BEFORE THE ARKANSAS DEPARTMENT OF LABOR

ARKANSAS DEPARTMENT OF LABOR,
LABOR STANDARDS DIVISION **PETITIONER**

Vs. **CASE NO. WH2009-009**

PINNACLE CAR SERVICES, INC. **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor on July 15, 2009. Pinnacle Car Services has appealed the finding of the Labor Standards Division of the Arkansas Department of Labor (hereafter referred to as the "Agency") that Pinnacle violated *Arkansas Code Annotated §§ 11-4-210 (Supp. 2007)* and 11-4-211(a)(Supp. 2007) and 11-4-217 by failing to pay some of its employees the State minimum wage, failing or refusing to pay some of its employees for work in excess of forty (40) hours in a work week at the statutorily required rate, and failing to keep wage and hour records as required by administrative regulations and applicable statutory law.

The Agency was represented by the Honorable Daniel Faulkner. Pinnacle Car Services was represented by its owner/operator, the Honorable Jeff Wright. The Agency presented five live witnesses, including Connie French, a former driver for Pinnacle, Jennifer Wallingford, Pinnacle's former dispatcher and client service manager, and Ryan Biggs, a former driver and fleet manager. Heidi Massey, an ADOL investigator and Tom Hudson, ADOL's Labor Standards Supervisor also testified on behalf of the agency. Jeff Wright, the owner and operator of Pinnacle Car Services, Inc., and Jessie Flowers, Pinnacle's Operations Manager, appeared as witnesses on the respondent's behalf.

FINDINGS OF FACT

Pinnacle Car Services, Inc. is a transportation and limousine company that started in

2005 with one automobile and one employee. The business expanded to approximately 5 vehicles in 2006, and eventually grew to 30-35 "associates" or employees. The agency received a complaint regarding Pinnacle's payment policies for its employees, and an investigation was commenced by the Labor Standards Division of the Arkansas Department of Labor. Although Pinnacle denied any intentional underpayments or other violations, the agency issued a Notice of Violation to Pinnacle on January 30, 2009, which determined that Pinnacle had underpaid 45 of its employees a total of $7,407.22 in minimum wages and four (4) other employees $2,667.30 in overtime wages, and assessing a penalty of $2,450.00. Pinnacle filed a timely request for an administrative appeal of the determination and Notice.

The parties have stipulated that, at all relevant times, Pinnacle Car Services had a written policy that required its payroll personnel to deduct a 30 minute lunch break period from the pay for all employees scheduled to work at least 6 hours and to deduct 1 hour for employees scheduled to work 8 or more hours. The parties also stipulated that the written policy was not applicable when an associate provided Jessie Flowers with specific notice that an associate was not able or allowed to actually take the required lunch break.

The Agency established through the testimony of its live witnesses and supporting documents that the nature of the employees' work required that the employees work 6-8 hour shifts without a lunch break, and that Pinnacle routinely refused to pay these employees for a full 6-8 hour shift per the company's written policy. The agency made a *prima facie* showing that through these improper deductions Pinnacle reduced the wages of a total of 48 of its employees to below the minimum wage. This showing by the agency shifted the legal burden to Pinnacle to come forward with evidence of the precise amount of work actually performed by each employee for the wage that was paid, or with some other evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. *Id.*

With regard to the overtime claims of Jennifer Walingford and Ryan Biggs, there is no dispute that both employees were paid based on at least a 50-hours work week, and that 5 hours pay was automatically deducted for lunch breaks. The agency presented Pinnacle's own payroll records as well as the testimony of investigator Heidi Massey and that of both Walingford and Biggs to prove that the two were not paid overtime for the hours they worked in excess of 40 hours, shifting the burden to Pinnacle to show some legal justification for failing or refusing to pay the overtime wages. *See Fife v. Harmon,* 171 F.3d 1173, 1176 (8th Cir. 1999). Pinnacle presented some evidence suggesting that Walingford and Biggs were "salaried employees" for whom no overtime pay was required.

Similarly, investigator Massey testified that Pinnacle employees Anthony Fine and Larry Simrell, who both served as car and limousine drivers, were not properly compensated for overtime hours. Ms. Massey testified and produced some documentary evidence that Pinnacle Car Services did not keep any record of the actual hours worked by its limousine drivers, and that she was forced to calculate limousine hours from "trip sheets" which showed only the only pickup and drop-off times for limousine customers. Ms. Massey identified several weeks in which combined car and limousine hours for Mr. Fine and Mr. Simrell exceeded 40 hours for the work week.

Finally, the agency made a *prima facie* showing that Pinnacle underpaid employees Jason Ashford by $54.69, Joshua Griffith $75.56, "Jakey" the sum of $635.94, Richard Kennedy by $503.39, John Saunders by $196.91, and Candace Wright by $300.00. These calculations/amounts are based on the observation by Heidi Massey, an investigator for the DOL, of time sheets for these employees that were not accompanied by any corresponding pay stub records. Although Pinnacle failed to produce any pay records during the DOL investigation or at the hearing, it did introduce some testimony that these employees were actually paid for

the time they worked, and requested permission to provide post-hearing documentation to substantiate this claim.

The agency successfully established that Pinnacle owes a total of 45 of its employees $7407.22 in minimum wage underpayments, $2667.30 in overtime back wages, and a penalty of $2,450.00 for all violations.

CONCLUSIONS OF LAW

Because the overtime claims presented here are in the nature of work performed for which inadequate compensation was made, the issue may be resolved by resorting to case law interpreting the federal Fair Labor Standards Act upon which our State minimum wage law is based. See ADL Regulation 010.14-112. Federal law provides that an employee has carried his burden of proving he has worked hours without proper compensation if he produces evidence to show the amount and extent of his work as a matter of "just and reasonable inference." *Anderson v. Mt. Clements Pottery Co.,* 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed 1515 (1946). The evidence 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. *Id.*

As previously noted, the agency made a *prima facie* showing Pinnacle made improper deductions for lunch breaks that were not actually taken by its workers, thereby reducing some of the employees' wages to below the minimum wage. Although Pinnacle presented some evidence that it did not deduct for a lunch break in those instances in which an employee provided Pinnacle's Operations Manager, Jessie Flowers, with notice that the employee had been unable to take his lunch break, this evidence was not sufficient to meet the employer's burden of proving the precise amount of work actually performed by each affected employee. Pinnacle also failed to produce sufficient evidence to negative the reasonableness of the

inference to be drawn from the employees' testimony and other evidence that the lunch break was always deducted. *Id.* *See Fife v. Harmon,* 171 F.3d 1173, 1176 (8th Cir. 1999).

To rebut the inference raised by the agency's proof that Pinnacle failed to pay employees Jennifer Walingford and Ryan Biggs for hours the employees worked in excess of 40 hours per week, the employer was required to prove that Pinnacle was somehow exempt from overtime pay. Pinnacle presented some evidence suggesting that Walingford and Biggs were "salaried employees" for whom no overtime pay was required. This evidence, which consisted of the testimony of Jeffrey Wright and a letter stating that Biggs would become a flat-rate salaried employee on August 7, 2007, was not sufficient to carry Pinnacle's burden of proving that either Biggs or Walingford was employed in a "bona-fide administrative, executive or professional capacity that falls within the state minimum wage exemption found at *A.C.A. 11-4-203(3)(A)* and *ADL Regulation 010.14.106(b)(1)*. On the contrary, the testimony of Walingford and Biggs demonstrated that neither of the exemptions would apply.

The agency also successfully proved that Pinnacle employees Anthony Fine and Larry Simrell were not paid for hours in excess of 40 hours per work for combined car and limousine service the two men provided for the company. To rebut the overtime claim, Pinnacle would have had to prove the precise amount of work performed by Fine and Simrell, or come forward with concrete evidence to negative the reasonableness of the inference to be drawn from the "trip sheets" showing limousine "pick-ups" and "drop-offs" in addition to the hours the two men worked while driving the company's other vehicles. *Anderson v. Mt. Clements Pottery Co.,* 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed 1515 (1946). Pinnacle failed to produce any timesheet or other simultaneous record documenting actual hours worked by its limousine drivers to rebut the agency's claim.

