

In the Matter of

ARNOLD J. MITRE dba Mitre Trucking

Case No. 13-02

Final Order of the Commissioner Jack Roberts

Issued March 18, 2001

SYNOPSIS

Respondent failed to pay Claimant all wages earned and due after Claimant quit his employment, in violation of ORS 652.140(2). Respondent unlawfully withheld Claimant's wages as reimbursement for damages caused by Claimant to Respondent's property. Respondent's failure to pay the wages was willful and Respondent was ordered to pay civil penalty wages, pursuant to ORS 652.150. ORS 652.140; ORS 652.150.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 11, 2002, in the hearing room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Cynthia Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Ronald Olson ("Claimant") was present throughout the hearing and was not represented by counsel. Arnold J. Mitre ("Respondent") was present throughout the hearing and was not represented by counsel.

The Agency called Claimant and Irene Zentner, BOLI Wage and Hour Compliance Specialist, as its witnesses.

Respondent Arnold J. Mitre called no witnesses, but testified on his own behalf.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-24;

b) Agency exhibits A-1 through A-7 (filed with the Agency's case summary) and A-8 (submitted at hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On December 5, 2000, Claimant filed a wage claim form stating Respondent had employed him from November 8 to November 17, 2000, and failed to pay him the agreed upon rate of \$800 per week for all hours worked. Additionally, Claimant alleged he was not paid for one day of training.

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

3) On February 23, 2001, the Agency issued an Order of Determination, numbered 00-5299. The Agency alleged Respondent had employed Claimant during the period November 8 to November 17, 2000, at the rate of \$800 per five day workweek for six days of work, no part of which was paid. The Agency also alleged Respondent's failure to pay all of Claimant's wages when due was willful and Respondent, therefore, was liable to Claimant for \$4,800 as penalty wages, plus interest. The Order of Determination gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) The Agency issued a Notice of Intent to Issue Final Order by Default on March 26, 2001, requiring Respondent to file an Answer and Request for Hearing no

later than April 5, 2001, or be held in default. On March 30, 2001, Respondent filed an answer stating in its entirety:

“To Labor Commission:

“This is the second letter that I have answered saying that I wanted a hearing on this labor dispute with Mr. Olson. The reason I held his check is because the 2nd day that he worked he tore the curtain on a trailer by not watching what he was doing and it was not my trailer. He agreed to pay for the repair on it and then he backed out of it and that is why I held this check. He lied to the Labor Commission about his wages. He agreed to \$700 a week and he was to pay his own tax. He said to you that I owed him \$1,060 and that is not true. I have people that were there when I told him what I paid a week for five days a week and no weekends. So, yes I would like to have a hearing on this matter and get it over with.

“Thank you,

“Arnold J. Mitre”

5) On October 25, 2001, the Agency requested a hearing. On November 7, 2001, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:00 a.m. on December 18, 2001. With the Notice of Hearing, the forum included a copy of the Order of Determination, a “SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES” and a copy of the forum’s contested case hearings rules, OAR 839-050-0000 to 839-050-0440. The Notice of Hearing and accompanying documents were mailed to Arnold J. Mitre at 418 Hilda Street, #12, Oregon City, Oregon 97045.

6) On November 14, 2001, the forum issued a case summary order requiring the Agency and Respondent to submit case summaries that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a statement of any agreed or stipulated facts; and any wage and penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries

by December 7, 2001, and advised them of the possible sanctions for failure to comply with the case summary order.

7) On November 16, 2001, the Agency requested that the case summary due date be extended to December 10, 2001. Respondent did not respond within the time allowed under OAR 839-050-0030(1), and on November 26, 2001, the forum granted the Agency's request.

8) On November 29, 2001, the Agency moved for a discovery order that required Respondent to produce five categories of documents. The Agency included a copy of its informal discovery request, marked as "Agency Exhibit A," which was mailed to Respondent on November 13, 2001. The Agency also provided a statement indicating the relevance of the documents requested. Respondent filed no response to the Agency's motion. On January 17, 2002, the forum issued an interim order that granted the Agency's motion and required Respondent to produce all of the requested documents to the Agency no later than Wednesday, January 23, 2002. The interim order was personally served on Respondent at 418 Hilda Street, #12, Oregon City, Oregon, on January 17, 2002.

