in the first action.

"On the first point, a determination depends on whether the 'same factual transaction that was at issue' in the court case is interpreted broadly to mean the employment relationship between Staff and Claimant, as Respondents contend, or interpreted narrowly to mean only the oral agreement on reimbursable expenses between Claimant and Staff that was outside the employment agreement, as the Agency contends. According to the facts as I understand them, the reimbursement agreement between Staff and Claimant was dependent upon and intertwined with the employment relationship. I conclude that the wage claim is based on the same factual transaction (which involves indebtedness arising during the employment relationship) that was at issue in the court case.

"On the second and third points, I conclude that this wage claim seeks a remedy additional to the one sought in the court action and is of a nature as could have been joined in the court action. Staff has established the basic elements of claim preclusion. Nevertheless, the inquiry does not end there.

"The Agency correctly points out that there are exceptions to the general rule of claim preclusion and two of them apply here. First, a defendant is generally free to waive the right to a combined action. *Rennie v. Freeway Transport*, 294 Or at 328, 656 P2d at 924. There is no evidence here that Staff objected to the splitting of Claimant's claim. At the time of the court action for reimbursable expenses, Staff was well aware of Claimant's wage claim and had been in communication with the Agency about it. Further, the arbitrator in the court action expressly omitted any decision based on wages and denied attorney fees because it did 'not appear that this is an action for wages, but an action for reimbursement.'

'Where the parties have agreed to the separate litigation of plaintiff's claim and the first judgment expressly withholds any decision as to the other aspects of the claim, reserving them for later litigation, a subsequent action by plaintiff based on those parts of the claim reserved is not precluded by *res judicata* [claim preclusion]. See Restatement (Second) of Judgments Sec. 26(1)(a).' *Rennie v. Freeway Transport*, 294 Or at 328, 656 P2d at 924.

"Silence in the face of simultaneous actions based on the same factual transaction constitutes acquiescence. Staff's failure to object to splitting the claims is effective as an acquiescence in the splitting. *Rennie v. Freeway Transport*, 294 Or at 328-30, 656 P2d at 924-25 (including fn.9). Accordingly, the Agency's wage claim is not precluded.

"Second, '[w]here a statutory scheme contemplates that the contentions arising from a transaction or series of transactions may be split, splitting as contemplated by the statutory scheme is not merged in or barred by a former adjudication concerning the overall transaction.' *Drews v. EBI Companies*, 310 Or 134, 141, 795 P2d 531, 536 (1990). ORS 652.380(1) provides:

'The remedies provided by ORS 652.310 to 652.414 shall be additional to and not in substitution for and in no manner impair other remedies and may be enforced simultaneously or consecutively so far as not inconsistent with each other.'

"I find that the statutory scheme in ORS chapter 652, regarding wage claims, contemplates that the contentions arising from a transaction or series of transactions may be split. Accordingly, this wage claim is not merged in or barred by the judgment from the earlier court action involving reimbursable expenses.

"With regard to Barrett's motion for summary judgment, Barrett was not a party to the earlier court action. Therefore, Barrett is in no position to raise the defense of claim preclusion. Even if this were not the case, the exceptions to the general rule of claim preclusion described above would apply.

"The motions for summary judgment are denied. The Agency is not precluded from bringing this wage claim case against Staff or Barrett." (References to exhibits omitted.)

The forum adopts and confirms the ALJ's ruling.

LACHES

In its answer, Respondent Staff raised an affirmative defense of laches, asserting that the "claim was originally raised in 1993. No final decision was made against Employer. Over three years later, BOLI resurrected the claim to the prejudice of Employer." Respondent Staff presented no evidence or argument in support of its defense.

Claimant filed the wage claim and assigned it to the Agency in January 1994. Following its investigation, the Agency issued an Order of Determination in August 1996. This contested case resulted from that Order of Determination.

Respondent Staff has the burden of proving the elements of the defense of laches. *In the Matter of Sapp's Realty, Inc.*, 4 BOLI 232, 240-41 (1985). It must prove (1) there was an unreasonable delay by the Agency, (2) the Agency had full knowledge of facts that would have allowed it to avoid the unreasonable delay, and (3) the unreasonable delay resulted in such prejudice to Respondent that it would be inequitable to afford the relief sought by the Agency. *In the Matter of Tim's Top Shop*, 6 BOLI 166, 184-86 (1987) (citing *Clackamas Co. Fire Protection v. Bureau of Labor and Industries*, 50 Or App 337, 341-42, 624 P2d 141 (1981)). The mere passage of time is not sufficient to invoke the equitable doctrine of laches. *In the Matter of Marion County*, 1 BOLI 159, 162 (1978). Respondent Staff must prove that it suffered actual prejudice

attributable to the passage of time. *In the Matter of the County of Multnomah*, 3 BOLI 52, 65-66 (1982). Respondent Staff's defense fails for lack of proof.

