BEFORE THE ARKANSAS DEPARTMENT OF LABOR

HEATHER LINZY **CLAIMANT**

vs. **CASE NO. 2013-0002**

PARAMOUNT SHOPS **RESPONDENT**

ORDER

This matter comes for hearing on Tuesday, April 23, 2013 at the offices of the Arkansas Department of Labor. Paramount Shops has appealed an agency order that $174.00 in unpaid wages is owed to the Claimant.

FINDINGS OF FACT

Linzy filed a wage claim with the Labor Standards Division of the Arkansas Department of Labor on or about September 4, 2012. She claimed $174.00 in unpaid wages earned between August 2-3, 2012. After investigation, the Labor Standards Division issued a Preliminary Wage Determination Order on January 4, 2013 finding that Linzy was owed $174.00. Paramount Shops filed an appeal of this finding on January 18, 2013.

The hearing was set for 10:00 a.m. The hearing convened promptly as scheduled. An attempt to reach Ms. Linzy was unsuccessful therefore no appearance was noted for her. The record indicates that Ms. Linzy did not make contact with the agency to provide a correct telephone number where she could be reached as instructed in the notification of hearing. Paramount Shops was represented by telephone appearance of Wini Gupta.

The Claimant appeared, and the Respondent, appeared not. Therefore, judgment is entered on behalf of the Respondent.

IT IS SO ORDERED.

Ricky Belk
Director of Labor

BY: Barry Strange by:
Barry Strange
Labor Mediator
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE: 4-25-13

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

APRIL CLAYTON **CLAIMANT**

vs. **CASE NO. 2013-0003**

PRETTY PETS **RESPONDENT**

ORDER

This matter comes for hearing on Tuesday, April 23, 2013 at the offices of the Arkansas Department of Labor. Pretty Pets has appealed an agency order that $206.40 in unpaid wages is owed to the Claimant.

FINDINGS OF FACT

Clayton filed a wage claim with the Labor Standards Division of the Arkansas Department of Labor on or about October 31, 2012. She claimed $206.40 in unpaid wages earned between October 4-5, 2012. After investigation, the Labor Standards Division issued a Preliminary Wage Determination Order on January 14, 2013, finding that Clayton was owed $206.40. Pretty Pets filed an appeal of this finding on January 29, 2013.

The hearing was set for 11:00 a.m. The hearing convened promptly as scheduled. An attempt to reach Ms. Clayton was unsuccessful therefore no appearance was noted for her. The record indicates that Ms. Clayton did make contact with the agency and provided a correct telephone number where she could be reached as instructed in the notification of hearing. Pretty Pets was represented by telephone appearance of Roger Yarbrough.

The Claimant appeared, and the Respondent, appeared not. Therefore, judgment is entered on behalf of the Respondent.

IT IS SO ORDERED.

Ricky Belk
Director of Labor

BY: Barry Strange by dm
Barry Strange
Labor Mediator
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE: 1-25-13

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

MICHELLE LOVE **CLAIMANT**

Vs. **CASE NO.: 2013-0004**

ABERNATHY MOTOR COMPANY **RESPONDENT**

ORDER

The Claimant, Michelle Love, filed a claim for unpaid wages with the Arkansas Department of Labor on January 8, 2013, in which she claimed the Respondent, Abernathy Motor Company, failed or refused to pay her $713.75 for unpaid commissions for sales she made on behalf of Abernathy Motor Company from July 13 through July 19, 2012. The Respondent filed a timely response disputing the claim. A preliminary Wage Determination Order was entered by the Labor Standards Department of the Arkansas Department of Labor on March 20, 2013 in favor of the Claimant, which was followed by the Respondent's March 28, 2013 Notice of Appeal and Request for Hearing.

The matter came before the Arkansas Department of Labor on Tuesday, May 28, 2013. Claimant, Michelle Love, appeared via telephone and testified on her own behalf. David Abernathy appeared via telephone on behalf of Abernathy Motor Company.

FINDINGS OF FACT

The Claimant was employed by Abernathy Motor Company as an office associate. Ms. Love testified that she worked in the office and had eventually been trained to sell cars. She stated that she had arranged a team agreement with a particular salesman and that commissions for sales would be split between them. Her testimony indicated that she sometimes assisted with sales but that other times she was only involved in completing the paperwork for the sale.

Mr. Abernathy testified that the salesman in question was an inmate participating in a work release program. He stated that Ms. Love was strictly an office associate and to his knowledge was not involved in car sales. Mr. Abernathy indicated that the inmate was subject to certain wage earning rules as a condition of his work release program and that wages earned in excess of the amount allowed must be returned to the Department of Corrections. He stated that he was unaware of any details regarding an arrangement the inmate had made with Ms. Love and was unsure of circumstances in which the company would have paid a commission to her.

There was no written agreement between the parties. Michelle Love did present paycheck stubs indicating that commissions of some type were occasionally paid to her.

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 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. 11-4-303(c).

3. In a wage claim matter, the claimant has the burden of proving by a preponderance of the evidence that the wage claim is valid. In the present case, the claimant has simply failed to meet this burden in light of the conflicting testimony from her former employer. While the claimant presented evidence that an agreement of some type existed, this was insufficient to establish the validity of her claim with any specificity.

THEREFORE, IT IS CONSIDERED AND ORDERED that the claim for wages in this matter is not valid.

IT IS SO ORDERED.

Ricky Belk
Director of Labor

BY: Barry Strange

Barry Strange
Hearing Officer
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE: 6/11/13

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

CAROLE DAVIS **CLAIMANT**

vs. **CASE NO. 2013-0006**

K-9 SPLASH AND DASH **RESPONDENT**

ORDER

This matter comes for hearing on Tuesday, May 28, 2013 at the offices of the Arkansas Department of Labor. Carole Davis has appealed an agency order that no wages were due to her.

FINDINGS OF FACT

Davis filed a wage claim with the Labor Standards Division of the Arkansas Department of Labor on or about January 3, 2013. She claimed $207.51 in unpaid wages earned between September 10, 2011 and December 13, 2011. After investigation, the Labor Standards Division issued a Preliminary Wage Determination Order on March 19, 2013, finding that Davis was not owed any unpaid wages. Davis filed an appeal of this finding on April 1, 2013.

Kim Jenkins appeared by telephone on behalf of K-9 Splash and Dash. When contacted to begin the telephone hearing, Davis notified the hearing officer that she did not wish to participate in the hearing. The hearing officer informed Ms. Davis that failure to appear and participate in the hearing could result in a default finding and Ms. Davis indicated she her understanding. After review of the documents included in the case file, it was determined that the finding of the Labor Standards Division was proper. Therefore, judgment is entered on behalf of the Respondent.

IT IS SO ORDERED.

Ricky Belk
Director of Labor

BY: Barry Strange
Barry Strange
Labor Mediator
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE: Oct 13

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

STEVEN FINCH **CLAIMANT**

vs. **CASE NO. 2013-0007**

SUPERIOR KIA **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor on Tuesday, May 28, 2013. Steven Finch, the Claimant, has appealed an agency finding no unpaid wages are due to him. Mr. Finch appeared via telephone on his own behalf. Superior Kia appeared via telephone, by and through its representatives, Mr. Jason Marx and Ms. Peggy Brewer.

FINDINGS OF FACT

Steven Finch filed a wage claim with the Labor Standards Division of the Arkansas Department of Labor on January 28, 2013. He claimed $208.72 for unpaid wages earned on December 29, 2012. The Labor Standards Division, after an investigation, issued a Preliminary Wage Determination Order on March 19, 2013 finding that Mr. Finch was not owed any unpaid wages. Mr. Finch filed an appeal of this finding and a request for a hearing on April 1, 2013.

At the appeal hearing, Mr. Finch testified that he worked as a car salesman for Superior Kia. On or about December 28, 2012, Mr. Finch interacted with a customer who had come to Superior Kia to look at a particular vehicle. The customer left the dealership and had looked at some vehicles at another dealership within the Superior Auto Group where he was assisted by other salespeople. The customer ultimately returned to Superior Kia and purchased the vehicle he originally looked at. Mr. Finch testified that as other salespeople had interacted with the customer, his commission was split which he contended was improper as he originated the sale

and his name was on the final sales paperwork. He stated that if the same salesperson originated and completed the sale, no other salesperson was entitled to a portion of the commission.

Mr. Marx provided testimony confirming that other salespeople (including himself) had assisted the customer and stated that it was customary to split commissions when multiple associates were involved in a sale. (In fact, wage records provided by both Mr. Finch and Superior Kia indicate previous partial commission credits for sales.) He also confirmed that Mr. Finch did receive half commission credit for the sale of the vehicle.

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 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).

3. Both parties concurred that that multiple associates were involved in assisting the customer in purchasing a vehicle from the Superior Auto Group. Furthermore, wage records included in the claim file support the notion that the splitting of commissions is a common practice at this dealership. It is further noted that Mr. Finch's signature is located on the original commission report indicating his agreement with the report wherein he received half of the commission for the sale of the vehicle in question.

THERFORE, IT IS CONSIDERED AND ORDERD that judgment is entered for the Respondent with no wages due to Mr. Finch.

IT IS SO ORDERED.

Ricky Belk
Director of Labor

BY: Barry Strange
Barry Strange, Labor Mediator
Hearing Officer
Arkansas Department of Labor
10421 West Markham
Little Rock, AR 72205

DATE: 6/10/13

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

LABOR STANDARDS DIVISION

VS. CASE NO.: 2013-0008

B & J HEATING & AIR, INC.
(PW 11-381, 11-382, AND 11-386)

ORDER

Pursuant to the Settlement Agreement signed by the parties Plaintiff request with this motion that this matter be dismissed **without prejudice**.

IT IS SO ORDERED this matter is dismissed without prejudice.

ADMINISTRATIVE LAW JUDGE

DATE: 8/14/13

APPROVED BY:

Daniel Knox Faulkner (2002-168)
Attorney for Arkansas Department of Labor

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

ARKANSAS DEPARTMENT OF LABOR,
LABOR STANDARDS DIVISION — AGENCY

VS.

DONG HAI LLC D/B/A NO. 1 CHINESE BUFFET — RESPONDENT

ORDER

This matter comes before the Arkansas Department of Labor on July 29 and 30, 2013. Dong Hai LLC d/b/a No. 1 Chinese Buffet (hereafter referred to as No. 1 Chinese Buffet) appealed the findings by the Labor Standards Division of the Arkansas Department of Labor (hereafter referred to as Agency) that No. 1 Chinese Buffet violated A.C.A. §§ 11-4-210, 211 and 217 by failing to pay four of its employees the state minimum wage, failing to pay these 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 Denise Oxley, Chief Legal Counsel. No. 1 Chinese Buffet was represented by Qiyan Weng, husband of Ms. Lan Jin Chen (Weng) one of the business' two co-owners. The Agency presented five witnesses. Three of these witnesses, Jose Angel, Jose Cruz and Xia Chen Buchanan, were current or former employees of the No. 1 Chinese Buffet. The other two witnesses, Rusty Geurin, Investigator, and Lindsay Moore, Administrator, are employees of the Labor Standards Division of the Arkansas Department of Labor. Mr. Qiyan Weng also appeared as a witness for No. 1 Chinese Buffet. Mr. Weng neither spoke nor understood English. One of the witnesses, Mrs. Buchanan, spoke and understood

limited English. Since both Mr. Weng and Mrs. Buchanan spoke and understood Mandarin Chinese, the proceedings were simultaneously translated to and from Mandarin Chinese to English. In a like manner, since two of the current or former employees, Mr. Lopez and Mr. Angel, spoke and understood only Spanish, their portions of the proceedings were simultaneously translated from English to Spanish and Chinese and from Spanish to Chinese and English.

The Agency presented five exhibits that were accepted into evidence. These were labeled Agency Exhibits 1 through 5. No. 1 Chinese Buffet presented two exhibits that were admitted into evidence. Those exhibits were numbered Respondent Exhibits 1 and 2.

The Administrative Law Judge considered all the evidence and testimony and weighed the credibility of all witnesses and makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

No. 1 Chinese Buffet is a restaurant located on Baseline Road in Little Rock, Arkansas. On January 20, 2012, the Agency received a referral from the U.S. Department of Labor alleging that some employees at the No. 1 Chinese Buffet restaurant were working in excess of 40 hours per week and were not being paid overtime, but instead were being paid a monthly salary. These employees were alleged to be kitchen staff, and as such, not exempt from minimum wage or overtime pay. The Agency began an investigation with an initial site visit on July 3, 2012 by Rusty Geurin. On that date, Mr. Geurin encountered a language barrier and made arrangements to return on July 6, 2012 when a translator could be present. On July 6, Mr. Geurin returned to the site where Dr. Wengui Yen served as a translator. Through Dr. Yen, it was stated that there

were four cooks, three waitresses and one dishwasher working in the restaurant. Further discussion elicited information that two of the cooks were paid on a monthly basis and all of the waitresses were paid $2.50 an hour plus tips.

From the U.S. Department of Labor referral, contact was made with complainant Jose Angel. The Agency subsequently learned the identities of two additional Hispanic workers, Jose Cruz and Moises Lopez. These three employees were not listed as employees on the employment information provided by the employer. The employer was unable to provide copies of W2 or other employee records to substantiate employment of these employees or the hours they had worked. Offsite interviews with Jose Cruz, Moises Lopez and Jose Angel were conducted by Rusty Geurin through a Spanish interpreter, Natalie Rich, an employee of the Labor Standards Division. These individuals stated that they worked at least 72 hours per week (6 work days a week with a minimum of 12 hours per day) and were paid a monthly salary. Moises Lopez and Jose Angel primarily worked as dishwashers and Jose Cruz worked, and is currently working, as a cook.

Based on this information, the Investigator completed computation sheets for these three individuals for the time they reported as working for the restaurant during the period January 1, 2011 through July 28, 2012. The computation sheets, based on a 72 hour work week, indicated that Mr. Angel would be entitled to $1,664 additional regular wages and $2,933.76 overtime wages, totaling $4,597.76; Mr. Lopez would be entitled to additional regular wages of $1,350 and $2,824.50 overtime wages totaling $4,174.50; and Mr. Cruz would be entitled to additional regular wages of $1,612.80 and $9,703.68 overtime wages totaling $11,316.48. (Agency Exhibit 1) Moises Lopez stated in his interview that he received three free meals a day. Jose Angel stated he received one meal break a day. Moises Lopez did not testify at the hearing, however,

Jose Angel and Jose Cruz both testified that they did receive free meals. Jose Cruz also testified that he has resided rent-free in a house owned by the restaurant during the entire time of his employment. None of the three reported having regularly scheduled meal breaks. (Agency Exhibit 1) Jose Cruz and Jose Angel both testified at the hearing that they did not have regular meal breaks and ate if and when time permitted. They were subject to work during meals, and when they did eat, it was only for brief periods of time and not a total of 2 hours a day.

Both Mr. Cruz and Mr. Angel testified that they were expected to be at work by 10:00 a.m. which was one hour before the restaurant opened so that they could prepare food for the 11:00 a.m. opening time, and that they stayed until normally 10:00 p.m. which was one hour after the restaurant closed. Mr. Cruz and Mr. Angel both testified that all employees of the restaurant worked the same work hours. At the closing interview with Rusty Geurin, No. 1 Chinese Buffet provided a document showing the purported employment data for Jose Cruz, Moises Lopez and Jose Angel that confirmed the employees worked for the restaurant and they worked 6 days a week. (Agency Exhibit 3) Mr. Weng testified at the hearing that the three were, or had been, employees and each were in fact paid a monthly salary. (Note: Agency Exhibit 1, and the testimony provided, indicated that Mr. Angel was initially paid $1,100 per month and was later raised to $1,150 per month, Mr. Lopez was paid $1,300 per month, and Mr. Cruz is currently paid $1,800 per month).[1] According to Agency Exhibit 3, Moises Lopez worked for a construction company during the months of May and June of 2012. In the interview on July 6, 2012, Mr. Lopez stated that he had only missed one day of work. (Agency Exhibit 1)

Testimony from both Mr. Cruz and Mr. Weng, indicated that Mr. Cruz was hired before Mr. Weng became involved with the restaurant. Mr. Weng hired Mr. Lopez and Mr. Angel at

[1] These monthly salaries were generally confirmed by No. 1 Chinese Buffet in Agency Exhibit 3.

the request of Mr. Cruz. Mr. Weng testified that he told these three individuals that all he could pay was the monthly salary and they verbally agreed to work for that amount. Mr. Weng stated that the three did not work 12 hours per day, that they reported to work at 11:00 a.m. (when the restaurant opened), and they were given at least three hours per day for meals and other breaks. (*See also* Agency Exhibit 3) Mr. Weng stated that these employees were paid on a monthly basis based on the amount of work needed. Mr. Weng pointed out that the three employees were frequently absent, they came and went at will, that they occasionally they did not show up for work, and sometimes when they were there, they were not needed. Mr. Weng stated that business was often slow and when his employees were not needed to work, employees would just sit around and visit at the restaurant. The restaurant conceded that it had no records of the actual clock hours worked by these three employees, nor did it keep records of the meal breaks or other breaks given. Mr. Weng produced copies (not originals) of 15 cash receipts signed by Jose Cruz from $200 to over $500 (exact amount illegible). These receipts were written in Chinese and English by several different persons, and appeared to indicate payment for total hours of work during various periods of time. Mr. Cruz acknowledged signing these receipts as receipts for cash received, not for hours worked and maintained that he was paid on a monthly salary.

Further, No. 1 Chinese restaurant did not provide to the Agency or the Administrative Law Judge any information relating to the reasonable documented value of meals and lodging provided by the restaurant to these three employees.[2] The Agency investigator testified that no meal or lodging allowance had been requested. Mr. Weng testified that restaurant did not keep records of how often the employees ate or the value of the food provided.

[2] A.C.A. §11-4-213 and ADL Regulation 010.14-107 (D)(1) and (4) allow employers an allowance of up to 30 cents per hour credit against minimum wage for the reasonable value of meals and lodging if customarily and reasonably provided to the employee for his or her benefit.

No. 1 Chinese Buffet provided employment records to the Investigator with regard to thirteen other employees for calendar year 2011 and part of 2012. None of these employees filed complaints and none consented to be interviewed or made themselves available for interview. As a result of the lack of cooperation and the language barrier, the Agency did not pursue wage claims on behalf of these other restaurant employees.

After the closing interview, the Agency received an additional wage and hour/overtime complaint from Mrs. Xia Chen Buchanan. Mrs. Buchanan stated that she worked from August 19, 2012 through December 2, 2012 and did not know Jose Angel, Jose Cruz, Moises Lopez before going to work at the restaurant. She stated that she was paid $731.00 per month during her employment and she produced copies of checks from No. 1 Chinese Buffet in that amount for the months of August, September, October and November. Mrs. Buchanan stated in her complaint and testified that during her employment she worked from 10:00 a.m. to 9:30-10:00 p.m., 6 days per week, with no scheduled meal, or other formal, breaks. Her husband, Mr. Buchanan, provided a written statement in support of her work hours, stating that many times he dropped her off at 10:00 a.m. and picked her up at 10:00 p.m.

Mrs. Buchanan testified that she cashed her pay checks at the bank each month; however, she was required to give back $550 in cash her first month of employment and $480 in cash for each subsequent month of employment to Mr. Weng. She testified that this was done in Mr. Weng's office with no other witnesses present. Mr. Weng confirmed paying Mrs. Buchanan $731 per month, but he denied requiring money, or accepting any money, from her. Mr. Weng testified that Mrs. Buchanan did ask him to keep money for her so that she could hide money from her husband; however he stated he told her no.

Mr. Weng further stated that Mrs. Buchanan did not work the hours she claimed in her complaint and he produced time clock records for October and November, 2012, maintained by the restaurant Manager, and signed by Mrs. Buchanan. (Respondent Exhibit 2) Mr. Weng pointed out that when he hired Mrs. Buchanan, he told her that she was only needed to work at meals and there would be times during the day where he would not need her to work. He also testified that he expressed concern to Mrs. Buchanan whether she would have trouble commuting to from her home in Benton several times a day for such little work.

Mr. Guerin testified and Mr. Weng confirmed that at the time Mrs. Buchanan worked, the restaurant had received guidance by the Investigator that the restaurant should maintain actual employee work times. Mr. Weng testified that in light of this, Mrs. Buchanan was required to clock in and out her work times. He further testified that not only did Mrs. Buchanan refuse to provide him her tip amounts, but that she asked the restaurant Manager to clock her in and out since she did not want to do it herself. Mrs. Buchanan testified that she received about $2,000 in tips a month. She further testified that although she signed the time clock records, the Manager came up with the hours she worked and Mrs. Buchanan would just sign a "stack" of them all at one time. These time clock records reflected various clock in and out times each work day showing Mrs. Buchanan working about 28 hours per week and not 72 hours. Mr. Weng admitted that the restaurant had no time records for Mrs. Buchanan's work for the months of August and September 2012.