9) On November 29, 2001, Respondent submitted a written request for a postponement of the scheduled hearing that stated, in its entirety:

"To the Bureau of Labor

"Case # 13-02

"I would like a postponement on this case for a later date. I am going to be out of the country as of 11-28-01 to 1-18-02. I had this planned as of Oct. 2001 as I have things to attend to for my wife & her family & we have to drive as she does not like to fly (and I have to get some papers together). Olson never did turn any log sheets to me & I don't have any records other than that. Arnold J. Mitre"

Included with Respondent's letter was the Agency's original letter to Respondent dated November 13, 2001, requesting discovery of certain documents.ⁱ The letter, with the attachment, was postmarked November 28, 2001.

10) On November 30, 2001, the forum issued an order requiring the Agency to respond to Respondent's request for postponement either by facsimile transmission or by regular mail by 4:00 p.m., Wednesday, December 5, 2001. The Agency filed its objections to Respondent's request for postponement on December 3, 2001.

11) On December 10, 2001, the Agency requested a second extension of time for filing case summaries and requested that the parties be allowed to file their case summaries by facsimile transmission. The Agency also requested a ruling on Respondent's motion for postponement.

12) On December 11, 2001, the Agency requested a postponement of the hearing due to an increased workload brought on by a longer than usual hearing and because another hearing was continued to the same week as the scheduled hearing.

13) On December 13, 2001, the forum denied Respondent's request for a postponement because it was untimely and failed to show good cause. On the same date, the forum granted the Agency's request for a postponement because "both participants [had] expressed a desire to postpone the hearing and [the forum found] that the interests of justice [would] best be served" to change the hearing date. The hearing was rescheduled to commence January 29, 2002. The forum's rulings on the Agency's and Respondent's requests for postponement were personally served on Respondent at 418 Hilda Street, #12, Oregon City, Oregon, on December 15, 2001.

14) On December 17, 2001, the Agency requested the hearing date be reset to either February 8 or February 11, 2002, because the Agency case presenter had previously scheduled a vacation during the last two weeks of January. The forum

issued an amended ruling on December 18, 2001, and granted the Agency's request for a continuance and the hearing was rescheduled to commence on February 11, 2002. The time for submitting case summaries was extended to February 1, 2002. The amended ruling was personally served on Respondent at 418 Hilda Street, #12, Oregon City, Oregon, on December 22, 2001.

15) The Agency filed its case summary, with its attached exhibits, on January 31, 2002. Respondent did not file a case summary.

16) At the start of hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

17) The ALJ issued a proposed order on February 21, 2002 that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Respondent Arnold J. Mitre did business in Oregon using the assumed business name, Mitre Trucking.

2) Sometime in early November 2000, Claimant met with Respondent at Tachoe's (phonetic) Restaurant and Bar in Oregon City, Oregon, and accepted Respondent's offer to drive a tractor-trailer ("truck") round-trip daily from Portland, Oregon to Tacoma, Washington. Respondent owned the tractor and the trailer belonged to a Tacoma company called Doable (phonetic) Products.

3) Respondent agreed to pay Claimant \$800 per week for work performed Monday through Friday. Claimant understood that the flat rate was to cover all of the hours necessary to perform the work in a five-day period, regardless of the number. The agreement between them was not in writing.

4) Before he started the job, Claimant asked Respondent if he could ride along with him for a day in order to “learn the ropes” and “learn how to tarp a load.” Respondent agreed and on November 8, 2000, Claimant rode with Respondent for the full 10-hour trip. During that trip, Claimant drove the empty truck to Tacoma and helped strap down at least one load. At the time, Claimant did not expect to get paid for riding along with Respondent.

5) Claimant worked November 13, 14, 15, 16, and 17, 2000.

6) Respondent kept the truck near a Jubitz truck stop on Vancouver Avenue in Portland. Claimant reported to the site daily and drove the truck to Tacoma to pick up lumber products for delivery to Home Depot and Home Base stores in Washington. Claimant’s route varied each day and on at least one day his route was primarily in Oregon.

7) On Claimant’s first day of work, while trying to pass two other trucks, Claimant drove too close to one and ripped the “curtain” on the trailer he was pulling. Respondent believed that the company that owned the trailer would charge him for the damage. Respondent told Claimant he would seek an estimate of the damages from the company and that he expected Claimant to pay for any amounts for which Respondent was held responsible. Claimant did not pay for the damage to the trailer. Subsequently, Claimant decided that the job was not working out and quit on November 17, 2000.

8) Claimant’s last day of work was November 17, 2000.

9) A few days after he quit, Claimant went to Respondent’s residence to inquire about his paycheck. Respondent told Claimant that after he determined the damage amount on the trailer, the pay issue would be resolved. Respondent expected

to have an estimate within two weeks. Respondent later contacted Claimant and told him that he was going to “charge” Claimant for the training day.

10) For the one week he worked, Claimant maintained a “Driver’s Daily Log” that shows he recorded 51¾ hours worked. Claimant did not record the 10 hours he rode with and performed work for Respondent on November 8, 2000.

