

**In the Matter of**  
**ADVANTAGE AVIATION**  
**ASSOC., INC., and ESU, Inc.,**  
**Respondents.**

Case Number 04-98  
Final Order of the Commissioner  
Jack Roberts  
Issued July 28, 1998.

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**SYNOPSIS**

Where the participants placed a settlement on the record by telephone conference call with the Administrative Law Judge on the date set for hearing and Respondents, who were represented by counsel, failed to submit closing documents encompassing the agreement and failed to pay the amounts agreed upon, the Commissioner awarded wages and penalty wages in the amounts designated in the settlement.

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The above-entitled contested case was scheduled for hearing before Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon, on May 5, 1998, in conference room 1004 of the State of Oregon Office Building, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Advantage Aviation Association, Inc., and ESU, Inc., (Respondents), both corporations, were represented by Stephen T. Boyke, Attorney at Law, Portland, in a conference telephone call at approximately 9:00 a.m.,

Tuesday, May 5, 1998, the date set for hearing. The conference was for the purpose of placing a settlement on the record pursuant to OAR 839-50-220 and was tape recorded.

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

#### **FINDINGS OF FACT - THE MERITS**

1) On June 1, 1997, the Agency issued its Order of Determination number 97-075 (Determination) based on the wage claims of Jeffrey R. Linscott, Alden A. Andre`, James O. Jackson, and James R. Morris alleging that said wage claimants were employed in Oregon by Advantage Aviation Association, Inc., an Oregon corporation, and ESU., Inc., an Oregon corporation (Respondents). The Determination found that wage claimants performed work, labor and services for Respondents during the time periods and at the rates listed below and were paid sums due and owing to them except the sums determined to be due and owing with interest totaling \$2,722.80 as follows:

Jeffrey Linscott, August 14 to August 18, 1996, 40 hours at \$16.82 per hour, earned \$672.80, paid 0.00, due \$672.80 plus interest at the legal rate from September 1, 1996;

Alden A. Andre`, August 14 to 18, 1996, 40 hours at \$15.00 per hour, earned \$600, paid 0.00, due \$600 plus interest at the legal rate from September 1, 1996;

James O. Jackson, March 15 to August 18, 1996, 42 hours at \$25.00 per hour, earned \$1,050, paid 0.00, due \$1,050 plus interest at the legal rate from September 1, 1996;

James R. Morris, August 13 to August 19, 1996, 40 hours at \$10.00 per hour, earned \$400, paid 0.00, due \$400 plus interest at the legal rate from September 1, 1996;

2) The Determination also found that Respondents' failure to pay was willful, that over 30 days had passed since the respective wages became due and owing, in violation of ORS 652.140 and that Respondents owed the respective wage claimants as

penalty wages (pursuant to ORS 652.150) a total of \$16,036.80 with appropriate interest as follows:

Jeffrey Linscott, terminated August 18, 1996, average daily wage \$134.56, for 30 days as penalty wages, \$4,036.80 plus interest at the legal rate from October 1, 1996;

Alden A. Andre`, terminated August 18, 1996, average daily wage \$120, for 30 days as penalty wages, \$3,600 plus interest at the legal rate from October 1, 1996;

James O. Jackson, terminated August 18, 1996, average daily wage \$200, for 30 days as penalty wages, \$6,000 plus interest at the legal rate from October 1, 1996;

James R. Morris, terminated August 19, 1996, average daily wage \$80, for 30 days as penalty wages, \$2,400 plus interest at the legal rate from October 1, 1996.

3) The Determination was served on Respondents by the Multnomah County Sheriff on June 24, 1997. It provided that Respondents either pay the amounts claimed or file an answer and request a hearing within 20 days from receipt. On July 3, 1997 the Agency extended time for Respondents' answer to July 14 and on July 14 Respondents through counsel timely filed answers and requests for contested case hearing.