The Agency produced evidence (Agency Exhibit 5) and testimony through Mr. Geurin that <u>if</u> the times on these time cards for Mrs. Buchanan were correct, Mrs. Buchanan's rate of pay would have varied from $4.91 per hour to $13.34 per hour for the weeks covered. (Agency Exhibit 5) This amount was inconsistent with the pay for other wait staff in the restaurant and

Mr. Geurin stated that he had never seen salaries for wait staff that high in his many years of experience investigating wage and hour claims. Mr. Geurin also pointed out that Mrs. Buchanan had less experience and tenure than the other wait staff who were paid at a lower rate of pay ($2.50 per hour).

The Agency prepared a computation sheet based on Mrs. Buchanan's claim that she worked 72 hours per week and only received $250 per month. According to the Agency, she was underpaid $1,098 in regular wages and $2,380.80 for overtime wages resulting in a total underpayment of $3,478.80 (Agency Exhibit 1).[3]

In accordance with A.C.A §11-4-217 and ADL Regulation 010.14-111(C), Lindsay Moore, Administrator of the Wage and Hour Division of the Agency, testified that he assessed a civil penalty against No. 1 Chinese Buffet in the amount of $3,500 for failing to maintain records of the hours worked by the Messrs. Angel, Lopez, Cruz and Mrs. Buchanan. Mr. Weng acknowledged that no records of the exact times worked were maintained for Messrs. Angel, Cruz and Lopez for the entire term of their employment, and he only produced time clock records for Mr. Buchanan for the months of October and November 2012. Mr. Weng conceded that the restaurant did not keep the required records and he agreed to pay the administrative fines. Mr. Weng did not concede that these employees worked 12 hour days and stated that his

[3] The Administrative Law Judge takes judicial notice that **had** this compensation sheet utilized the $731 per month figure that both Mrs. Buchanan and No. 1 Chinese Buffet agreed she was paid prior to any alleged kickbacks, the amount the compensation sheet would show due to Mrs. Buchanan would be only $174 for regular wages and $1,641.60 for overtime wages. Thus, the total owed for the same amount of time would be $1,815.60. (Regular wage computation: $731 per month x 12 months = $8,772 annually. $8,772 divided by 52 weeks = $168.69 per week. $168.69 divided by 72 hours = $2.34 per hour. $2.34 + $3.62 tip credit = $5.96 per hour payment allowed. $6.25 minimum wage minus $5.96 = $0.29 underpayment per hour for regular wages. $0.29 x 40 = $11.60 per week underpayment for regular rate. $11.60 x 15 week = $174 total underpayment for regular wages. Overtime wage computation: $6.25 x 1.5 = $9.38 overtime rate of pay. $9.38 - $5.96 = $3.42 amount underpaid per overtime hour. $3.42 x 32 overtime hours worked per week = $109.44 unpaid overtime per week. $109.44 x 15 weeks = $1,641.60 total overtime underpayment.) Judicial notice is also taken that, if the restaurant timesheets are taken as correct for October and November, the amount due Mrs. Buchanan for overtime during these two months would be zero, and the amount due her for regular wages for all four months would be slightly lower than $174.

agreement with these employees was that it was up to them to work when there was something to do and not to work when there was not. He also repeatedly stated that the restaurant's business was in decline.

CONCLUSIONS OF LAW

The Arkansas Department of Labor is the agency of Arkansas State Government charged with the enforcement of the Arkansas Minimum Wage and Overtime laws, A.C.A §11-4-201 *et. seq.* Since No. 1 Chinese Buffet operates in the State of Arkansas and had more than four employees, it falls under the jurisdiction of the Arkansas wage and hour laws. Kitchen workers and wait staff are not exempt from minimum wage and overtime under the Arkansas minimum wage and overtime laws and regulations, and the employer made no claim for such exemption.

The first issue to be addressed is the amount of the civil penalties assessed against the restaurant by the Agency. A.C.A . §11-4-217 and ADL Regulation 010.14-111(C) allow the Agency to assess civil penalties between $50 and $1000 for each of several named violations. These violations include: "b. willfully failing to make, keep, or preserve any records required by the Act or these Rules or willfully falsifying such records; . . . e. paying or agreeing to pay wages at a rate less than required by the Act; . . . . " There is adequate testimony in the record from Mr. Geurin and Mr. Weng that the restaurant did not maintain records of the actual times worked for Messrs. Lopez, Cruz and Angel from January 2012 through July 2012, and for Mrs. Buchanan for August and September 2012. Further, Mr. Weng agreed that the restaurant was liable for failure to keep accurate records. Thus, the finding that the restaurant was liable for civil penalties in the amount of $3,500 is not in controversy, and is accepted as true.

The next issue to be considered is whether the restaurant failed to pay the required minimum wage and overtime for the hours worked by Messrs. Lopez, Angel and Cruz. This issue is complicated by the fact that the restaurant did not maintain actual work time records for these employees. Messrs. Angel and Cruz steadfastly maintained that they were paid on a monthly basis, worked 12 hours per day for 6 days a week, and were not given regularly scheduled meal breaks. Both testified that they were provided meals and rent free lodging in a house provided by No. 1 Chinese Buffet. Mr. Weng did not dispute the fact that these three employees were paid a salary. He did, on the other hand, dispute the hours worked and argues that even if they worked 11 hours a day, each was given a total of 3 hours in breaks (2 hours for 3 meals and 1 hour regular breaks) each work day. This would bring the maximum number of hours worked per day for each employee to 8 hours and not 12 hours as claimed. Mr. Weng's calculations are based on the assumption that the restaurant's cooks and kitchen staff start to work exactly when the restaurant opens.

In cases where the employer fails to maintain work time records or fails to maintain accurate work time records, the Agency has consistently relied on the United States Supreme Court case of *Anderson v. Mt. Clemons Pottery Co*, 328 U.S. 680 (1946). In that case, the Court held:

> The solution . . . is not to penalize the employee by denying him any recovery on the ground that that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold than an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative [*sic*] the reasonableness of the inference to be drawn from the employee's

evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result may be only approximate.

It is clear that there are two divergent views of the work performed by these three individuals. The workers maintain that they worked throughout the day, eating when they could, and were available for work at all times. No. 1 Chinese Buffet maintains that they did not work the hours they stated, that they were given 3 hours in breaks per day, that they came and went at will, and their work was of poor quality. The restaurant further claims that it provided meals and lodging as part of the compensation package.

Here, the workers maintained that they worked a set amount of hours (12 hours per day, six days a week). They were consistent in their testimony and statements. Their testimony was supported by Mrs. Buchanan, a waitress at the restaurant who did not know them prior to her employment. Like in *Mr. Clemons*, No. 1 Chinese Buffet did not maintain complete and accurate records of the clock hours worked and the time off from work for all of its employees. At the hearing, copies of 15 cash receipts signed by Mr. Cruz were introduced, but these were incomplete, confusing and written in many different languages and handwritings. The restaurant conceded that accurate records were not constructed and maintained at the time the hours were actually being worked. Any allowance for meals and lodging must be discounted under A.C.A. §11-4-213 and ADL Regulation 010.14-107(D) because the restaurant failed to show the reasonable value of the meals and lodging provided.

Although it does somewhat strain credibility that these three workers never took off any appreciable time during this period (January 2011 – July 2012), the burden of proof is clearly on the employer to show the specific times and dates these employees where not at work. It is not credible to believe that kitchen staff would not report to work until the time the restaurant

actually opens for business. The employer has not successfully rebutted or refuted the employees' claimed work times.

Based upon the claims and testimony of these employees, and the collaboration of Ms. Buchanan, it must be concluded, using the framework of the *Mt. Clemons* analysis that the regular wages and overtime wages set forth in the computation sheets for Messrs. Lopez, Cruz and Angel are true. Under Arkansas law and the regulations of the Arkansas Department of Labor, the correct amount of additional wages due to Messrs. Angel, Cruz and Lopez are as follows:

	Angel	Lopez	Cruz
Regular Wages	$1,664.00	$1,350.00	$ 1,612.80
Overtime Wages	$2,933.76	$2,824.50	$ 9,703.68
Total Wages Due	$4,597.76	$4,174.50	$11,316.48

Mrs. Buchanan's claim is more complicated. Before any analysis can be done, the issue of Mrs. Buchanan's allegation that she was required to return a portion of her wages to Mr. Weng in cash, must be resolved. Mrs. Buchanan provided copies of checks from the restaurant in the amount of $731.00 for the months of August, September, October and November 2012. Both Mrs. Buchanan and Mr. Weng confirmed that $731.00 was her monthly pay. Ms. Buchanan maintains that she turned back to the restaurant $550.00 the first month of employment and $480.00 for each of the other three full months she was employed. She offers no physical evidence of such payments and maintains that the payments were made in the privacy of Mr. Weng's office with no witnesses present. Mr. Weng denies asking for, or receiving, any such payments and he stated that Mrs. Buchanan asked him to hold out part of her money for her, but he refused.

In determining whether to calculate Mrs. Buchanan's wages on the $731.00 per month versus the $250.00 per month the Agency used on its computation sheet, it must be first determined whether the Agency and Mrs. Buchanan have shown by the preponderance of evidence that the monies in question were in fact paid back to Mr. Weng. The Agency and Mrs. Buchanan have not met their burden that such payments actually took place. It is therefore concluded that Mrs. Buchanan was paid $731.00 per month during the four full months of her employment.

The amount of Mrs. Buchanan's wages being established, Mrs. Buchanan's claims for unpaid regular wages and overtime wages may now be considered. Mrs. Buchanan's claims are even more complicated than those of the other 3 kitchen workers. First, Mrs. Buchanan was a waitress, a tipped employee, subject to special rules. Tipped employees are subject to the State minimum wage of $6.25 per hour (A.C.A. §11-4-210), but only $2.63 per hour must be paid in cash wages by the employer provided at least $3.62 per hour is earned in tips (A.C.A. §11-4-212). Mrs. Buchanan testified that she averaged $2,000 or more per month in tips for the time she worked at the restaurant so the employer was required to pay her $2.63 per hour for the first 40 hours she worked each week. Second, No. 1 Chinese Buffet kept no time records for Mrs. Buchanan's work for the months of August and September 2012. They did submit time card records for the months of October and November 2012 that were signed by Mrs. Buchanan.

Clearly, the *Mt. Clemons* analysis applied earlier to the kitchen workers applies to Mrs. Buchanan's wages for August and September 2012. Using that framework, Mrs. Buchanan claimed that she worked 72 hours per week, 6 days per week during that time. Both she and the restaurant agree that her pay was $731 per month. Her testimony was collaborated regarding her work hours by the two kitchen workers who did not previously know her prior to her

employment at the restaurant. Similar to the kitchen workers, she claimed that she reported to work at 10:00 a.m. and did not leave work until 10:00 p.m. She claims that she also received no scheduled meal breaks and that she did not have a time during the day that she was off work.

Mr. Weng, as he claimed for the kitchen workers, maintained that Mrs. Buchanan was given time off for meals and other breaks, and since she was only needed for meals, there were times during the day where she could leave the restaurant and even go home to Benton. Mr. Weng testified that he expressed concern when he hired her that she would have trouble commuting back and forth several times a day for such little work. He stated that he emphasized to her he only had enough work to pay her $731 per month. Mr. Weng offered no witnesses to collaborate that position.

Under *Mt. Clemons,* Mrs. Buchanan has met her burden of showing the hours she worked during the months of August and September 2012. On the other hand, the restaurant failed to show with any certainty the hours that she did or did not work during that time. The monthly salary paid Mrs. Buchanan is consistent with an hourly rate of pay much lower than the rate of pay that she would have been paid had the restaurant's figures been utilized.[4] No. 1 Chinese Buffet's figures are untenable and lack credibility in view of the restaurant's previous statements that the wait staff were paid $2.50 per hour plus tips. Subject to the adjustments set forth in footnote 3 and our previous findings regarding the monthly wages actually paid, the minimum wage claim and overtime wage claim for Mrs. Buchanan is accepted as true for the months of August and September 2012.

[4] Mrs. Buchanan's figures of working 72 hours per week at a monthly salary of $731.00 correspond to an hourly rate of $2.34 per hour--- $731 x 12 months= $8772.00 annually; $8772.00 divided by 52 weeks equals $168.29 per week; $168.29 divided by 72 hours equals $2.34 per hour. The restaurant provided no data for August and September, but did provide data for October and November 2012. This data supported an hourly rate of $6.10 per hour --- $168.28 per week divided by 27.6 hours equals $6.10 per hour.

Finally, Mrs. Buchanan's minimum wage and overtime wage claim for October and November 2012 may be considered. The question arises here whether the Agency may rely on *Mt. Clemons* to support Mrs. Buchanan's claim for minimum wages and overtime wages for the months of October and November 2012 since No. 1 Chinese Buffet produced original time clock cards signed by Mrs. Buchanan for this period of time. Although the other contentions by Mrs. Buchanan and the restaurant are identical to those raised for the months of August and September, the time cards create an entirely different set of assumptions. Under ADL regulation 010.14-102, employers are required to keep and maintain accurate payroll records. Timecards are an acceptable means of keeping track of hours worked for pay purposes, and an employee's signature on those cards should be given significant weight. Timecards alone, however, are not the only records contemplated under this regulation. Payroll records must include *inter alia* the employee's full name and home address, date of birth, occupation, hourly rates of pay, deductions from pay, total wages paid per pay period, and the dates of those payments. ADL Regulation 010.14-102(A)(1). For tipped employees, the employer must also maintain *inter alia* reports of tip income (for example IRS Form 4070), the amount of wages increased by tips, and any hours tipped employees work in a nontipped status. ADL Regulation 010. 14-102(B)(3). Any claim for meal credit must also be documented. ADL Regulation 010.14-102(B)(4). No records showing of this information was provided by the employer.

Although the timecards facially reflected the clocked times the employer maintains for Mrs. Buchanan, it cannot be overlooked that these timecards are inconsistent with testimony provided by Mrs. Buchanan and two kitchen workers. Most importantly these timecards are totally inconsistent with the amount the restaurant and Mrs. Buchanan agree that she was paid during this time period ($731.00 each of these two months). The timecards reflect that she

worked a total of 123 hours at $6.50 per hour ($799.50) for October 2012, and 129 hours at $6.50 per hour ($838.50) for November 2012. These figures reflect a stated hourly rate of pay of $6.50 per hour which neither Mrs. Buchanan nor the restaurant claimed her rate of pay to be; and the total amounts reflected are totally inconsistent with the amounts paid to her for those two months. Additionally, a $6.50 per hour rate of pay would be out of line with the hourly rate of pay for other tipped employees in the restaurant and with other similarly situated tipped employees within the restaurant industry. Further, Mrs. Buchanan's testimony that she did not maintain timecards herself, and only signed a stack of them when confronted by the restaurant management, is noteworthy. Such records should be executed contemporaneously and there is no evidence that these timecards were either accurate or contemporaneous. Finally, the restaurant produced no collaborating witness regarding the hours Mrs. Buchanan actually worked or the person who completed the timecards.

Normally, the Agency would give deference to signed timecards, but in this case, the cards simply do not correspond to the facts as laid out before us, to logic, or even common sense. Therefore these timecards must be discounted, and based on the other records keeping deficiencies, a holding that the No. 1 Chinese Buffet failed to keep and maintain accurate and complete payroll records for Mrs. Buchanan for the months of October and November 2012 is found.

Consistent with this finding, the Administrative Law Judge concludes that, subject to the same limitations as stated before concerning the months of August and September, Mrs. Buchanan's claims for regular minimum wages and overtime wages for the months of October and November 2012 are taken as true, and Mrs. Buchanan is due $174.00 in regular wages and

$1,641.60 in overtime wages for a total amount due of $1,815.60 for the period from August 19, 2012 through December 1, 2012.

THEREFORE, IT IS CONSIDERED AND ORDERED that the employer, No. 1 Chinese Buffet d/b/a Dong Hai LLC, shall be liable for a total sum of $25,440.34.

Ricky Belk
Director, Arkansas Labor Department

BY: _____
Donna M. Lipsmeyer, Administrative Law Judge
Arkansas Department of Labor
10421 West Markham Street
Little Rock, Arkansas 72205

DATE: August 14, 2013

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

LABOR STANDARDS DIVISION

VS. CASE NO.: 2013-0010

GERALD E. PRINCE CONSTRUCTION, INC.
(PW 11-297)

ORDER

Pursuant to the Settlement Agreement signed by the parties Plaintiff request with this motion that this matter be dismissed **with prejudice**.

IT IS SO ORDERED this matter is dismissed with prejudice.

ADMINISTRATIVE LAW JUDGE

DATE: 10/17/13

APPROVED BY:

Daniel Knox Faulkner (2002-168)
Attorney for Arkansas Department of Labor

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

ARKANSAS OCCUPATIONSAL SAFETY AND HEALTH DIVISION — AGENCY

VS. CASE NO. 2013-0013

STEVE BUCKLEY AND BUCKLEY POWDER COMPANY — RESPONDENTS

ORDER

Upon motion of the parties herein, the Administrative Law Judge finds that they have reached a satisfactory settlement of the issues and that this matter is hereby dismissed with prejudice.

IT IS SO ORDERED.

Donna M. Lipsmeyer
Administrative Law Judge

Date: 11/14/13

APPROVED AS TO FORM:

ARKANSAS DEPARTMENT OF LABOR

By:
Denise P. Oxley (84-117)
General Counsel for the Agency
Arkansas Department of Labor
10421 W. Markham Street
Little Rock, AR 72205
(501) 682-4505
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STEVE BUCKLEY AND BUCKLEY POWDER COMPANY

By:
Dan F. Bufford (72014)
Attorney for Respondents
Laser Law Firm, P.A.
101 S. Spring Street, Suite 300
Little Rock, AR 72201-2488
(501) 376-2981
dbufford@laserlaw.com

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

ARKANSAS DEPARTMENT OF LABOR — AGENCY

VS. — CASE NO.: 2013-0014

SPEEDWAY CAFÉ', LLC AND
FRANK HENRY, JR. — RESPONDENTS

ORDER

The parties have reached a satisfactory administrative settlement in the above matter. The Plaintiff requests with this motion that this matter be dismissed **without prejudice**.

IT IS SO ORDERED this matter is dismissed without prejudice.

ADMINISTRATIVE LAW JUDGE

DATE: 11/14/13

APPROVED BY:

Denise P. Oxley (84-117)
Attorney for Arkansas Department of Labor

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

LABOR STANDARDS DIVISION

VS. CASE NO.: 2013-0015

MS. CARRIE'S DAY SCHOOL

ORDER

Pursuant to the settlement agreement by the parties Plaintiff request with this motion that this matter be dismissed **with prejudice**.

IT IS SO ORDERED this matter is dismissed with prejudice.

ADMINISTRATIVE LAW JUDGE

DATE: 11/19/13

APPROVED BY:

Daniel Knox Faulkner (2002-168)
Attorney for Arkansas Department of Labor

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

CASE NO. 2013-0016

CHARLOTTE BRIDWELL-PURIFOY **CLAIMANT**

vs.

A&J GROCERY, INC. **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor on Wednesday, September 11, 2013 at 9:00 a.m. A&J Grocery, Inc. through its owner, Avrinder S. Multani, appealed an agency finding of unpaid wages due Ms. Charlotte Bridwell-Purifoy in the amount of $480. The claimant appeared by telephone, and A&J Grocery, Inc. was represented by its owner, Avrinder S. Multani, who also appeared by telephone.

FINDINGS OF FACT

Charlotte Bridwell-Purifoy, filed a wage claim with the Labor Standards Division of the Arkansas Department of Labor on May 19, 2013. She claimed $480 of unpaid wages earned between April 12, 2013 and April 20, 2013. The Labor Standards Division, after an investigation, issued a Preliminary Wage Determination Order on July 1, 2013 finding that Ms. Bridwell-Purifoy was owed $480. A&J Grocery, Inc. filed an appeal of this finding on July 10, 2013.

Ms. Bridwell-Purifoy provided evidence and testified that she worked as a cashier for the gas pumps and other general areas for A&J Grocery, Inc. from March 2, 2013

through April 20, 2013. She was originally hired by Mr. Robert Hughes, the Store Manager, however, she was trained by Mr. Multani, the owner. Ms. Bridwell-Purifoy also provided Mr. Multani documents of store receipts by fax each night. Mr. Multani stated that he did receive this information and had to sometimes remind that these be sent to him. Mr. Multani acknowledged that she was hired by Mr. Hughes, that Mr. Multani trained her, and that she provided him daily sales reports, including receipts from the gas pumps and other sales conducted by the store. He did not dispute that she was paid $8.00 per hour, but stated that he believed Mr. Hughes should be responsible for her wages since he had some kind of oral arrangement with Mr. Hughes about hiring employees and running the kitchen area. However, Mr. Multani acknowledged that he maintained the bank accounts, signed the checks, paid for inventory and received an accounting for all monies received by the store under A&J Grocery, Inc. Ms. Bridwell-Purifoy confirmed these facts as well.

Mr. Multani holds himself out to be both the owner of the building and A&J Grocery, Inc., and it is undisputed that Mr. Multani closed the store and that he was the one who ultimately sent all employees home.

Ms. Bridwell-Purifoy stated, and it is undisputed, that she was not paid for the 60 hours she worked between April 12, 2013 and April 20, 2013.

DISCUSSION AND 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. § 11-4-303(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 testimony and documents in the record indicate Ms. Bridwell-Purifoy was paid hourly at rate of $8.00 per hour.