As to the Agency's inadequate wage claim that arose from investigator Massey's

discovery of time sheets for some employees that were not accompanied by any corresponding pay stub records, Pinnacle also failed to carry its shifted burden of proof at the hearing. However, despite the fact that Pinnacle did not produce any records during the DOL investigation or at the hearing to prove it paid its employees as alleged by the agency, Pinnacle did offer testimony at the hearing that these employees were actually paid for the time they worked. Pinnacle was allowed to supplement its proof by exhibits appended to its post-hearing brief, which was received in the office of the DOL on July 23, 2009. These records show that Pinnacle paid the following amounts to the following persons during the relevant time period, which is January 2007 - May 2008:

"Rich" Kennedy was paid $247.50 on February 14, 2007,
$367.50 on March 2, 2007;
$355.00 on March 14, 2007; and
$52.13 on May 24, 2007.

Under *A.C.A. 11-4-218,* an employer who fails to pay minimum wage to an employee is liable to the affected worker for only the full amount of wages *less any amounts actually paid by the employer.* Because Pinnacle has successfully demonstrated it actually did pay wages to some of the employees named in the Agency's preliminary findings, the law will not require it pay these amounts again. Accordingly, the amount of back wages Pinnacle is required to pay is reduced by $1194.02.

THEREFORE, IT IS CONSIDERED AND ORDERED that the employer, Pinnacle Car Services shall be liable for a total sum of eleven thousand three hundred thirty dollars and thirty two cents ($11,330.50). Payment drafts in the form of company checks in the amount of $6,213.20 for minimum wage back wages, and $2,667.30 for overtime back wages shall be issued payable to the affected employees, and forwarded to the Arkansas Department of Labor, Labor Standards Division within ten (10) days of receipt of this Order. An additional check in the amount of

$2,450.00, made payable to the Arkansas Department of Labor shall also be issued and received by the Department of Labor within ten (10) days of the receipt of this Order.

IT IS SO ORDERED.

James E. Salkeld
Director of Labor

BY: _____
Danny R. Williams, Administrative Law Judge
Arkansas Department of Labor
10421 West Markham Street
Little Rock, AR 72205

Date: August 21, 2009

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

SHELBY STANTON **CLAIMANT**

Vs. **CLAIM NO. WC209-0012**

FOREST PARK MEDICAL CLINIC **RESPONDENT**

ORDER

This claim was heard August 4, 2009 at 11:00 a.m. The Claimant, Shelby Stanton appeared in person and represented himself. The Respondent appeared by its Executive Director, Ernie Dodson.

FINDINGS OF FACTS

This wage claim results from a "last paycheck" dispute between the Claimant, Shelby Stanton and the Respondent, Forest Park Medical Clinic after Mr. Stanton's employment relationship with the Respondent ended on February 28, 2009. Mr. Stanton had previously been paid at the rate of $11.00 per hour. Mr. Stanton filed his wage claim for $217.25 in unpaid wages on April 8, 2009, to which Forest Park responded on May 4, 2009. Mr. Stanton's claim was for compensation for 19.75 hours he claimed he worked from February 26th -28th, 2009. After the Labor Standards Division of the Arkansas Department of Labor had reviewed the wage claim and the response and had fully investigated the facts and circumstances that led to the dispute, Investigator Gloria Armas issued a Preliminary Wage Determination Order finding that the Claimant is not entitled to any additional compensation on his claim. Mr. Stanton requested an administrative appeal.

At the hearing on the claim, the Claimant testified that he began working for Forest Park Medical Clinic on Jun 9, 2008 in the collections department, and that he resigned on Friday, February 25, 2009, after working February 22, 23, and 24th. He stated that he received a final check of $.76 for 19.75 hours of work and that his check stub indicated $129.00 was deducted

from his pay and sent to the Office of Child Support Enforcement. Mr. Stanton was unable to substantiate which other employees worked on Friday, February 27, 2009 and admitted that he did not take any cash receipts or telephone messages that day, and did not offer any other manner in which his attendance at work could be verified.

Forest Park produced three witnesses, Veronica Bland, the office manager for Forest Park, Fretonzia Hickman, assistant office manager, and Ernie Dodson, the Executive Director of the business who all testified that the Claimant did not work on Wednesday, February 25, 2009, that he returned to work on February 26th, and that he worked his last day, a ½ day after receiving his paycheck on Friday, February 27, 2009. Ernie Dodson also testified and produced documentary evidence that Forest Park deducted $129.00 from Mr. Stanton's final check and forwarded a check for that amount to the Arkansas Child Support Clearinghouse pursuant to a Wage Withholding Order directing Forest Park to withhold $79.20 "per weekly pay period," or $158.40 "every two weeks."

CONCLUSIONS OF LAW

Federal law provides that an employee has carried his burden of proving he has worked hours without proper compensation if he produces evidence to show the amount and extent of his work as a matter of "just and reasonable inference." Anderson v. Mt. Clements Pottery Co., 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed 1515 (1946). The evidence 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. Id.

Whether the Claimant is entitled to any additional compensation in this case depends on whether he has produced enough evidence on his own behalf to lead a reasonable person to believe he worked 19.75 hours between February 26th and February 28, 2009. Because the record shows that February 28, 2009 was a Saturday, and a day on which Mr. Stanton would

not have been working, Mr. Stanton, himself testified at the administrative hearing that he worked the 19.75 hours from February 22-February 25, 2009, and Mr. Stanton was unable to identify any co-workers who were present or any verifiable work functions he performed during the period of time he stated in his Wage Claim Form, Mr. Stanton has not carried his burden of proving "the amount and extent of his work."

THEREFORE, IT IS CONSIDERED AND ORDERED that the claim of Shelby Stanton against Forest Park Medical Clinic for unpaid wages shall be dismissed, with prejudice, forthwith.

IT IS SO ORDERED.

James E. Salkeld
Director of Labor

BY: _____
Danny R. Williams, Administrative Law Judge
Arkansas Department of Labor
10421 West Markham Street
Little Rock, AR 72205

Date: August 18, 2009

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

JULIO GONZALES

vs. **CASE NO. 2009-0019**

TIM POOR dba QUALITY CONSTRUCTION AND CLEANUP

ORDER

This matter comes for hearing on this Tuesday, August 18, 2009 at the offices of the Arkansas Department of Labor. The hearing was set for 9:00 a.m. The hearing convened at approximately 9:30 a.m. Neither party has appeared for the hearing. The Claimant in this matter carries the burden of proof and his appearance is necessary to prevail.

THEREFORE, this matter is hereby dismissed without prejudice; however refilling will only be accepted under proof of good cause.

IT IS SO ORDERED.

James L. Salkeld
Director of Labor

BY:_____
Danny R. Williams
Administrative Law Judge

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

EZEQUIAL ZAMORA

vs. **CASE NO. 2009-0020**

TIM POOR dba QUALITY CONSTRUCTION AND CLEANUP

ORDER

This matter comes for hearing on this Tuesday, August 18, 2009 at the offices of the Arkansas Department of Labor. The hearing was set for 10:00 a.m. The hearing convened at approximately 10:38 a.m. Neither party has appeared for the hearing. The Claimant in this matter carries the burden of proof and his appearance is necessary to prevail.

THEREFORE, this matter is hereby dismissed without prejudice; however refilling will only be accepted under proof of good cause.

IT IS SO ORDERED.

James L. Salkeld
Director of Labor

BY:_____
Danny R. Williams
Administrative Law Judge

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

JAMES EUGENE MORRIS, JR. **CLAIMANT**

Vs. **CASE NO. WC2009-0015**

CL SMALL ENTERPRISES,
D/B/A/ PLATINUM BENEFITS **RESPONDENT**

ORDER

This claim was heard July 30, 2009 at 2:00 p.m. The Claimant, James Eugene Morris, Jr. appeared in person and represented himself. The Respondent appeared by telephone, and was represented by Chris Small.

FINDINGS OF FACTS

The Respondent, CL Small Enterprises, LLC is a foreign limited liability company doing business in the State of Arkansas under the fictitious name, Platinum Benefits. Platinum Benefits offers "a variety of Health Benefit choices to the consumer." Employees of Platinum Benefits, such as the Claimant solicited insurance sales, by telephone at the employers place of business.

