

**In the Matter of**

**ANN L. SWANGER and LUTHER M. SWANGER,  
both dba MTR INVESTMENTS**

**Case No. 33-99**

**September 17, 1999**

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**SYNOPSIS**

Where Claimant was a car salesman who was paid by commission and Respondents claimed that he was independent contractor, the forum applied the "economic reality" test and found that Claimant was a commissioned sales employee who was entitled to the statutory minimum wage for all hours worked. The forum found Claimant was paid all commissions due to him. No reliable evidence in the record established the dates and hours worked by Claimant. As a result, the Agency failed to meet its burden of proof of showing that Claimant performed work for which he was not properly compensated, and the amount and extent of that work. The Commissioner dismissed the Order of Determination. ORS 652.140(2); ORS 652.150.

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The above-entitled case came on regularly for hearing before Alan McCullough, 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 April 16 and April 21, 1999, in a conference room in the State Office Building, 165 East Seventh, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI") was represented by Cynthia L. Domas, an employee of the Agency. The wage claimant, Lane Hampton, was present through most of the hearing and was not represented by counsel. Respondents were represented by Anthony T. Rosta of Rosta & Connelly, P.C., Eugene.

The Agency called as witnesses: Lane Hampton, the wage claimant; Rick W. Curson, owner of a business that retails and wholesales vehicles; and Gerhard Taeubel, Agency Compliance Specialist.

Respondent called as witnesses: Ann L. Swanger and Luther M. Swanger, Respondents; and Shawn T. Carey and Frank Caldwell, friends of Respondents who assisted Respondents in the operation of their business.

Administrative exhibits X-1 to X-19, Agency exhibits A-1 to A-5, and Respondents' exhibits X-10 to X-16 were offered and received into evidence. The record closed on April 21, 1999.

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 April 29, 1998, Claimant filed a wage claim with the Agency. He alleged that Respondent Ann L. Swanger employed him and failed to pay wages earned and due to him.

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

3) Claimant filed his wage claim within the statute of limitations.

4) On October 16, 1998, the Agency served on Respondent Ann L. Swanger Order of Determination 98-105 based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent Ann L. Swanger, dba MTR Investments, owed a total of \$3,524.25 in unpaid wages based on Claimant having worked 803.5 hours between November 27, 1997, through March 14, 1998, and only having been paid \$1,200, plus \$1,401.60 in civil penalty wages and interest, and required that, within 20 days, Respondent either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

5) On November 5, 1998, Respondent Ann L. Swanger, through counsel, filed an answer and requested a hearing in this matter. In her answer, she admitted that “a person known as Lane B. Hampton” sold automobiles for Respondent, and alleged the affirmative defenses that Claimant was an independent contractor and that Respondent was financially unable to pay the unpaid wages and penalty alleged in the Order of Determination.

6) On March 1, 1999, the Agency filed a “Request For Hearing” with the Hearings Unit.

7) On March 2, 1999, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and the Claimant stating the time and place of the hearing as March 30, 1999, at 9:00 a.m., in Eugene, Oregon. Together with the Notice of Hearing, the forum sent a document entitled “Summary 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 839-050-000 to 839-050-0440.

8) On March 2, 1999, the Agency moved for a discovery order requiring Respondent to produce certain documents, accompanied by a letter setting out the Agency’s unsuccessful attempts to obtain the documents by informal means.

9) On March 2, 1999, the Agency mailed its Request for Hearing to Respondent.

10) On March 3, 1999, the ALJ sent Respondent and the Agency a letter denoting the timeline for responding to the Agency’s motion.

11) On March 10, 1999, the ALJ issued a discovery order requiring Respondent to produce the documents requested by the Agency in its motion for a discovery order.

12) On March 11, the Hearings Unit received a response from Respondent with regard to the Agency’s motion for a discovery order indicating that Respondent had provided some of the requested documents and objecting to the production of

Respondent's telephone and electric bills during the period of Claimant's alleged employment on the basis of relevance.

13) On March 11, 1999, the ALJ modified the discovery order. The ALJ required Respondent to produce all documents listed in the discovery order, to the extent they existed, and directed the Agency to provide the forum with a statement of relevance showing how those documents were reasonably likely to produce relevant information.

14) On March 16, 1999, the ALJ issued a case summary order requiring the Agency and Respondent each to submit a list of witnesses to be called, copies of documents or other physical evidence to be introduced, a statement of any agreed or stipulated facts, and, by the Agency only, any damage calculations. The ALJ ordered the participants to submit case summaries by March 24, 1999, and notified them of the possible sanctions for failure to comply with the case summary order.

