

In the Matter of

**DAVID W. LEWIS aka Bandon Boatworks
Case No. 18-11**

Final Order of Commissioner Brad Avakian

Issued April 21, 2011

SYNOPSIS

Seven wage claimants worked for Respondent at 11 varying rates of pay between October 16 and November 23, 2008, and were not paid any wages. The Agency determined that Respondent owed them \$4,034.35 in unpaid, due and owing wages and paid the claimants \$4,034.35 from the Wage Security Fund ("WSF"). The Agency sought to recover the \$4,034.35 paid out from the WSF, plus a 25 percent penalty on those funds, and the forum ordered Respondent to repay the full amount paid out by the WSF, plus a 25 percent penalty of \$1,008.59, with interest on both sums. ORS 652.140(2), ORS 652.414.

The above-entitled case was assigned to Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Patrick A. Plaza, an employee of the Agency. Because this matter was resolved on summary judgment before a Notice of Hearing was issued, no hearing was scheduled or held.

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

FINDINGS OF FACT – PROCEDURAL

1) On January 6, 2010, the Agency issued Order of Determination #09-3453 ("Order") in which it alleged the following:

- Seven wage claimants (“Claimants”) were employed in Oregon by David W. Lewis aka Bandon Boatworks (“Respondent”) and “performed work, labor and services” for Respondent between October 16 and November 23, 2008.
- All Claimants filed wage claims and assigned their unpaid wages to the Oregon Bureau of Labor and Industries. In total, \$4,034.35 in wages was unpaid. The Agency subsequently determined that \$4,034.35 in unpaid wages was due and owing to Claimants and caused \$4,034.35 in unpaid wages to be paid out to Claimants from the Wage Security Fund (“WSF”).
- Respondent owes \$15,180 to Claimants as ORS 652.150 penalty wages, along with interest, and \$9,540 to Claimants as ORS 653.055(1)(b) civil penalties, along with interest.
- The Commissioner of BOLI is entitled to recover the \$4,034.35 paid out from the WSF and a 25 percent penalty on that amount, with interest.

2) On February 11, 2010, Respondent, through Oregon attorney Manuel Hernandez, filed an answer and request for a contested case hearing in which Respondent admitted owing Claimants \$4,034.35 in unpaid wages and admitted that \$4,034.35 had been paid out to Claimants from the WSF. Respondent denied it was liable for ORS 652.150 penalty wages or ORS 653.055(1)(b) civil penalties.

3) On February 3, 2011, the Agency filed a motion for summary judgment, alleging that, as a matter of law, Respondent owes \$4,034.35 to the Wage Security Fund (“WSF”) for unpaid wages paid out to the Claimants, along with a 25 percent penalty of \$1,529.62. At the same time, the Agency moved to amend its Order of Determination (“Order”) to waive recovery of \$15,180 in penalty wages under ORS 652.150 and \$9,540 in civil penalties under ORS 653.055(1)(b).

4) On February 3, 2011, the ALJ issued an order requiring Respondent’s written response to the Agency’s motions no later than February 17, 2011. Respondent did not file a response. On February 25, 2011, the ALJ issued a ruling **GRANTING** the Agency’s motions. That ruling is reprinted below:

“History Of The Case

“On January 6, 2010, the Agency issued Order of Determination #09-3453 (‘Order’) in which it alleged that seven wage claimants (‘Claimants’) were

employed in Oregon by David W. Lewis aka Bandon Boatworks ('Respondent') and 'performed work, labor and services' for Respondent for which they were not paid. The Order alleged that Respondent owed \$4,034.35 to Claimants and that \$4,034.35 had been paid to Claimants from the WSF. The Order further alleged that Respondent owed \$15,180 as ORS 652.150 penalty wages, along with interest, and \$9,540 as ORS 653.055(1)(b) civil penalties, along with interest. Finally, the Agency alleged that the Commissioner of BOLI is entitled to recover the \$4,034.35 paid out from the WSF and a 25 percent penalty on that amount, with interest.

"Ruling On Agency's Motion To Amend Order Of Determination

"The Agency's motion to amend its order is **GRANTED** and the Agency's request for ORS 652.150 penalty wages and ORS 653.055(1)(b) civil penalties is deleted from the Agency's Order. This leaves Respondent's repayment of the WSF and a penalty under ORS 652.414(3) as the only issues in the case.

"Summary Judgment Standard

"A motion for summary judgment may be granted where no genuine issue as to any material fact exists and a participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings. *OAR 839-050-0150(4)(B)*. The standard for determining if a genuine issue of material fact exists and the evidentiary burden on the participants is as follows:

" * * * No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at [hearing].' ORCP 47C.

"The only evidence submitted by the Agency in support of its motion for summary judgment was its original Order, accompanied by Respondent's answer and request for hearing. The forum bases its decision on those documents and their legal significance.