Claimant began working for Platinum Benefits as a sales associate pursuant to an employment agreement he signed on January 12, 2009. Under the terms of the parties' agreement, the first week of on-the-job training would be unpaid unless the new "sales associate" sold at least $199.00 in benefits during that week. If the associate successfully sold a $199.00 benefit plan or more, the associate would be paid for 40 hours work plus a $25 –per-sale commission. During the second week of work, the associate was required to sell two $199.00 benefits plan in order to be paid for the hours worked during the second week. It is undisputed that an associate would not be paid for his 40 hours work during the first or the second week unless he met the agreed-upon sales quota for the week.

Claimant worked for Platinum Benefits during the period from January 12, 2009 through January 29, 2009. Mr. Morris filed his wage claim on February 19, 2009. Platinum Benefits filed its response on March 16, 2009. Platinum Benefits relied on its contract for its response, and does not dispute that the Claimant has not been paid for 97.5 hours of work. The Labor Standards Division entered a Preliminary Wage Determination Order on May 4, 2009, determining that Platinum Benefits failed to pay the Claimant $780.00 gross wages, pursuant to the parties contract and the provisions of Arkansas Code Annotated Section 11-4-303. Platinum Benefits requested an appeal.

At the hearing on Platinum Benefits appeal, the Morris admitted he signed a commission-only agreement before he started working for Platinum Benefits, and testified that he worked 110 hours during a three-weeks period for which he was never paid. Chris Small, owner of CL Small Enterprises, LLC and Platinum Benefits did not dispute that Morris worked for three weeks without pay, and relied on the parties contract for the business' defense. Small produced evidence that Morris worked 97.5 hours during the period of his employment and that Morris knowingly agreed to the minimum-sale requirement in the parties contract.

CONCLUSIONS OF LAW

The Arkansas Minimum Wage Act, A.C.A. Section 11-4-201 et seq., requires most employers to pay nonexempt employees a minimum wage of not less than $6.25 per hour and overtime at 1/12 times the regular rate of pay for hours worked in excess of 40 hours per work week. A.C.A. Sec. 11-4-210 and 211. The right to be paid at least minimum wage is a statutory right that may not be waived, released or contracted away. See Brooklyn v. O'Neil, 324 U.S. 697, 707 (1945)(applying federal minimum wage law); ADL Labor Standards Regulation 010.14-112.

While it is true that the Claimant did not meet the sales quotas required to trigger payment of hourly wages under the parties contract, it is not true that CL Small Enterprises, LLC d/b/a Platinum Benefits is not liable to Mr. Morris for the work Mr. Morris actually performed. In the State of Arkansas, only salespersons "involved in outside sales" are exempt from the requirement that employers pay the State minimum wage. A.C.A. 11-4-203(1)(A)(definition of "Employee" does not include an individual "employed . . . as an outside commission-paid salesperson who customarily performs his or her services away from his or her employer's premises taking orders for goods or services."). Because Mr. Morris did all his on-the-job training at the place of business of the employer, he cannot be said to have been engaged for "outside sales" within the meaning of the statute. Under the provisions of A.C.A. Sec. 11-4-210 and 211, the Claimant is entitled to compensation in the amount of $607.37 for his 97.5 hours of work at $6.25 per hour, the prevailing minimum wage.

THEREFORE, IT IS CONSIDERED AND ORDERED that the employer, CL Small Enterprises, LLC, d/b/a Platinum Benefits shall issue payment for the sum of six hundred seven dollars and thirty seven cents ($607.37). Payment drafts shall be issued to James Eugene Morris, Jr., and mailed to the Department of Labor. Payment shall be issued within ten (10) days of the receipt of this Order.

IT IS SO ORDERED.

James E. Salkeld
Director of Labor

BY: _____
Danny R. Williams, Administrative Law Judge
Arkansas Department of Labor
10421 West Markham Street
Little Rock, AR 72205

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

CLAUDE McMAHON **CLAIMANT**

vs. **CASE NO. 2009-0016**

RTT REFRIGERATION **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor on Tuesday, August 4, 2009. RTT Refrigeration has appealed any agency order that one thousand dollars ($1,000.00) in unpaid wages is owed to Claude McMahon. McMahon appeared on his own behalf. RTT Refrigeration did not appear.

FINDINGS OF FACT

McMahon filed a wage claim with the Labor Standards Division of the Arkansas Department of Labor on January 26, 2009. He claimed one thousand dollars ($1,000.00) in unpaid wages earned between December 1, 2008 and December 8, 2008. After investigation, the Labor Standards Division issued a Preliminary Wage Determination Order on May 13, 2009, finding that McMahon is owed one thousand dollars ($1,000.00). RTT Refrigeration filed an appeal of this finding on May 15, 2009.

The hearing was set for 9:00 a.m. The hearing convened at approximately 9:20 a.m. The Claimant appeared, and the Respondent, appeared not. Therefore, judgment is entered for the Claimant in the amount of one thousand dollars ($1,000.00). The Respondent is directed to issue a check payable to Mr. McMahon in the amount of one thousand dollars ($1,000.00) within ten (10) days of the receipt of this Order and mailed to the Department of Labor.

IT IS SO ORDERED.

James L. Salkeld
Director of Labor

BY:_____
Danny R. Williams
Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

LISA McMAHON **CLAIMANT**

vs. **CASE NO. 2009-0017**

RTT REFRIGERATION **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor on Tuesday, August 4, 2009. RTT Refrigeration has appealed any agency order that one thousand dollars ($1,000.00) in unpaid wages is owed to Lisa McMahon. McMahon appeared on her own behalf. RTT Refrigeration did not appear.

FINDINGS OF FACT

McMahon filed a wage claim with the Labor Standards Division of the Arkansas Department of Labor on January 26, 2009. She claimed one thousand dollars ($1,000.00) in unpaid wages earned between December 1, 2008 and December 8, 2008. After investigation, the Labor Standards Division issued a Preliminary Wage Determination Order on May 13, 2009, finding that McMahon is owed one thousand dollars ($1,000.00). RTT Refrigeration filed an appeal of this finding on May 15, 2009.

The hearing was set for 10:00 a.m. The hearing convened at approximately 10:00 a.m. The Claimant appeared, and the Respondent, appeared not. Therefore, judgment is entered for the Claimant in the amount of one thousand dollars ($1,000.00). The Respondent is directed to issue a check payable to Ms. McMahon in the amount of one thousand dollars ($1,000.00) within ten (10) days of the receipt of this Order and mailed to the Department of Labor.

IT IS SO ORDERED.

James L. Salkeld
Director of Labor

BY:_____
Danny R. Williams
Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

ARKANSAS DEPARTMENT OF LABOR,
LABOR STANDARDS DIVISION **PETITIONER**

Vs. **CASE NO. WH2009-2007**

LEWIS BROTHERS SERVICES INC.
d/b/a LEWIS TOWING **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor on June 3, 2009. Lewis Towing has appealed the finding of the Labor Standards Division of the Arkansas Department of Labor (hereafter referred to as the "Agency") that Lewis Towing violated Arkansas Code Annotated §§ 11-4-210 (Supp. 2007) and 11-4-211(a)(Supp. 2007) by failing to pay some of its employees the State minimum wage, and by failing or refusing to pay some of its employees for work in excess of forty (40) hours in a work week at the statutorily required rate. The Agency was represented by the Honorable Denise Oxley. Lewis Towing was represented by the Honorable Lorraine Hatcher. The Agency presented evidence in the form of testimony by Gloria Armas, a Labor Standards Division investigator, Aywon Hart and Michael Abrams former employees of the Respondent, and Tom Hudson the Administrator of the Labor Standards Division. Don Adams, Larry Lewis, Michael Broussard, Wayne Lewis and Ken Lewis testified for the Respondent. The following exhibits were identified by the Agency prior to the hearing and were offered and accepted as evidence on the record: 1)Administrative Regulations of the Agency; 2)Business Profile Report of Lewis Towing; 3) Secretary of State Certificate of Good Standing for Lewis Brothers Services, Inc.; 4) Lewis Towing Employee Lists for 2006-2007 [redacted version of list]; 5)Lewis Towing Pay Records for October 2006 – October 23, 2008; and 6) September 24, 2008 Inspection Report of Gloria Armas with attachments. The respondent did not respond to the prehearing questionnaire that was mailed out to the parties,

but did offer the following exhibit(s) that were offered and accepted as evidence on the record:

1) Independent Contracting Agreement signed by Donald Adams.