(7) Ms. Bridwell-Purifoy 's testimony indicated that she was not paid for 60 hours worked at $8.00 per hour for the period from April 12, 2013 through April 20, 2013. A&J Grocery, Inc. through its owner, Mr. Multani, does not dispute the hours worked and that she was not paid.

(8) Mr. Multani's argument that Ms. Bridwell-Purifoy was not an employee of the corporation or him and that neither he nor the corporation should be responsible for her wages is without merit. Mr. Multani trained Ms. Bridwell-Purifoy, and she reported to him on a daily basis. Further Mr. Multani provides no proof of any type of written agreement whereby Mr. Hughes agreed to indemnify the corporation and Mr. Multani for any wages incurred in the operation of A&J Grocery, Inc. It is incredulous to believe that daily sales data and inventory data would be submitted to an individual not

exercising overall control of the business. Simply why would he need this information if it was not his "business." Why would he keep buying supplies and gasoline for A&J Grocery, Inc. if he was not associated with what was being done there? The testimony and evidence overwhelmingly supports the agency's finding in Ms. Bridwell-Purify's favor in the amount of $480.

THEREFORE, IT IS CONSIDERED AND ORDERED that judgment is entered for the claimant in the amount of $480. A&J Grocery, Inc. is directed to issue a check payable to Charlotte Bridwell-Purifoy in amount of $480 and mail that check to the Arkansas Department of Labor within 10 days of the receipt of this order.

IT IS SO ORDERED.

Ricky Belk
Director of Labor

BY: Donna M

Donna M. Lipsmeyer
Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, Arkansas 72205

DATE: September 11, 2013

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

CASE NO. 2013-0017

AMANDA BYNUM **CLAIMANT**

vs.

MEDDIRECT, INC. **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor on Wednesday, September 11, 2013 at 10:00 a.m. MedDirect, Inc. through its attorney, Mark E. Ford, appealed an agency finding of unpaid vacation days due Ms. Amanda Bynum in the amount of $528. The claimant appeared by telephone, and MedDirect, Inc. was represented by Mark E. Ford, its attorney, who also appeared by telephone.

BACKGROUND AND FINDINGS OF FACT

Ms. Bynum worked for MedDirect, Inc. from sometime in 2010 through December 9, 2011. She provided a two-week notice of her resignation to the employer. At the time Ms. Bynum left employment, she had accrued 6 days of unused vacation (48 hours at $11.00 per hour). On December 16, 2011, she returned to the MedDirect, Inc. office for the purpose of securing her vacation paycheck. A dispute arose between Ms. Bynum and Ms. Heavener regarding certain e-mails that may have been deleted from Ms. Bynum's computer, and whether Ms. Bynum had contacted customers regarding her departure. As a result, Ms. Bynum did not receive her vacation check that day, and she subsequently filed suit against Ms. Terri Heavener

and a nonexistent entity, MedDirect, in the District Court of Sebastian County Arkansas (Fort Smith Division). This case was transferred from the Small Claims Division of District Court to the Civil Division when Ms. Heavener secured legal counsel. The case was subsequently dismissed without prejudice. Ms. Bynum then filed a claim with the Labor Standards Division of the Arkansas Department of Labor on April 2, 2013. Due to confusion regarding the payroll account from which Ms. Bynum was being paid, the Preliminary Wage Determination Order was issued, not to her employer, MedDirect, Inc., but instead to the payroll company for MedDirect, Inc. a company called Qurion Management, Inc. After Ms. Bynum filed her claim with the Labor Standards Division, and the proper parties were determined, service regarding her claim was obtained upon MedDirect, Inc. by serving Mark E. Ford, the attorney for MedDirect, Inc. This matter proceeds subsequent to that notice dated August 5, 2013.

Ms. Bynum through her testimony and wage claim form states that under company policy, accrued unused vacation would be paid upon termination provided the employee gives two weeks notice, maintains attendance and performs job duties in an acceptable manner during the notice period. She maintains that she met those conditions. She further maintains that she was not terminated from her employment. The employer, through Ms. Heavener's written statement of May 22, 2013, does not dispute her resignation, but refers to three customers who had contacted another Amanda (Amanda Espy) and other unnamed employees asking whether Amanda Espy was resigning. Ms. Heavener further mentioned that she spoke with Amanda Bynum about the e-mails and Ms. Bynum did not respond to her at that particular time. She then asked Ms. Bynum to refrain from any further communications regarding her resignation. After Ms. Bynum had ceased her work, Ms. Heavener stated that she "discovered that she [Ms. Bynum] had deleted all of her e-mails, both incoming and outgoing." Ms. Bynum testified that

she deleted her personal e-mail, like to her mother, and she had sent notice to only two or three customers that she was leaving MedDirect, Inc. She felt these were personal in nature since these were customers she had developed a closer working relationship with. She stated that she had deleted those e-mails as well. Upon examination by Mr. Ford, Ms. Bynum confirmed that she took no customer information with her for the purpose of taking it to a competitor, and that she did not go to work for a competitor. She also stated that there was no policy regarding limited or otherwise use of company e-mail for personal use, and there was no company e-mail retention policy. Ms. Bynum testified that she did not delete any business e-mails or e-mails in her folders, but only personal e-mails.

Mr. Ford proffered that the company expended less than $200 to an IT professional in an attempt to reconstruct any files that were deleted. MedDirect, Inc. did not provide copies of that expenditure information prior to the hearing in accordance with agency procedures set forth in the notice of hearing. The Judge does take notice that some nominal expense was incurred in an attempt to reconstruct those files, but the Judge also takes notice that no evidence was proffered or presented to document any lost business or loss or damage to the business' reputation as a result of Ms. Bynum's resignation e-mail.

DISCUSSION AND 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. § 11-4-303(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 testimony and documents in the record indicate Ms. Bynum was paid hourly at rate of $11.00 per hour and that she had accrued 6 days of unpaid vacation.

(7) Ms. Bynum's testimony indicated that she was not paid for 48 hours at $11.00 per hour for the 6 days of accrued vacation, and MedDirect, Inc. does not dispute the vacation hours accrued and that Ms. Bynum was not paid for those hours

(8) Ms. Bynum's presence and willingness to be subjected to examination must be given substantial weight. Mr. Ford's efforts to find inconsistencies in her statements, evidence and testimony were pointed, but failed to sway her from her position. She was a credible witness. On the other hand, the lack of testimony at the hearing under oath from MedDirect, Inc. and the lack of demonstrative evidence of misconduct by Ms. Bynum is noted. MedDirect, Inc. did not prove that the e-mails sent out were improper in nature or against company policy. It also did not prove that it suffered significant expense or any loss of business or business reputation as a result of Ms. Bynum's actions. Any suggestion that Ms. Bynum's actions were dishonest, rose to the level of insubordination or lack of acceptable performance were simply that. The testimony and evidence supports the agency's finding in Ms. Bynum's favor in the amount of $528.

THEREFORE, IT IS CONSIDERED AND ORDERED that judgment is entered for the claimant in the amount of $528. MedDirect, Inc. is directed to issue a check payable to Amanda Bynum in the amount of $528 and mail that check to the Arkansas Department of Labor within 10 days of the receipt of this Order.

IT IS SO ORDERED.

Ricky Belk
Director of Labor

BY: _____
Donna M. Lipsmeyer
Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, Arkansas 72205

DATE: September 11, 2013

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

LABOR STANDARDS DIVISION

VS. CASE NO.: 2013-0018

TA DA'S CAFÉ' AND LEON WORKS INDIVIDUALLY

ORDER

Upon motion of Plaintiff herein, this matter is hereby dismissed **with prejudice.**

IT IS SO ORDERED this matter is dismissed with prejudice.

ADMINISTRATIVE LAW JUDGE

DATE: 2/26/14

APPROVED BY:

Daniel Knox Faulkner (2002-168)
Attorney for Arkansas Department of Labor

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

ARKANSAS DEPARTMENT OF LABOR, SAFETY DIVISION — AGENCY

VS.

BLUFF CITY SHOWS — RESPONDENT

ORDER

This matter comes before the Arkansas Department of Labor on August 20, 2013. In his capacity as owner of Bluff City Shows, Delmar Giles requested a hearing relating to four amusement attractions and/or rides that were red tagged by Arkansas Department of Labor, Safety Division ("Agency"). The original hearing was scheduled for June 17, 2013, however at the request of Mr. Giles, this hearing was subsequently rescheduled to June 27, 2013, and then August 20, 2013. Bluff City Shows requests that the red tagged[1] status be removed and that it be allowed to place these four amusement attractions/rides back into operation.

At the hearing, Ms. Denise Oxley, Chief Legal Counsel, represented the Agency. Neither Mr. Delbert Giles nor any representative appeared on behalf of Bluff City Shows. The Agency presented one witness, Kevin Looney, Division Manager of AOSH within the Arkansas Department of Labor. Ten Agency exhibits were introduced and accepted into the record as evidence.

[1] Rule 1.9 of the Administrative Regulations of the Arkansas Amusement Ride and Amusement Attraction Safety Insurance Act defines red tag as a notice or order prohibiting the use or operation of an amusement ride or attraction, or any such device that restricts access to a particular part of any amusement ride or attraction. As long as a ride or attraction has this prohibition, it may not be operated.

The Administrative Law Judge considered all the evidence and testimony, weighed the credibility of the witness, and makes the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

Both Bluff City Shows and its owner, Delmar Giles, have been in, or associated with, the amusement ride and attraction business for some 30 to 60 years or more. In recent years, Mr. Giles' health has declined and the day-to-day business operation of Bluff City Shows shifted to his sons, Leonard "Dugan" Giles, and Morris Giles. At this time, Morris Giles is no longer with Bluff City Shows. During the Agency's most recent inspection, Mr. Delmar Giles' son-in-law, Matt,[2] was in charge of Bluff City Shows' daily operations. Although Matt was new to Bluff City Shows, he was not new to the amusement ride and attraction business, and he was fully aware of the required maintenance standards.

Under A.C.A. § 23-89-506(3) and Administration Regulation 5.3 of the Arkansas Amusement Ride and Amusement Attraction Safety Insurance Act, the Arkansas Department of Labor inspects all portable amusement rides or attractions each time they are moved to a new location in Arkansas and before they are permitted to begin operation or open to the public. If the Agency determines that an amusement ride or attraction is defective to the point that it would affect patron safety or that it is unsafe to operate, it may be red tagged. Any amusement ride or attraction that is in red tag status, in whole or part, is prohibited from use or operation until the Agency is notified that the deficiency has been corrected and a re-inspection has cleared the ride or attraction from such types of defects. (A.C.A. § 23-89-506 (c), Administrative Regulations

[2] Matt's last name was not known and he was identified as Delmar Giles' son-in-law and Leonard "Dugan" Giles' brother in law.

1.9, 3 and 5.7 of the Arkansas Amusement Ride and Amusement Attraction Safety Insurance Act, and Exhibit 6).

In May, 2013, Bluff City Shows moved its amusement attractions and rides to Walnut Ridge, Arkansas. Accordingly, on May 16 and 17, 2013, the Agency conducted a two-day on site inspection of Bluff City Shows' 15 rides or attractions that were set up in Walnut Ridge, Arkansas. This inspection was conducted by Harry Lenhart, an Agency Inspector, and Kevin Looney, a Program/Division Manager. Mr. Looney has over 17 years of experience inspecting amusement rides and attractions with the Agency. His qualifications include a Level 2 certification status by the National Association of Amusement Ride Safety Officials (NAARS).[3] Mr. Looney testified that he has the only higher Level 2 certification in the State. All other inspectors with the Agency are Level 1 NAARS certified which qualifies them to inspect these types of rides and attractions.

Mr. Looney testified that, over the past 2 years, the Agency increased its efforts to work with Bluff City Shows in an attempt to get numerous and repetitive deficiencies corrected. During the calendar years 2011, 2012 and 2013, Agency records revealed frequent or continual ride or attraction deficiencies by Bluff City Shows.

Agency Exhibit 9 reflects that over the past few years, the Agency cited Bluff City Shows for numerous and frequent failures to maintain and provide inspectors with the required and necessary written documents to demonstrate that manufacturer and/or industry standards for the proper upkeep, repair and routine regular scheduled maintenance on equipment and facilities

[3] Inspectors for the Arkansas Department of Labor who inspect amusement rides and attractions must be certified with the National Association of Amusement Ride Safety Officials. (A.C.A §23-89-504(4) and Regulation 5.1 Administrative Regulations of the Arkansas Amusement Ride and Amusement Attraction Safety Insurance Act).

were followed or performed on its rides and attractions.[4] There were several deficiencies noted for noncompliance with the National Electric Code[5], including instances where no operational emergency lighting or proper smoke alarms were in the Harry Potter amusement attraction. The Harry Potter attraction involves patrons walking through a darkened maze.[6]

Other deficiencies fell into an overall mechanical type category. These included such items as: the fencing and railing were not in compliance with ASTM[7] requirements; ride tubs or vehicles with broken steering rods sticking out or in disrepair; ride tubs not free of cracks or excessive wear; or the ride did not have properly working brakes and/or stops in that the brake band closest to the operation station was not adjusted properly and the brake band away from the operator station was showing signs of excessive wear.

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[4] Agency Exhibit 9 is twenty double sided pages of violations that fall under the general deficiency categories: (a) maintenance and repair records not available for a period of one year not available; (b) records of employee/operator training for each employee authorized to operate, assemble, disassemble, transport, or conduct maintenance on the ride for a period of 1 year not available; (c) Preoperational inspection documentation was not available. The Preoperational inspection documentation includes such things as a visual check of all passenger-carrying devices including restraint devices and latches; visual inspection of stairways, ramps, fencing, guarding and barricades, inspection or test; an inspection or test of all automatic and manual safety devices and brakes; (d) Maintenance checklists were not available. The person who performs the regular scheduled maintenance must be provided these checklists. Checklists include such items as descriptions of preventive maintenance assignments performed; description of the inspections that need to be performed, and special safety instructions; (e) No ride fact sheets were available. These must at least include specific ride operation policies and procedures with pertinent information from the manufacturer's instructions; a description of the ride operation; duties of the ride operator and/or attendant; general and specific safety procedures; (f) Other documentation required by Administrative Regulations and their adopted standards such as welding of significant parts or structures were not available.

[5] National Electric Code, Article 525 and supplemental requirements found in F2291-04 Section 12.

[6] The Harry Potter amusement attraction is a walk through maze in a darkened environment. This is a very old attraction that has been around for some time and was renamed to attract patrons with the use of a more up to date name recognition.

[7] Under Regulation 3.1(a) of the Administrative Regulations of the Arkansas Amusement Ride and Amusement Attraction Safety Insurance Act, the Agency adopted and incorporated the American Society for Testing and Materials F-24 (ASTM F-24) Standards Amusement Rides and Devices, Seventh Edition, 2004 with only certain sections of Designation F 2291-04 applying to rides covered under Regulation 3.1. These sections are listed in the regulation. ASTM standards further set out certain responsibilities that owners of amusement ride/attractions must do. These responsibilities include knowing the manufacturer's ride or attraction specifications, development and use of ride checklists, and providing training.

Many of these deficiencies were not deemed by the Agency to pose an immediate danger to patron safety, but were otherwise unsafe, and Bluff City Shows was allowed to correct the deficiencies within a reasonable period of time. However, prior to the Agency's May 16 and 17, 2013 inspection, the Agency red tagged three Bluff City Shows rides for deficiencies that posed an immediate danger to patron safety but are not an issue at this time.[8]

Mr. Looney testified that over the past few years, Bluff City Shows was cited for many deficiencies, and it would normally make corrections. However, on subsequent inspections, the same or similar deficiency(ies) would be found by the inspector. Mr. Looney stated that these types of deficiencies and lack of proper records relating to maintenance and training were reflective and indicative of either Bluff City Shows having a failed maintenance program or even the absence of a maintenance program. He further stated that amusement rides and attractions take a lot of maintenance, but this is required for the safety of patrons and amusement ride workers, and for the proper running of the equipment; and he testified that one of the goals of inspecting amusement rides and attractions is to prevent accidents and harm to the patrons, public, and workers.

As a result of the Agency's inspection on May 16 and 17, 2013, four Bluff City Shows rides or attractions were determined to pose immediate danger to patrons and these rides were red tagged or continued to be red tagged. These rides were Harry Potter, Paratrooper, Super Sizzler and Swinger.

The Harry Potter attraction was in very bad disrepair. It had exposed wiring hanging from the exit sign, its emergency lighting and smoke alarms were not working, and the lighting in the center of the maze was not operational. These were all violations of the National Electric

[8] These three rides were the Dune Buggy, Trabant (ride has been sold by Bluff City Shows) and Scat, a partially red tagged ride. These three rides left the State and have not since returned to Arkansas.

Code, Article 525 and the supplemental requirements found in F 2291-04 Section 12.[9] The attraction did not comply with the manufacturer's specifications. Examples of noncompliance included numerous electrical defects including loose or unprotected wiring and panel boxes, numerous damaged and/or broken interior panels and features. The attraction was not up to the manufacturer's original specifications and subsequent updates and bulletins. All amusement ride/attraction owners are required to have a program (based on the manufacturer's recommendations) of maintenance, testing and inspection that provides for the duties and responsibilities necessary for the care of each ride or device. There was no such program established for this attraction. Further, in the absence of current manufacturer's specifications, the ride/attraction must meet the standards adopted in Regulation 3.2 of the Arkansas Administrative Regulations of the Arkansas Amusement Ride and Amusement Attraction law. Replacement parts must be procured from the original ride manufacturer, or procured or produced in conformity with applicable sections of Practice F1159 and F1193. The attraction failed to meet the standards for replacement parts.

The Paratrooper ride has a center support with passenger tubs radiating out from that support. The ride lifts up when operating and patrons are high off the ground, traveling at a moderate speed. This ride carried a red tag prior to the May 16 and May 17 inspection. At the time of the previous inspection(s), the operator could not get the ride to run. Electrical issues were noted, and the welds did not comply with the ride manufacturers requirements for an NDT [10]check for stress fractures. Further, one of the drive wheels was not the proper replacement wheel and it did not have the required working breakers for the main drive wheel. The

[9] Mr. Looney testified that at the May 16-17, 2013 inspection, the Fire Marshall expressed concerns regarding fire and safety issues of Bluff City Shows.

[10] Various independent structural testing and inspections must be made periodically to ensure the structural integrity of certain rides.

Paratrooper was withdrawn from the May 16 and 17, 2013 inspection, but it remained red tagged from an earlier inspection. Mr. Looney testified that the brakes and rim drive wheel issues were still present and had not been corrected.

The Super Sizzler is a ride that travels parallel to the ground and has a center shaft with tubs radiating out. It is designed by the manufacturer as a teenager-adult thrill ride and not recommended for small children. Previously, the Super Sizzler had been cited by the Agency for many deficiencies, one of which included electrical concerns from the exposed electrical panel in the "dog house".[11] The inspection also revealed noncompliance with the manufacturer's specifications. The following are a sample of the examples of this nature noted: several tub lap bar mechanisms were disconnected or broken, ride control panel had been altered, seat surfaces were not proper material, and patron safety decals were missing or illegible, and the lower sweep was rubbing on the drive. It had stairs, walkways and/or platforms that posed a hazard in that the platform was too worn or uneven with cracks. The ride had been assembled incorrectly and the safety latch was broken on the #9 lap bar. Further, maintenance and training records were not available. This ride was red tagged from a previous inspection. The May 16 and 17, 2013 inspection continued the red tagged status of this ride for noncompliance of manufacturer's specifications; for having no program of maintenance testing and inspection; for assurances that replacement parts are properly produced and procured, and for not correcting previous deficiencies.[12]

[11] A dog house in this context is the area from which the ride operator operates the ride control panel. In this instance it was a 3' x 4' to 5' platform.

[12] Harry Potter, Paratrooper, Super Sizzler and the Swinger attractions or rides have all been cited over the last few years for repeated failures to maintain and provide inspectors with the required and necessary written documentation to substantiate compliance with manufacturer and/or industry standards for the proper upkeep, repair and routine regular scheduled maintenance of equipment and facilities.

The Swinger is a hydraulic ride that has a center column. Various structural concerns were noted in a prior inspection. Included in these concerns was a loose bolt in the upper cable of the ride; the hydraulic system needed replacing; the "S" hooks on the seat chains were not proper parts and improperly procured or produced. Electrical issues were also noted, and as with the other 3 rides/attraction, no maintenance and training records were available. The red tagged status from the inspection prior the May 16 and 17, 2013 inspection was continued on this ride.

CONCLUSIONS OF LAW

The State of Arkansas has determined that when adults use amusement rides or attractions or permit their minor children to use them, their safety is paramount. Accordingly, under Arkansas law, the Arkansas Department of Labor has been charged with the responsibility of inspecting all non-exempt amusement rides and attractions each time they are set up, and before use, in the State of Arkansas. The Arkansas Department of Labor's inspectors must be certified by a national accrediting organization and they must follow established protocols and procedures when inspecting rides and attractions. When deficiencies are found in a ride or attraction that put the public safety at risk, they are required to shut down (red tag) that ride or attraction.