15) On March 16, 1999, the Hearings Unit received a statement from the Agency indicating that Respondent's telephone and electric bills were relevant based on Respondent's affirmative defense of inability to pay wages. The ALJ issued a discovery order in response that required Respondent to produce these documents.

16) On March 25, 1999, Respondent moved for a postponement of the hearing based on Respondent Ann L. Swanger's pending dental surgery set for March 29. Respondent's counsel indicated he had only learned of this surgery on March 24, that Respondent Swanger was scheduled to have all the teeth of her lower jaw removed, and that additional surgery would be done in the days following the initial surgery, making it extremely difficult for her to communicate and attend the hearing presently set for March 30.

17) On March 24, 1999, the Agency submitted its case summary with attached exhibits.

18) On March 25, 1999, Respondent submitted its case summary with attached exhibits.

19) On March 29, 1999, the ALJ granted Respondent's motion for postponement for good cause, and rescheduled the hearing for April 16, 1999. At the same time, the ALJ issued an Amended Notice of Hearing.

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

21) Pursuant to ORS 183.415(7), the ALJ explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

22) At the start of the hearing, the ALJ, on his own motion, excluded witnesses pursuant to OAR 839-050-0150(3). Respondent's counsel moved to allow Luther M. Swanger, Respondent Ann L. Swanger's husband, to remain in the hearing room throughout the hearing, representing that he was a co-owner of MTR Investments, that he was aware of a number of transactions involving Claimant that Ann L. Swanger had no direct knowledge of, and that Respondent Ann L. Swanger's case would be prejudiced if Luther M. Swanger could not be present during the hearing to assist Respondent Ann L. Swanger's counsel. The ALJ initially denied the motion. The Agency then moved to amend the Order of Determination to name Luther M. Swanger as an additional Respondent, based on the representation of Respondent's counsel that Luther M. Swanger was a co-owner of MTR Investments. Respondent did not object, and the ALJ granted the amendment. As a result, Respondent's motion became moot. Subsequently, Respondents stipulated that Ann L. Swanger and Luther M. Swanger both had a financial interest in MTR Investments at all times material herein.

23) At the start of the hearing, Respondents stipulated that Lane Hampton, the Claimant who was present at the hearing, was the “Lane B. Hampton” whom Respondent Ann L. Swanger referred to in her answer as having “sold automobiles for Ann L. Swanger dba MTR Investments.”

24) By 5 p.m. on Friday, April 16, the Agency had concluded its case. Respondents had called two witnesses, but neither Respondent had testified yet. Accordingly, the ALJ recessed the hearing and, with the mutual assent of the participants, scheduled the hearing to reconvene at the same location at 10:00 a.m. on April 21, 1999.

25) On June 25, 1999, the ALJ issued a Proposed Order in this case. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions. On June 29, 1999, the Agency requested an extension of time until August 1, 1999, in which to file exceptions based on the case presenter’s work schedule and upcoming move of her personal residence. Respondents did not object, and the Agency’s motion was granted. On July 27, 1999, 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) During all times material, Respondents Ann L. Swanger (“Ann”) and Luther M. Swanger (“Luther”) did business as MTR Investments (“MTR”), a partnership located in Eugene, Oregon, and employed one or more persons to work at that business.

2) Respondents entered into the business of motor vehicle sales as a result of Luther having suffered a disabling injury while driving heavy equipment. Respondents registered MTR as an assumed business name with the Oregon Corporations Division on April 14, 1997, and obtained the vehicle dealer certificate necessary to engage in commercial sales of motor vehicles pursuant to ORS Ch. 822. Respondents began selling and detailing cars<sup>1</sup> under the assumed business name of MTR at 2800

Roosevelt, Eugene. Respondents' inventory at that time, and at all times material, consisted of "low end, cheap cars."

3) Sometime between April and October 1997, Claimant purchased a 1980 Cadillac, license AQP792, from Respondents, arranging to pay for it by means of monthly payments.

4) In October 1997, Respondents moved their business to a car lot on 650 Highway 99, Eugene. Respondents were invited to move to that location by David Minor ("Minor"), another licensed car dealer who was already selling cars at that location, but was having trouble paying the rent. After Respondents moved MTR to 650 Highway 99, they paid rent to Minor and split the utility bills for the lot with him. Minor continued to sell cars from the shared car lot until April or May 1998. Minor, like Respondents, had his own vehicle dealer certificate.

