

In the Matter of

BARBARA and ROBERT BLAIR, dba Mid-Valley Mechanical

Case No. 74-02

Final Order of Commissioner Jack Roberts

Issued December 17, 2002

SYNOPSIS

Respondents employed two wage claimants and failed to pay them straight time and overtime wages between August and December 2001. Respondents were ordered to pay claimants a total of \$3755 in due and unpaid wages. Respondents' failure to pay the wages was willful, and they were ordered to pay \$4800 in civil penalty wages. ORS 652.140(1), *former* ORS 652.150, ORS 653.261, *former* OAR 839-001-0470(1), OAR 839-020-0030.

The above-entitled case came on regularly for hearing before Alan McCullough, 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 November 5, 2002, at the Salem office of the Bureau of Labor and Industries, located at 3865 Wolverine NE, Building E, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Cynthia L. Domas, an employee of the Agency. Wage claimants Lawrence Winney and Brandon Speck ("Claimants") were present throughout the hearing and were not represented by counsel. Respondents Robert and Barbara Blair did not appear at the hearing and were found in default.

The Agency called the following witnesses: Lawrence Winney and Brandon Speck, wage claimants; Mary Nelson, Winney's girlfriend; Ellis Hallman and John Andrews, individuals who observed Winney's work; and Kathleen Johnson, BOLI Wage and Hour Division compliance specialist.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-15 (submitted or generated prior to hearing);
- b) Agency exhibits A-1 through A-19, and A-22 (submitted prior to hearing);
- c) Exhibit ALJ-1, a copy of Claimant Winney's original calendar (submitted by the Agency as Exhibit A-5) made by the ALJ because some of the entries in Exhibit A-5 were too faint to be deciphered.

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 21, 2001, Claimants each filed wage claims with the Agency alleging that Respondent Robert Blair, dba Mid Valley Mechanical, had employed them and failed to pay wages earned and due to them.

2) At the time they filed their wage claims, Claimants assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimants, all wages due from Respondent.

3) Claimants brought their wage claims within the statute of limitations.

4) On March 29, 2001, the Agency issued Order of Determination No. 01-5687 based upon the wage claims filed by Claimants and the Agency's investigation. The Order of Determination alleged that Respondent "Barbara Blair dba Mid Valley Mechanical, Employer" owed a total of \$3,755 in unpaid wagesⁱ and \$4,800 in civil penalty wages,ⁱⁱ plus interest, and required that, within 20 days, Respondent Barbara Blair either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

5) On April 9, 2002, Respondent Barbara Blair and Robert Blair jointly filed an answer and request for hearing. The answer and request for hearing was typed on letterhead for "Mid Valley Mechanical, CCB#142619" and was signed by "Robert and Barbara Blair D.B.A. Mid Valley Mechanical." The address printed on the letterhead was "34058 Oakville Road, Albany, Oregon 97321." The answer denied that Respondents had employed Claimants or owed any money to them and alleged that they did not know Speck.

6) On May 17, 2002, the Agency filed a "BOLI Request for Hearing" with the forum.

7) On May 22, 2002, the Hearings Unit issued a Notice of Hearing to Respondent Barbara Blair, the Agency, and Claimants stating the time and place of the hearing as November 5, 2002, at 3865 Wolverine Street NE, Building. E-1, Salem, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440. These documents were mailed to Respondent Barbara Blair at 34058 Oakville Road, Albany, OR 97321.

8) On June 5, 2002, the forum ordered the Agency and Respondent Barbara Blair each to submit a case summary including: 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); and 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 case summaries no later than October 25, 2002, and notified the Agency and Respondent of the possible sanctions for failure to

comply with the case summary order. The forum also enclosed a form designed to assist *pro se* respondents in filing a case summary.

9) On September 25, 2002, the Agency filed a motion to add Robert Blair as a Respondent. The Agency accompanied its motion with documentation from the Oregon Construction Contractor's Board showing that Barbara and Robert Blair had declared themselves to be a partnership.

10) On October 15, 2002, the Agency filed a motion for a discovery order seeking documents from Respondents that would tend to show that Claimants worked for Respondents, the amount of money paid by Respondents to Claimants, and the dates that Claimants worked for Respondents. The Agency provided documentation showing it had informally requested these documents from Respondents and had received no response.