In this matter, the Agency conducted an inspection of 15 rides and/or attractions owned or operated by Bluff City Shows that were situated in Walnut Ridge, Arkansas. Previously, the Agency had performed other such inspections involving this same company, issuing red tags on occasion, but usually listing deficiencies that did not put the public at imminent risk. This time, Bluff City Shows, despite numerous admonitions failed to conduct maintenance, maintain

records, and make repairs, as required on almost all the 15 rides or attractions, and four of the rides were deemed so unsafe that they were red tagged.

At the hearing, the Agency reports were supplemented by the expert testimony of the nationally accredited inspector. These reports and testimony were not refuted by Bluff City Shows despite being given several opportunities to be present, give testimony and evidence, and to show that the deficiencies had been corrected. Based upon the entire record, the Administrative Law Judge must conclude that the findings of the Agency that the four rides and/or attractions constituted an imminent risk to patron safety and should have been red tagged must be upheld. Since no evidence has been presented that the deficiencies have been corrected, there is no basis to remove the red tag designations for the Harry Potter attraction, and the Paratrooper, Super Sizzler and Swinger rides.

ORDER

THEREFORE, IT IS CONSIDERED AND ORDERED that the red tags previously issued by the Arkansas Department of Labor – Safety Division regarding the Harry Potter attraction, and the Paratrooper, Super Sizzler and Swinger rides owned or operated by Bluff City Shows, be upheld, be considered in full force and effect, and that these rides and attraction may not be operated within the boundaries of the State of Arkansas until, and unless, all deficiencies are corrected, a subsequent re-inspection is conducted and it is determined that the ride is safe for patron operation, and the appropriate inspection fee is paid.

Ricky Belk
Director, Arkansas Labor Department

BY: Donna M. Lipsmeyer

Donna M. Lipsmeyer, Administrative Law Judge
Arkansas Department of Labor
10421 West Markham Street
Little Rock, Arkansas 72205

DATE: August 21, 2013

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

LABOR STANDARDS DIVISION

VS. CASE NO.: 2013-0020

VEE-JAY CEMENT CONTRACTING

ORDER

Upon motion of Plaintiff herein, this matter is hereby dismissed **with prejudice**.

IT IS SO ORDERED this matter is dismissed with prejudice.

ADMINISTRATIVE LAW JUDGE

DATE: 1/14/14

APPROVED BY:

Daniel Knox Faulkner (2002-168)
Attorney for Arkansas Department of Labor

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

[redacted] APPELLANT

v. CASE NUMBER 2013-0021

ARKANSAS MILITARY DEPARTMENT APPELLEE

ORDER TO DISMISS

By agreement of both parties, the Arkansas Military Department currently does not participate in, nor is it currently covered under the provisions of the voluntary program for drug free workplaces as set out in Ark. Code Ann. §§ 11-14-101 through 11-14-112 and Workers' Compensation Commission Rule 099.36. Accordingly, the Arkansas Department of Labor has no jurisdiction in this matter and this case is dismissed with prejudice.

IT IS SO ORDERED.

Ricky Belk
Director of Labor

BY: Donna M. Lipsmeyer
Donna M. Lipsmeyer
Administrative Law Judge

Date: October 25, 2013

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

CASE NO. 2013-0022

AMANDA CLARK LOGHRY **CLAIMANT**

vs.

HIGHLAND HEALTHCARE LLC
d/b/a BRIGHTSTAR **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor (Agency) through a telephone hearing conducted on Thursday, January 9, 2013 at approximately at 9:10 a.m. Highland Healthcare LLC d/b/a BrightStar (hereafter referred to as BrightStar) through its President, Mr. Sean Trumbo, appealed an Agency finding of unpaid wages due Ms. Amanda Clark Loghry in the amount of $612.40. The claimant represented herself and had no further witnesses. BrightStar was represented by Mr. Sean Trumbo. Mr. Jay Rodman, the payroll and billing manager, provided testimony and served as a witness for the company. Both parties agreed that they had received copies of the case file.

The Administrative Law Judge considered all the evidence and testimony, weighed the credibility of all witnesses, and makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

Amanda Clark Loghry filed a wage claim (dated 8/5/13) with the Labor Standards Division of the Arkansas Department of Labor. She claimed, and Mr. Trumbo

confirmed, that she had yet to receive her final paycheck for wages for the week of June 3 – June 7, 2013.

Both Ms. Loghry and Mr. Trumbo testified that Ms. Loghry was an exempt employee and she was paid the same amount regardless of how many hours it took for her to accomplish the job. Ms. Loghry, an LPN, worked as a case manager with an annual salary of $32,000 per year. This corresponds to a weekly rate of pay of $615.38. She made home visits and was responsible for establishing and maintaining patient medical charts. Mr. Trumbo testified that BrightStar cannot bill and receive reimbursement for services performed without patient charts completed.

Page 3 of the Humana Care's Senior Bridge Documentation Manual sets out that a case manager must enter professional patient activity notes in Rosalind within 24 hours from the time the work was actually done and dated with the actual date of service. The case manager must also review and sign the weekly activity notes by Sunday, 8:00 p.m. Eastern Standard Time. The file reflects that on Friday, June 7, 2013 Jennifer Livermore, her direct supervisor, directed Ms. Loghry to finish all charting by the end of that day. Ms. Loghry admits that she did not finish her charting that day and that she did her best to accomplish as much as she could. On Monday, June 10, 2013, Ms. Loghry called in sick. At that time, there were 6 Senior Bridge clients for whom charting had not been completed by Ms. Loghry. It was later determined that 4 of the chartings could be completed by another employee who was familiar with, and who had previously seen, the clients. However, ultimately two home visits of Ms. Loghry's clients had to be redone so that the company could be reimbursed.

On Monday, June 10, 2013, Ms. Loghry was notified that she was terminated effective Friday, June 7, 2013. At that time, she was requested to complete her charting, and return her company car and equipment to the office. Ms. Loghry testified that she told them she would be unable to return the car and equipment because she did not have someone else to provide her transportation back home, but they could come and pick it up. Both parties agree that she refused to do any charting because she was no longer an employee.

As a result of Ms. Loghry's refusal to do the remaining charting, Mr. Trumbo, citing an expense of $2,160.00 to the company and Ms. Loghry's failure to complete her work product, refused to pay any of Ms. Loghry's salary for the week of June 3-7, 2013. Additionally, Mr. Trumbo testified that they were charging Ms. Loghry for the time and expense to retrieve and clean the company vehicle ($150.00 - $50.00 for professional cleaning and $100.00 in two employees' time), the replacement of a frayed IPhone 4 charger ($29.00), the cost to reset the password on the computer ($30.00). They were also refusing to reimburse Ms. Loghry for $25.00 in gas which she had purchased on June 7, 2013 at 4:45 p.m. because the gas tank in the car was empty when the car was picked up on Monday. Ms. Loghry testified and the company agreed that she did not perform any substantial work after 4:45 p.m., Friday, until the car was retrieved. There was no signed agreement that Ms. Loghry would be responsible for deductions to her pay because of normal wear and tear of company equipment, cleaning of the company car, resetting the password on the company's computer, or for resetting the company's computer password. The company did not offer to pay her time for returning the company car or for completing the charts.

BrightStar's response of July 29, 2013 in the case file along with testimony by Mr. Trumbo and Mr. Rodman, pointed out that Ms. Loghry had received two payments for the period ending 4/28/13 with a pay date of 5/3/13. The first payment was a direct deposit of Ms. Loghry's weekly paycheck into her bank account. Ms. Loghry testified that the bank had taken that money and used it to pay against a balance she owed the bank. It is agreed that she notified the company of this event, and the company allowed a pay advancement to her that was to be paid back in 8 equal installments. Mr. Trumbo and Mr. Rodham testified that the balance owing on this advanced payment as of her last date of employment was $147.08 (2 remaining payments of $73.54). Ms. Loghry acknowledges both payments and she did not provide any contrary testimony regarding the amount owed. Payroll records reflect at least one example where a repayment in the amount of $73.54 is indicated as a loan payback (*See* payroll stub date May 3, 2013).

DISCUSSION AND 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. § 11-4-303(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 testimony and documents in the record indicate Ms. Loghry was a salaried employee paid regardless of the number of hours needed to accomplish the job.

(7) The Arkansas Department of Labor, Labor Standards Regulation 010.14.112 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 Act and Rule 010.14-100 through -113 except to the extent a different interpretation is required." There is no contact, agreement or employer policy in the present case outlining when a deduction from a salary can be made as it relates to the cleaning of the company car, resetting a computer password, time to retrieve the company car after an employee is terminated, normal wear and tear of equipment and the cost to compete the work of a terminated employee.

If an employee is not performing his/her job to the satisfaction of the employer, the employer's remedy is to discipline the employee. This includes terminating the employee. Mere negligence or failure to perform job duties does not subject the employee to the employer's risk of fixing the employee's mistakes. No evidence was produced that Ms. Loghry did not perform the home visits or other duties other than the 6 charts during the week in question. Salaried or hourly employees' paychecks may not be simply withheld because the employee failed to produce a final work product or because of the employee's poor job performance.

Accordingly, the claimant has met her burden that her last paycheck should not be withheld or reduced for failure to: complete the charts, return the car in a clean condition, pay for an IPhone 4 charger, and to pay for resetting the computer password.

Similarly, the employer cannot be required to reimburse the employee for gas that was not used in a manner reasonably connected with the work absent a clear written policy to do so.

(8) There is no credible dispute that Ms. Loghry received a payroll advancement and that she was aware that deductions were to be taken from her check to satisfy this loan. Mr. Trumbo and Mr. Rodman provided adequate documentation through testimony and documents that, at the time of Ms. Loghry's termination, she still owed the company 2 payments of $73.54. Ms. Loghry produced no evidence to refute that amount and conceded that the advancement had not been totally repaid. Accordingly, BrightStar met its burden of providing an affirmative defense or set off in the amount of $147.08.

THEREFORE, IT IS CONSIDERED AND ORDERED that judgment is entered for the claimant for full salary of $615.38 less $147.08 or **$468.30,** and she is not due a gas reimbursement in the amount of $25.00. The respondent is directed to issue a check payable to Ms. Loghry in the amount of $468.30 within ten days of receipt of this order, and mailed it to the Arkansas Department of Labor.

IT IS SO ORDERED.

Ricky Belk
Director of Labor

BY: _____

Donna M. Lipsmeyer
Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, Arkansas 72205

DATE: January 13, 2014

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

ARKANSAS DEPARTMENT OF LABOR — AGENCY

VS. CASE NO.: WH 2013-0023

JDCF INVESTMENTS LLC DBA
ABC PLUMBING & ELECTRIC — RESPONDENTS

ORDER

Pursuant to the attached Settlement Agreement signed by the parties the Agency request with this motion that this matter be dismissed **without prejudice**.

IT IS SO ORDERED this matter is dismissed without prejudice.

ADMINISTRATIVE LAW JUDGE

DATE: 2/28/14

APPROVED BY:

Denise P. Oxley (84-117)
Attorney for Arkansas Department of Labor

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

LABOR STANDARDS DIVISION

VS. CASE NO.: 2013-0024

JOSE SAUCEDO
ARTURO SAUCEDO
BROTHER'S PAINTING, LLC

ORDER

Upon motion of Plaintiff herein, this matter is hereby dismissed **with prejudice**.

IT IS SO ORDERED this matter is dismissed with prejudice.

ADMINISTRATIVE LAW JUDGE

DATE: 2/26/14

APPROVED BY:

~~Daniel Knox Faulkner (2002-168)~~
Attorney for Arkansas Department of Labor

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

LABOR STANDARDS DIVISION AGENCY

VS. CASE NO. 2013-0025

GOLDEN HOSPITALITY MANAGEMENT, LLC
dba 8TH STREET HOTEL and
KOMAL DHALIWAL RESPONDENTS

ORDER

Upon motion of the Agency, the parties have satisfactorily settled this matter and it is hereby dismissed.

Donna Lipsmeyer
Administrative Law Judge

Date: 3/10/14

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

CASE NO. 2013-0026

STEVE JOHNSON **CLAIMANT**

vs.

IZARD COUNTY ROAD DEPARTMENT **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor (hereinafter referred to as Agency) on Tuesday, November 19, 2013 at approximately 9:30 a.m. through a telephone hearing. Mr. Steve Johnson appealed an Agency finding in favor of his former employer, Izard County Road Department (hereafter referred to as Izard County) that he was not owed 45 hours of vacation pay as he had already received payment for these hours. The claimant represented himself. Mr. Johnson testified and had the opportunity to question the other party. County Judge David Sherrell represented, and testified on behalf of, the Izard County Road Department. The documents contained in the record were also accepted and used as evidence in this hearing. Prior to the hearing, the Agency provided copies of these documents to both parties. Neither party raised questions regarding these documents or objected to their admission and use.

The Administrative Law Judge considered all the evidence and testimony and weighed the credibility of all witnesses and makes the following findings of fact, conclusions of law, and order.

BACKGROUND AND FACTS

Mr. Steve Johnson worked as a motor grader operator for the Izard County Road Department. Although Mr. Johnson could not remember his actual last day of physically working at the Izard County Road Department, Judge Sherrell's testimony together with Mr. Johnson's Time and Attendance Sheet for the period of January 21, 2013 through January 31, 2013, and Mr. Johnson's leave taken log for the period of January 2, 2013 through January 31, 2013, reflect that his last day of physically working was January 23, 2013. Izard County policy specifies that employees with Mr. Johnson's service time receive 80 hours (8 days for employees with 10 hours workdays) at the beginning of each calendar year and 6 days of sick leave per year with 3 days allotted at the beginning of each calendar year. It is undisputed that Mr. Johnson had accrued 80 hours of annual leave and 3 days of sick leave on January 1, 2013 (the beginning of a new calendar year).

Mr. Johnson testified that he believed he was only paid for actual days worked for the pay period that ended January 31, 2013. On the other hand, Judge Sherrell testified that Mr. Johnson's last paycheck dated January 30, 2013 included Mr. Johnson's unused leave and covered the pay period ending January 31, 2013. Judge Sherrell testified that Izard County records indicated that Mr. Johnson was left on the county's payroll until Mr. Johnson's vacation leave due under their policy was exhausted. Further, because of an incorrect charge against Mr. Johnson's sick leave balance during January 2013 (the beginning of a new calendar year for leave purposes) where 5 hours were charged to sick leave not yet earned, a corresponding amount, was claimed as an offset to annual leave. This leave was taken on January 2, 2013.

According to Mr. Johnson's leave taken records, he agreed that he had used four days (40 hours) of vacation leave and 35 hours of sick leave during the period between January 2 and January 24, 2013. Mr. Johnson's written statement in the file indicates he thought he would get credit for 6 days (60 hours) of sick leave on January 1, not the 3 days (30 hours) as specified in the county leave policy.

The only substantial dispute is the forty hours of vacation leave (actually 35 hours after application of the sick leave offset) which Izard County maintains were used between January 28 and January 31, 2013 when the county left Mr. Johnson on the payroll to use his remaining vacation balance. Mr. Johnson indicated that his employment with Izard County was from 11/9/09 until 1/26/2013. This corresponds with Izard County using Mr. Johnson's remaining 40 hours of vacation time for his normal work schedule of January 28, January 29, January 30, and January 31, 2013, and which would complete the second week of Mr. Johnson's final pay period. A copy of check 09424 dated January 30, 2013 to Mr. Johnson, and endorsed by him, reflects a payment of $612.94. This amount corresponds to the payroll history list entry of that same date showing a gross pay of $972.00 which is consistent with previous pay amounts paid to Mr. Johnson for 80 hours of pay at $12.15 per hour.

DISCUSSION AND 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. § 11-4-303(c).

(4) The wage claimant carries the burden of proof for any claim of unpaid vacation time.

(5) Arkansas state law does not generally mandate the payment of unused vacation time to employees. There was no evidence introduced to indicate that an Arkansas state law exists that mandates the payment of unused annual leave to Izard County employees.

(6) In most instances, vacation time payout is a matter of contract law with the terms of the contract governing this issue. There was no evidence that a contract existed between Mr. Johnson and Izard County relating to vacation pay.

(7) In the absence of State law, or a contract in this regard, the employer's policy written or unwritten may be looked at for guidance. It is an undisputed fact that Izard County maintains a leave policy that awards employees in Mr. Johnson's tenure and work schedule status two weeks paid leave (or 80 hours) at the beginning of each calendar year, and 3 days of paid (30 hours) sick leave at the beginning of each calendar year. Mr. Johnson is mistaken in his belief that the policy grants the entire annual allotment of 6 sick days at the beginning of the calendar year.

(8) Mr. Johnson maintains that that he has not been paid for the forty hours of annual leave that he had accrued, and had not used, as of January 24, 2013. Unfortunately, he does not remember the exact date that he ceased physically to work, but he states in his wage claim that his ending date of employment was January 26, 2013. This coincides with Judge Sherrell's

contention that the four days of annual leave were paid for the dates of January 28, January 29, January 30, and January 31, 2013.

(9) Mr. Johnson failed to carry his burden to prove that Izard County did not pay vacation in accordance with its policy.

THEREFORE, IT IS CONSIDERED AND ORDERED that the Preliminary Wage Determination Order finding that Mr. Johnson was not owed 45 hours of vacation pay, as he had already received payment for these hours, is upheld.

IT IS SO ORDERED.

Ricky Belk
Director of Labor

BY: _____
Donna M. Lipsmeyer
Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, Arkansas 72205

DATE: November 20, 2013

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

FILED

CASE NO. 2013-0027

NOV 25 2013

Arkansas Department of Labor

SONYA PUGH — CLAIMANT

vs.

HARPS FOOD STORES, INC.
SPRINGDALE, ARKANSAS — RESPONDENT

ORDER

This matter came before the Arkansas Department of Labor (hereinafter referred to as Agency) on Tuesday, November 19, 2013 at approximately 10:30 a.m. through a telephone hearing. Ms. Sonya Pugh appealed an Agency finding in favor of her former employer, Harps Food Stores, Inc. in Springdale, Arkansas (hereafter referred to as Harps) that she was not owed 31 hours of vacation pay in accordance with company policy. The claimant represented herself. Ms. Pugh testified and had the opportunity to question all witnesses. In addition to the written existing agency record in this matter, Ms. Pugh proffered an undated, un-notarized statement signed by six individuals, a handwritten, undated and un-notarized statement signed by Betty Redmon, and an August 9, 2013 letter from Lynn Snow. Ms. Pugh failed to provide copies of these documents to Harps in advance of this hearing as contained in the Instructions for Telephone Hearing provided to her by the Agency. Harps did not object to the document signed by Ms. Betty Redmond nor the one signed by the six individuals. These two documents were accepted into evidence. However, the letter from Lynn Snow contained a copy of an unused, unauthenticated, unsigned rain check and the information related to an unnamed person at Harps.

Although Ms. Pugh believed that this information was part of her unemployment hearing, Harps representatives did not recall this information. Because of the lack of notice, authentication, prejudicial nature and relevance of this information, the August 9, 2013 letter from Lynn Snow was not accepted into evidence. Harps Food Stores, Inc. in Springdale, Arkansas was represented by Russell Horton, Store Manager, and Ron Trolinger, Payroll Clerk, and additional testimony was provided by its witness, Amanda Plant, Grocery Manager.

The Administrative Law Judge considered all the evidence and testimony and weighed the credibility of all witnesses and makes the following findings of fact, conclusions of law, and order.

BACKGROUND AND FACTS

Ms. Sonya Pugh last worked for Harps Food Stores, Inc. in Springdale, Arkansas from February 15, 2005 through May 28, 2013. Both parties agree that Ms. Pugh wrote a rain check dated May 19, 2013 for the purchase of Pepsi products at an advertised special price of five for $10.00 or $2.00 per item. The regular price per item was $4.39. The rain check also indicated that Ms. Pugh subsequently purchased 10 of these items using the sales price. Through testimony and statements in the record, Mr. Horton and Mr. Trolinger both set out that the store was not out of the product at the time the rain check was written. Ms. Pugh testified that a customer reported to her that a particular type of Pepsi product was not in stock at the time the customer received a rain check. She further testified that she wrote the rain check for a customer and not herself. It was cited in the Arkansas Appeals Tribunal decision that, in addition to the product not being out of stock, the sale price was after the sale was over.

The hearsay statement provided by Ms. Betty Redmond tells of her elderly mother who was unable to come into the store on Memorial Day to collect her rain checked sodas and who accidently called Ms. Pugh instead of her daughter, who then took it upon took herself to then write a rain check on the mother's behalf, purchase the sodas, and offer to drop them off on her way home. In contrast, Ms. Amanda Plant testified that when she specifically asked Ms. Pugh whether she wrote the rain check, Ms. Pugh responded yes. Further, when Ms. Plant asked Ms. Pugh if she wrote the rain check for herself, Ms. Pugh responded that she had. Ms. Pugh denied stating to Ms. Plant that she had written the rain check for herself.

Mr. Horton testified that after discovering information about the rain check, the store suspected that Ms. Pugh was getting coffee and not paying for it. Company policy states that all items are to be paid for immediately prior to consumption, and an associate is to have the receipt for the item being consumed either attached to the product or in their possession. Ms. Pugh provided a signed statement from six individuals who worked on the weekends with her. There is a statement on this document that says that these individuals all say that when Ms. Pugh worked on the weekends with them, she paid for her coffee and snacks. Mr. Horton testified that he reviewed store videotape that showed occasions where Ms. Pugh did not pay. Ms. Pugh did not contest this testimony at the hearing.