FINDINGS OF FACT

Lewis Towing is an automobile towing business which is physically located at 123 S.A. Jones Drive, North Little Rock, Arkansas. On or about September 4, 2008 Nathan Butler, an investigator for the Agency, received an overtime complaint from a former employee of Lewis Towing and called Lewis Towing to request payroll records from the period October 2006 through July 2008. The responded provided Mr. Butler with a "payroll journal," "payroll adjustment journal" and "electronic time sheet from Paychex.[1]" Mr. Butler assigned the case to investigator Gloria Armas, who commenced an investigation and inspection that same day.

Ms. Armas conducted telephone interviews with Lewis Towing former employees Aywon Hart and Mike Abrams, and also called Lewis Towing by telephone on September 4, 2008 and spoke with Ken Lewis. Mr. Lewis stated in response to questioning at that time "all employees are salaried" and that Lewis Towing "does not have any time sheets." Ken Lewis agreed to send the agency "whatever he had" in the nature of employee time records showing the actual hours each Lewis Towing employee worked by September 8, 2008, and later extended the period to include September 12, 2008. No additional employee records were received by the agency until September 22, 2008, when the respondent forwarded an April 5, 2001 Help Wanted Ad and an undated document entitled "Salary Package" that was included with another copy of the records that had already been provided to the agency on September 4, 2008.

On October 29, 2008 Ms. Armas accompanied her co-worker, Nathan Butler to the premises of Lewis Towing where she and Mr. Butler both spoke with Mr. Ken Lewis and Mr.

[1] Apparently, the "Electronic Timesheet from Paychex" recorded the cumulative hours worked during each workweek, and did not contain any record or notation of which hours or days any of the employees actually worked.

Lewis' brother, Wayne Lewis concerning the investigation. Ken Lewis told the investigators that Lewis Towing has an "honor system" whereby each employee orally reports the number of hours he or she worked, which Mr. Ken Lewis in turn submitted to Paychex for calculation of the wages due each employee. Mr. Ken Lewis also stated that Lewis Towing pays the "same salary regardless of hours worked,"' and that the drivers for the company get a salary plus commission ranging from $10-$12-$20/ per call. After Ms. Armas and Mr. Butler pointed out that Lewis Towing employee Don Adams salary varied from week to week, Mr. Lewis explained the discrepancy between the records on Don Adams and the statement concerning salary and commissions by stating that Adams is a "commission only" worker. Mr. Lewis also confirmed that there were no time sheets showing which days and hours Don Adams actually worked. The respondent agreed to provide the agency a sworn statement of the employee's work agreements and an approximation of the number of hours worked by each employee for the past two years by December 2, 2008.[2]

The Agency eventually found that Lewis Towing failed to compensate Mr. Aywon Hart a total of $1,707.11 for overtime hours worked between the dates October 26, 2006 and April 30, 2008, failed to compensate Michael Abrams in the amount of $344.95 for overtime hours worked from October 5, 2006 and August 16, 2007, and failed to compensate James Works, III $715.60 for overtime hours worked between February 20, 2008 and October 22, 2008.

CONCLUSIONS OF LAW

Because the overtime claims presented here are in the nature of work performed for which inadequate compensation was made, the issue may be resolved by resorting to case law interpreting the federal Fair Labor Standards Act upon which our State minimum wage law is

[2] It appears from the record and exhibits provided that this sworn statement was not provided to the Agency.

based. See ADL Regulation 010.14-112. Federal law provides that an employee has carried his burden of proving he has worked hours without proper compensation if he produces evidence to show the amount and extent of his work as a matter of "just and reasonable inference." Anderson v. Mt. Clements Pottery Co., 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed 1515 (1946). The evidence 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. Id.

At the June 3, 2009 hearing, the Agency made out a prima facie case of overtime violations as to Aywon Hart, Michael Abrams and James E. Works, III through the testimony of investigator Gloria Armas and other evidence presented at the hearing. This evidence includes Michael Abrams' own testimony and a June 22, 2007 fax from Lewis Towing reflecting Abrams' hours to be 7:30 a.m. through 5:00 p.m. Monday through Friday and 10:00 a.m. until 5:00 p.m. on alternating Saturdays at a rate of $50/Saturday. This amounts to a minimum of 47.5 hours and 54 hours on successive alternating weeks in which no overtime compensation was paid to Abrams.

Aywon Hart's hours were from 8:00 a.m. through 6:00 p.m., Monday through Friday, and 10:00 a.m. through 5:00 p.m. on Saturdays after his pay was converted from hourly to salary, consistent with the undated , generic "Salary Package" submitted by the respondent as evidence of how it paid its salaried employees[3]. Mr. Hart worked alternating weeks of 47.5 and 54 hours for which overtime payments were required, but not paid.

James E. Works, III normally worked 7:00 a.m. through 4:45 p.m. with a 30 minute lunch break. This amounts to a 46.25 hour workweek, for which 6.25 hours overtime compensation is required.

[3] The agency also introduced a specific "salary package" whereby Michael Abrams would work Monday through Friday from 7:30 a.m. through 5:00 p.m. with a 30 minute lunch, and 10:00 a.m. through 5:00 p.m. on alternating Saturdays, in addition to after hour calls, starting June 22, 2007. Agency Exhibit 6.

Although there is much finger pointing and accusations of fraudulent billing by the affected employees (specifically Aywon Hart), the employer did not identify which hours were falsified or "unauthorized" or what dates or times the employees missed and were compensated for. The lack of specificity amounts to a failure by the employer to carry its burden of proving the precise amount of work performed by Hart and the other employees. Lewis Towing also failed to come forward with sufficient evidence to negate the reasonableness of the inference that the employees worked the hours contained in the employer's own "Salary Package" that was presented as a business record of Lewis Towing.

Also, the fact that Hart may have taken some after hour calls that were unauthorized by Lewis Towing, is insufficient to carry the employer's burden of proof once a prima facie case of improper compensation is made. Under Arkansas Code Annotated § 11-4-203(2), an employee includes one who not only is hired to work, but also those who are "permitted or suffered" to work. See also ADL Regulation 010.14-108 (The employer has a duty to make sure the work is not performed if it is not to be performed). The fact that Hart actually did the after hours work and was paid some amount by the employer for the work is evidence that the employer, at the very least "suffered" the work to be done by Hart and received some benefit from the work. Because Lewis Towing failed to make the required evidentiary showing, damages may be awarded to the employees, even if is an approximate or imprecise amount. Id.

The formula utilized by the agency to calculate overtime is derived from ADL Regulation 010.14-109, which adopts and incorporates by reference, the provisions of 29 CFR § 778.109. In determining an employee's "workweek" as a basis for overtime compensation, under 29 CFR § 778.109, all hours worked by the employee . . . during the workweek must be totaled in determining the number of hours to be compensated. 29 CFR § 778.103. The regular rate of

pay or "base rate," cannot be based on a declaration of the parties, but must be based on what actually happens under an employment agreement. 29 CFR § 778.108. The employer must include "all remuneration for employment paid to, or on behalf of the employee, unless precluded by some statutory exception." 29 CFR § 778.108. The regular hourly rate of pay of an employee is determined by dividing his total remuneration for employment during a given workweek by the total number of hours actually worked. All compensation received during the workweek must be included as a matter of law. 29 CFR § 778.108. Even when after hours compensation is paid on a commission basis, the amount of the commission must be included in the regular rate and divided by the number of hours worked to arrive at the base rate of pay for overtime. 29 CFR §§ 778.117-778.118. The agency complied with these principals and provisions in determining the respondent's liability for unpaid overtime compensation in this case.

The respondent has taken the position that Don Adams was not an employee of the respondent for which recordkeeping was required and that the agency lacked jurisdiction over any Lewis Towing employees during weeks in which the company employed only three other persons, besides Adams.

While it is true that Donald Adams signed a written document entitled Independent Contracting Agreement dated December 12, 2006 which requires that Adams "shall be responsible for providing all tools and materials required for performance of the tasks agreed to and that Adams would be responsible for payment of all federal, state and local income taxes, it is the actual working arrangement of the parties that is controlling. ConAgra Foods, Inc. v. Draper, 372 Ark. 361, 276 S.W.3d 244 (2008)(although a written contract creates the relation of employer and independent contractor, such relation may be destroyed by conduct of the employer); Blankenship v. Overholt, 301 Ark. 476, 786 S.W.2d 814 (1990).