5) In October or November 1997, Claimant was behind in his car payments to Respondents. Claimant came to Respondents' car lot and talked with Luther about making up payments and purchasing a 1985 Cadillac that was for sale on Respondents' lot. While discussing his payments, Claimant told Luther that he had prior car sales experience. Luther, who had no experience in car sales prior to MTR, told Claimant that Respondents couldn't have any employees, but that Claimant could sell cars for MTR to earn money for his car payments. Luther offered, and Claimant agreed, that Claimant would be paid for sales on the following commission schedule: \$50 when Respondents' profit was \$1-\$500; \$100 when Respondents' profit was \$501-\$999; and \$150 when Respondents' profit was \$1000 or more. Claimant and Luther did not enter into a written employment agreement. There was no discussion concerning how long Claimant could sell cars for Respondents.

6) Claimant began selling cars for Respondents at Respondents' lot in mid-November 1997, and continued to do so through March 7, 1998. Claimant only sold cars that were on display in Respondents' lot.

7) At the time of filing his wage claim, Claimant completed a calendar (WH-127) provided by Bureau of Labor and Industries showing that he had worked a total of 803.5 hours for Respondents between November 27, 1997 and March 14, 1998, and that he had worked every day in this time period except for December 19th and 25th, 1997, and January 1st and 2nd, 1998. Claimant's WH-127 further shows that, with the exceptions of December 19, 24-25, and 31, 1997, and January 1-2, 1998, Claimant worked 8 to 9 hours every day of the week from Monday through Saturday.

8) During the time that Claimant sold cars for Respondents, Respondents' car lot was open from 9 a.m. to 5 p.m., seven days a week. These hours were set by Respondents. Claimant was free to leave for varying amounts of time and different times of the day without having to first obtain Luther's permission. Claimant often came to work late or left early. Claimant did not work every Sunday, and on the Sundays he did work, he often worked a very short period of time.

9) Respondents did not keep a written record of the hours and dates that Claimant sold cars at Respondents' lot.

10) Claimant did not create a contemporaneous record of the hours and dates he sold cars at Respondents' lot.

11) Claimant and Luther maintained a written record showing the cars sold by Claimant, the week in which they were sold, and how much commission Claimant received for each sale.

12) After obtaining the approval of Minor and Luther, Claimant also sold cars for Minor that were displayed on the shared car lot during the period of time that he sold

cars for Respondents. Claimant only sold as many as four cars in total for Minor. There was no evidence presented concerning the number of hours Claimant spent selling cars for Minor.

13) Respondents determined the selling price for each car in their inventory. Claimant's only opportunity to make a profit was the volume of cars he sold. Claimant invested no money in Respondents' business. Claimant did not use any of his own equipment or supplies in selling Respondents' cars. Claimant did not have a vehicle dealer certificate while selling cars for Respondents.

14) Claimant wanted to be paid his commissions in cash, and Luther paid Claimant the commissions he had earned on the same day that Claimant made the sale that generated the commission.

15) Because Luther had no prior experience in car sales, he relied on Claimant to fill out the appropriate paperwork after each sale and did not give Claimant instructions as to sales techniques.

16) The skills Claimant used to sell cars for Respondents were sales skills and the ability to complete the paperwork required by law. Claimant's sales efforts were solely directed to customers who came to Respondents' lot of their own volition.

17) Shawn Carey, a good friend of Luther's, moved into a "fifth wheel trailer" parked immediately behind MTR's office building on December 2, 1997, and lived in that trailer continuously until April 1998. During the time period that Claimant sold cars for Respondents, Carey performed various odd jobs for Respondents, including constructing an awning, grounds maintenance, painting, and minor car repair. He seldom left MTR's lot during business hours. Carey also had a set of keys to the lot and opened the lot when Luther was not there at 9 a.m. Carey was frequently able to observe who was present on the lot and overheard conversations on the lot between

Luther and Claimant. At one point, Claimant told Carey that he made his own hours. Carey still lives in a trailer parked behind MTR's office building, although he now owns the trailer and pays rent to the owner of MTR's lot.

18) Frank Caldwell is a good friend of Luther who "hung out all day" helping Luther as a friend, starting the third week in January 1998 and continuing throughout the remainder of time that Claimant sold cars for Respondents. Caldwell lived in a motor home at Swanger's house during January and February 1998. Because of his association with Luther, Caldwell frequently had an opportunity to observe Claimant's presence, or lack of presence, at the MTR lot from the third week of January 1998 through March 7, 1998.