11) On October 15, 2002, the forum granted the Agency's motion to add Robert Blair as a Respondent and issued an amended interim order for case summaries that was identical to the first order except that the amended order was also sent to Robert Blair.

12) On October 24, 2002, the Agency filed its case summary.

13) On October 24, 2002, the forum issued a discovery order requiring Respondents to produce the documents requested by the Agency in its motion for a discovery order.

14) On November 5, 2001, at 10 a.m., Respondents did not appear for the hearing and had not earlier notified the Hearings Unit that they would not be present at the hearing. The ALJ went on the record and announced that he would wait until 10:30 a.m., pursuant to OAR 839-050-0330, to commence the hearing and that Respondents would be in default if they did not make an appearance by that time. When

Respondents did not appear by 10:30 a.m., the ALJ declared Respondents to be in default and commenced the hearing.

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

16) On November 19, 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, Respondents Barbara and Robert Blair owned and operated a business that engaged in metal fabrication and sandblasting under the assumed business name of Mid Valley Mechanical in Albany, Oregon. Respondents owned and operated Mid Valley Mechanical as a partnership.

2) Robert Blair hired Claimant Winney (“Winney”) on August 8, 2001, to perform sandblasting, painting, ironwork, and other general contracting duties. Blair agreed to pay Winney \$10 per hour for his work, and time and a half for all work over 40 hours in a given week.

3) When Winney was hired, Respondents operated their business out of a shop owned by Ellis Hallman. At the time, Winney was living in a recreational vehicle (“RV”). At Robert Blair’s request, Winney parked his RV behind Respondents’ shop and lived there. Winney’s girlfriend, Mary Nelson, also lived in the RV during Winney’s employment with Respondents.

4) On November 4, 2001, Hallman evicted Respondents from his property and Respondents relocated their business to 34058 Oakville Road, Albany, Oregon 97321.

5) Respondents did not keep a record of the hours worked by Winney, but Winney maintained a calendar on which he wrote down his hours of work for Respondents each day at the end of the workday.

6) Winney's last day of employment with Respondents was December 9, 2001. On December 10, 2001, he quit working for Respondents because Respondents hadn't paid him for his work.

7) Respondents paid Winney a total of \$350 in cash for his work. Winney received an additional \$750 in benefits, including rent, boots, and tools.

8) During his employment with Respondents, Winney worked on a project subject to the prevailing wage rate and also performed work not subject to the prevailing wage rate.

9) During his employment with Respondents, Winney earned \$1,402.46 while working on the prevailing rate project. Although Respondents did not pay Winney anything for his work on this project, Respondents' surety, CNA Surety, paid Winney all wages owed to him for his work on the project.

10) During his employment with Respondents, Winney performed 444 hours of work on projects not subject to the prevailing wage rate. Six of these hours were overtime hours. Winney's overtime rate of pay was \$15 per hour. Winney earned a total of \$4,470 for this work, computed at \$10 per hour for straight time work and \$15 per hour for overtime work.

11) During his employment with Respondents, Winney submitted time sheets showing the hours that he worked to Robert Blair. Blair asked Winney do this because he did not keep track of Winney's hours.

12) At the time of hearing, Respondents owed Winney \$3,370 in unpaid wages (\$4,470 less \$350 in wages paid and \$750 in benefits).

13) Civil penalty wages are computed as follows for Winney, in accordance with *former* ORS 652.150 and *former* OAR 839-001-0470(1): \$10.00 per hour x 8 hours x 30 days = \$2,400.

14) Robert Blair hired Claimant Speck ("Speck") to do sandblasting, grinding, and some driving. Blair agreed to pay Speck \$10 per hour for his work.

15) Speck started work for Respondents on December 3, 2001, and worked through December 8, 2001.

16) During his employment with Respondents, Speck worked on a project subject to the prevailing wage rate and also performed work not subject to the prevailing wage rate.

17) During his employment with Respondents, Speck earned \$352.84 while working on the prevailing rate project. Although Respondents did not pay Speck anything for his work on this project, Respondents' surety, CNA Surety, paid Speck all wages owed to him for his work on the project.

18) During his employment with Respondents, Speck performed 38.5 hours of work on projects not subject to the prevailing wage rate, earning \$385 for this work, computed at \$10 per hour.