According to testimony by Mr. Horton and case documents in the file, Harps, along with other things, considered Ms. Pugh's conduct and actions relating to her writing and use of the rain check and her not paying for coffee as: breaches of the store's Code of Business Ethics (signed by Ms. Pugh October 25, 2007); serious infractions (specifically theft in any form, and untruthfulness about personal work history, skills or training, falsifying records or information) that could warrant immediate termination; and a violation of the employee purchase policies for

consuming food without prior payment. Although the loss of coffee sales to the store was not estimated by the store, Mr. Horton did confirm that the loss to the store by selling the 10 items of Pepsi products using the sales price was around $20.00.

Mr. Horton testified that it is Harps unwritten policy to not payout vacation time when an employee is terminated for gross misconduct that results in a monetary loss to the store. According to him, this is, and has been, the store's policy for many years. He did mention that the store is in the process of putting this unwritten policy into writing. Ms. Pugh stated that she knew of two former employees who had been terminated for theft who had received their vacation pay. Mr. Trolinger recognized the name of one of these individuals. He testified that this employee's termination was not for theft, but for insubordination, making that person eligible for vacation payment. Neither Mr. Trolinger nor Mr. Horton knew the circumstances of the second person. Mr. Horton stated that, if for some reason, that person had been terminated actually for gross misconduct that resulted in a monetary loss to the store, then it would have been a mistake to pay that person for vacation time and that such payment should not have occurred.

According to documents in the file, the Arkansas Department of Workforce Services found that Ms. Pugh's handling of her own rain check transactions violated the store's policy for self checking and that her actions were against the store's best interest, and she was disqualified to unemployment benefits. Ms. Pugh appealed the Arkansas Department of Workforce Services denial of unemployment benefits to the Arkansas Appeal Tribunal. After its telephone hearing, the Arkansas Appeal Tribunal found that the rain check Ms. Pugh had written violated the employer's policy. Although the Tribunal found that there was significant evidence that Ms. Pugh was terminated for dishonesty, it chose to classify her termination for unemployment

benefit purposes as misconduct in connection with the work as it related to the improper use of a rain check. There was no mention of nonpayment for coffee.

DISCUSSION AND 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. § 11-4-303(c).

(4) The wage claimant carries the burden of proof for any claim of unpaid vacation time.

(5) Arkansas state law does not generally mandate the payment of unused vacation time to employees. There was no evidence that an Arkansas state law exists that mandates the payment of unused annual leave to Harps Food Stores, Inc. employees.

(6) In most instances, vacation time payout is a matter of contract law with the terms of the contract governing this issue. There was no evidence that a contract existed between Ms. Pugh and Harps Food Stores, Inc. relating to vacation pay.

(7) In the absence of State law, or a contract in this regard, the employer's policy written or unwritten may be looked at for guidance. Harps Food Stores, Inc. in Springdale, Arkansas has

a policy to not payout vacation time when an employee is terminated for gross misconduct that results in a monetary loss to the store. A loss of any amount to the store for theft would fall within this policy of nonpayment. At best, based upon the facts of this case, Ms. Pugh wrote a rain check, herself, for a customer who claimed over the phone to have a rain check, then Ms. Pugh used the rain check Ms. Pugh wrote out (not the customer's referenced rain check) to purchase the 10 items at the sales price. Accordingly, Ms. Pugh would not have used the customer's alleged original rain check to purchase the items, but one that Ms. Pugh wrote out herself after the rain check date (more than likely backdated to the date), and then Ms. Pugh subsequently purchased the products on a date (probably Memorial Day weekend) when the items were not on sale, and when the products were readily available. It is interesting to note that Ms. Pugh never testified that she actually delivered the drinks to the customer nor collected the outstanding customer rain check.

The store also reviewed videotape that showed Ms. Pugh using and paying for store items such as coffee. Ms. Pugh said that she always paid for her snacks and coffee, and she submitted the signatures of 6 individuals who apparently worked with her saying that Ms. Pugh paid for her coffee and snacks when she worked with them. Obviously, co-workers can only speak for those times when they are in a position to make observations and there can be other times when they may not be in such a position. Ms. Pugh did not dispute the testimony by Mr. Horton relating to the video tape evidence.

Clearly, there is evidence that Ms. Pugh was terminated from Harps Food Stores, Inc. in Springdale, Arkansas for theft, no matter how small the amount, and other violations of store policies. Harps Food Stores Inc., like most employers, considers theft by an employee as gross misconduct.

(8) Accordingly, Harps Food Stores, Inc. acted within its policy by not paying out Ms. Pugh's 31 hours of vacation.

THEREFORE, IT IS CONSIDERED AND ORDERED that the Preliminary Wage Determination Order finding that Ms. Pugh is not eligible for vacation pay is upheld.

IT IS SO ORDERED.

Ricky Belk
Director of Labor

BY: _____
Donna M. Lipsmeyer
Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, Arkansas 72205

DATE: November 20, 2013

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

CASE NO. 2013-0029

JOHNNY BAYIRD **CLAIMANT**

VS.

KINGRIDGE ENTERPRISES, INC. **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor on Thursday, January 9, 2014. Mr. Mark Gregory Jackson, on behalf of Kingridge Enterprises, Inc., appealed a September 5, 2013 Preliminary Wage Determination by the Labor Standards Division of the Arkansas Department of Labor that Kingridge Enterprises, Inc. owed $147.00 in unpaid wages to Johnny Bayird. Mr. Jackson requested that in lieu of a telephone hearing, that this hearing be held in person. Notice was provided by both certified mail and first class mail to both parties that the hearing was set for November 21, 2013 at 1:00 p.m. Mr. Jackson appeared for the November 21, 2013 hearing; however, Mr. Bayird failed to appear citing transportation issues. This hearing was rescheduled and set for January 9, 2014. The Arkansas Labor Department sent notices of the new hearing date to both parties on December 3, 2013. Although Mr. Bayird did not sign for his certified mail notice of the rescheduled hearing date, his first class mail was not returned. He did receive this notice because, on January 6, 2014, two days before the hearing, Mr. Bayird contacted the Arkansas Labor Department to once again request to reschedule this

hearing. Mr. Bayird stated that sometime during the week after Christmas, his doctor's office scheduled him for elective knee surgery for January 9, 2014. Since this was the date his doctor's office scheduled, he did not request another date nor did he volunteer to check with his doctor's office to try and arrange another date or time. Mr. Jackson stated his objection to another hearing date, setting out inconveniences he had to overcome to attend both hearings. Taking into consideration all the facts and circumstances surrounding the claimant's new request to reschedule, Mr. Bayird's request was denied.

Mr. Bayird did not appear for the hearing. Mr. Mark Jackson, CEO, appeared on behalf of Kingridge Enterprises, Inc. No witnesses other than Mr. Jackson were present. Prior to the hearing, both parties had been provided a copy of the case file in this matter. Mr. Jackson confirmed he had received his copy.

The Administrative Law Judge considered all the evidence and testimony, weighted the credibility of all witnesses, and makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

Johnny Bayird initially filed a wage claim with the Labor Standards Division of the Arkansas Department of Labor in April of 2013 for 15 hours of unpaid time worked during the periods of March 10 – March 16, 2013 and March 17 – March 23, 2013. His total claim was for $210 ($14 per hour x 15 hours). According to documents in the file submitted by Mr. Bayird, he did not pursue his initial claim because his new boss said that "he would check in to it & give me my hours if he had to add on some ever [*sic*] week, which he never did."

In June 2013, Mr. Bayird refiled his same wage claim for $210 with the Labor Standards Division of the Arkansas Department of Labor. As part of his claim, Mr. Bayird provided a copy of a March 2013 calendar which reflected various handwritten times on March 13, 14, 15, 16 18, 20, 21 and 27. The Labor Standards Division originally reduced his claim by two hours based on information provided by Mr. Bayird that he had been paid for those hours. His claim was further reduced by an additional 1.5 hours for a mathematic error involving work claimed on March 21, 2013. Accordingly, the Labor Standards Division's investigation resulted in a finding in favor of Mr. Bayird for $147.00 ($10.5 hours x $14.00).

Mr. Jackson testified at the hearing that, at the particular point in time Mr. Bayird was claiming these additional hours, Mr. Jackson was implementing a more structured work site pay reporting procedure to correct overpayments for work not performed, yet for which work time was being claimed and paid. He stated that individual time cards or time clocks were not maintained on the construction site, but instead the company used a time recording/reporting system customarily used on highway construction sites whereby the site manager/superintendent observes and reports the actual times employees report and depart from work. Having a time clock or timesheets in the field on a spread out worksite is not practical or conducive to verification. Employees are to review and record their time with the superintendent as well.

Mr. Jackson stated that employees on this construction site were originally required to work from 7:00 a.m. to 5:00 p.m. with no lunch break. He produced letters to the site superintendent dated March 7, 2013 and March 20, 2013 that employees had been reporting to work late, leaving work early and claiming to have worked through lunch on

a routine basis. Mr. Jackson testified that he had personally observed employees on this site not arriving at work by 7:30 a.m. and leaving at 4:00 p.m. and being paid for working earlier hours and leaving work later. He further reported complaints from local businesses that company trucks had been seen "within town and frequenting local eateries and restaurants through the lunch hour." Mr. Jackson refuted Mr. Bayird's claim that Mr. Bayird started work on March 16, 2013 at 7:00 a.m. and left work at 4:30 p.m. by testifying that he was personally on the job site that day and no one started work until 7:30 a.m. and everyone ended work by 4:00 p.m. This is in conflict with Mr. Bayird's handwritten records, and claim, that he worked from 7:00 a.m. until 4:30 p.m. that day. Further, Mr. Bayird's handwritten records indicated that he worked 10.5 hours on March 20, 2013, with only a notation of 6:30 and no other time recorded for that day. The investigator gave Mr. Bayird credit for working 10 hours (10.5 hours minus 30 minute lunch) for March 20, 2013. On March 21, 2013, Mr. Bayird once again claimed that he started work at 7:00 a.m., he worked until 4:00 p.m., and he took a 30-minute lunch. He then erroneously claimed that he worked 11 hours on March 21. The Labor Standards Investigator corrected Mr. Bayird's calculations on March 21 and reduced his hours worked from 11 hours to 9 hours.

The investigator gave additional weight to Mr. Bayird's claim because of a claim filed by Ms. Wanda Payne that Kingridge Enterprises, Inc. shorted one of her paychecks 2.2 hours and failed to pay her the agreed upon hourly rate of pay. According to documents in Ms. Payne's file, her claim was subsequently closed because Ms. Payne reported that she had received her pay and requested her claim be closed.

Mr. Jackson refuted the presumption of the Labor Standards investigator of additional weight granted to Mr. Bayird's claim because of a previous claim filed by Wanda Payne. Mr. Jackson testified that Ms. Payne withdrew her complaint and no additional payment was made to her although Ms. Payne reported to the Labor Department that she had received her pay and requested her claim be closed.

DISCUSSION AND 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. § 11-4-303(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 testimony and documents in the record indicate Mr. Bayird was paid an hourly rate of $14.00 per hour.

(7) Mr. Bayird's filing initially requested payment for 15 hours of unpaid time worked. However, Mr. Bayird's own records were incomplete and contained at least one

mathematical error. Additionally, Mr. Bayird's claimed start and ending times for March 16, 2013 were refuted by the personal observation of Mr. Jackson. Mr. Jackson provided a reasonable explanation for why actual time cards or time clocks were not maintained by the employees, but instead utilized a time recording system customarily used on highway construction sites. Additionally, Mr. Jackson provided a possible motive that employees might have to claim additional hours to make up for hours they had been claiming but not actually working. Finally, Mr. Jackson refuted the presumption of additional weight granted to this claim by the Labor Standards Investigator because of a previous claim filed by Wanda Payne. Mr. Jackson testified that Ms. Payne withdrew her complaint and no additional payment was made to her although Ms. Payne reported to the Labor Department that she had receive her pay and requested her claim be closed. Mr. Jackson was a credible witness.

(8) Although Mr. Bayird's written filings carried the original burden of establishing a *prima facie* case, Mr. Bayird failed to appear under oath and rebut the refutation of his claim by Mr. Jackson. Mr. Bayird failed to carry his burden of proof.

The testimony and evidence supports that Kingridge Enterprises, Inc. does not owe Mr. Bayird any wages for the period from March 10 – March 30, 2013.

THEREFORE, IT IS CONSIDERED AND ORDERED that judgment is entered in favor of the respondent, Kingridge Enterprises, Inc. and the claimant is not due any unpaid wages.

IT IS SO ORDERED.

Ricky Belk
Director of Labor

BY: _____

Donna M. Lipsmeyer
Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, Arkansas 72205

DATE: January 12, 2014

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

CASE NO. 2013-0030

DEBRA NASSAR **CLAIMANT**

VS.

SOUTHWEST- ARK DEVELOPMENT COUNCIL, INC. **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor (hereinafter referred to as Agency) on Thursday, November 21, 2013 at approximately 1:30 p.m. through a telephone hearing. Ms. Debra Nassar appealed an Agency finding in favor of her former employer, Southwest-Ark Development Council, Inc. (hereafter referred to as SWADC) that she was not owed any hours of vacation pay in accordance with company policy. The claimant represented herself. Ms. Nassar testified and had the opportunity to question all witnesses. SWADC was represented by Ms. Regenia Emanual, Human Resource Manager, and Ms. Sandra Patterson, SWADC Executive Director, and its witness, Shiandra Luckett, who was present but did not testify.

The Administrative Law Judge considered all the evidence and testimony, weighed the credibility of all witnesses, and makes the following findings of fact, conclusions of law, and order.

BACKGROUND AND FACTS

Ms. Debra Nassar was terminated on June 24, 2013 from SWADC as the Nevada County Senior Program Director in Precott, Arkansas due to an incident, on that date, involving her layoff notice. Because of budget deficits and constraints, SWADC was restructuring its Senior Center Director positions by eliminating eight Center Directors positions, and creating instead, four Regional Center Director positions. Ms. Nassar and the other Center Directors were given the opportunity to apply for the new Regional Director positions.

On June 24, 2013, Ms. Patterson, SWADC Executive Director, along with Ms. Griffie, Ms. Myrtle Pratt, and Ms. Shiandra Luckett traveled to Prescott to notify Ms. Nassar, in person, that she had not been selected for one of the Regional Director positions, and that she would be laid off effective immediately. Ms. Griffie and Ms. Pratt, both Center Directors, specifically accompanied Ms. Patterson to help in gathering information from Ms. Nassar to assist in the transition of managing the Center.

Ms. Nassar testified that she did become upset and angry during the June 24, 2013 meeting, and she said things that she wished she had not said. She was sorry to have said those things. Ms. Nassar testified further that she takes certain medications that cause her to become upset or angry, and that she also felt somewhat intimidated by having four people in her office and being told that she could not take certain personal items in her office with her at that time (e.g. a computer). The record indicates that Ms. Nassar became loud and confrontational and called both the local Mayor's office and the police. Ms. Nassar told everyone to get out of "her" building since it was owned by the City of Prescott and not SWADC. Ms. Patterson attempted to

calm Ms. Nassar down and have Ms. Nassar sign the Lay Off letter, but Ms. Nassar refused to sign that letter.

The situation escalated, and Ms. Nassar became more confrontational and used profanity and abusive language. There is no dispute that Ms. Nassar referred to Ms. Patterson as a "Black Bitch." Ms. Nassar testified that when she was advised that her conversation was being recorded, she felt that her "rights" were being violated since she was not initially advised of the recording.

Due to the June 24, 2013 incident, SWADC elected to rescind the lay off notice offer, and instead, terminate Ms. Nassar's employment for gross negligence. SWADC written policy allows employees who are laid off to be paid for vacation benefits, however, employees who are terminated are not eligible for vacation time.

Subsequent to her termination, Ms. Nassar filed for unemployment benefits. The Arkansas Department of Workforce Services found that she was discharged from her job on June 24, 2013 due to the offensive manner in which she argued with her employer and that her actions were against her employer's best interest.

DISCUSSION AND 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. § 11-4-303(c).

(4) The wage claimant carries the burden of proof for any claim of unpaid vacation time.

(5) Arkansas state law does not generally mandate the payment of unused vacation time to employees. There was no evidence that an Arkansas state law exists that mandates the payment of unused annual leave to SWADC employees.

(6) In most instances, vacation time payout is a matter of contract law with the terms of the contract governing this issue. There was no evidence that a contract existed between Ms. Nassar and SWADC relating to vacation pay.

(7) In the absence of State law, or a contract in this regard, the employer's policy written or unwritten may be looked at for guidance. SWADC has a policy to not pay out unused vacation time when an employee is terminated. Ms. Nassar was terminated by SWADC for gross misconduct.

(8) Accordingly, SWADC acted within its policy by not paying Ms. Nassar for the fifteen unused vacation days upon her termination.

THEREFORE, IT IS CONSIDERED AND ORDERED that the Preliminary Wage Determination Order finding that Ms. Nassar is not eligible for vacation pay is upheld.

IT IS SO ORDERED.

Ricky Belk
Director of Labor

BY: _____
Donna M. Lipsmeyer
Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, Arkansas 72205

DATE: November 22, 2013

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

CASE NO. 2013-0031

DAVID W. SANDIN **CLAIMANT**

VS.

UNITED CEREBRAL PALSY OF ARKANSAS, INC. **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor (hereinafter referred to as Agency) on Thursday, November 21, 2013 at approximately 2:00 p.m. through a telephone hearing. Mr. Sandin appealed an Agency finding in favor of his former employer, United Cerebral Palsy of Arkansas, Inc. (hereafter referred to as UCP) that he was not owed any hours of vacation pay in accordance with company policy. The claimant represented himself. Mr. Sandin testified and had no further witnesses. Ms. Melissa Boswell, Human Resource Director, represented UCP. UCP had no persons other than Ms. Boswell present.

The Administrative Law Judge considered all the evidence and testimony, weighed the credibility of all witnesses and makes the following findings of fact, conclusions of law, and order.

BACKGROUND AND FACTS

Mr. Sandin was terminated by UCP on June 28, 2013. He worked as a caregiver (DCW) for clients. On June 17, 2013, EMT first responders were called to transport a client to the

(5) Arkansas state law does not generally mandate the payment of unused vacation time to employees. There was no evidence that an Arkansas state law exists that mandates the payment of unused annual leave to UCP employees.

(6) In most instances, vacation time payout is a matter of contract law with the terms of the contract governing this issue. There was no evidence that a contract existed between Mr. Sandin and UCP relating to vacation pay.

(7) In the absence of State law, or a contract in this regard, the employer's policy written or unwritten may be looked at for guidance. UCP has a policy to not pay out vacation time when an employee is terminated for misconduct. Mr. Sandin was terminated by UCP for misconduct.

(8) Accordingly, UCP acted within its policy by not paying Mr. Sandin 50.22 unused vacation days upon his termination.

THEREFORE, IT IS CONSIDERED AND ORDERED that the Preliminary Wage Determination Order finding that Mr. Sandin is not eligible for unused vacation pay is upheld.

IT IS SO ORDERED.

Ricky Belk
Director of Labor

BY: _____
Donna M. Lipsmeyer
Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, Arkansas 72205

DATE: November 22, 2013

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

CASE NO. 2013-0032

BEVERLY WILLIAMS	**CLAIMANT**
vs.	
RIVER RIDGE REHABILITATION AND CARE CENTER	**RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor (hereinafter referred to as Agency) on Thursday, November 21, 2013 at approximately 2:30 p.m. through a telephone hearing. Ms. Beverly Williams appealed an Agency finding in favor of her former employer, River Ridge Rehabilitation and Care Center (hereafter referred to as River Ridge) that she was not owed any hours of vacation pay in accordance with company policy. The claimant represented herself. Ms. Williams testified and had no further witnesses. Mr. Gaylon Gammill, Facility Administrator, represented River Ridge. River Ridge had no persons other than Mr. Gammill present.

The Administrative Law Judge considered all the evidence and testimony, weighed the credibility of all witnesses, and makes the following findings of fact, conclusions of law, and order.

BACKGROUND AND FACTS

The facts presented in the written case file and through the testimony are substantially undisputed. Ms. Williams worked an LPN for River Ridge. She submitted her written notice of resignation and two-week notice on June 10, 2013. Ms. Williams stated that her work schedule had been changed and she was assigned to work some hours other than those she had normally worked in the past. Due to personal reasons, Ms. Williams advised River Ridge that she was unable to work those hours and her last actual workday was June 11, 2013.

River Ridge's written resignation pay policy states that "If an employee wishes to resign his/her position at this facility, most employees must give at least 2 weeks notice to receive earned and accrued vacation time." Ms. Williams testified that she was aware of this policy. There is also a copy of her signature (dated July 16, 2010) where she signed the Acknowledgement of Understanding the Employee Handbook's Purpose and Contents. Ms. Williams stated in the Claimant Wage Claim Form that she felt that she gave River Ridge a two weeks notice, but just did not work those two weeks. She feels that she is due payment for her 59.15 hours of accrued vacation benefits.