19) Rick Curson is the owner of Sierra Truck and Auto Sales and used Respondents' detailing service during the time Claimant sold cars for Respondents. During that time, he visited Respondents' lot an average of twice a week, at different times of the day, for 15 minutes each time, and observed Claimant selling cars on Respondents' car lot on almost all of those occasions. He called Respondents' business at different times of the day, and Claimant answered the phone about half the time.

20) Luther was present at MTR's lot during the majority of Respondents' business hours.

21) Claimant's last day of work was March 7, 1998. He was unable to work after that because he was in jail.

22) The Agency provided nine "Statements of Transaction" that document some of Claimant's car sales for Respondents. These sales occurred on 11/28/97, 11/28/97, 12/26/97, 12/30/97, 1/31/98, 2/5/98, 2/6/98, 2/7/98, and 2/28/98. All of these dates fall on Tuesday, Thursday, Friday, or Saturday.

23) Claimant was paid, directly or indirectly, a total of approximately \$3,695 by Respondents in compensation for his car sales for Respondents.<sup>2</sup>

24) On his wage claim form, Claimant stated that Respondents had only paid him "\$1200 – possibly less; if more not much."

25) Curson was a credible witness.

26) Although Carey and Caldwell were both good friends with Luther, their natural bias did not materially affect their testimony. It was apparent from their demeanor that both took the proceeding seriously. Both were articulate in their testimony and did not try to hide the extent of their relationship with Luther. Their testimony was internally consistent, consistent with one another, and consistent with Luther's. Although Taeubel, the Agency's compliance specialist, testified that Carey told him during his investigation of Claimant's wage claim that he couldn't estimate Claimant's hours because he worked in another area at the car lot and couldn't see Claimant, the forum is convinced, based on the evidence presented at the hearing, that Carey was able to observe whether or not Claimant was present at MTR's lot at least part of each day. Finally, in evaluating Carey's and Caldwell's testimony, the forum found it significant that Claimant was not called as a rebuttal witness to address the testimony of either witness. The forum has credited their testimony whenever it conflicted with Claimant's testimony.

27) Luther Swanger was an unsophisticated witness who testified in a straightforward, nonevasive manner. Unlike Claimant, he had a direct recollection of material events and answered questions directly, without hesitation or qualification. He freely admitted that he did not maintain any record of Claimant's dates and hours worked. The only major inconsistency in his testimony was his statement that he always opened the lot in the morning, contrasted with his statement during cross-

examination that Carey opened the lot when he and Ann were gone. This inconsistency, however, was not sufficient to discredit his testimony as a whole, and the forum has credited his testimony whenever it conflicted with Claimant's testimony.

28) Ann Swanger's testimony was credible. However, the forum relied on it to a limited extent because she did not witness most of the material events.

29) Claimant was not a credible witness. The forum was troubled by his selective memory. For example, he testified that he relied on his memory to determine the amount of money Respondents owed him, but was conveniently unable to recall whether or not he had been paid for certain transactions that were written down in the record he and Luther jointly maintained. The forum was even more troubled by his answers to questions directed at him by Respondents' counsel and the ALJ. On cross-examination, he repeatedly failed to respond to straightforward questions in a direct manner, and instead replied with a series of nonresponsive and evasive answers.<sup>3</sup> Claimant's testimony contained internal inconsistencies regarding material facts that are impossible to ignore. For example, he testified that he sold fewer than 20 cars for Respondents, yet Exhibits R-10, R-11, R-12 and A-4 show that he sold at least 30. In particular, he testified that Exhibits R-10, R-11, and R-12 were his handwritten record of cars he sold, yet those documents contained no reference to seven car sales referenced in Statements of Transaction that he himself created and the agency offered as Exhibit A-4. He testified that he sold "1-2" cars and "not more than 4" for David Minor. He testified that his first day of work was November 27, 1997, but his own handwriting on R-10 shows that he sold a car in the week ending "11/21/97. His WH-127 shows he worked through March 14, 1998, contrasting with his testimony that he did not work after March 7, 1998, because of his incarceration. He wrote on his wage claim form that he had only been paid \$1200 by Respondents, yet admitted at the

hearing that he had been paid at least \$1750. Finally, Claimant has had four felony convictions in the last 15 years that reflect adversely on his credibility.<sup>4</sup> For these reasons, the forum has discredited Claimant's testimony wherever it conflicted with other credible evidence, and in some cases, has not believed Claimant even when there was no conflicting testimony.