11) Between November 8 and November 17, 2000, Claimant earned \$960, calculated by dividing Claimant’s weekly wage rate of \$800 by five days to determine the daily rate, which equals \$160. Complainant worked six days, multiplied by \$160, earning a total of \$960.

12) Claimant did not sign any document that authorized Respondent to withhold his wages.

13) Respondent admits he paid no compensation for Claimant’s personal services rendered to Respondent.

14) The Agency calculated civil penalty wages of \$4,800. That amount was erroneously calculated by using Claimant’s daily rate of \$160 and multiplying it by 30 days. When computed in accordance with ORS 652.150 and OAR 839-001-0470(2), the result is as follows: \$960 (total wages earned) divided by 61¾ (total hours worked) equals an average hourly rate of \$15.55. This figure is multiplied by 8 (hours per day) and then by 30 (the maximum number of days for which civil penalties continue to accrue) for a total of \$3,732, which is the amount this forum awards Claimant as civil penalty wages.

15) Claimant’s testimony was credible. His responses to questions were straightforward and consistent with his statements on his wage claim form. He did not attempt to embellish the facts surrounding the circumstances of his employment with

Respondent and readily acknowledged that he damaged the trailer he was hauling on his first day of work. The forum has credited his testimony in its entirety.

16) Zentner testified in an objective, straightforward manner. With the exception of her testimony pertaining to her computation of civil penalty wages, her testimony has been credited in its entirety.

17) The forum did not believe Respondent's testimony that he promised to pay Claimant \$700 per week rather than the \$800 claimed by Claimant. Respondent's credibility was affected by his prehearing representation to the forum on November 28, 2001, that he was going to be "out of the country" from November 28 until January 18, 2002, and that he therefore required a postponement of the hearing scheduled for December 18, 2001. Evidence in the record places Respondent at 418 Hilda Street, #12, Oregon City, Oregon, on December 15 and 22, 2001, and on January 17, 2002. Moreover, the Agency submitted evidence that Respondent's wife, Evelin, signed for a certified letter from Claimant on December 13, 2001, after Respondent had testified that he returned to Oregon, accompanied by his wife, Evelin, on December 15 or December 18, 2001. Respondent's statements at hearing regarding his whereabouts during the time he previously claimed to be out of the country shifted notably when challenged by the Agency. Consequently, his testimony was not believed unless it was corroborated by credible evidence.

ULTIMATE FINDINGS OF FACT

1) During all times material herein Arnold J. Mitre was a person who engaged the personal services of one or more employees in the State of Oregon.

2) Respondent employed Claimant from November 8 through November 17, 2000.

3) Respondent agreed to pay Claimant \$800 per five-day workweek, regardless of the number of hours worked.

- 4) Claimant worked 61¾ hours between November 8 and 17, 2000. Claimant's hourly wage rate for the purpose of calculating civil penalty wages is \$15.55 per hour.
- 5) Between November 8 and 17, 2000, Claimant earned a total of \$960 in wages during his employment with Respondent
- 6) Claimant quit his employment with Respondent on November 17, 2000, without giving Respondent notice of his intention to quit.
- 7) Respondent withheld Claimant's wages based on damages Claimant caused to Respondent's truck.
- 8) Respondent had no written authorization to withhold Claimant's wages.
- 9) Civil penalty wages, computed in accordance with ORS 652.150 and OAR 839-001-0470, equal \$3,732.

CONCLUSIONS OF LAW

- 1) During all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.
- 2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414.
- 3) ORS 652.140(2) provides in part:

"When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs."

Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid within five days, excluding Saturdays, Sundays and holidays, after Claimant quit his employment without notice.

4) ORS 652.150 provides:

“If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date, and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued.”

OAR 839-001-0470 provides:

“(1) When an employer willfully fails to pay all or part of the wages due and payable to the employee upon termination of employment within the time specified in OAR 839-001-0420, 839-001-0430 and 839-001-0440, the employer shall be subject to the following penalty:

“(a) The wages of the employee shall continue from the date the wages were due and payable until the date the wages are paid or until a legal action is commenced, whichever occurs first;

“(b) The rate at which the employee’s wages shall continue shall be the employee’s hourly rate of pay times eight (8) hours for each day the wages are unpaid;

“(c) Even if the wages are unpaid for more than 30 days, the maximum penalty shall be no greater than the employee’s hourly rate of pay times 8 hours per day times 30 days.