In spite of this agreement Don Adams testified that Lewis Towing did, in fact, pay all federal, state and local income taxes on Adams' behalf, and that Lewis Towing provided all the tools and equipment Adams utilized on Lewis Towing jobs. Adams also testified that he performed the same services for Lewis Towing in the same manner as other persons who are admittedly bona fide employees of Lewis Towing, and that he never understood that the agreement he signed was intended to make him an independent contractor as opposed to an employee. Under these circumstances, even if the written agreement introduced by the respondent effectively created an independent contractor relationship when it was signed, the actual conduct of Lewis Towing thereafter is not consistent with the agreement and indicates that Adams was, in fact, an employee of Lewis Towing.

From the testimony presented by the parties and the written records provided to the agency, it is a just and reasonable inference that Mr. Hart was underpaid for 404.25 overtime hours between the dates October 26 2006 and April 30, 2008 at amounts ranging from $4.00/overtime hour to $4.90/overtime hour. The total amount of compensation owed to Mr. Hart is $1,734.37. Michael Abrams was underpaid for 110 overtime hours in amounts ranging from $3.88/hour to $4.64/hours, and is owed $374.95. James Works, III is owed $715.60 for underpayment of overtime for 65 hours in amounts ranging from $3.89 to $5.50.

Finally, the agency has assessed a fine of $900 against the respondent, which breaks down to a $150 fine for each of 3 separate minimum wage violations, and 3 overtime violations for which a prima facie case was made out by the agency and not rebutted by the respondent. Because Arkansas Code Annotated § 11-4-206(a)(1) does not require a showing that the violations were willful, it is irrelevant that the respondent acted in good faith toward its employees and that it relied on Paychex systems to report any noncompliance with the applicable wage and hour laws in this case. These amounts are reasonable in light of the fact

that the respondent is a small business, the violations are not severe or wanton, and the authorized range of monetary penalty ranges from $50/day - $1,000/day.

Lewis Towing does not dispute the fact that it failed to pay minimum wage to employees as charged by the agency, and therefore will be ordered to pay the $115.27 due along with the 3 separate fines of $150 each assessed by the agency for each minimum wage violation. THEREFORE, IT IS CONSIDERED AND ORDERED that the employer, Lewis Towing shall issue payment for a total sum of three thousand, eight hundred twelve dollars and ninety-three cents ($3,812.93). Payment drafts shall be issued to the employees in the following amounts and mailed to the Department of Labor: $374.95 to Michael Abrams; $66.63 to Kenneth E. Harris; separate checks of $27.26 and $1,707.11 to Aywon Hart ; $21.38 to Tiffany Lewis; $715.60 to James E. Works, III, and $900 to the Arkansas Department of Labor. Payment shall be issued within ten (10) days of the receipt of this Order.

IT IS SO ORDERED.

James E. Salkeld
Director of Labor

BY: _____

Danny R. Williams, Administrative Law Judge
Arkansas Department of Labor
10421 West Markham Street
Little Rock, AR 72205

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

LUIS ZEPEDO **CLAIMANT**

vs. **CASE NO. 2009-0021**

TIM POOR dba QUALITY CONSTRUCTION AND CLEANUP **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor on Tuesday, August 18, 2009. Tim Poor has appealed any agency order that six hundred twenty-seven dollars ($627.00) in unpaid wages is owed to Luis Zepedo. Zepedo did not appear. Tim Poor and Carl Brown appeared on behalf of Tim Poor dba Quality Construction and Cleanup.

FINDINGS OF FACT

Zepedo filed a wage claim with the Labor Standards Division of the Arkansas Department of Labor on February 17, 2009. He claimed five hundred seventy dollars ($570.00) in unpaid wages earned between December 5, 2008 and December 13, 2008. After investigation, the Labor Standards Division issued a Preliminary Wage Determination Order on June 1, 2009, finding that Zepedo is owed six hundred twenty-seven dollars ($627.00). Tim Poor filed an appeal of this finding on June 14, 2009.

The hearing was set for 11:00 a.m. The hearing convened at approximately 11:05 a.m. The Respondent appeared, the Claimant appeared not. Therefore, judgment is entered for the Respondent.

IT IS SO ORDERED.

James L. Salkeld
Director of Labor

BY:_____
DANNY R. WILLIAMS
ADMINISTRATIVE LAW JUDGE
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

Tracy Harris **CLAIMANT**

vs. **CASE NO. 2009-004**

West Conway Mini Storage **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor on Monday, April 20, 2009. West Conway Mini Storage has appealed any agency order that one hundred seventy-eight dollars and sixty-six cents ($178.66) in unpaid wages is owed to Tracy Harris. Harris appeared on her own behalf. West Conway Mini Storage did not appear.

FINDINGS OF FACT

Harris filed a wage claim with the Labor Standards Division of the Arkansas Department of Labor on November 18, 2008. She claimed one hundred seventy-eight dollars and six cents ($178.06) in unpaid wages and one hundred fifty dollars ($150.00) in unpaid commissions earned between October 27, 2008 and November 9, 2008. After investigation, the Labor Standards Division issued a Preliminary Wage Determination Order on January 26, 2009, finding that Harris is owed one hundred seventy-eight dollars and sixty-six cents ($178.66). West Conway Mini Storage filed an appeal of this finding on February 6, 2009.

The hearing was set for 10:00 a.m. The hearing convened at approximately 10:23 a.m. The Claimant appeared, and the Respondent, appeared not. Therefore, judgment is entered for the Claimant in the amount of one hundred seventy-eight dollars and sixty-six cents ($178.66). The Respondent is directed to issue a check payable to Ms. Harris in the amount of one hundred seventy-eight dollars and sixty-six cents ($178.66) within ten (10) days of the receipt of this Order and mailed to the Department of Labor.

IT IS SO ORDERED.

James L. Salkeld
Director of Labor

BY:_____
Mark A. Martin
Appointed Hearing Officer
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

MICHAEL HEARING **CLAIMANT**

vs. **CASE NO. 2009-010**

NIGHTHAWK VACUUM SERVICES **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor on Thursday, May 28, 2009. Nighthawk Vacuum Services has appealed an agency finding that unpaid wages in the amount of one thousand dollars ($1,000.00) are due to Mr. Hearing. Mr. Hearing appeared in person on his own behalf. Nighthawk Vacuum Services was represented by Diana Winkfield and Mary Ella Duplantis, who appeared by telephone. Claimant exhibit number one (Vendor Quick Report) and Claimant exhibit number two (untitled document detailing vehicle allowance) were offered and received into the record; however are already found within the Agency file.

FINDINGS OF FACT

Michael Hearing, employee, filed a wage claim with the Labor Standards Division of the Arkansas Department of Labor on November 10, 2008. He claimed one thousand dollars ($1,000.00) in unpaid vehicle allowance earned during his employment spanning from April 28, 2008 through October 28, 2008. The Labor Standards Division, after an investigation, issued a Preliminary Wage Determination Order on April 2, 2009, finding that Hearing was owed one thousand dollars ($1,000.00). Nighthawk Vacuum Services filed an appeal of this finding on April 13, 2009.

Mr. Hearing testified he began his employment with Nighthawk Vacuum Services on or about April 28, 2008. His vehicle was used for his employment, and the untitled document previously referred to as Claimant's exhibit two shows his "personal vehicle in service date" as

April 28, 2008. His employment ended on or about October 28, 2008. Claimant exhibit number one (Vendor Quick Report) indicates that Mr. Hearing was paid four Auto Allowance payments, beginning on July 28, 2008, and paid on the 28th day of the following three months. Mr. Hearing testified that the basis of his claim is for the auto allowance of May and June at five hundred dollars ($500.00) per month for a total of one thousand dollars ($1,000.00), although the documentation in the claim file indicates an established allowance of six hundred fifty dollars ($650.00) per month. Ms. Duplantis directed questions to Mr. Hearing regarding the execution of the document. Mr. Hearing acknowledged that the document was signed by his supervisor, Adam Grimes, and by Lou Anders in July, but backdated with an effective date of April 28.