### **ULTIMATE FINDINGS OF FACT**

1) At all times material herein, Respondents Luther Swanger and Ann Swanger were persons doing business as MTR Enterprises in the state of Oregon, and engaged the personal services of one or more employees in the operation of that business.

2) Respondents employed Claimant from mid-November 1997 through March 7, 1998. During that time, Respondents suffered or permitted Claimant to render personal services to them.

3) Respondents and Claimant agreed that Claimant would be paid on a commission basis for all cars sold, to be calculated as follows: \$50 when Respondents' profit was \$1-\$500; \$100 when Respondents' profit was \$501-\$999; and \$150 when Respondents' profit was \$1000 or more.

4) The state minimum wage during 1997 was \$5.50 per hour, and during 1998 was \$6.00 per hour.

5) While employed by Respondents, Claimant generated a total of \$3,695 in commissions<sup>5</sup> and was paid a total of \$3,695.

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

7) The forum is unable to compute what Claimant would have earned, had he been paid state minimum wage, due to a lack of sufficient reliable evidence to determine the dates and hours that Claimant worked.

## **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 652.405. During all times material herein, Respondents employed Claimant.
- 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) At times material, ORS 652.140(2) provided:

“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 even occurs first.”

At times material, ORS 652.025 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:

“(1) For calendar year 1997, \$5.50.

“(2) For calendar year 1998, \$6.00.”

While employed by Respondents, Claimant earned and was paid a total of \$3,695 in commissions.<sup>6</sup> There were no wages due Claimant at the time he ceased employment with Respondents.

- 4) Under the facts and circumstances of this record, and according to the law applicable to this matter, the wage claim and Agency’s Order of Determination filed against Respondents, as amended at hearing, are hereby dismissed.

## **OPINION**

## INTRODUCTION

The Agency alleged in its Order of Determination, as amended at hearing, that Claimant was employed by Luther and Ann Swanger as a car salesman from November 27, 1997, through March 14, 1998, that he worked a total of 803.5 hours and was only paid \$1,200, and that he is entitled to \$3,524.25 in unpaid wages and \$1,401.60 as penalty wages. By way of defense, Respondents alleged that Claimant was an independent contractor and that Claimant was paid all money due to him in connection with his employment with Respondents. Respondents also alleged that they were financially unable to pay Claimant the wages alleged in the Order of Determination, but did not provide any evidence at hearing to support that defense.

## EMPLOYEE OR INDEPENDENT CONTRACTOR?

This forum utilizes an “economic reality” test to determine whether a claimant is an employee or independent contractor under Oregon’s minimum wage and wage collection laws. *In the Matter of Francis Bristow*, 16 BOLI 28, 37 (1997); *In the Matter of Geoffroy Enterprises*, 15 BOLI 148, 164 (1996). The focal point of the test is “whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which she renders her services.” *Geoffroy*, at 164. The forum considers five factors to gauge the degree of the worker’s economic dependency, with no single factor being determinative. These factors are:

- “(1) The degree of control exercised by the alleged employer;
- “(2) The extent of the relative investments of the worker and alleged employer;
- “(3) The degree to which the worker’s opportunity for profit and loss is determined by the alleged employer;
- “(4) The skill and initiative required in performing the job;
- “(5) The permanency of the relationship.” *Bristow*, at 37, *citing Geoffroy*, at 164.

In this case, the preponderance of credible evidence on the whole record establishes the following:

**A. The degree of control exercised by the alleged employer.**

Respondents exercised minimal control over Claimant. Although Claimant was at work the majority of Respondents' business hours, he was free to come and go as he pleased. Respondents controlled the price at which Claimant could sell each car, but exercised very little control, if any, over the means by which Claimant used to sell the cars, relying heavily on Claimant's prior car sales experience due to their own lack of experience. Claimant was even free to sell cars for David Minor, the other certified vehicle dealer who displayed cars on the same lot, and did sell several cars for Minor. On the other hand, Claimant could only sell cars during the business hours set by Respondents.

**B. The extent of the relative investments of the worker and alleged employer.**

Claimant's only investment was his time. Respondents rented the lot, paid the utility bills, had the vehicle dealer certificate required to sell cars on a commercial basis, and owned all the inventory.