In his letter of August 6, 2013 in the case file, Mr. Gammill states that it is River Ridge's policy, which its employees understand, "that a written two week notice of resignation includes the responsibility of the resigning employee to work all scheduled shifts based on the date of submission through two weeks following notice of resignation." Accordingly, Mr. Gammill testified that River Ridge does not owe Ms. Williams any vacation pay.

DISCUSSION AND 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. § 11-4-303(c).

(4) The wage claimant carries the burden of proof for any claim of unpaid vacation time.

(5) Arkansas state law does not generally mandate the payment of unused vacation time to employees. There was no evidence that an Arkansas state law exists that mandates the payment of unused annual leave to River Ridge employees.

(6) In most instances, vacation time payout is a matter of contract law with the terms of the contract governing this issue. There was no evidence that a contract existed between Ms. Williams and River Ridge.

(7) In the absence of State law, or a contract in this regard, the employer's policy written or unwritten may be looked at for guidance. River Ridge has a policy to not pay out vacation time when an employee in Ms. Williams' job title fails to provide two weeks notice. Ms. Williams initially gave a two week notice; however, for personal reasons she did not fulfill her

responsibility to work that time period. Instead, Ms. Williams effectively resigned June 11, 2013, her last day of work, thus not giving a two week notice.

(8) Accordingly, River Ridge acted within its policy by not paying Ms. Williams 59.15 hours of unused vacation pay upon her resignation.

THEREFORE, IT IS CONSIDERED AND ORDERED that the Preliminary Wage Determination Order finding that Ms. Williams is not eligible for unused vacation pay is upheld.

IT IS SO ORDERED.

Ricky Belk
Director of Labor

BY: _____
Donna M. Lipsmeyer
Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, Arkansas 72205

DATE: November 24, 2013

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

CASE NO. 2013-0033

PAMELA A. FOX **CLAIMANT**

vs.

CHARLES C. "CLIF" TURNAGE, TRUSTEE
CHARLES L. TURNAGE TRUST **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor (hereinafter referred to as Agency) on Thursday, November 21, 2013 at approximately 3:00 p.m. through a telephone hearing. Mr. Charles C. "Clif" Turnage (Clif Turnage), appealed an Agency finding in favor of Ms. Fox that Mr. Clif Turnage as Trustee for the Charles L. Turnage Trust, owes Ms. Fox $360.00 for unpaid final wages. The case file in this matter reflects that the notice of hearing was sent to Ms. Fox by certified mail. This notice to Ms. Fox's last known address of record was returned unclaimed. Further, when the Agency attempted to established phone contact with Ms. Fox at her last known phone number of record, at the time of this hearing, the Agency received a recording that the number was no longer in working order. Mr. Clif Turnage testified and had one witness, Ronald Johnson.

The Administrative Law Judge considered all the evidence and testimony, weighed the credibility of all witnesses, and makes the following findings of fact, conclusions of law, and order.

BACKGROUND AND FACTS

The Arkansas Department of Labor received a Claimant Wage Claim Form completed by Ms. Pamela Ann Fox on April 22, 2013. Ms. Fox indicated that she worked from February 2, 2013 through March 28, 2013 performing nursing duties for a patient with ALS. She indicated that she was paid weekly, on an hourly basis, and she had just received a raise to $350.00 per week, with $14.00 per hour to be paid for hours in excess of 8 hours a day. Ms. Fox listed Mr. Clif Turnage as her supervisor and the person who hired her. She specified on her Wage Claim Form that she had not been paid for work performed from March 27 through March 29, 2013. Specifically, she said that she had worked 12 hours on Wednesday (March 27), 12.5 hours on Thursday (March 28) and 14.5 hours on Friday (March 29). This amounted to $150.00 ($50.00 per day x 3 days) plus $210.00 (15 hours over 8 hours a day at $14.00 per hour), totaling to $360.00, owed to her. The case file indicated that on April 23, 2013, a Notice of Wage Claim and Employer Response Form was mailed by the Labor Standards Section of the Department of Labor to Mr. Clif Turnage at an address in Lake Village, Arkansas, and on May 14, 2013 another copy was fax'ed to the employer. On May 23, 2013, the Agency had not received a response from Mr. Clif Turnage, and the Labor Standards Section entered a default finding in favor of the claimant, Ms. Fox.

On September 25, 2013, Mr. Clif Turnage contacted the Labor Department regarding the Labor Standards Preliminary Determination in favor of Ms. Fox, and he requested a hearing in the matter so that he could have an opportunity to respond and demonstrate that she had been paid.

He stated, that at that time Ms. Fox had provided care for his father, he was an agent for his father, Charles L. Turnage, who had passed away on July 25, 2013, and that he was not personally Ms. Fox's employer. Mr. Clif Turnage mentioned that he had just opened up mail to Lake Village as he does not check mail at the Lake Village address very often. Since there was a question as to whether Mr. Clif Turnage was actually the employer, or what his standing in this instance actually was, Mr. Turnage was allowed to appeal the Preliminary Wage Determination.

Mr. Clif Turnage testified that Ms. Fox, a Registered Nurse, had been hired to care for his father, Mr. Charles L. Turnage. With the advice of his father's attorney, the Charles L. Turnage Trust had been established. This trust was for the care and benefit of his father and mother. The father was the original Trustee, but as the father's condition worsened, Clif Turnage was appointed substitute Trustee. Mr. Clif Turnage hired Ms. Fox and supervised her as a Trustee of the trust. Mr. Clif Turnage's sister is also a Co-Trustee for this trust. Up until Ms. Fox's last workday, she had been paid out of the trust. Ms. Fox previously submitted a copy of a paystub to the Agency indicating "Charles L. Turnage, Lake Village" on the check information, as payor. This check stub was for the pay period March 6, 2013 through March 12, 2013.

Mr. Clif Turnage testified that Ms. Fox had resided in one of his properties, the "red house," rent free. This house was located a few houses down from his father's house in Lake Village. On Ms. Fox's last workday (which he thought was probably the same date that Ms. Fox indicated—Friday, March 29, 2013), he went to the red house to talk with Ms. Fox about her employment. Mr. Clif Turnage stated that by mutual agreement, Ms. Fox ceased her employment that night. Mr. Clif Turnage called Mr. Ronald Jones to help pack her things and move her and her belongings out of the red house. Mr. Clif Turnage testified that he asked Ms.

Fox how much he owed her. She told him the amount and that she needed the money. Instead of waiting to process a check on the computer, he paid her $500 in cash which was more than what she said she was owed. Mr. Ronald Jones testified that he did hear Mr. Turnage ask Ms. Fox how much he owed her, that Mr. Turnage counted out cash to her, and that she was pleased with the amount. Although Mr. Jones was not able to confirm the amount paid, he did mention that Mr. Turnage is a very generous man who rounds amounts up. Mr. Jones is a subcontractor who does work for Mr. Turnage.

DISCUSSION AND 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. § 11-4-303(c).

(4) The wage claimant carries the burden of proof for any claim of unpaid vacation time.

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

(6) The Labor Standards Division of the Department of Labor issued a Preliminary Wage Determination Order in favor of Ms. Pamela Fox based only on information provided by Ms. Fox that she was owed $360.00 wages for her last 3 days of pay.

(7) Mr. Clif Turnage's testimony is collaborated through testimony of Ronald Jones that Mr. Clif Turnage asked Ms. Fox how much was owed her, that he paid her in cash, and that she did not say anything to imply that that amount was incorrect or lacking. It is credible and believable that since it was late in the evening on March 29, 2013 and Ms. Fox's employment had just ended that she would be vacating her residence at the red house owned by Mr. Clif Turnage. It is also credible that Mr. Clif Turnage would settled up with Ms. Fox as to how much was owed her that evening. Further since Ms. Fox was paid on a weekly basis, she should have easily remembered the hours worked that same day (March 29) and the two days prior (March 28 and March 27) and could provide that account to Mr. Clif Turnage that evening before moving out. It is also believable that Ms. Fox would have wanted to receive her salary that evening before she left and that Mr. Clif Turnage would pay Ms. Fox in cash instead of making her wait for check that could be issued in the near future. Mr. Clif Turnage's testimony is largely collaborated by Mr. Jones who stated that he heard Mr. Clif Turnage ask Mr. Fox how much money he owed her, he observed him pay Ms. Fox in cash, and observed Ms. Fox accept the amount paid to her for working. Further, Mr. Jones testified that Ms. Fox seemed happy with the amount paid and she never said anything about more money was owed.

(8) Although Ms. Fox met her initial burden of showing that she had been owed $360.00, Mr. Clilf Turnage, as Trustee, met the employer's burden of showing that amount had been paid to her the evening of March 29, 2013.

THEREFORE, IT IS CONSIDERED AND ORDERED that the Preliminary Wage Determination Order finding that Ms. Fox is owed $360.00 in final wages is overruled, that Ms. Fox has already been paid final wages and no further wages are due to her.

IT IS SO ORDERED.

Ricky Belk
Director of Labor

BY: _____
Donna M. Lipsmeyer
Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, Arkansas 72205

DATE: November 24, 2013

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

ARKANSAS OCCUPATIONAL SAFETY & HEALTH DIVISION — AGENCY

VS. CASE NO. 2013-0034

RYAN WILLIAMS, individually and THE MONKEY HOUSE NWA, LLC — RESPONDENTS

ORDER

This matter comes before the Director of Labor, State of Arkansas on a citation and civil money penalty assessment issued to Ryan Williams, individually and The Monkey House NWA, LLC for violations of Arkansas statutes and regulations regarding the operation of amusement rides. Ark. Code Ann. §§ 23-89-501 *et seq.* The parties have reached a satisfactory settlement of the issues in this matter. The matter is dismissed with prejudice.

IT IS SO ORDERED this 3rd day of ~~April~~ May, 2014.

DONNA LIPSMEYER
ADMINISTRATIVE LAW JUDGE

Approved as to Form:

By: _____
Denise P. Oxley, 84-117
General Counsel
Arkansas Department of Labor
10421 W. Markham St.
Little Rock, AR 72205
(501) 682-4504
denise.oxley@arkansas.gov

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

ARKANSAS DEPARTMENT OF LABOR AGENCY

VS. CASE NO.: WH 2013-0035

GRADIE L. RAMEY INDIVIDUALLY AND
TIPS NEIGHBORHOOD INSURANCE AGENCY, INC. RESPONDENTS

ORDER

Pursuant to the Settlement Agreement signed by the parties Plaintiff request with this motion that this matter be dismissed **with prejudice**.

IT IS SO ORDERED this matter is dismissed with prejudice.

ADMINISTRATIVE LAW JUDGE

DATE: 2/28/14

APPROVED BY:

Denise P. Oxley (84-117)
Attorney for Arkansas Department of Labor

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

CASE NO. 2013-0036

ALAINA BRADLEY **CLAIMANT**

vs.

THE PEDIATRIC CLINIC PA **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor on Thursday, January 9, 2014 at approximately 12:30 p.m. Ms. Alaina Bradley appealed a Preliminary Wage Determination by the Labor Standards Division for the Arkansas Department of Labor that she is not owed any unpaid wages. Ms. Bradley was notified by certified mail and regular first class mail that a telephone hearing in this matter was set for January 9, 2014. Ms. Bradley signed for her certified notice on December 9, 2013 and her first class letter of hearing notice was not returned to the Arkansas Department of Labor. At the time of this hearing, Ms. Bradley's phone number of record was dialed. A recording was reached advising that this number was no longer a working phone number. Ms. Amanda Landreth, Business Manager, appeared by telephone on behalf of The Pediatric Clinic PA.

The Administrative Law Judge considered all the evidence and testimony, weighted the creditability of all witnesses, and makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

According to case file documents that were provided to both parties prior to the hearing, Ms. Alaina Bradley worked from 3/14/2005 through 7/11/13 as a collection clerk with The Pediatric Clinic PA and she was paid $19.75 per hour. Ms. Bradley filed a $1,035.00 wage claim dated August 7, 2013 with the Labor Standards Division of the Arkansas Department of Labor. Her initial claim set out that dental insurance premiums had erroneously been deducted from her recent paychecks, 401k loan repayments had not been properly credited to her 401k account, she had not received any holiday pay and that she had been placed on mandatory leave of absence from January 22, 2013 until January 25, 2013. During the investigation process, Ms. Bradley withdrew her claim for the 401k loan repayments.

Case file records and testimony by Ms. Amanda Landreth, show that during the pay period that ended July 9, 2013, Ms. Bradley worked 50.47 hours, that she was paid for .4 hours from a previous payroll error on the previous pay period, 1.54 hours of accrued sick leave, 4.62 hours of accrued vacation leave, and 8 hours of holiday pay. On the pay stub for the pay period ending July 9, 2013, Ms. Bradley was 58.87 hours at her regular hourly rate of $19.75, 1.54 hours of sick leave at regular hourly rate of pay, and 4.62 hours of vacation time also at her regular hourly rate of $19.75. These same records indicate that no deductions were made from Ms. Bradley's paycheck for dental insurance since March 19, 2013 and that a total of $4.17 had been deducted from her check between January 1, 2013 and March 19, 2013. Ms. Landreth also testified that Ms. Bradley was given two weeks severance pay although there was no company policy or statute requiring them to do so.

DISCUSSION AND 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. § 11-4-303(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 testimony and documents in the record indicate Ms. Bradley was paid hourly at a rate of $19.75.

(7) Documents and testimony refute Ms. Bradley's claim that she was not ever paid for holiday pay. Clearly, she was paid for 8 hours of holiday pay during the pay period June 26, 2013 through July 9, 2013. Ms. Bradley did not specify or prove any other specific holidays that she was not properly paid.

(8) Documents and testimony refute Ms. Bradley's claim that dental insurance premiums were deducted from her paycheck for the months of April, May, June and July 2013. A total of $4.17 prior to March 19, 2013, was deducted for dental insurance provided to Ms. Bradley through January 31, 2013. Ms. Bradley admitted having

coverage through January 31, 2013, and she provided no evidence that any of the $4.17 was not for coverage through January 31.

(9) Ms. Bradley claimed that she was placed on a mandatory leave of absence from January 22 – January 25, 2013. She concludes that because the leave of absence was mandatory that she should be paid for those three days. Ms. Bradley provided no statutory or equitable argument in support of that claim. In fact, The Pediatric Clinic PA paid two weeks severance pay (80 hours) to her after her termination for hours that Ms. Bradley clearly did not work, and for which the company was not under any obligation to pay. Nowhere in the case file did Ms. Bradley contest or challenge the fact that she received 80 hours of severance pay for time she actually did not work.

(10) Ms. Bradley failed to carry her burden of proving she is owed any unpaid wages.

The testimony and evidence supports the findings of the Labor Standards Division of the Arkansas Department of Labor that Ms. Alaina Bradley is owed $0.00 in wages from The Pediatric Clinic PA.

THEREFORE, IT IS CONSIDERED AND ORDERED that judgment is entered in favor of the respondent, The Pediatric Clinic, PA and the claimant is not due any unpaid wages.

IT IS SO ORDERED.

Ricky Belk
Director of Labor

BY: _____
Donna M. Lipsmeyer
Administrative Law Judge

Arkansas Department of Labor
10421 West Markham
Little Rock, Arkansas 72205

DATE: January 13, 2014

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

CASE NO. 2013-0037

ASHLEY MATHIS **CLAIMANT**

vs.

AFFORDABLE VETERINARY SERVICES OF NORTH ARKANSAS LLC **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor on Thursday, January 9, 2014 at approximately 1:30 p.m. The Affordable Veterinary Services of North Arkansas LLC (Affordable Veterinary Services) appealed a Preliminary Wage Determination by the Labor Standards Division for the Arkansas Department of Labor that Ms. Ashley Mathis was owed $616.00 in unpaid wages.

Ms. Mathis was notified by certified mail and regular first class mail that a telephone hearing in this matter was set for January 9, 2014 at 1:30 p.m. Ms. Mathis signed for her certified notice on December 10, 2013. At the designated hearing time, Ms. Mathis was called. A voice mail message recording was obtained and a message was left on the voice mail that she was being contacted regarding the hearing. A few minutes later, Ms. Mathis' phone was called again with the same result. In the Instructions for Telephone Hearing provided to Ms. Mathis in her certified mail regarding the hearing, she was informed that if she did not receive a call within ten minutes of the scheduled hearing time, that she should immediately contact the Director's office at the number

provided. She was further informed that should she fail to contact the Director's Office that the hearing would be conducted in her absence.

Dr. Suzanne Seward, DVM and President of Affordable Veterinary Services, represented and testified on behalf of the company. She presented no other witnesses.

The Administrative Law Judge considered all the evidence and testimony, weighted the creditability of all witnesses, and makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

According to case file documents that were provided to both parties prior to the hearing, Ms. Ashley Mathis worked for Affordable Veterinary Services from 2/25/13 through 8/30/13 when she was terminated. Ms. Mathis was originally hired as an hourly employee. On June 1, 2013, she was changed to a salaried employee with an annual salary of $24,000 per year. She was paid on a semi-monthly basis with pay periods running from the 1st and 15th of each month and the 16th through the last day of the month.

According to Ms. Mathis' wage claim form, Affordable Veterinary Services incorrectly withheld $616.00 from her final paycheck after she was terminated on August 30, 2013. This deduction was listed under the category of an cash advance repayment. She set out in her claim that "I had worked everyday from August 15th, 2013 to September 1st , 2013, except for Tuesday, August 27th, 2013 to Friday, August 30th, 2013." In the Agency's wage claim summary report, the investigator reported that no deductions had ever been made from Ms. Mathis' paycheck for vacation or sick time

prior to her final paycheck, and that the amount of hours she worked did not affect her salary.

Dr. Seward provided documentation and testimony that the pay period in question was August 16, 2013 through August 31, 2013 and she allowed Ms. Mathis to remain on the payroll for 8 hours of holiday pay for the September 2, 2013 Labor Day Holiday. No documentation or evidence of any additional compensation paid for Labor Day was provided. Dr. Seward also testified and provided documentation including Ms. Mathis' pay stub for the pay period ending August 15, 2013, that, at the conclusion of the August 15, 2013 pay period, it clearly showed Ms. Mathis having a negative balance in her PTO account of 18 hours and 40 minutes. Further testimony by Dr. Seward citing other payroll records, showed Ms. Mathis' negative balance had been as high as 25 hours and 20 minutes as indicated on her pay stub for the July 1 though July 15, 2013 pay period, and 22 hours as indicated on Ms. Mathis' pay stub for the July 16 through July 31 pay period. This negative leave balance was determined in accordance with a written leave policy that specified the amount of PTO leave each employee of the company would accrue per pay period. This policy was read into the record at the hearing. Further, Dr. Seward testified that during August 15 – September 1, 2013 (probably before August 27, 2013), that Ms. Mathis had texted requesting how many PTO hours she had remaining. According to Dr. Seward's testimony, she replied to that text and informed Ms. Mathis that she actually owed hours. Documentation in the case file indicated that Ms. Mathis: did not work Friday August 16, 2013; worked 4 hours on Monday August 26, 2013 and that she worked zero hours on August 27-30, 2013. Neither party provided any documentation to indicate that Ms. Mathis worked Saturday, August 17; Sunday, August

18; Saturday, August 24, 2013; Sunday, August 25, 2013; Saturday, August 31, 2013; Sunday, September 1, 2013; or Monday, September 2, 2013. Counting the eight-hour holiday pay, Ms. Mathis was given credit by the employer for 52 hours worked and 44 hours not worked during the total 96-hour work period from August 16, 2013 through September 2, 2013 (Mondays through Fridays– 8 hours each work day).

Ms. Mathis was paid at an annual salary of $24,000 per year or $1,000 semi-monthly. Although Ms. Mathis was a salaried employee, her final paycheck was computed at an hourly rate of pay of $11.54 per hour. This figure was arrived at by dividing the annual salary by 2,080 hours in a work year.

The $616.00 was determined by the employer by deducting 44 hours of unworked time during the terminal pay period and by recovering a portion of the PTO arrearage (Deduction was made for $108.24 although the exact amount that could have been deducted according to Dr. Seward was $215.11. The $215.11 was determined by multiplying the 18.64 hours in arrears from the previous pay periods by the hourly rate of $11.54). Dr. Seward testified that she used the Cash Advance Repayment category on the pay stub to make these deductions because their software did not have a more appropriate category.

DISCUSSION AND 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. § 11-4-303(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 testimony and documents in the record indicate Ms. Mathis was a salaried employee paid $1000,000 per semi-monthly pay period.

(7) ADL Labor Standards Regulation 010.14-112 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." In this case, there is a written employer policy outlining that deductions from salary may be made for PTO. In construing the federal Fair Labor Standards Act, the U.S. Department of Labor has examined what is means to be paid on a salary basis. 29 C.F.R. § 541.602(2) states "Deductions from pay may be made for absences of one or more full days occasioned by sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability." Similar deductions may be made if a salaried employee is absent from work for personal reasons. 29 C.F.R. § 541.602(b)(1). Further, certain wage adjustments may be made during the initial or terminal pay periods. 29 C.F.R. § 541.603(6)&(7). In those pay periods, salaried

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BEFORE THE ARKANSAS DEPARTMENT OF LABOR

LABOR STANDARDS DIVISION

VS. CASE NO.: 2013-0038

LAWSON LIQUOR INC.