4) On September 17, 1997 the Agency requested a hearing date and the forum issued a Notice of Hearing. On November 7 the ALJ issued a Discovery Order requiring the filing of case summaries by November 19. On November 13 Respondents' original counsel withdrew.

5) On November 19, 1997 Respondents' new counsel, Mr. Boyke, filed a partial summary of the case together with a motion for postponement of hearing and case summaries and a request for further discovery. In its response on November 24, the Agency did oppose postponement and assured cooperation in further discovery.

6) On November 24, 1997, the ALJ ordered the participants to cooperate in discovery and reset the hearing for February. On February 3, 1998 the Agency moved

for postponement because of the temporary military service of a witness. Respondents did not oppose postponement and on February 5, 1998, the ALJ reset the hearing for May 5, 1998.

7) On April 17, 1998, the Agency notified the ALJ that the Agency and Respondents had "agreed to resolve all issues in this matter by consent order." The Agency further advised that if documents were not completed by the date of hearing, the participants would "be prepared to put the terms and conditions of the agreement on the record May 5, 1998."

8) At approximately 9:00 a.m., May 5, 1998, the ALJ, the Agency Case Presenter and Respondents' counsel participated in a conference telephone call, which was tape recorded, for the purpose of placing the settlement on the record pursuant to OAR 839-50-220.

9) On May 5, 1998, Respondents through counsel agreed to enter into a consent order with the Agency providing for the payment to the Agency by Respondents of the \$2,722.80 earned and unpaid wages to be distributed to the wage claimants as specified in the Determination. Respondents further agreed that the consent order provide for the payment to the Agency by Respondents the further sum of \$8,018.40, representing one half the claimed penalty wages, to be distributed proportionately to the wage claimants as specified in the Determination. The consent order provided further that such payments were in settlement of a disputed claim and Respondents expressly waived their rights to hearing, administrative appeals and judicial review and assured future compliance with statutes and rules governing payment of wages. The Commissioner through the Agency accepted the terms of the consent order as settlement and compromise of the allegations of the Determination, agreed to forego further action on the wage claims therein, and found that Respondents' promises and

immediate payment of \$10,741.20 was consistent with ORS Chapter 652. The ALJ approved the settlement, ordered that the signed consent order and Respondents' payment be submitted by May 15, 1998, and canceled the hearing.

10) On May 21, 1998, the Agency notified the ALJ that Respondents had not executed the consent order and had not tendered payment as agreed and moved for a final order based on the terms of settlement placed on the record, pursuant to OAR 839-050-0220(6). On May 22, 1998, the ALJ issued an order reciting that no final documents or payment had been received and that no extension of time had been requested. The order further recited that a final order based on the settlement terms placed on the record would be issued pursuant to OAR 839-050-0220 if the documents were not received by the Hearings Unit by May 29, 1998. No signed consent order or payment have been received up to the date of this order.

11) The administrative exhibits, X-1 to X-18, consisting of the pleadings and correspondence among the participants and the forum up to the time of the Proposed Order, were admitted into the record by the ALJ.

12) On June 23, 1998, the ALJ issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions. The Hearings Unit received no exceptions.

#### **CONCLUSIONS OF LAW**

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein pursuant to ORS 652.140, 652.150, and 652.332.

2) OAR 839-050-0220 provides, in part:

"(4) Where a case is settled within ten days before or on the date set for hearing, the terms of the settlement shall be placed on the record, unless fully executed settlement documents are submitted on or before the date set for hearing.

"(5) Where settlement terms are placed on the record because settlement documents are incomplete, \* \* \* fully executed settlement documents must be submitted to the hearings unit within ten days after the date set for hearing. Where a party fails to submit the settlement documentation within ten days after the date set for hearing, the terms of the settlement set forth on the record shall constitute the basis for a final order."

OAR 839-50-240 provides, in part:

"The commissioner designates as administrative law judges those employees who are employed by the agency as hearings officers, \* \* \*. The commissioner delegates to such designee the authority to:

" \* \* \*

"(9) Decide procedural matters, but not grant motions for summary judgment or other motions by a party which involve final determination of the proceeding, but to issue a proposed order as provided for in these rules."