**C. The degree to which the worker's opportunity for profit and loss is determined by the alleged employer.**

Since Claimant had no expenditures, he could earn no profit and suffer no loss. His only opportunity to earn more than minimum wage was through the volume of cars he could sell, as he had no opportunity to negotiate the price of each car sold. There is no evidence that he had any way to attract more customers to Respondents' lot in order to increase his sales volume. Given Claimant's lack of control over customer volume or the sales price of cars, Claimant's situation is clearly "far more closely akin to wage earners toiling for a living, than to independent entrepreneurs seeking a return on their risky capital investments." *Reich v. Circle C. Investments, Inc.*, 998 F.2d 324, at 328

(5<sup>th</sup> Cir 1993), *citing Brock v. Mr. W. Fireworks, Inc.*, 814 F.2d 1042, at 1051 (5<sup>th</sup> Cir.), *cert. denied*, 484 U.S. 924, 108 S.Ct. 286, 98 L.Ed.2d 246 (1987).

**D. The skill and initiative required in performing the job.**

To perform his job, Claimant had to possess the verbal communication skills required to negotiate and consummate a car sale. Presumably, this involved a basic knowledge of cars. In addition, he had to be able to read and write sufficiently well to fill out a "Statement of Transaction" for every car that he sold. The initiative required consisted of the same initiative ordinarily required of "commission" salespersons in any profession whose solicitation attempts are limited to customers who shop, of their own volition, at the employer's business.

**E. The permanency of the relationship.**

Although the relationship only lasted four months, there is no indication that either Claimant or Respondents considered it other than indefinite at any time between mid-November 1997 and March 7, 1998.

**F. Conclusion.**

Although Claimant had extensive control over how he sold cars to customers who came to look at cars displayed on Respondents' lot, Claimant had no means of attracting a higher volume of customers to the lot to increase his potential sales commissions, or "profit." The relationship between Claimant and Respondents may have been of short duration, but that was only because Claimant's incarceration made it impossible for him to work. Claimant had no investment in Respondents' business, and the skill and initiative required of him was no more than that required of other commission-paying jobs, a great variety of which are performed by workers in an employment relationship. *Bristow*, at 39. Although Claimant did not work the hours claimed, he was present at Respondents' lot, selling cars, approximately 60% of the

time that Respondents' lot was open, Monday through Sunday. Claimant was paid almost \$3700 for his work, and there is no reliable evidence that Claimant earned money by any other means from mid-November 1997 through March 7, 1998, except for the few cars he sold for David Minor. Clearly, Claimant's "economic reality" in this time period rested on the number of hours he worked and volume of cars he sold at Respondents' business. Finally, although Respondent Luther Swanger testified that he considered that Claimant was an independent contractor, and Claimant agreed to be paid solely on a commission basis, intent is not a controlling factor in determining whether an employment relationship exists. *Id.*, at 40. Considering each factor of the economic reality test, I conclude that Claimant was economically dependent upon Respondents' business and that he was an employee of Respondents.

**WERE THERE ANY UNPAID WAGES DUE CLAIMANT AT THE TIME OF HIS TERMINATION?**

To establish a prima facie case for wage claims, the Agency must establish the following elements: (1) Respondents employed Claimant; (2) Claimant's agreed upon rate of pay, if it was other than minimum wage; (3) Claimant performed work for which he was not properly compensated; and (4) the amount and extent of work performed by Claimant. *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 260 (1999).

In wage claim cases, the claimant has the burden of proving that he performed work for which he was not properly compensated. *In the Matter of Graciela Vargas*, 16 BOLI 246, 253-54, *citing Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). This burden can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. *Id.*, at 254.

Where an employer produces no records of hours or dates worked by the claimant, the commissioner may rely on evidence produced by the Agency, including credible testimony by the claimant, "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.” *In the Matter of Diran Barber*, 16 BOLI 190, 196-97 (1997), *citing Anderson* at 687-88.

The forum has already determined that Respondents employed Claimant, and that Claimant was an employee, and not an independent contractor. The second element, Claimant’s agreed upon wage rate, is undisputed. Respondents and Claimant both agree that Claimant agreed to work on the commission basis set out in Finding of Fact – The Merits #5. Employers are free to compensate employees solely by commission, so long as the commission rate does not result in an employee earning less than minimum wage for all hours worked. *In the Matter of Mary Stewart-Davis*, 13 BOLI 188, 198 (1994), *aff’d without opinion, Stewart-Davis v. Bureau of Labor and Industries*, 136 Or App 212, 901 P2d 268 (1995). Consequently, Claimant is only due wages if the amount of commissions he received is less than the wages he would have received, computed at minimum wage, for all the hours he worked, or, in the alternative, if he earned more in commissions than the wages he would have received, computed at minimum wage, for all hours he worked, and he was not paid for all his commissions.