Nighthawk Vacuum Services representative, Mary Ella Duplantis, offered testimony indicating all vehicle allowances are subject to final approval by her, and that her approval of the allowance was not effective until July 8, and that payments were made thereafter. She further testified that she had no knowledge of the allowance beginning in the amount of five hundred dollars ($500.00).

CONCLUSIONS OF LAW

1. Upon application of either an employer or employee, the Director of the Department of Labor or any person authorized by the director shall have authority to inquire into, hear, and decide disputes arising from wages earned and shall allow or reject any deduction from wages. Ark. Code Ann. 11-4-303(a).

2. After final hearing by the director or person appointed by him, a copy of findings and facts and any award shall be filed in the office of the Department of Labor. Ark. Code Ann. 11-4-303(b).

3. The amount of the award of the director shall be presumed to be the amount of wages, if any, due and unpaid to the employee. Ark. Code Ann. 1-4-303(c).

4. The wage claimant carries the burden of proof for any claim of unpaid wages.

5. The employer carries the burden of proof for any set-off or affirmative defense.

6. In the present case, the documents in the record, which were provided by the Respondent, indicate Mr. Hearing was approved for a vehicle allowance in the amount of six hundred fifty dollars ($650.00) per month, beginning on April 28, 2008. The Respondent has not provided documentation or evidence disputing the approved beginning date for this allowance. Payments did not commence until July 28, 2008, leaving the May and June allowance unpaid.

THERFORE, IT IS CONSIDERED AND ORDERD that judgment is entered for the claimant for two (2) months of vehicle allowance payments in the amount of five hundred dollars ($500.00) each as claimed, for a total of one thousand dollars ($1,000.00). The Respondent is directed to issue a check payable to Mr. Hearing in the amount of one thousand dollars ($1,000.00) within ten (10) days of the receipt of this Order and mailed to the Department of Labor.

James L. Salkeld
Director of Labor

BY: _____
Danny R. Williams
Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

PAMELA STEWART **CLAIMANT**

vs. **CASE NO. 2009-0002**

DANIELLE N. HOOVER, INC. d/b/a/ AESTHETIQUE SKIN CARE CENTER POOL OF BETHESDA DAY SPA **RESPONDENT**

ORDER

This matter came for hearing on Wednesday, February 4, 2009 in the offices of the Arkansas Department of Labor. The hearing was set for 11:00 a.m. The hearing convened at approximately 11:15 a.m. The Respondent appeared and was represented by Ginger Amaral. The Claimant appeared not. The Claimant contacted the office of the Department of Labor at approximately 8:30 a.m. on this day and notified the Administrative Services Division that she was not prepared to appear and would most likely not be present. As of the time the hearing commenced, no additional contact was made by the Claimant. THEREFORE, this matter is hereby dismissed with prejudice.

IT IS SO ORDERED.

James L. Salkeld
Director of Labor

BY:_____
MARK MARTIN
APPOINTED HEARING OFFICER

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

DON BIRCH **CLAIMANT**

vs. **CASE NO. WC2008050020**

SCHUMACHER HOMES OF ARKANSAS, INC. **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor on Friday, September 12, 2008 at 10:00 a.m. The claimant appeared in person and the employer appeared by telephone and was represented by Brenda Renicker, Human Resource Manager.

FINDINGS OF FACT

Don Birch was employed by Schumacher Homes of Arkansas, Inc. as a New Home Consultant. He began work on December 17, 2007 and his last day of employment was Monday, April 14, 2008. On April 22, 2008, the claimant filed a wage claim with the Labor Standards Division of the Arkansas Department of Labor. He claimed that he was owed $940.01 in net wages for work performed March 29, 2008 through April 14, 2008. The Labor Standards Division investigated the claim and issued a Preliminary Wage Determination Order on June 2, 2008 finding that Mr. Birch was owed wages in the amount of $230.84.

The Labor Standards investigator determined that Mr. Birch had not been paid minimum wage and overtime for 86 hours of work from March 29 through April 14, 2008 in the amount of $556.28. The investigator deducted from this amount the gross amount of $325.44 which was paid by Schumacher Homes to Mr. Birch on April 25, 2008 as payment of accrued vacation.

The respondent tendered to the Department of Labor and to the order of Mr. Birch a paycheck in the gross amount of $230.84. Mr. Birch timely appealed the Preliminary Wage Determination.

Mr. Birch signed a contract at the time of hire which set out the terms of his employment, including his compensation. Specifically, the contract provided that he was to be paid a base or guaranteed salary of $577 per week for 13 weeks, or a total of $7500.00. The salary was to be paid on a bi-weekly basis. The salary was to cease "[b]eginning on Day 91" and Mr. Birch was to be compensated solely on commissions.

The respondent paid the claimant gross wages of $577 per week for 13 weeks. Mr. Birch continued to work for 4 weeks and one day, March 16, 2008 through April 14, 2008. While there was some discussion between the parties about whether Mr. Birch would continue to receive a salary for some additional time, his written contract was never formally revised. On April 14, 2008 Mr. Birch was advised that he would not receive any additional compensation. He terminated his employment after 2 hours of work that day. He received no compensation for the period of work from March 16, 2008 through April 14, 2008.

After filing his wage claim, Mr. Birch was paid on April 25, 2008, the sum of $325.44 for accrued vacation.

The evidence from the parties conflicts with respect to the exact number of hours Mr. Birch worked from March 16, 2008 through April 14, 2008. The evidence is clear, however, that Mr. Birch's regular schedule of work was 8 hours per day, 5 days per week, for a total of 40 hours per week. Sunday and Wednesday were his days off. Mr. Birch worked 162 hours from March 16, 2008 through April 14, 2008 for which he has not been compensated.

CONCLUSIONS OF LAW

1. Upon application of either an employer or employee, the Director of the Department of Labor, or any person authorized by the director, shall have authority to inquire

into, hear, and decide disputes arising from wages earned and shall allow or reject any deduction from wages. Ark. Code Ann. § 11-4-303(a).

2. The wage claimant carries the burden of proof for any claim of unpaid wages.

3. The employer carries the burden of proof for any set-off or affirmative defense.

4. In the present case, the employer paid the claimant all wages due under the written employment contract. The only issue is whether the employer is obligated to pay Mr. Birch minimum wage.

5. The Arkansas Minimum Wage Act, Ark. Code Ann. §§ 11-4-20 *et seq.*, requires most employers to pay nonexempt employees a minimum wage of not less than $6.25 per hour and overtime at 1 ½ times the employee's regular rate of pay for hours worked in excess of 40 hours per workweek. Ark. Code Ann. §§ 11-4-210 and -211.

6. In the present case, the respondent has not claimed any exemption, but merely relies on the signed contract. The right to payment of minimum wage is a statutory right that can not be waived or released or contracted away. *Brooklyn Sav. Bank v. O'Neil*, 324 U. S. 697, 707 (1945)(applying the federal minimum wage law). *See also* ADL Labor Standards Regulation 010.14-112 which provides "The department may rely on the interpretations of the U. S. Department of Labor and federal precedent established under the Fair Labor Standards Act in interpreting and applying the provisions of the [state] Act."

7. Commission salespersons are exempt from payment of minimum wage only if they are involved in outside sales. Ark. Code Ann. § 11-4-203(1)(A) excludes from the definition of "Employee" for purposes of the Arkansas Minimum Wage Act, any individual employed as "an outside commission-paid salesperson who customarily performs his or her services away from his or her employer's premises taking orders for goods or services."

8. In the present case, the claimant was employed by Schumacher Homes as a New Home Consultant working in the employer's "design center". In fact, part of his job responsibility was to ensure that the design center was neat and clean. There is no evidence that he was an outside sales employee. "The outside sales employee is an employee who makes sales at the customer's place of business or, if selling door-to-door, at the customer's home." 29 C.F.R. 541.502, adopted by ADL Labor Standards Regulation 010.14-106(B)(1)(a).

9. The respondent owes the claimant for 162 hours of work from March 16, 2008 through April 14, 2008 at minimum wage, or a total of $1012.50 in gross wages.

IT IS THEREFORE CONSIDERED AND ORDERED that Schumacher Homes of Arkansas, Inc. shall pay Don Birch wages in the gross amount of $1012.50.