19) Speck's last day of work for Respondents was December 8, 2001, after which he quit Respondents' employment because Respondents did not pay him.

20) At the time of hearing, Respondents had not paid Speck anything for his work and owed him \$385 in unpaid wages.

21) Civil penalty wages are computed as follows for Speck, in accordance with *former* ORS 652.150 and *former* OAR 839-001-0470(1): \$10.00 per hour x 8 hours x 30 days = \$2,400.

22) Winney, Speck, Hallman, Nelson, and Johnson were credible witnesses, and the forum has credited their testimony in its entirety. Andrews' testimony was credible except for his statement that Winney did not begin work for Respondents until September 2001.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Robert and Barbara Blair were partners doing business under the assumed business name of Mid Valley Mechanical and engaged the personal services of one or more employees.

2) Lawrence Winney was employed by Respondents from August 8 through December 9, 2001, at the agreed wage rate of \$10 per hour. Winney quit Respondents' employment effective December 10, 2001.

3) From August 8 through December 8, 2001, Winney earned \$4,470 in wages on non-prevailing wage rate jobs and has only been paid \$1,100.

4) Respondents owe Winney \$3,370 in due and unpaid wages.

5) Respondents willfully failed to pay Winney \$3,370 in earned, due, and payable wages within five business days, excluding Saturdays, Sundays, and holidays, after Winney quit Respondents' employment and more than 30 days have elapsed from the date Winney's wages were due.

6) Civil penalty wages for Winney, computed in accordance with *former* ORS 652.150 and *former* OAR 839-001-0470(1), equal \$2,400.

7) Brandon Speck was employed by Respondents from December 3 through December 8, 2001, at the agreed wage rate of \$10 per hour. Speck quit Respondents' employment effective December 9, 2001.

8) From December 3 through December 8, 2001, Speck earned \$385 in wages on non-prevailing wage rate jobs and has not been paid any of this amount.

9) Respondents owe Speck \$385 in due and unpaid wages.

10) Respondents willfully failed to pay Speck \$385 in earned, due, and payable wages within five business days, excluding Saturdays, Sundays, and holidays, after Speck quit Respondents' employment and more than 30 days have elapsed from the date Speck's wages were due.

11) Civil penalty wages for Speck, computed in accordance with *former* ORS 652.150 and *former* OAR 839-001-0470(1), equal \$2,400.

CONCLUSIONS OF LAW

1) During all times material herein, Respondents Robert and Barbara Blair were employers and Claimants Winney and Speck were employees subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405. During all times material, Respondents employed Claimants.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein. ORS 652.310 to 652.414.

3) At times material, ORS 652.140(2) provided:

"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 schedule payday after the employee has quit, whichever event first occurs."

Respondents violated ORS 652.140(2) by failing to pay Claimant Speck all wages earned and unpaid not later than December 14, 2001, five business days after Speck quit, and by failing to pay Claimant Winney all wages earned and unpaid not later than December 17, 2001, five business days after Winney quit. Those wages amount to \$3,370 for Winney and \$385 for Speck.

4) *Former* ORS 652.150 provided:

“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.”

Former OAR 839-001-0470(1) provided:

“(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.”

Respondents are liable for \$4,800 in civil penalties under *former* ORS 652.150, computed by multiplying Claimants’ hourly rate (\$10 per hour) x 8 hours per day x 30 days = \$2,400, for willfully failing to pay all wages or compensation to Claimants when due as provided in ORS 652.140(2).

5) 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 has the authority to order Respondents to pay Claimants their earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

When a respondent defaults, the Agency must establish a prima facie case to support the allegations of its charging document. *In the Matter of Peter N. Zambetti*, 23 BOLI 234, 241 (2002). The forum may consider unsworn assertions contained in a defaulting respondent's answer when making factual findings, but those assertions are overcome whenever controverted by other credible evidence. *Id.*

The Agency's prima facie case consists of credible evidence of the following elements: 1) Respondents employed Claimants; 2) Respondents agreed to pay both Claimants \$10 per hour; 3) Claimants performed work for which they were not properly compensated; and 4) the amount and extent of work Claimants performed for Respondents. *In the Matter of Scott Miller*, 23 BOLI 243, 258 (2002).