Based on the credible testimony of the Swangers and Claimant’s corresponding lack of credibility, the forum has already concluded that Claimant was paid all the commissions he earned. The remaining issue, then, is how many hours Claimant worked, and whether those hours, multiplied by the minimum wage, add up to a greater sum than the commissions Claimant received. Since Respondents produced no records of hours or dates worked by the Claimant, the commissioner may rely on credible evidence produced by the Agency to establish the amount and extent of work performed. *Barber*, 16 BOLI at 196-97. The problem for the Agency in this case is that there was no credible evidence produced at the hearing that the forum considered

sufficiently reliable to form a basis for calculating Claimant's hours.<sup>7</sup> The Agency's case rested on Claimant's testimony, the documents created by the Claimant, and Claimant's testimony concerning those documents. The forum's assessment of Claimant's credibility is stated in some detail in Proposed Finding of Fact – The Merits #29. In brief, Claimant's testimony and the documents he created concerning his hours worked were unreliable, unpersuasive, and simply unbelievable when evaluated in the light of credible testimony from Respondents' witnesses and Claimant's equally incredible testimony concerning how much he was paid. Neither his testimony or the WH-127 forms a basis for drawing a "just and reasonable inference" as to the amount of Claimant's work that would justify an "approximate" award of damages. *Id.*

This forum has previously declined to "speculate or draw inferences about wages owed based on insufficient, unreliable evidence." *In the Matter of Burrito Boy*, 16 BOLI 1, 12 (1997). The forum follows the same path in this case, and will not attempt to compute dates and hours worked by Claimant or wages earned by Claimant, calculated at minimum wage. As a result, despite Respondents' failure to create and maintain a record of hours worked by Claimant as required by statute,<sup>8</sup> the Agency's case must fail due to its inability to prove the third and fourth elements of its prima facie case.<sup>9</sup>

## **AGENCY EXCEPTIONS**

The Agency did not except to the Proposed Order's conclusion that Claimant was not owed any unpaid wages by Respondents. Instead, the Agency filed two exceptions concerning the forum's methodology in reaching that conclusion.

The Agency's first exception concerned the forum's reference, in Proposed Finding of Fact – The Merits #29, that Claimant had created a false document showing that he had fully paid for a vehicle purchased from Respondents. At hearing, Respondents offered R-15, which consisted of 18 pages, each entitled "Statement of

Transaction.” Each page purported to represent a car sale made by Claimant while in Respondents’ employ. Although these documents fit within the scope of a Discovery Order issued on March 10, 1999 in response to the Agency’s motion,<sup>10</sup> Respondents did not provide them to the Agency prior to the redirect examination of Luther Swanger by Respondents’ counsel. Over the Agency’s objection, the ALJ admitted R-15 for the limited purpose of showing the basis of certain checkmarks made by Respondents on R-10, R-11, and R-12.

In the Proposed Order, the ALJ cited Ann Swanger’s testimony in concluding that Claimant had created a false document showing that the 1980 Cadillac he purchased from Respondents was paid in full on January 6, 1998. This document was part of R-15. The Agency excepted to this conclusion on the basis that it used R-15 for a purpose outside the limited purpose for which it was admitted and because Respondents had not provided it pursuant to the ALJ’s March 10, 1999 Discovery Order. Upon review, the record clearly shows that Ann Swanger’s testimony concerning Claimant’s creation of the objectionable document was not based on her independent recollection, but was given while the document was in front of her and she was reading from it. Based on both reasons cited by the Agency, any testimony by Ann Swanger derived from her reading the objectionable document, other than testimony concerning the checkmarks, will not be used by the forum to impeach Claimant. Finding of Fact – The Merits #29 has been modified in response to this exception.

The Agency’s second exception involves the ALJ’s calculation of the approximate number of hours worked by Claimant and subsequent calculation of Claimant’s earnings, based on the state minimum wage. The ALJ’s calculation was based on Claimant’s total number of hours claimed, multiplied by 60%.<sup>11</sup> The Agency contended that these calculations were purely speculative, that the ALJ should not have performed

the calculations at all when the Agency failed to meet its burden of proof as to the number of hours worked, and that engaging in additional analysis where none was required might confuse employers and employees. Upon reflection, the forum is in agreement with the Agency. This Order has been modified to reflect that agreement.