ORDER

Upon motion of Plaintiff herein, this matter is hereby dismissed **with prejudice.**

IT IS SO ORDERED this matter is dismissed with prejudice.

ADMINISTRATIVE LAW JUDGE

DATE: 3/19/14

APPROVED BY:

Daniel Knox Faulkner (2002-168)
Attorney for Arkansas Department of Labor

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

CASE NO. 2013-0039

JULIE QUEEN **CLAIMANT**

vs.

ALMHAM CORPORATION d/b/a
CANDLEWOOD SUITES IN
HOT SPRINGS, ARKANSAS **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor (hereinafter referred to as Agency) on Thursday, January 9, 2014 at approximately 2:30 p.m. through a telephone hearing. Mr. Ali Khan, Secretary, of Almham Corporation d/b/a Candlewood Suites in Hot Springs, Arkansas (hereafter referred to as Candlewood Suites) appealed an Agency finding in favor of Ms. Queen that she is owed $251.79 in unpaid final wages. Ms. Queen testified and had one witness, Ms. Paula Driver. Mr. Ali Khan testified and represented the corporation. Both parties agreed that they received copies of the case file.

The Administrative Law Judge considered all the evidence and testimony, weighed the credibility of all witnesses, and makes the following findings of fact, conclusions of law, and order.

BACKGROUND AND FACTS

The Arkansas Department of Labor received a Claimant Wage Claim Form completed by Ms. Julie Queen indicating that she was forced to pay for a missing guest's tablet and case, and

that she had not been paid for 3 days of work (8/30/13; 8/31/13; and 9/2/13). Ms. Queen was a front desk clerk and paid at an hourly rate of $8.75. Documents in the file indicated that Ms. Queen's last day worked was August 31, 2013 and that she was terminated on September 1, 2013. Neither Ms. Queen nor Candlewood Suites provided any documentation that indicated Ms. Queen actually worked September 1 or September 2, 2013. Time clock records were provided that indicated work times for Ms. Queen from Saturday, August 17, 2013 through Saturday, August 31, 2013.

The time clock records were essentially not in dispute except for the dates of August 27, 2013 and August 30, 2013. Pay records provided by the employer reflected that Ms. Queen was paid for 44.5 hours for the week of August 17 – August 23, 2013 with 40 hours paid at her regular rate of pay and 4.5 hours paid as overtime. Pay records provided by the employer also indicated that Ms. Queen was paid for 31 hours at the regular rate of pay for the week beginning August 24, 2013 and ending August 30, 2013. These records do not reflect hours worked on August 27 and August 30. Finally, the employer records indicate that Ms. Queen was paid for 8 hours and 38 minutes worked at her regular rate of pay for August 31, 2013. Through testimony, Ms. Queen maintained that she was not paid for 7 hours and 59 minutes of work on August 27, 2013 and 8 hours and 23 minutes of work for August 30, 2013. Ms. Queen pointed out that according to the time clock records, she clocked in at 3:01 p.m. on August 27 and that she failed to clock out. The business' work schedule for August 27 reflected that Ms. Queen was scheduled to work from 3:00 p.m. until 11:00 p.m. and that from 4:00 p.m. until 11:00 p.m. she was the only employee scheduled to work on the front desk. Ms. Queen further pointed out that the time clock records for August 30 indicated that she left work at 12:23 a.m. on August 31, 2013. This is also consistent with working an assigned shift beginning at 4:00 p.m. and with Ms.

Tahmina Khan's, General Manager, write up dated August 31, 2013 whereby Ms. Queen was admonished for clocking out beyond her scheduled times (like the night before where Ms. Queen did not clock out until an hour and half after her shift was over) and failing to clock in and out on time. Ms. Queen wrote a note to Ms. Khan saying that she forgot to clock in today and to "just clock me in and out at the scheduled times."

When asked about Ms. Queen's work times on August 27 and 30, Mr. Khan said he would defer to the work schedule, but then when the schedule indicated that only Ms. Queen was scheduled to work that shift, he hypothesized that she could have clocked for one minute and then left the premises. He did not provide any records that another front desk clerk worked all of those hours instead of Ms. Queen. He offered no explanation for the August 30, 2013 nonpayment of wages. Mr. Khan was given much time during the hearing to travel to where he had the business' records, so that he could review the records for those two dates.

Ms. Queen disputed the withholding of $251.79 from her final check for a missing guest's electronic tablet and case. This dispute arose from an electronic tablet and case that a guest left and was found by fellow employee (David). A July 20, 2013 document indicated that the tablet and case were noted in the "MOD" report and then placed in the lost and found closet. Mr. Khan testified that the closet is unlocked, and Ms. Queen testified that the time clock for employees is located outside this closet. Mr. Khan stated that only front desk personnel are authorized to enter this closet. Both parties agree that when Ms. Queen went to return the tablet and case by mail to the guest, it was missing. Ms. Queen denied taking the tablet, but Mr. Khan testified that he believes she took the tablet and it is in her house. The investigator's report stated that both Mr. and Mrs. Khan had no actual proof that the claimant took the missing tablet and case.

After the items were discovered missing, Ms. Queen typed a July 20, 2013 statement for each of the five front desk employees, that each would be responsible for $40 each for the missing table ($199 value). Ms. Paula Driver, Ms. Queen's witness and one of the five desk employees in the July 20, 2013 statement, testified that none of the five employees named in the statement agreed to pay $40.00 and this amount was not withheld from any of their paychecks. On July 30, 2013, Ms. Queen testified that at Ms. Khan's direction, she prepared a statement authorizing $50.00 a pay period be withheld from her pay to repay for the missing tablet and case ($199 for the value of the table plus $29.99 for the case plus tax). This statement also contained a provision that if she no longer worked for the company, the company could withhold the balance from her paycheck.

Ms. Queen testified that she signed that statement under duress because of an implied threat by Ms. Khan that she would or could lose her job. Her statement contained the following admonition: "This is not an admission of guilt. There is no other choice." The investigator's report stated that the investigator was told by the Khans that they did request Ms. Queen prepare and sign a statement holding her liable for the missing items. Ms. Queen did not provide Ms. Khan as a witness nor do Agency records reflect that Ms. Queen requested a subpoena for Ms. Khan to be present as a witness for this hearing. Mr. Khan, in his 9/24/13 statement in the file and in his testimony at the hearing, stated that Ms. Queen agreed to pay for the tablet in full although the other employees were initially to share equally in the paying for it.

Neither party offered any employment contract. The file contained an acknowledgement of receipt of an employee manual signed by Ms. Queen dated May 31, 2013. This acknowledgement set out that Ms. Queen's employment with Candlewood Suites in Hot Springs

is "at-will." The acknowledgement further explained that the business could terminate her employment at any time, with or without cause, notice or reason.

DISCUSSION AND 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. § 11-4-303(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) The Labor Standards Division of the Department of Labor issued a Preliminary Wage Determination Order in favor of Ms. Julie Queen for $251.79 for a deduction from her wages for the missing tablet and case. The preliminary finding also indicated that Ms. Queen was paid for all time shown on the timecard.

(7) Under normal circumstances, employers are not justified in deducting from employee's paychecks the cost of a lost, stolen or broken item unless it can be shown that the employee was grossly negligent in the loss of the item, or intentionally destroyed or stole the item, or intentionally allowed someone else to do so. In this case, the employer produced no

such evidence. The investigator could easily have concluded that the deduction was improper especially with the claim of duress raised by the claimant. However, in this case, no one agreed to the $40.00 payback and apparently no adverse employment happened because of any of these employees' refusal to agree. Only later, did Ms. Queen prepare and sign the document agreeing to pay for the tablet and case and to allow a $50.00 deduction from her paychecks and the balance collected upon termination of her employment. At the hearing, Ms. Queen was not apprehensive or timid in responding to Mr. Khan's accusations or parts of his testimony that she felt were inaccurate. Her behavior at the hearing was not indicative of a very shy and easily controlled or intimidated person.

The hurdle of duress in Arkansas is very factual. Generally, duress must constitute a wrongful act or threat that overcomes the free will of a party. In Arkansas, it was not duress for an employer to threaten to fire an employee if he failed to sign a drug policy simply because the employee was an employee at will and the employer could legally discharge the employee at any time with or without cause. *Riceland Foods, Inc. v. Director of Labor*, 38 Ark. App. 269, 832 S.W. 2d 295 (1992). There are insufficient facts to support a finding of duress to completely invalidate the agreement Ms. Queen made to reimburse Ms. Khan for the tablet and case.

(8) Ms. Queen's claim for unpaid hours for the August 30, August 31 and September 2, 2013 was reviewed in light of the testimony by Ms. Queen and Mr. Khan and the case documents. There is no evidence to indicate that Ms. Queen was not correctly paid for August 31, 2013 and there is no evidence to indicate that Ms. Queen actually worked the day of September 2, 2013. Ms. Queen testified at the hearing that she did not believe that she had been paid for August 27 along with August 30 based on the time clock records and her final check.

After reviewing the work schedules, the time records, Ms. Queen's final pay stub and testimony, it is clear and reasonable to conclude that Ms. Queen worked on August 27, 2013 from approximately 3:10 p.m. until 11:00 p.m. (she was the only one scheduled to work at that time and the business did not have any records to indicate that someone else worked those times). It is also clear and reasonable to conclude that Ms. Queen worked from approximately 4:00 p.m. on August 30, 2013 until 12:23 a.m. the next morning, August 31, 2013 (in fact, Ms. Khan actually admonished Ms. Queen's sign in and out behavior on that date and Ms. Khan specifically mentioned that Ms. Queen logged 1.5 hours after the end of her scheduled shift that morning).

Accordingly, it is concluded that Ms. Queen was not paid for approximately 16 hours and 22 minutes for the week of August 24 through August 30, 2013. Since Ms. Queen has been paid for the other hours she worked that week (31 hours at her regular rate of pay), she is due 9 hours of pay at her regular rate of pay ($8.75 per hour) and 7 hours and 22 minutes of overtime pay at time an one half rate of pay ($13.13 per hour). Ms. Queen is due $78.75 regular pay and $96.73 overtime pay for a total of $175.47 in unpaid wages.

(9) Ms. Queen failed to prove that she is owed $251.79 for an agreed deduction from her pay for a missing tablet and case, however she did meet her burden of establishing that she was not paid for 16 hours and 22 minutes of work time for the dates of August 27 and August 30, 2013 resulting in unpaid wages totaling $175.47.

THEREFORE, IT IS CONSIDERED AND ORDERED that the Preliminary Wage Determination Order finding that Ms. Queen is owed $251.79 is overruled, and a judgment in favor of Ms. Queen in the amount of **$175.47** for final unpaid wages ordered. The respondent is

directed to issue a check payable to Ms. Queen in the amount of $175.47 within ten days of receipt of this order and mailed to the Arkansas Department of Labor.

IT IS SO ORDERED.

Ricky Belk
Director of Labor

BY: _____
Donna M. Lipsmeyer
Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, Arkansas 72205

DATE: January 12, 2014

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

CASE NO. 2013-0040

ARMANDO HERNANDEZ **CLAIMANT**

vs.

JALARAM HOSPITALITY, INC. (RELAX INN) **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor (Agency) on Tuesday, January 14, 2014 at 1:30 p.m. Jalaram Hospitality, Inc. d/b/a Relax Inn (Relax Inn) appealed a Preliminary Wage Determination by the Labor Standards Division of the Agency that it owed $400.00 in unpaid wages to Armando Hernandez.

Mr. Ash Patel, owner and Operations Manager, represented and testified on behalf of Relax Inn. Mr. Armando Hernandez appeared and provided testimony. Mr. Patel is bilingual in English and Spanish. Mr. Hernandez speaks Spanish and limited English. Ms. Natalie Rich, with the Agency, served as the interpreter for this hearing.

Prior to the hearing, the Agency provided copies of the existing case file documents to both parties. Neither party filed any objection to the admission and use of these documents.

The Administrative Law Judge considered all the evidence and testimony, weighed the credibility of all witnesses, and makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

Mr. Hernandez had performed work for Mr. Patel in the past. Mr. Patel stated that he had been "unhappy with his [Mr. Hernandez] performance with his work ability" and he did not keep in touch with Mr. Hernandez because he did not plan on using him again. Then sometime in August of 2013, Mr. Patel and Mr. Hernandez ran across each other. At that time, Mr. Patel testified that Mr. Hernandez wanted work and needed money. Mr. Patel said that he told Mr. Hernandez the main reason he had not contacted him since that time about work was due to Mr. Hernandez's "work finishing and quality." Mr. Patel testified that Mr. Hernandez agreed and pointed out that things had changed since he did not have his brother working with him now. Since Mr. Petal was doing some minor upgrading at the Relax Inn, he decided to give Mr. Hernandez a second chance. This time, Mr. Patel provided a written statement and testified that he told Mr. Hernandez that his main goal was the finish work and that it be done correctly and that if it is not done correctly it won't look great and it will be noticeable. The majority of the work was cosmetic in nature and would be noticed by guests. Mr. Patel also mentioned in his statement that he told Mr. Hernandez that "this time we will be doing this on a slow pace because I would like to use the material that I have in my storage" to keep costs low.

In Mr. Patel's written statements and in his testimony, Mr. Patel states that he told Mr. Hernandez he needed something in writing regarding the job because he wanted them both to be on the same page about the work. When Mr. Hernandez failed to bring in something to that affect and when Mr. Hernandez advised him that he did not know how to write it out, Mr. Patel said he went ahead and wrote it in English on a "Hernandez

Handyman" form and translated it to Mr. Hernandez. This form only contained Mr. Patel's signature. It does not contain Mr. Hernandez's signature.

Mr. Hernandez testified that he was not aware of this written document and what it contained. Mr. Hernandez further testified that he normally completes, with the assistance of his son, these forms for each potential client/client; however he did not in this instance because Mr. Hernandez "trusted Ash."

The work order prepared by Mr. Ash Patel indicated that it was a renovation job that needed to be done on Apt #132 to complete and supply minor needed materials. The job was for a contract price of $2,000.00. The job included a "turnkey completion" with payment upon the job being completed, finished and cleaned. The job included: installing cabinets, doing wall repair, hanging and finishing sheet rock, repairing molding, pulling up old carpet and laying new carpet, laying and grouting tile, doing some electrical and plumbing, checking for water leakage in the bedroom wall and repairing as needed, etc. The contractor would also be responsible for demolishing and hauling.

The Administrative Judge asked Mr. Hernandez at the hearing about those specific items that the job included on this work order. Mr. Hernandez confirmed that he had done all or parts of those items listed.

Mr. Patel testified that even though he was not under any agreement to make interval payments, he wanted to help out Mr. Hernandez, so he made advance payments to Mr. Hernandez instead of paying the $2,000 at the completion of the job. Both Mr. Hernandez and Mr. Patel agree that Mr. Hernandez received $1,600.00 in such payments.

On September 19, 2013, Mr. Patel asked Mr. Hernandez to take his tools and leave his property. Mr. Patel said that he was not satisfied with Mr. Hernandez's work quality; and every time he came by the apartment, there was always something that was not completed and not properly finished, but Mr. Hernandez had moved on to the next thing instead of doing the job right. Mr. Patel said that kept on telling Mr. Hernandez to complete things properly, and when he did, Mr. Hernandez would respond by saying that he had not told him to do those things. Mr. Hernandez did testify at the hearing that he felt Mr. Patel was telling him to more things than what he thought he agreed to do, and that Mr. Patel commented on his work and how it was being done. Both parties agreed that when Mr. Patel asked Mr. Hernandez to leave the property, Mr. Hernandez asked about the remaining money for his job.

At the hearing, Mr. Patel showed several IPhone pictures as of September 19, 2013 that he felt demonstrated the state of the remodeling project, including items not completed and the poor quality of some of the work. One close up picture showed that a finished corner (where an existing sheet rock wall met the new sheet rocked partition wall) was rough and jagged for the entire length of the corner. A second picture demonstrated the quality of Mr. Hernandez's orange peel texturing. This picture showed a rather large painted area that had uneven sized orange peel texturing and two long vertical streaks of plaster. A third picture was of a ceiling repair that did not look completed but painted. A fourth picture showed that care had not been taken to cover items (a curtain rod coated in paint) when the bathroom was spray-painted.

Mr. Hernandez testified during the hearing that he had completed all sheetrock work. Mr. Hernandez mentioned that he told "Ash" that he would do his "best." He

went on to show a scar on his forearm and said that this injury (not one that occurred on this job) affected his ability to do some types of work.

Mr. Hernandez also provided IPhone pictures of the renovation. These pictures were not close up pictures of the sheetrock and texturing, but did generally match up with those of Mr. Patel relating to the work needed to complete the project

Both the claimant and the respondent were asked to estimate how much of the job was still unfinished as of September 19, 2013. Mr. Hernandez stated that there still was 10 to 15% unfinished work on the project and Mr. Patel stated around 25% of the work was still outstanding. The following are some of the items that still needed to be completed on this project: install cabinet side panels; repair molding, install tile on countertop sides, grout and seal tiling, reconnect the kitchen sink; locate water leak, and lay carpet in all rooms. Mr. Hernandez stated that he thought it would take a couple of days to complete. Mr. Patel testified that it would cost him about $700.00 to $800.0 in labor to complete and correct the rest of the job.

It is uncontested that Mr. Patel sold Mr. Hernandez an air conditioner unit at an agreed price of $200.00. Mr. Hernandez took the air conditioner off the property and he did not pay Mr. Patel for it. Mr. Hernandez testified that he decided he could not afford the air conditioner, and he returned it. He placed the air conditioner, not in the remodeling apartment, but in another area (room) from where an electrical plug in was being used to connect an electrical cord for the remodel. Mr. Hernandez did not get a receipt or discuss this return with Mr. Patel. Mr. Patel testified that he was not aware of this return or had any knowledge that this air conditioner is on his property. There is no

testimony or evidence in the case that indicated Mr. Patel agreed to take the air conditioner back and rescind the sale.

DISCUSSION AND 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). This authority extends to disputes in remuneration for work performed by an independent contractor provided the amount in controversy does not exceed $2,000. Ark. Code Ann. § 11-4-301.

(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. § 11-4-303(c).

(4) The wage claimant carries the burden of proof for any claim of unpaid wages or remuneration.

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

(6) In the present case, the testimony and documents in the record indicate Mr. Hernandez was an independent contractor to be paid $2,000 upon completion of the remodeling job. This amount falls within the jurisdiction limit of the director.

(7) It is clear Relax Inn withheld $400.00 from Mr. Hernandez's final payment.

(8) In contract disputes, the director may rely on the general rules of contract construction, court cases and equity. In this case, the Administrative Law Judge accepts assertions of both parties that they had an agreement to do remodeling work. Unfortunately, the parties disagreed as to the some of the specific terms, conditions and elements of that agreement, and they ask the director to resolve those issues.

For the most part, both parties agreed that this job entailed remolding and updating an apartment. Mr. Hernandez's idea of how work this involved versus that of Mr. Patel's may have varied somewhat, however, materially they agreed.

It is clear that Mr. Patel was not pleased with the quality of Mr. Hernandez's work and that he had experience with this contractor in the past. He did not believe that Mr. Hernandez had the skill to do the type of finishing work that he required and wanted on this job. The pictures presented by Mr. Patel demonstrated that his conclusions might have been reasonable; however, Mr. Patel did not allow Mr. Hernandez the opportunity to make repairs and correction to these areas or other areas before terminating the agreement. It is clear that Mr. Patel was frustrated with the way this job had been performed and was going; however there was no agreement on an exact completion date. In fact, Mr. Patel stated that he told Mr. Hernandez "we will be doing this [job] on a slow pace." Based upon the evidence and testimony, the Administrative Law Judge determined Mr. Patel breeched the agreement and did not allow Mr. Hernandez the opportunity to finish his job.

Mr. Hernandez admitted that he removed the air condition under an agreement to pay Mr. Patel $200.00. He testified that he could not afford paying this, and admitted that when he returned the air conditioner, he did not obtain a receipt or even an

agreement or approval for its return. A finding is entered that Mr. Hernandez bought an air conditioner unit for $200.00, has not paid for it, and there is no evidence that the sale was properly rescinded. The air conditioner was Mr. Hernandez's when he took it from the property. Accordingly, Relax Inn met its burden of providing an affirmative defense or set-off of $200.00.

(9) In conclusion, the testimony and evidence does not support the findings of the Labor Standards Division that Mr. Hernandez is owed $400.00 and this order is overruled. A judgment in favor of Mr. Hernandez is now granted entered in the amount of $200.00 ~~is granted~~.

THEREFORE, IT IS CONSIDERED AND ORDERED that judgment is entered for the claimant for $400.00 less $200.00 or **$200.00 in unpaid wages.** The respondent is directed to issue a check payable to Ms. Hernandez in the amount of $200.00 within ten days of receipt of this order, and mailed to the Arkansas Department of Labor.