RESPONDENTS EMPLOYED CLAIMANTS

Respondents asserted in their unsworn answer that they did not employ Claimants. Both Claimants credibly testified that Robert and Barbara Blair owned and operated a business under the assumed business name of Mid Valley Mechanics, that Robert Blair hired them, and that they performed work for Mid Valley Mechanics. In addition, the Agency provided uncontroverted written statements from several witnesses who corroborated this testimony. Respondents' answer, which appears on letterhead topped with the name "Mid Valley Mechanical," is signed "Robert & Barbara Blair D.B.A. Mid Valley Mechanical," indicating a partnership relationship between the Blairs. Based on Respondents' answer, the forum concludes that Robert and Barbara Blair were both Claimants' employers.

RESPONDENTS AGREED TO PAY BOTH CLAIMANTS \$10 PER HOUR

Both Claimants credibly testified that Robert Blair agreed to pay them \$10 per hour for their work, and Winney credibly testified that Blair agreed to pay him \$15 per hour for any overtime work. The forum accepts this credible testimony as fact.

CLAIMANTS PERFORMED WORK FOR WHICH THEY WERE NOT PROPERLY COMPENSATED

Speck credibly testified that he worked 38.5 hours for Respondents on non-prevailing wage rate jobs and was paid nothing. Winney credibly testified that he worked 444 hours for Respondents on non-prevailing wage rate jobs and only received \$1,100 in pay and benefits for his work, far below the \$4,470 that he actually earned. Based on this credible testimony, the forum concludes that both Claimants performed work for which they were not properly compensated.

THE AMOUNT AND EXTENT OF WORK CLAIMANTS PERFORMED FOR RESPONDENTS

The final element of the Agency's prima facie case requires proof of the amount and extent of work performed by the claimants. The Agency's burden of proof can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. *In the Matter of Sreedhar Thakkun*, 22 BOLI 108, 115 (2001). When an employer produces no records of dates or hours worked by claimants, the forum may rely on credible testimony by the claimants to show the amount and extent of the claimants' work. *In the Matter of G & G Gutters, Inc.*, 23 BOLI 135, 145 (2002). In this case, credible testimony by Speck and Winney established that Speck worked 38.5 hours for Respondents on non-prevailing wage rate jobs, earning \$385, and that he was paid nothing for his work. Credible testimony by Winney, bolstered by the contemporaneous entries of his work hours he made on his calendar, established that Winney worked 444 hours for Respondents on non-prevailing wage rate jobs.

RESPONDENT MUST PAY PENALTY WAGES TO BOTH CLAIMANTS

The forum may award penalty wages where a respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission "willfully" if he or she acts (or fails to

act) intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

Both claimants credibly testified to their wage agreements with Respondents and that Respondent Robert Blair was aware of the amount and extent of the work they performed. There is no evidence to show that Respondents acted other than intentionally and as a free agent in underpaying them.

Based on the foregoing, the forum concludes that Respondents acted willfully and assesses penalty wages in the amount of \$2,400 each for Winney and Speck.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages and civil penalty wages owed as a result of their violations of ORS 652.140(2), the Commissioner of the Bureau of Labor and Industries hereby orders Respondents Robert and Barbara Blair 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 Lawrence Winney in the amount of FIVE THOUSAND SEVEN HUNDRED AND SEVENTY DOLLARS (\$5,570), less appropriate lawful deductions, representing \$3,370 in gross, earned, unpaid, due, and payable wages and \$2,400 in penalty wages, plus interest at the legal rate on the sum of \$3,370 from January 1, 2002, until paid and interest at the legal rate on the sum of \$2,400 from February 1, 2002, until paid.

A certified check payable to the Bureau of Labor and Industries in trust for Claimant Brandon Speck in the amount of TWO THOUSAND SEVEN HUNDRED AND EIGHT FIVE DOLLARS (\$2,785), less appropriate lawful deductions, representing \$385 in gross, earned, unpaid, due, and payable wages and \$2,400 in penalty wages, plus interest at the legal rate on the sum of \$385 from January 1, 2002, until paid and interest at the legal rate on the sum of \$2,400 from February 1, 2002, until paid.

ⁱ The Agency alleged that Winney was entitled to \$3,370 and Speck was entitled to \$385 in unpaid wages.

ⁱⁱ The Agency alleged that Claimants were each entitled to \$2,400 in penalty wages.