"The Agency Is Entitled To Recover The Amount Paid Out By The WSF

"The Agency's prima facie case consists of proof of the following elements: (1) Respondent employed Claimants; (2) An amount was paid to Claimants from the WSF as unpaid wages; and (3) Respondent is liable for the amounts paid from the WSF. *See, e.g., In the Matter of Bukovina Express, Inc.*, 27 BOLI 184, 199 (2006); *In the Matter of Lisa Sanchez*, 27 BOLI 56, 61 (2005). In its answer, Respondent admitted that it employed all seven Claimants in Oregon during the wage claim periods set out in the Order, that Claimants earned a total of \$4,034.35 in wages for which they

were not paid, and that \$4,034.35 was paid out to Claimants from the WSF pursuant to ORS 652.414. In cases involving payouts from the WSF, when (1) there is credible evidence that a determination on the validity of the claim was made; (2) there is credible evidence as to the means by which that determination was made; and (3) the Agency has paid out money from the WSF and seeks to recover that money, there is a rebuttable presumption that the Agency's determination is valid for the sums actually paid out. *In the Matter of Carl Odoms*, 27 BOLI 232, 240 (2006). Although the Agency presented no evidence other than the allegations in the Order and Respondent's admissions to support the first and second elements of this presumption, that evidence, coupled with the presumption that '[o]fficial duty has been regularly performed,'ⁱ leads to the forum to conclude that the Agency's determination was valid for the \$4,034.35 paid out from the WSF. That leaves no material facts in dispute. Accordingly, the Agency is entitled as a matter of law to recover the \$4,034.35 WSF payout from Respondent.

"The Agency Is Entitled To A 25 Percent Wage Security Fund Penalty

"ORS 652.414(3) entitles the Agency to recover 'a penalty of 25 percent of the amount of wages paid from the Wage Security Fund or \$200, whichever amount is the greater.' Respondent denied this allegation in his answer. Respondent's denial does not insulate him from summary judgment, given his admission that he owed the \$4,034.35 paid out to Claimants from the WSF. Under ORS 652.414(3), if the WSF makes a payout, then a penalty is automatically due from a liable Respondent. The only question is the amount. In its Order of Determination, the Agency seeks a penalty of \$1,529.62, computed by applying the statutory equation of '25 percent or \$200' to each Claimant separately, then adding the totals together.ⁱⁱ In previous cases involving multiple wage claimants in which a WSF penalty was assessed, the Commissioner has consistently ordered respondents to pay a 25 percent penalty on the total amount of wages paid out. In 2009, the Commissioner specifically held that that this is the correct method of computation under ORS 652.414(3). *See In the Matter of Blachana, LLC*, 30 BOLI 197, 225-26 (2009), *appeal pending*.ⁱⁱⁱ The forum follows *Blachana* to compute the WSF penalty in this case. That penalty amounts to \$1,008.59 ($\$4,034.35 \times .25 = \$1,008.59$). The Agency is entitled to recover a WSF penalty in the amount of \$1,008.59 from Respondent.

"Conclusion

"The Agency is entitled to recover its WSF payout of \$4,034.35, along with a WSF penalty of \$1,008.59 from Respondent. Procedurally, the next step in this contested case proceeding will be the forum's issuance of a Proposed Order that incorporates this interim order."

This ruling is **AFFIRMED**.

5) On March 17, 2011, the ALJ issued a Proposed Order. On May 1, 2002, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent David W. Lewis was an Oregon employer doing business under the name of Bandon Boatworks.

2) Respondent employed Claimant Leslie Ballantyne from October 20 to November 21, 2008, at the wage of \$7.95 per hour. Ballantyne was not paid at all for 58 hours of work and received a “non-sufficient” check in the amount of \$247.68 for other work she performed. In total, Ballantyne earned \$708.78 and was paid no wages, leaving \$708.78 in unpaid, due and owing wages. Ballantyne was paid \$708.78 from the WSF.

3) Respondent employed Claimant Jesse Downs from October 16 to November 21, 2008, at the wage of \$7.95 per hour. Downs was not paid at all for 22 hours of work and received a “non-sufficient” check in the amount of \$108.27 for other work that Downs performed. In total, Downs earned \$283.17 and was paid no wages, leaving \$283.17 in unpaid, due and owing wages. Downs was paid \$283.17 from the WSF.

4) Respondent employed Claimant Dena Freed from October 24 to November 22, 2008, at the wage of \$7.95 an hour. Freed was not paid at all for 42.75 hours of work and received a “non-sufficient” check in the amount of \$159.38 for other work Freed performed. In total, Freed earned \$499.24 and was paid no wages, leaving \$499.24 in unpaid, due and owing wages. Freed was paid \$499.24 from the WSF.

5) Respondent employed Claimant Charles Heil, Jr., from October 16 to November 23, 2008, at the wage of \$12.00 an hour. Heil was not paid at all for 35.5

hours of work and received a “non-sufficient” check in the amount of \$647.95 for other work he performed. In total, Heil earned \$1,073.95 and was paid no wages, leaving \$1,073.95 in unpaid, due and owing wages. Heil was paid \$1,073.95 from the WSF.