JAMES L. SALKELD
DIRECTOR OF LABOR

By:_____
C. J. Acklin, Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

VIRGINIA SCOTT **CLAIMANT**

vs. **CASE NO. 2008-020024**

A TASTE OF ITALY **RESPONDENT**

ORDER

The record in this case indicates that the case was originally set for hearing on October 13, 2008 and subsequently continued due a medical emergency on the part of the Respondent. This matter was reset for final hearing on this Friday, November 21, 2008 at the offices of the Arkansas Department of Labor. Both parties were duly notified of the resetting via certified mail with return receipt requested, along via regular mail, to the permanent addresses listed in the file. The hearing was set for 1:00 p.m. The hearing convened at approximately 1:15 p.m. Neither party has appeared for the hearing. The Claimant in this matter carries the burden of proof and her appearance is necessary to prevail. Extensive efforts have been made to contact the Claimant. All telephone calls have gone unanswered and unreturned, and all Certified Mailings have been returned as unclaimed.

THEREFORE, this matter is hereby dismissed with prejudice.

IT IS SO ORDERED.

James L. Salkeld
Director of Labor

BY:_____
Don Cash
Appointed Hearing Officer

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR
CASE NO. WH2008-005

ARKANSAS DEPARTMENT OF LABOR AGENCY

vs. Case No. WH2008-006

McDONALDS OF HARRISON RESPONDENT

ORDER

This matter came before the Arkansas Department of Labor on September 18, 2008. McDonalds of Harrison (hereafter referred to as "McDonald's") has appealed the finding of the Labor Standards Division of the Arkansas Department of Labor (hereafter referred to as the "LS Division") that they are in violation of Ark. Code Ann. § 11-4-210 (Minimum Wage). The Agency was represented by the Honorable Daniel Faulkner. McDonalds was represented by the Honorable James D. Sprott. Kathy Dilbeck, Labor Standards Investigator, and Tom Hudson, Labor Standards Administrator, testified on behalf of the LS Division. Jay Herrin testified on behalf of McDonald's. Agency Exhibit number one (Administrative Regulations Pertaining to the Arkansas Minimum Wage Act, June 2007), Agency Exhibit number two (inspection report completed by Kathy Dilbeck), Respondent Exhibit number one (list of employee charges), Respondent Exhibit number two (proposed revision of amounts owed) and Respondent Exhibit number three (copy of McDonald's policies) were offered and accepted into the record.

FINDINGS OF FACT

McDonald's of Harrison is a fast food chain restaurant, owned by Herrin Land Company, which operates at 1314 North Main Street in Harrison, Arkansas. On or about May 12, 2008, Labor Standards Investigator Kathy Dilbeck performed a routine inspection of McDonald's by inspecting payroll and time records. Ms. Dilbeck testified that her inspection included records from October 1, 2006 through May 2, 2008 and that her determination was that McDonald's was in violation of Ark. Code Ann.

§ 11-4-210. Ms. Dilbeck testified that it was her finding that employee meal charges were being deducted from wages and, as a result of those deductions, the final paycheck after those deductions reflected a wage rate that, averaged over the number of hours worked, calculated to be less than five dollars and ninety-five cents ($5.95) per hour. The record reflects that the investigator allowed credit of thirty cents ($0.30) per hour according to the allowance set forth in Ark. Code Ann. § 11-4-213. The total calculation by the investigator for these violations is four thousand, two hundred fifty-nine dollars and four cents ($4,259.04) for fifty seven employees. Labor Standards Administrator Tom Hudson offered testimony consistent and comparable to that of Ms. Dilbeck.

Jay Herrin testified the practice of McDonald's prior to the investigation was to allow employees to "charge" food that they chose to purchase for personal meals. As outlined in Respondent Exhibit 3 (McDonald's policy), employees' meals are discounted by fifty percent, regardless of whether or not they are purchased during a shift, and that the meal may be charged and withheld from the employee's paycheck. These charges were documented by within a handwritten spreadsheet which shows rate of pay, hours worked and total food deductions. Mr. Herrin also provided a revised calculation that he proposed, in the event that the Administrative Law Judge found that the employees in question were underpaid. This calculation, labeled Respondent Exhibit Number two, appears to be a figure arrived to by deducting employee charges made off duty, in addition to an adjustment to minimum wage for student employees. However, no student eligibility certificates were offered as evidence, and furthermore, the student rate was not being paid to those employees.

CONCLUSIONS OF LAW

The employer herein did withhold more than the allowable amount pursuant to A.C.A. § 11-4-213, although there was no willful intent to violate the code by the employer. However, in accordance with Administrative Regulations of the Labor Standards Division, Rule Number 010.14-112, "the department may rely on the interpretations of the U.S. Department of Labor and federal precedent established under the Fair labor Standards Act in interpreting and applying provisions of the Act and Rule

010-14-100 through -113." It has long been recognized that the protection afforded by the Fair Labor Standards Act may not be waived by agreement between employer and employee. *Brooklyn Bank v. O'Neil, 1945, 324 U.S. 697, 65 S. Ct. 895, 89 L. Ed. 1296.*

THEREFORE, IT IS CONSIDERED AND ORDERED that the employer, McDonald's, shall issue payment for a total sum of four thousand, two hundred fifty-nine dollars and four cents ($4,259.04). Payment drafts shall be issued to the employees in the respective amounts as detailed on page two (2) and three (3) of Agency exhibit two (2) and mailed to the Department of Labor. Payment shall be issued within ten (10) days of the receipt of this Order.

IT IS SO ORDERED

James L. Salkeld
Director of Labor

BY: _____
C.J. Acklin, Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR
CASE NO. WH2008-005

ARKANSAS DEPARTMENT OF LABOR PETITIONER

vs.

J.L.S. & K. INC., and LYN'S DARI-DELITE, INC. d/b/a DARI-DELITE RESPONDENT

ORDER

This matter came before the Arkansas Department of Labor on September 18, 2008. J.L.S. & K. Inc. and Lyn's Dari-Delite, Inc. d/b/a Dari-Delite (hereafter referred to as "Dari Delite") has appealed the finding of the Labor Standards Division of the Arkansas Department of Labor (hereafter referred to as the "LS Division") that they are in violation of Ark. Code Ann. § 11-4-210 (Minimum Wage). The LS Division was represented by the Honorable Daniel Faulkner. Dari Delite was represented by owner Lyn Warden, appearing on her own behalf. Kathy Dilbeck, Labor Standards Investigator, and Tom Hudson, Labor Standards Administrator, testified on behalf of the LS Division. Melissa Jones and Doris Davis testified on behalf of Dari Delite. Agency Exhibit number one (Administrative Regulations Pertaining to the Arkansas Minimum Wage Act, June 2007), Agency Exhibit number two (Administrative Regulations Pertaining to the Arkansas Minimum Wage Act, September, 1979), Agency Exhibit number three (inspection report completed by Kathy Dilbeck), Agency Exhibit number four (minimum wage poster, June 2007), Respondent Exhibit number one (Statutes Regulating Wages and Hours in Arkansas, October 2006), and Respondent Exhibit number two (verification of enrollment for employed students) were offered and accepted into the record.

FINDINGS OF FACT

Lyn Warden is the owner of Dari Delite, a restaurant operating at 1315 East Walnut Street, Paris, Arkansas. Dari Delite was previously incorporated under the name of "J.L.S. & K. Inc." Following a divorce involving Ms. Warden on or about January 2006, J.L.S. & K. Inc. was dissolved, and the business was purchased and incorporated under Lyn's Dari-Delite, Inc.

Dari Delite customarily employs young adults as well as minors. On or about March 4, 2008, Labor Standards Investigator Kathy Dilbeck performed an inspection following the receipt of a complaint alleging wage and hour violations. Ms. Dilbeck testified her inspection of records included those dating from the purchase of the business in January 2006 through January 2008 and her determination was that Dari Delite was in violation of Child Labor Regulation 2.6 and Ark. Code Ann. § 11-4-210.

Ms. Dilbeck testified it was her finding that proper records were not being maintained, as the time cards were relinquished to the employees along with the corresponding paycheck. A record of the hours worked was not being kept as required by Arkansas Administrative Regulations Pertaining to Child Labor, Section 600, section 2.6. Although the record-keeping violation was noted in the investigation, no penalty was assessed for the infraction.