Respondent's failure to submit settlement documents or cooperate in the preparation and execution of settlement documents within 10 days after the hearing date, or by such date as modified by the written order of the ALJ, allows the terms of settlement as placed on the record to form the basis for a final order as proposed herein.

3) Under the facts and circumstances of this record, and in accordance with ORS 652.140, 652.150, and 652.332, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay the wages and penalty wages agreed to, plus interest on both sums until paid.

#### **OPINION**

Where the forum cancels a hearing based upon a respondent's agreement on the record to sign settlement documents and to pay wages and penalties and the respondent thereafter fails to execute settlement documents and make payment as agreed within the time allowed by the forum, the Commissioner may enter a final order against the respondent based upon the record of settlement. OAR 839-050-0220(5), (6), (7). *In the Matter of Fidel Hernandez*, 14 BOLI 149, 153-154 (1995); *In the Matter of*

*Dale Bryant*, 14 BOLI 111, 114 (1995); *In the Matter of Portland Custom Interiors, Inc.*, 14 BOLI 82, 85 (1995).

Respondents' agreement of settlement having been placed on the record and the forum having canceled the hearing and the Agency having agreed to forego any further action on the wage claims settled thereby, the entry of a final order by the Commissioner based on the settlement as placed on the record is a proper disposition of this matter.

### **ORDER**

NOW, THEREFORE, as authorized by ORS 652.332, and as a result of Respondents' violation of ORS 652.140 and pursuant to ORS 652.150, the Commissioner of the Bureau of Labor and Industries hereby orders that:

1) ADVANTAGE AVIATION ASSOCIATION, INC., and ESU, INC., corporations, jointly and severally, deliver to the Fiscal Services Office, Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

a) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR JEFFREY LINSOTT in the amount of TWO THOUSAND SIX HUNDRED NINETY ONE DOLLARS AND TWENTY CENTS (\$2691.20), less appropriate lawful deductions, representing \$672.80 in gross earned, unpaid, due, and payable wages, and \$2,018.40 in penalty wages, plus interest at the legal rate on the sum of 672.80 from September 1, 1996, until paid and interest at the legal rate on the sum of \$2,018.40 from October 1, 1996, until paid. These sums are assessed for violation of ORS 652.140 and pursuant to ORS 652.150.

b) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR ALDEN A. ANDRE` in the amount of TWO THOUSAND FOUR HUNDRED DOLLARS (\$2,400), less appropriate lawful deductions, representing \$600 in gross

earned, unpaid, due, and payable wages, and \$1,800 in penalty wages, plus interest at the legal rate on the sum of \$600 from September 1, 1996, until paid and interest at the legal rate on the sum of \$1,800 from October 1, 1996, until paid. These sums are assessed for violation of ORS 652.140 and pursuant to ORS 652.150.

c) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR JAMES O. JACKSON in the amount of FOUR THOUSAND FIFTY DOLLARS (\$4,050), less appropriate lawful deductions, representing \$1,050 in gross earned, unpaid, due, and payable wages, and \$3,000 in penalty wages, plus interest at the legal rate on the sum of \$1,050 from September 1, 1996, until paid and interest at the legal rate on the sum of \$3,000 from October 1, 1996, until paid. These sums are assessed for violation of ORS 652.140 and pursuant to ORS 652.150.

d) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR JAMES R. MORRIS in the amount of ONE THOUSAND SIX HUNDRED DOLLARS (\$1,600), less appropriate lawful deductions, representing \$400 in gross earned, unpaid, due, and payable wages, and \$1,200 in penalty wages, plus interest at the legal rate on the sum of \$600 from September 1, 1996, until paid and interest at the legal rate on the sum of \$1,200 from October 1, 1996, until paid. These sums are assessed for violation of ORS 652.140 and pursuant to ORS 652.150.

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