Ricky Belk
Director of Labor

BY: _____
~~Donna M. Lipsmeyer~~
Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, Arkansas 72205

DATE: January 17, 2014

agreement or approval for its return. A finding is entered that Mr. Hernandez bought an air conditioner unit for $200.00, has not paid for it, and there is no evidence that the sale was properly rescinded. The air conditioner was Mr. Hernandez's when he took it from the property. Accordingly, Relax Inn met its burden of providing an affirmative defense or set-off of $200.00.

(9) In conclusion, the testimony and evidence does not support the findings of the Labor Standards Division that Mr. Hernandez is owed $400.00 and this order is overruled. A judgment in favor of Mr. Hernandez is now granted and entered in the amount of $200.00.

THEREFORE, IT IS CONSIDERED AND ORDERED that judgment is entered for the claimant for $400.00 less $200.00 or **$200.00 in unpaid wages.** The respondent is directed to issue a check payable to Ms. Hernandez in the amount of $200.00 within ten days of receipt of this order, and mailed to the Arkansas Department of Labor.

Ricky Belk
Director of Labor

BY: _____
Donna M. Lipsmeyer
Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, Arkansas 72205

DATE: January 17, 2014

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

CASE NO. 2013-0041

JONQUIN NEVELS-COWTHORNE **CLAIMANT**

vs.

APPLE TREE SERVICE, INC. **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor (hereinafter referred to as Agency) on Tuesday, January 14, 2014 at approximately 10:42 a.m. through a telephone hearing. Mr. JonQuin Nevels-Cowthorne appealed an Agency finding in favor of his former employer, Apple Tree Service, Inc., that he was not owed $900.00 for unused vacation pay at the time of his termination.

The Agency sent Mr. Nevels-Cowthorne notice of the hearing by certified and regular mail. U.S. Postal records indicate that Mr. Nevels-Cowthorne signed for this notice on December 5, 2013. At the time of the hearing (10:30 a.m.) an attempt was made to contact Mr. Nevels-Cowthorne. The number he had provided to the Agency was a non-working number. In the Instructions for Telephone Hearing provided to Mr. Nevels-Cowthorne regarding the hearing, he was informed that if he did not receive a call within ten minutes of the scheduled hearing time, that he should immediately contact the Director's office at the number provided. He was

further informed that should he fail to contact the Director's Office that the hearing would be conducted in her absence. He failed to contact the Director's Office as directed.

Bill Camplain, Jr., Operations Manager, represented Apple Tree Service, Inc. and testified on behalf of the company. He provided no other witnesses. The documents contained in the record were also accepted and used as evidence in this hearing. Prior to the hearing, the Agency provided copies of these documents to both parties. Neither party objected to the admission and use of these documents.

The Administrative Law Judge considered all the evidence and testimony and weighed the credibility of all witnesses and makes the following findings of fact, conclusions of law, and order.

BACKGROUND AND FACTS

Mr. Nevels-Cowthorne did tree work for Apple Tree Service, Inc. prior to his termination in September, 2013. In Mr. Nevels-Cowthorne's wage claim form of September 5, 2013, he states that he is due vacation days not taken or paid that were earned and due him because he had completed one year of continuous employment prior to his termination.

On January 9, 2011, Mr. Nevels-Cowthorne signed an orientation form that indicated that all company policy and rules had been explained to him. The company policy for vacations sets out that an employee " with 1 year of continuous service will be eligible for 1 week of vacation." It also specifically states "Employees who quit or are terminated will not receive vacation or vacation pay." Testimony by Mr. Camplain at the hearing and statements contained within his September 20, 2013 response letter to the Agency, set out that Mr. Nevels-Cowthorne was terminated for violating attendance policy; and, in accordance with company policy, Mr. Nevels-Cowthorne was terminated a terminated employee not eligible for vacation pay.

DISCUSSION AND 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. § 11-4-303(c).

(4) The wage claimant carries the burden of proof for any claim of unpaid vacation time.

(5) Arkansas state law does not generally mandate the payment of unused vacation time to employees. There was no evidence introduced to indicate that an Arkansas state law exists that mandates the payment of unused annual leave by Apple Tree Services, Inc.

(6) In most instances, vacation time payout is a matter of contract law with the terms of the contract governing this issue. There was no evidence that a contract existed between Mr. JonQuin Nevels-Cowthorne and Apple Tree Services, Inc.

(7) In the absence of State law, or a contract in this regard, the employer's policy written or unwritten may be looked at for guidance. It is an undisputed fact that Apple Tree Service, Inc. maintains a leave policy that employees with one year of continuous service are eligible for one week of vacation. It is also undisputed that when employees leave employment (quit or are terminated) they are not eligible for payout of any remaining vacation time.

(8) It is undisputed that Mr. JonQuin Nevels-Cowthorne was terminated in September 2013 and is no longer an employee of Apple Tree Service, Inc.

(9) Mr. Nevels-Cowthorne failed to carry his burden to prove that Apple Tree Service, Inc. did not pay vacation in accordance with its policy.

THEREFORE, IT IS CONSIDERED AND ORDERED that the Preliminary Wage Determination Order finding that Mr. Nevels-Cowthorne is owed no wages for unused vacation time is upheld.

IT IS SO ORDERED.

Ricky Belk
Director of Labor

BY: _____
Donna M. Lipsmeyer
Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, Arkansas 72205

DATE: January 15, 2014

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

CASE NO. 2013-0040

ARMANDO HERNANDEZ **CLAIMANT**

VS.

JALARAM HOSPITALITY, INC. (RELAX INN) **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor (Agency) on Tuesday, January 14, 2014 at 1:30 p.m. Jalaram Hospitality, Inc. d/b/a Relax Inn (Relax Inn) appealed a Preliminary Wage Determination by the Labor Standards Division of the Agency that it owed $400.00 in unpaid wages to Armando Hernandez.

Mr. Ash Patel, owner and Operations Manager, represented and testified on behalf of Relax Inn. Mr. Armando Hernandez appeared and provided testimony. Mr. Patel is bilingual in English and Spanish. Mr. Hernandez speaks Spanish and limited English. Ms. Natalie Rich, with the Agency, served as the interpreter for this hearing.

Prior to the hearing, the Agency provided copies of the existing case file documents to both parties. Neither party filed any objection to the admission and use of these documents.

The Administrative Law Judge considered all the evidence and testimony, weighed the credibility of all witnesses, and makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

Mr. Hernandez had performed work for Mr. Patel in the past. Mr. Patel stated that he had been "unhappy with his [Mr. Hernandez] performance with his work ability" and he did not keep in touch with Mr. Hernandez because he did not plan on using him again. Then sometime in August of 2013, Mr. Patel and Mr. Hernandez ran across each other. At that time, Mr. Patel testified that Mr. Hernandez wanted work and needed money. Mr. Patel said that he told Mr. Hernandez the main reason he had not contacted him since that time about work was due to Mr. Hernandez's "work finishing and quality." Mr. Patel testified that Mr. Hernandez agreed and pointed out that things had changed since he did not have his brother working with him now. Since Mr. Petal was doing some minor upgrading at the Relax Inn, he decided to give Mr. Hernandez a second chance. This time, Mr. Patel provided a written statement and testified that he told Mr. Hernandez that his main goal was the finish work and that it be done correctly and that if it is not done correctly it won't look great and it will be noticeable. The majority of the work was cosmetic in nature and would be noticed by guests. Mr. Patel also mentioned in his statement that he told Mr. Hernandez that "this time we will be doing this on a slow pace because I would like to use the material that I have in my storage" to keep costs low.

In Mr. Patel's written statements and in his testimony, Mr. Patel states that he told Mr. Hernandez he needed something in writing regarding the job because he wanted them both to be on the same page about the work. When Mr. Hernandez failed to bring in something to that affect and when Mr. Hernandez advised him that he did not know how to write it out, Mr. Patel said he went ahead and wrote it in English on a "Hernandez

Handyman" form and translated it to Mr. Hernandez. This form only contained Mr. Patel's signature. It does not contain Mr. Hernandez's signature.

Mr. Hernandez testified that he was not aware of this written document and what it contained. Mr. Hernandez further testified that he normally completes, with the assistance of his son, these forms for each potential client/client; however he did not in this instance because Mr. Hernandez "trusted Ash."

The work order prepared by Mr. Ash Patel indicated that it was a renovation job that needed to be done on Apt #132 to complete and supply minor needed materials. The job was for a contract price of $2,000.00. The job included a "turnkey completion" with payment upon the job being completed, finished and cleaned. The job included: installing cabinets, doing wall repair, hanging and finishing sheet rock, repairing molding, pulling up old carpet and laying new carpet, laying and grouting tile, doing some electrical and plumbing, checking for water leakage in the bedroom wall and repairing as needed, etc. The contractor would also be responsible for demolishing and hauling.

The Administrative Judge asked Mr. Hernandez at the hearing about those specific items that the job included on this work order. Mr. Hernandez confirmed that he had done all or parts of those items listed.

Mr. Patel testified that even though he was not under any agreement to make interval payments, he wanted to help out Mr. Hernandez, so he made advance payments to Mr. Hernandez instead of paying the $2,000 at the completion of the job. Both Mr. Hernandez and Mr. Patel agree that Mr. Hernandez received $1,600.00 in such payments.

On September 19, 2013, Mr. Patel asked Mr. Hernandez to take his tools and leave his property. Mr. Patel said that he was not satisfied with Mr. Hernandez's work quality; and every time he came by the apartment, there was always something that was not completed and not properly finished, but Mr. Hernandez had moved on to the next thing instead of doing the job right. Mr. Patel said that kept on telling Mr. Hernandez to complete things properly, and when he did, Mr. Hernandez would respond by saying that he had not told him to do those things. Mr. Hernandez did testify at the hearing that he felt Mr. Patel was telling him to more things than what he thought he agreed to do, and that Mr. Patel commented on his work and how it was being done. Both parties agreed that when Mr. Patel asked Mr. Hernandez to leave the property, Mr. Hernandez asked about the remaining money for his job.

At the hearing, Mr. Patel showed several IPhone pictures as of September 19, 2013 that he felt demonstrated the state of the remodeling project, including items not completed and the poor quality of some of the work. One close up picture showed that a finished corner (where an existing sheet rock wall met the new sheet rocked partition wall) was rough and jagged for the entire length of the corner. A second picture demonstrated the quality of Mr. Hernandez's orange peel texturing. This picture showed a rather large painted area that had uneven sized orange peel texturing and two long vertical streaks of plaster. A third picture was of a ceiling repair that did not look completed but painted. A fourth picture showed that care had not been taken to cover items (a curtain rod coated in paint) when the bathroom was spray-painted.

Mr. Hernandez testified during the hearing that he had completed all sheetrock work. Mr. Hernandez mentioned that he told "Ash" that he would do his "best." He

went on to show a scar on his forearm and said that this injury (not one that occurred on this job) affected his ability to do some types of work.

Mr. Hernandez also provided IPhone pictures of the renovation. These pictures were not close up pictures of the sheetrock and texturing, but did generally match up with those of Mr. Patel relating to the work needed to complete the project

Both the claimant and the respondent were asked to estimate how much of the job was still unfinished as of September 19, 2013. Mr. Hernandez stated that there still was 10 to 15% unfinished work on the project and Mr. Patel stated around 25% of the work was still outstanding. The following are some of the items that still needed to be completed on this project: install cabinet side panels; repair molding, install tile on countertop sides, grout and seal tiling, reconnect the kitchen sink; locate water leak, and lay carpet in all rooms. Mr. Hernandez stated that he thought it would take a couple of days to complete. Mr. Patel testified that it would cost him about $700.00 to $800.0 in labor to complete and correct the rest of the job.

It is uncontested that Mr. Patel sold Mr. Hernandez an air conditioner unit at an agreed price of $200.00. Mr. Hernandez took the air conditioner off the property and he did not pay Mr. Patel for it. Mr. Hernandez testified that he decided he could not afford the air conditioner, and he returned it. He placed the air conditioner, not in the remodeling apartment, but in another area (room) from where an electrical plug in was being used to connect an electrical cord for the remodel. Mr. Hernandez did not get a receipt or discuss this return with Mr. Patel. Mr. Patel testified that he was not aware of this return or had any knowledge that this air conditioner is on his property. There is no

testimony or evidence in the case that indicated Mr. Patel agreed to take the air conditioner back and rescind the sale.

DISCUSSION AND 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). This authority extends to disputes in remuneration for work performed by an independent contractor provided the amount in controversy does not exceed $2,000. Ark. Code Ann. § 11-4-301.

(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. § 11-4-303(c).

(4) The wage claimant carries the burden of proof for any claim of unpaid wages or remuneration.

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

(6) In the present case, the testimony and documents in the record indicate Mr. Hernandez was an independent contractor to be paid $2,000 upon completion of the remodeling job. This amount falls within the jurisdiction limit of the director.

(7) It is clear Relax Inn withheld $400.00 from Mr. Hernandez's final payment.

(8) In contract disputes, the director may rely on the general rules of contract construction, court cases and equity. In this case, the Administrative Law Judge accepts assertions of both parties that they had an agreement to do remodeling work. Unfortunately, the parties disagreed as to the some of the specific terms, conditions and elements of that agreement, and they ask the director to resolve those issues.

For the most part, both parties agreed that this job entailed remolding and updating an apartment. Mr. Hernandez's idea of how work this involved versus that of Mr. Patel's may have varied somewhat, however, materially they agreed.

It is clear that Mr. Patel was not pleased with the quality of Mr. Hernandez's work and that he had experience with this contractor in the past. He did not believe that Mr. Hernandez had the skill to do the type of finishing work that he required and wanted on this job. The pictures presented by Mr. Patel demonstrated that his conclusions might have been reasonable; however, Mr. Patel did not allow Mr. Hernandez the opportunity to make repairs and correction to these areas or other areas before terminating the agreement. It is clear that Mr. Patel was frustrated with the way this job had been performed and was going; however there was no agreement on an exact completion date. In fact, Mr. Patel stated that he told Mr. Hernandez "we will be doing this [job] on a slow pace." Based upon the evidence and testimony, the Administrative Law Judge determined Mr. Patel breeched the agreement and did not allow Mr. Hernandez the opportunity to finish his job.

Mr. Hernandez admitted that he removed the air condition under an agreement to pay Mr. Patel $200.00. He testified that he could not afford paying this, and admitted that when he returned the air conditioner, he did not obtain a receipt or even an

agreement or approval for its return. A finding is entered that Mr. Hernandez bought an air conditioner unit for $200.00, has not paid for it, and there is no evidence that the sale was properly rescinded. The air conditioner was Mr. Hernandez's when he took it from the property. Accordingly, Relax Inn met its burden of providing an affirmative defense or set-off of $200.00.

(9) In conclusion, the testimony and evidence does not support the findings of the Labor Standards Division that Mr. Hernandez is owed $400.00 and this order is overruled. A judgment in favor of Mr. Hernandez is now granted and entered in the amount of $200.00.

THEREFORE, IT IS CONSIDERED AND ORDERED that judgment is entered for the claimant for $400.00 less $200.00 or **$200.00 in unpaid wages.** The respondent is directed to issue a check payable to Ms. Hernandez in the amount of $200.00 within ten days of receipt of this order, and mailed to the Arkansas Department of Labor.

Ricky Belk
Director of Labor

BY: _____

Donna M. Lipsmeyer
Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, Arkansas 72205

DATE: January 17, 2014

BEFORE THE ARKANSAS DEPARTMENT OF LABOR

CASE NO. 2013-0043

GREGORY HIRSCH **CLAIMANT**

vs.

D. M. T. SERVICES, INC. **RESPONDENT**

ORDER

This matter came before the Arkansas Department of Labor (Agency) through a telephone hearing conducted on Thursday, January 9, 2013 at approximately 12:30 p.m. Mr. Hirsch appealed a Preliminary Wage Determination by the Labor Standards Division of the Agency that he is not owed any further wages from his former employer, D. M. T. Services, Inc.

Mr. Hirsch contacted the Agency by phone on January 13, 2014. He stated that he would not be present at the hearing because he was working and he requested a continuance. On December 20, 2013, Mr. Hirsch signed for his certified notice that his hearing was scheduled for January 14, 2014 at 12:30 p.m. This notice also contained instructions for the hearing and included information relating to requests for any hearing continuance. Specifically, it stated that a continuance would not be granted without a written request and good cause. Any such requests must be made no later than five business days prior to the scheduled hearing date. Mr. Hirsch made a verbal request for continuance, one day prior to his hearing date even though he had notice of the time and date of this hearing since December 20, 2013. Further, Mr. Hirsch did not set forth the existence of an emergency or condition beyond his control preventing his presence by

telephone for this hearing. Therefore, his request for a continuance was denied and the hearing was conducted as scheduled.

Ms. Janice Bach, Safety Director, represented D. M. T. Services, Inc., and she testified at the hearing. Mr. Hirsch failed to appear at this hearing. The documents contained in the record were also accepted and used as evidence in this hearing. Prior to the hearing, the Agency provided copies of these documents to both parties. Neither party filed any objection to the admission and use of these documents.

The Administrative Law Judge considered all the evidence and testimony, weighed the credibility of all witnesses, and makes the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

Mr. Gregory Hirsch filed a wage claim (dated 9/27/13) with the Labor Standards Division of the Arkansas Department of Labor claiming that a total of $1,647.91 had been "illegally" withheld from his paychecks while employed as an over the road professional truck driver for D. M. T. Services, Inc. His claim included deductions from his paychecks in the amount of $24.00 for two straps, $100 for cleaning the truck, and $1,523.91 for repair of damages to a right side cab extender. He further requested reimbursement for the cost of a hotel room for the night of September 12, 2013 in Jasper, Indiana in the amount of $72.80. In his original compliant, his wife, Mrs. Hirsch, stated that she had cleaned the cab and that at one point in time she had seen two straps. Mrs. Hirsch further wrote in the complaint that she had seen other damage to the silver step deck of the cab.

Ms. Bach testified that D.M.T. Services, Inc. employed Mr. Hirsch as an over the road professional truck driver for D. M. T. Services, Inc. from June 25, 2013 until September 13, 2013 at a rate of pay of $0.37 per mile. She confirmed a total of $1,647.91 had been withheld from Mr. Hirsch's paychecks in the amounts stated by Mr. Hirsch. Ms. Bach referenced the Driver Responsibility Letter dated June 25, 2013 and signed by Mr. Hirsch setting forth the circumstances where deductions could be made from driver checks. The Driver Responsibility Letter states that the company may deduct up to $100 to clean a truck, $24.00 to replace two straps, and the full cost to repair a damaged right side cab extender. This document is contained in the record.

Ms. Bach also verified the cost to repair the right side cab extender by referring to an estimate from Diamond International in the amount of $1,523.91. She noted a damage report to D. M. T. Services, Inc. filed by Mr. Hirsch that stated that the damage may have occurred in Buffalo, New York when he was delivering to DLM Foods and had to make a sharp turn to the right to stay clear of a telephone post and fence to enter the dock. Ms. Bach notified Mr. Hirsch that the cost would be deducted from his pay after the company obtained repair estimates.

When a tractor is turned in, the company performs an inspection. On September 16, 2013, the shop foreman/operations manager, Jason Dalrymple, did an inspection and competed a tractor inspection report. This report shows the damage to the right side cab extender, the dirty condition of the truck, and the fact that two straps were missing upon return of the truck to D. M. T. Services, Inc.

In response to Mr. Hirsch's claim for a motel room, Ms. Bach testified that the company does not reimburse its drivers for motel bills. The truck contained a sleeper

compartment for the use of the truck driver. Although the truck does not contain bathroom accommodations, drivers are responsible for making their own arrangements in this regard.

DISCUSSION AND 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. § 11-4-303(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 testimony and documents in the record indicate Mr. Hirsch was an over the road professional truck driver who was paid a set rate of $0.37 per mile subject to certain off-sets contained in a Driver Responsibility Letter.

(7) The Arkansas Department of Labor, Labor Standards Regulation 010.14-112 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 Act and Rule 010.14-100 through -113

except to the extent a different interpretation is required." These interpretations generally allow an employer and employee to agree to payroll deductions set out in a contract, agreement or company policy. In the present case, there is a written Driver Responsibility Letter signed by Mr. Hirsch that clearly states that a deduction from pay can be made as it relates to the cleaning of the truck, replacing straps, and repairing a right side cab extender.

(8) It is clear that D. M. T. Services, Inc. withheld $1,647.91 from Mr. Hirsch's checks, and the company met its affirmative defense of showing that these set-offs/deductions were allowable under the terms of an agreement between Mr. Hirsch and the company (The Driver Responsibility Letter).

(9)There is no agreement or company policy requiring the company to reimburse Mr. Hirsch for his $72.80 motel expense. Mr. Hirsch did not meet his burden that he is entitled to such payment.

In conclusion, the testimony and evidence supports the findings of the Labor Standards Division of the Arkansas Department of Labor that Mr. Hirsch is owed $0.00 in wages from D. M. T. Services, Inc.

THEREFORE, IT IS CONSIDERED AND ORDERED that judgment is entered in favor of the respondent, D. M. T. Services, Inc. and the claimant is not due any unpaid wages.

Ricky Belk
Director of Labor

BY: _____

Donna M. Lipsmeyer
Administrative Law Judge
Arkansas Department of Labor
10421 West Markham
Little Rock, Arkansas 72205

DATE: January 15, 2014