Ms. Dilbeck further testified Dari Delite was paying employees who were students at a reduced minimum wage rate as allowable by Ark. Code Ann. § 11-4-210 (b). However, she also found that while the reduced rate was being paid, the employer failed to obtain certificates of eligibility as required by Administrative Regulation 010.14-103 (A)(1)(a). The employer acknowledged that she had not obtained the certificates, but in an effort to support her position that payment of the reduced rate was proper, provided verification that the students in question were, in fact, enrolled on a full-time basis at one of two high schools in the area (Paris High

School and Scranton High School). Ms. Warden's testimony was that it was her understanding that the reduced rate was allowable on the basis that the employees in question were students, and she was unaware of a regulation requiring she obtain a certificate of eligibility prior to adjustment being made to the wage rate.

CONCLUSIONS OF LAW

The purpose of the Department of Labor shall be to foster, promote, and develop the welfare of the wage earner of Arkansas, to improve their working conditions, and to advance their opportunities for profitable employment. Ark. Code Ann. § 11-2-101. The Director shall have the power to make, modify, or repeal such rules, or changes in rules, as he may deem necessary to carry out the provisions of this subchapter. Ark. Code Ann. § 11-2-110 (b). The rules of the director shall have the force and effect of law, and shall be enforced by the director in the same manner as the provisions of this subchapter. Ark. Code Ann. § 11-2-110 (d). Further regulatory authority in minimum wage is granted the Director pursuant to Ark. Code Ann. § 11-2-209.

Ark. Code Ann. § 11-4-210, prior to October 1, 2006, mandated Arkansas minimum wage to be $5.15 per hour. Minimum wage, beginning October 1, 2006, became $6.25 per hour. Ark. Code Ann. § 11-4-210 subsection (b) allows an employer to pay full-time students at a rate equal to but not less than 85% of the minimum wage. The student rate would be $4.38 per hour prior to October 1, 2006 and $5.32 per hour thereafter. Former Administrative Regulation 11 required an employer to, "…obtain authorization from the Director to employ any full-time student at less than the applicable minimum wage…evidenced by a certificate of eligibility to be issued by the Director." Administrative Regulation 11.1 and 11.2. Current Administrative Regulation 010.14-103 requires, "The employer has, in advance of employment at less that the

applicable minimum wage rate, a full-time student certificate issued by the department." Administrative Regulation 010.14-103 (a.).

All parties agree the employees herein were full-time students as defined by the Code. All parties agree the employer did not procure either a "certificate of eligibility" or a "student certificate" as required by the Regulation. The employer is in compliance with Ark. Code Ann. § 11-4-210. The employer is not in compliance with Administrative Regulation 010.14-103. There were forty-eight employees paid as students. The employer is a small business in a small town with minimal employees and income. The A.L.J. finds the employer has violated the regulation forty-eight times, there being forty-eight students without certificates. The employer is required to pay the minimum fine of fifty dollars ($50.00) per violation for a total fine of twenty-four hundred dollars ($2,400.00).

Additionally, while reviewing the Department's Exhibit 3 it is evident the following employees were paid below the minimum allowable rate. To wit:

Brittany Baumgartner	$5.98	Rebecca Becker	$4.84	Mikka Berg	$6.85
Marcus Brown	$0.39	Molly Bunch	$2.89	Kelby Chambers	$1.75
Amanda Cordell	$6.37	Ashley Coy	$2.29	Brandi Forst	$1.10
Christopher Hayden	$0.34	Tiffany Hill	$3.65	Catlin Huber	$2.20
Nick Hughes	$6.80	Alaina Kaelin	$4.76	Christin Kampmann	$4.25
Dylan Lowe	$2.94	Ryan Nicholas	$1.95	Lisa Ralph	$0.80
Danny Wilks	$2.85				

WHEREFORE the employer is ordered to submit funds to the Department in the sum of $62.00 to be paid to these employees. Payment shall be issued within ten (10) days of the receipt of this Order.

FURTHER the employer is ordered to make arrangements with the Department within ten (10) days for the payment of the civil penalty in the amount of $2,400.00

The motion of the Agency to correct the style of the case is granted.

IT IS SO ORDERED

James L. Salkeld
Director of Labor

BY:_____
C.J. Acklin, Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

SARAH CAPLE **CLAIMANT**

vs. **CASE NO. 2008-018**

RK COLLECTIONS **RESPONDENT**

ORDER

The record in this case indicates that the case was originally set for hearing on November 21, 2008 and subsequently continued at the request of the respondent due to a medical emergency. This matter was reset for final hearing on this Monday, December 15, 2008 at the offices of the Arkansas Department of Labor. Both parties were duly notified of the resetting. The claimant was notified via certified mail with return receipt requested to the permanent addresses listed in the file and the respondent was notified via confirmed facsimile and US Mail. The hearing was set for 9:00 a.m. The hearing convened at approximately 9:30 a.m. Neither party has appeared for the hearing. The Claimant in this matter carries the burden of proof and her appearance is necessary to prevail.

THEREFORE, this matter is hereby dismissed without prejudice.

IT IS SO ORDERED.

James L. Salkeld
Director of Labor

BY:_____
MARK MARTIN
APPOINTED HEARING OFFICER
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE:_____

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

JOHN WINEMILLER **CLAIMANT**

vs. **CASE NO. 2008-0046**

STEPHEN'S JEWELERS **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor on Monday, January 5, 2009. Stephen's Jewelers has appealed an agency finding that unpaid wages are due to Mr. John Winemiller. Mr. Winemiller appeared in person on his own behalf. Stephen's Jewelers was represented by Stephen Kirsch, who appeared by telephone. No exhibits were offered at the time of the hearing. The claim file was accepted into the record with no objections.

FINDINGS OF FACT

John Winemiller, employee, filed a wage claim with the Labor Standards Division of the Arkansas Department of Labor on July 9, 2008. He claimed four hundred dollars ($400.00) in unpaid vacation time earned during his employment spanning from May 8, 2006 through May 31, 2008. The Labor Standards Division, after an investigation, issued a Preliminary Wage Determination Order on September 19, 2008 finding that Winemiller was owed four hundred dollars ($400.00). Stephen's Jewelers filed an appeal of this finding on September 22, 2008.

Mr. Winemiller's testimony was that he was claiming one week of unused vacation time that was earned after completion of his second year of employment at Stephen's Jewelers. He indicated that he had earned two weeks of vacation time and had taken one week off prior to his termination. He stated that his contention was that he was entitled to the second week of vacation time.

Stephen's Jewelers representative, Stephen Kirsch, offered testimony congruous to the employer response in the claim file, stating that the position of the employer is that vacation is prorated after termination and that Stephen's Jewelers did not owe any unpaid time to Mr. Winemiller.

CONCLUSIONS OF LAW

1. Upon application of either an employer or employee, the Director of the Department of Labor or any person authorized by the director shall have authority to inquire into, hear, and decide disputes arising from wages earned and shall allow or reject any deduction from wages. Ark. Code Ann. 11-4-303(a).

2. After final hearing by the director or person appointed by him, a copy of findings and facts and any award shall be filed in the office of the Department of Labor. Ark. Code Ann. 11-4-303(b).

3. The amount of the award of the director shall be presumed to be the amount of wages, if any, due and unpaid to the employee. Ark. Code Ann. 1-4-303(c).

4. The wage claimant carries the burden of proof for any claim of unpaid wages.

5. The employer carries the burden of proof for any set-off or affirmative defense.

6. In the present case, the documents in the record indicate Stephen's Jewelers had a policy in effect regarding vacation time. The policy states "After two years of service, the employee is granted two weeks of paid vacation. If an employee resigns or is terminated vacation pay will be prorated." After review of the handbook language, the policy in effect clearly states that two weeks of paid time is awarded upon completion of two years of service. It is the opinion of the Hearing Officer that the language regarding proration of vacation time applies solely to years of service that had not been fully completed. The Hearing Officer further concludes that Mr.

Winemiller had completed two years of service and should have been granted two weeks of paid vacation in accordance with the handbook.

THERFORE, IT IS CONSIDERED AND ORDERD that judgment is entered for the claimant for 40 hours of vacation time at ten dollars ($10.00) per hour. The Respondent is directed to issue a check payable to Mr. Winemiller in the amount of four hundred dollars ($400.00) within ten (10) days of the receipt of this Order and mailed to the Department of Labor.

James L. Salkeld
Director of Labor

BY: _____
Mark Martin, Appointed Hearing Officer
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE:_____