### **ORDER**

NOW, THEREFORE, as Respondents have been found to have paid Claimant all wages due and owing by the date of his termination from Respondents' employment, the Commissioner of the Bureau of Labor and Industries hereby orders that Order of Determination 98-105 against Anne L. Swanger, dba MTR Investments, as amended at hearing to include Luther M. Swanger, also dba MTR Investments, as a Respondent, is hereby dismissed.

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<sup>1</sup> Claimant sold automobiles, vans, and pickup trucks at Respondents' lot. The forum uses "cars" in a generic sense to refer to all three types of motor vehicles.

<sup>2</sup> The forum arrived at this total based on the following: \$1750 that Claimant admitted being paid; \$700 that Claimant couldn't "recall" if he was paid but Swangers testified he had been paid; \$600 for sales that appear in A-4, pp. 2, 4-8, but not on R-10, R-11, or R-12, with Claimant's signature and Luther's initials; \$600 for the sales of four vehicles with \$150 commissions in Claimant's last two weeks of employment with Luther ('84 Honda, '91 Chev Lumina, '88 Jeep, '86 Buick Skylark), \$300 of which was paid by Luther to Dorinda Brown, at Claimant's request.

<sup>3</sup> An prime example of this sort of testimony during cross examination is as follows:

Q. "Looking at that one particular vehicle, at A-4, page one of nine. It's an '86 Olds Cutlass."

A. "Umhum."

Q. "Do you remember selling that car?"

A. "Yeah, I do."

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Q. "And did you get paid for that car?"

A. "It's possible."

Q. "You don't know if you got paid for it?"

A. "I'm pretty sure I may have."

Q. "You're pretty sure you may have? Is that your answer?"

A. "Yes."

Q. "Did you keep some kind of records of when you got paid and when you didn't get paid?"

A. "Not exactly to the letter, but yeah, I kept some sort of a little something or other for."

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Q. "Your testimony, if I heard you correctly, was that there were times when you weren't being paid on some of the cars you sold for MTR, at \$50 increments. Is that right?"

A. "I believe."

Q. "You did not get paid on some of those cars?"

A. "I believe there may have been a time; I'm not sure."

Q. "Well, did you get paid on most of the cars that you sold?"

A. "I'm sure I did."

Q. "How many cars did you sell?"

A. "I don't know."

Q. "Approximately."

A. "I don't know."

Q. "Well, was it more than ten?"

A. "Could be."

Q. "More than twenty?"

A. "No."

Q. "You sold fewer than 20 cars?"

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A. "I'm sure."

Q. "Did you get paid on all of those cars--the ones that you sold?"

A. "Same question. Um, I may have, yeah."

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<sup>4</sup> See, e.g., *In the Matter of Marvin Clancy*, 11 BOLI 205, 210-11, 213-14 (1993); *In the Matter of Dan Cyr Enterprises*, 11 BOLI 172, 177, 179 (1993).

<sup>5</sup> While this figure may not be exact, due to the difficulty in deciphering the records on which the figure is based, the forum is certain that Claimant was paid all the commissions he had coming to him.

<sup>6</sup> *Id.*

<sup>7</sup> Although the forum finds Respondents' estimate that Claimant worked "60%" of the hours he claimed more credible than the hours recorded on Claimant's WH-127, the forum also concludes that this estimate was insufficiently reliable on which to base an approximate award of damages, assuming *arguendo* that calculations based on that estimate would have resulted in a back pay award to Claimant.

<sup>8</sup> ORS 653.045 provides, in pertinent part:

"(1) Every employer required by ORS 653.025 or by any rule, order or permit issued under ORS 653.030 to pay a minimum wage to any of the employer's employees shall make and keep available to the Commissioner of the Bureau of Labor and Industries for not less than two years, a record or records containing:

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"(b) The actual hours worked each week and each pay period by each employee."

<sup>9</sup> Employers should not read this opinion as an open invitation to violate ORS 653.045 as a means of avoiding wage obligations to employees. Furthermore, 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.

<sup>10</sup> See Findings of Fact – Procedural ##s 8, 11, and 13.

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<sup>11</sup> The figure of “60%” represented Respondents’ estimate of the number of hours Claimant actually worked, compared to the number he claimed on his WH-127.