“(2) The wages of an employee that are computed at a rate other than an hourly rate shall be reduced to an hourly rate for penalty computation purposes by dividing the total wages earned while employed or the total wages earned in the last 30 days of employment, whichever is less, by the total number of hours worked during the corresponding time period.”

Respondent is liable for \$3,732 in civil penalties under ORS 652.150 and OAR 839-001-0470 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(2).

5) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant his earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

AGENCY'S PRIMA FACIE CASE

In this case, the Agency was required to prove: 1) that Respondent employed Claimant; 2) Respondent agreed to pay Claimant \$800 per week; 3) Claimant performed work for which he was not properly compensated; and 4) that Claimant's work time included one additional day of compensable training. See *In the Matter of Barbara Coleman*, 19 BOLI 230 (2000). Respondent admits he employed Claimant for one week and did not pay him any wages. Respondent also admits that during the week prior to Claimant beginning work, Claimant rode along with Respondent one day for training purposes. In dispute are the amount Respondent agreed to pay Claimant and the compensability of Claimant's one-day training. Also at issue is whether Respondent was permitted by law to withhold Claimant's paycheck as payment for damages Claimant caused to property for which Respondent was responsible.

AGREED UPON RATE

In this case there is no written employment agreement specifying the wage rate. Respondent does not dispute that he agreed to compensate Claimant at a weekly rate for any and all hours worked. The dispute amounts to a \$100 difference in their understanding of the agreement and its resolution rests on credibility. Claimant credibly testified that he was promised \$800 per week for his services as a truck driver. Respondent's testimony that the wage agreement was for \$700 per week is tainted by his previous misrepresentation to the forum when he initially requested a postponement

of the hearing and his subsequent contradictory testimony at hearing. Consequently, absent credible evidence to the contrary, the forum relies on Claimant's representation that the wage agreement was for \$800 per week.

WORK TIME

With certain exceptions that do not apply here, training time is compensable work time. See OAR 839-020-0044; *In the Matter of Frances Bristow*, 16 BOLI 28 (1997), citing *In the Matter of Dan's Ukiah Service*, 8 BOLI 96, 106 (1989). In this case, Claimant, at his own request, received training for one day with Respondent's full acquiescence. The training was directly related to his job duties and during the training Claimant performed productive work for Respondent. Under those circumstances, Claimant's one day of training is compensable at the agreed upon wage rate which, in this case, computes to \$160 per day.ⁱⁱ

UNAUTHORIZED DEDUCTIONS

Respondent's defense that he withheld Claimant's paycheck in order to recover damages he thought were owed has no merit. Claimant admits he caused some damage to the trailer he was hauling on the first day of his employment. Even if Respondent's claim was supported by proof of actual damages, ORS 652.610, concerning deductions from wages, precludes Respondent from withholding Claimant's wages except in certain circumstances that do not apply here. ORS 652.610 "require[s] that an employer pay an employe the wages that are due and seek to resolve any claims the employer may have against the employe by other means." *In the Matter of Ken Taylor*, 11 BOLI 139 (1992), quoting *Garvin v. Timber Cutters, Inc.*, 61 Or App 497, 658 P2d 1164, 1166 (1983). Respondent had no legal basis for withholding Claimant's paycheck and owes Claimant \$960 in unpaid wages sought in the Order of Determination.

CIVIL PENALTIES

An award of penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent, as an employer, had a duty to know the amount of wages due to his employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238 (1983). Respondent admits he intentionally withheld Claimant's final paycheck to cover amounts Respondent believed were owed for property damage caused by Claimant. There is no evidence that Respondent acted other than voluntarily or as a free agent. The forum concludes that Respondent acted willfully and assesses penalty wages in the amount of \$3,732. This figure is computed in accordance with ORS 652.150 and OAR 839-001-0470.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, Respondent **Arnold J. Mitre** is hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Ronald Olson, in the amount of FOUR THOUSAND SIX HUNDRED AND NINETY TWO DOLLARS (\$4,692), less appropriate lawful deductions, representing \$960 in gross earned, unpaid, due and payable wages and \$3,732 in penalty wages, plus interest at the legal rate on the sum of \$960 from December 1, 2000, until paid and interest at the legal rate on the sum of \$3,732 from January 1, 2000, until paid.

ⁱ The Agency's original letter to Respondent, dated November 13, 2001, was erroneously designated as an attachment to the Agency's Motion for Discovery Order and marked as Administrative Exhibit X-7, when, in fact, it was an attachment to Respondent's request for postponement.

ⁱⁱ *Cf. In the Matter of Box/Office Delivery*, 12 BOLI 141, 148 (1994) (finding that nothing in the facts of the case or in the law justified paying the claimant less than the agreed upon rate while in training).