6) Respondent employed Claimant Bridgett Huff from October 16 to November 21, 2008, at the wage of \$7.95 an hour. Huff was not paid at all for 77 hours of work and received a “non-sufficient” check in the amount of \$432.35 for other work she performed. In total, Huff earned \$1,044.50 and was paid no wages, leaving \$1,044.50 in unpaid, due and owing wages. Huff was paid \$1,044.50 from the WSF.

7) Respondent employed Claimant Greg Kloumasis from November 17 to November 22, 2008, at the wage of \$11.50 an hour. Kloumasis worked 25.87 hours, earning \$297.51. Respondent paid Kloumasis no wages, leaving \$297.51 in unpaid, due and owing wages. Kloumasis was paid \$297.51 from the WSF.

8) Respondent employed Claimant Peggy Kyle from November 17 to November 22, 2008, at the wage of \$7.95 an hour. Kyle worked 16 hours, earning \$127.20. Respondent paid Kyle no wages, leaving \$127.50 in unpaid, due and owing wages. Kyle was paid \$127.50 from the WSF.

9) The Agency determined that the wage claimants were owed the unpaid wages set out in Findings of Fact ##2-8 – The Merits before making its WSF payout. In total, the Agency paid out \$4,034.35 from the WSF.

10) Twenty-five percent of \$4,034.35 is \$1,008.59.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent David W. Lewis was an Oregon employer doing business under the name of Bandon Boatworks.

2) Respondent employed all seven wage claimants in Oregon from October 16, 2008, to November 23, 2008.

3) Claimants earned the following wages while employed by Respondent and were paid nothing:

<u>Claimant</u>	<u>Wages Earned</u>
Leslie Ballantyne	\$708.78
Jesse Downs	\$283.17
Dena Freed	\$499.24
Charles Heil, Jr.	\$1,073.95
Bridgett Huff	\$1,044.50
Greg Kloumasis	\$297.51
Peggy Kyle	\$127.20

4) BOLI's Wage and Hour Division determined that all seven wage claims were valid and paid \$4,034.35 in unpaid wages to Claimants from the WSF.

5) Twenty five percent of \$4,034.35 is \$1,008.59.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent employed Claimants. ORS 652.310, 653.010.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 652.330, 652.332.

3) Respondent violated ORS 652.140 by failing to pay Claimants all wages earned and unpaid after the termination of their employment.

4) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries is entitled to recover from Respondent the sum of \$4,034.35 paid to the Claimants from the WSF and sought in the Order of Determination, along with a 25 percent penalty of \$1,008.59 assessed on that sum, plus interest until paid. ORS 652.332, ORS 652.414(3).

OPINION

CLAIMANTS' WAGE CLAIMS

To establish Claimants' wage claims, it was necessary for the Agency to prove the following elements by a preponderance of the evidence: 1) Respondent employed Claimants; 2) The pay rate upon which Respondent and Claimants agreed, if more than the minimum wage; 3) Claimants performed work for which they were not properly compensated; and 4) The amount and extent of work Claimants performed for Respondent. *In the Matter of Creative Carpenters Corporation, 29 BOLI 271, 277 (2007)*. The Agency proved its case through Respondent's admissions and the forum granted summary judgment to the Agency regarding the validity of the wage claims and the amount owed to each Claimant.

WAGE SECURITY FUND REIMBURSEMENT

The Agency also moved for summary judgment on this issue. The motion was granted by the forum and requires no more discussion. Respondent is liable to reimburse the Agency \$4,034.35 for unpaid wages paid out from the WSF and a 25 percent penalty of \$1,008.59.

ORDER

NOW, THEREFORE, as authorized by ORS 652.414 and as payment of payment of amounts paid from the Wage Security Fund ("WSF"), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **David W. Lewis aka Bandon Boatworks** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

A certified check payable to the Bureau of Labor and Industries in the amount of FIVE THOUSAND FORTY TWO DOLLARS AND NINETY FOUR CENTS (\$5,042.94), representing \$4,034.35 paid to Leslie Ballantyne, Jesse Downs, Dena Freed, Charles Heil, Jr., Bridgett Huff, Greg Kloumasis, and Peggy Kyle from the WSF, and a 25 percent penalty

of \$1,008.59 on the sum of \$4,034.35, plus interest at the legal rate on the sum of \$5,042.94 from November 9, 2009, until paid.

ⁱ See ORS 40.135(1).

ⁱⁱ The Order seeks \$200 penalties for each of five claimants who were respectively paid \$283.17, \$499.24, \$708.78, and \$297.51 from the WSF, for a total of \$1,000, and penalties of \$268.49 and \$261.13 for wage claimants who were paid \$1,073.95 and \$1,908.00 from the WSF, for a total of \$1,529.62.

ⁱⁱⁱ In further support of its statutory analysis in *Blachana* and its conclusion in this case, the forum notes that ORS 652.414(3) only refers to a “penalty” in relationship to “amounts paid from the Wage Security Fund.” (*emph. added*)