RESPONDENT BARRETT'S EXCEPTIONS

The forum has addressed many of Respondent Barrett's exceptions in this opinion. On the basis of the facts found, the conclusions of law reached, and the reasoning explained in the opinion above, the forum hereby rejects Respondent Barrett's remaining exceptions that are inconsistent herewith.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders STAFF, INC. to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR DEBBIE MARTINEZ in the amount of Four Hundred Thirty Two Dollars and Sixty Seven Cents (\$432.67), less appropriate lawful deductions, representing gross earned, unpaid, due, and payable wages, plus interest at the rate of nine percent per year on the sum of \$432.67 from October 1, 1992, until paid.

AND FURTHER, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders STAFF, INC. and BARRETT BUSINESS SERVICES, INC. to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR DEBBIE MARTINEZ in the amount of Five Thousand Five Hundred Ninety Dollars (\$5,590), representing \$1,138.80 in gross earned, unpaid, due, and payable wages, less appropriate lawful deductions; \$1,338.20 in net earned, unpaid, due, and payable wages; and \$3,113 in penalty wages; plus interest at the rate of nine percent per year on the sum of \$2,477 from August 1, 1993, until paid and nine percent interest per year on the sum of \$3,113 from September 1, 1993, until paid.

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¹The contested case hearing rules were amended effective December 9, 1996. As amended, OAR 839-050-0000 to 839-050-0440 were sent to all participants in this case.

²Respondent Barrett joined in Respondent Staff's motion for summary judgment, but briefed it separately.

³Manuel Galan and Respondents never charged Claimant for lodging or motel expenses until the last pay period in July 1993, when Galan discharged her. Then, contrary to the agreement between Galan and Claimant, he apparently reported to Respondent Barrett that Claimant had a \$500 hotel bill that should be deducted from her wages.

⁴This contract is sometimes referred to in the evidence as the "John Day contract" or the "John Day project."

⁵In 1992, an applicator license was not required to mix the big game repellent chemicals.

⁶At times, Galan paid Claimant a flat fee of \$50 (from the Staff, Inc. field account) to take a vehicle somewhere and drop it off. None of these trips is included in Claimant's wage claim.

⁷Respondent Staff's Operation Account payroll check stubs showed the total number of hours worked ("Reg Uts" or Regular Units), but did not distinguish Claimant's driving hours from her foreman hours. The stubs did not show the rates of pay. As a result, Claimant could not calculate from the stubs the rate of pay Respondent Staff was paying her for her foreman duties.

⁸This contract is sometimes referred to in the evidence as the "Sisters" contract.

⁹Throughout the evidence, an advance on wages was variously called a draw, a loan, or an advance.

¹⁰This contract is sometimes referred to in testimony as the "Shaver Lake" or "Clovis" project.

¹¹Galan and Claimant agreed that Claimant's rate of pay would be \$17.00 per hour on this and any succeeding contracts where her applicator's license was required.

¹²This contract is sometimes referred to in the evidence as the "Humboldt Nursery" project.

¹³See footnote 14.

¹⁴Claimant's pay check stubs show "Total Hours," but these hours do not include her driving hours. Wages for her driving hours show up on the stubs as "Sal." Her "Regular" pay amount is her gross pay without the fringe benefit amount required by USFS contracts. This benefit shows up on the check stubs as "CLB," or "cash in lieu of benefit," and must be added to the gross pay to determine the actual hourly rate Respondents paid Claimant for her work (other than driving).

¹⁵Claimant sometimes referred to this as the "Clovis herbicide contract."

¹⁶The hourly rate of pay required on this contract for laborers was \$10.23, plus 83 cents fringe benefit.

¹⁷This contract is sometimes referred to in the evidence as the "Placerville" job.

¹⁸This is consistent with the responsibility of joint employers under the federal Fair Labor Standards Act (FLSA). See 29 CFR 791.2 -- Joint Employment.

¹⁹Again, this is consistent with joint employers' responsibilities under the FLSA. See 29 CFR 791.2.

²⁰Employee Leasing Agreement, section 2.1(a).

²¹Employee Leasing Agreement, section 2.3(c).

²²Employee Leasing Agreement, section 3.1.

²³Employee Leasing Agreement, section 4.10.

²⁴ORS 652.360.

²⁵In its exceptions, Respondent Barrett challenged the ALJ's conclusion that Claimant's testimony was credible. It also gave reasons why her records were unreliable. An Administrative Law Judge's credibility findings are accorded substantial deference by the forum. Absent convincing reasons for rejecting such findings, they are not disturbed. *In the Matter of Western Medical Systems, Inc.*, 8 BOLI 108, 117 (1989). After considering Respondent Barrett's arguments and the evidence, the forum concurs with the ALJ's credibility findings and finds no convincing reason to reject them. Accordingly, the credibility findings have not been disturbed. Regarding the reliability of her records, Claimant explained why there were discrepancies between her daily diaries of hours worked and the reports Galan accepted from her. See Finding of Fact -- The Merits 13. That testimony was believable and the forum found her records reliable. With her records and testimony, Claimant produced "sufficient evidence to show the amount and extent of [her] work as a matter of just and reasonable inference." *Mt. Clemens Pottery*, 328 US at 688. The forum also notes that Galan recorded the hours on several of the projects, and the forum based the findings of fact concerning those projects on his records.