

In the Matter of
BELANGER GENERAL CONTRACTING, INC.

Case No. 67-99

August 4, 1999

SYNOPSIS

Respondent employed Claimant to install siding at a piece rate of \$50.00 per 12 square feet of siding installed. Respondent failed to pay Claimant all wages due under this agreement upon termination, in violation of ORS 652.140. Respondent's failure to pay the wages was willful, and the Commissioner ordered Respondent to pay civil penalty wages in addition to the unpaid wages it owed Claimant. ORS 652.140, ORS 652.150, OAR 839-001-0470.

The above-entitled case came on regularly for hearing before Erika L. Hadlock, 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 July 9, 1999, in Hearings Room #1004 of the State Office Building, 800 NE Oregon Street, Portland, Oregon.

Cynthia Domas, an employee of the Bureau of Labor and Industries ("BOLI" or "the Agency") represented the Agency. Wage claimant Pablo Mercado was not present during the hearing. Neither counsel for Respondent nor any other representative of Respondent was present at the hearing.

The Agency called three witnesses: interpreter Terry Rogers; Agency compliance specialist Gerhard Taeubel; and Claimant's coworker, Shane Wilson Wallis. Agency Exhibits A-1 through A-8, attached to the Agency's case summary, were offered and received into evidence.

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 or about December 21, 1998, Claimant filed a wage claim with the Agency. He alleged that he had been employed by Belanger General Contracting, Inc., from November 7, 1998, through December 3, 1998. Claimant further alleged that he was employed at a piece-rate wage of \$50.00 per piece, had not been paid for his work, and was owed \$5052.00.

2) When he filed the wage claim, Claimant completed an assignment of wages.

3) Claimant brought his wage claim within the statute of limitations.

4) On or about March 4, 1999, the Agency served Respondent with an Order of Determination dated February 25, 1999. The Order of Determination alleged that Respondent had employed Claimant from November 7, 1998, through December 3, 1998, at the rate of \$50.00 per piece for 101.5 pieces, no part of which had been paid. Consequently, the Agency alleged, Respondent owed Claimant \$5075.00 in earned and unpaid wages, \$6460.80 as penalty wages, and interest on both amounts. The Order of Determination required Respondent, within 20 days, either to 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 or about March 16, 1999, attorney Sonia Montalbano filed an Answer and Request for Hearing on behalf of Respondent in which Respondent denied all substantive allegations in the Order of Determination. Respondent also asserted two affirmative defenses: inability to pay wages at the time they accrued; and that

Respondent had paid Claimant \$2500.00 for work performed in full satisfaction of his claims.

6) By letter dated April 16, 1999, Montalbano notified the Agency that she no longer represented Respondent with regard to this matter.

7) On May 27, 1999, the Agency requested a hearing. On June 4, 1999, the Hearings Unit issued a Notice of Hearing stating that the hearing would commence at 9:00 a.m. on Friday, July 9, 1999, in Hearings Room #1004 of the State Office Building, 800 NE Oregon Street, Portland, Oregon. With the Notice of Hearing, the forum included 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.

8) On June 7, 1999, the forum issued a case summary order requiring the Agency and Respondent to submit summaries of the case 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 brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any wage, damages, and penalties calculations (for the Agency only). The forum ordered the participants to submit their case summaries by June 29, 1999, and notified them of the possible sanctions for failure to comply with the case summary order.

9) The Agency submitted a timely case summary and addendum that included eight exhibits. Respondent submitted no case summary.

10) The contested case hearing was scheduled to begin at 9:00 a.m. on July 9, 1999. Nobody appeared on behalf of Respondent at that time, and the ALJ recessed the hearing for thirty minutes pursuant to OAR 839-050-0330(2). By 9:33 a.m., nobody

had appeared on Respondent's behalf and the ALJ declared Respondent to be in default. The ALJ then explained the issues involved in the matter and the procedures governing the conduct of the hearing. At no time during the hearing did Respondent make an appearance.

11) In accordance with a request from the Agency, Terry Rogers, a Spanish interpreter certified by the State of Oregon, was present throughout the July 9, 1999, hearing. Before any witnesses were called, Rogers stated her credentials on the record and took an oath or affirmation to translate the proceedings truthfully and accurately to the best of her ability. Because no Spanish-speaking witnesses appeared, Ms. Rogers did not translate the proceedings. She did, however, appear as a witness regarding the affidavit of Claimant Pablo Mercado, as discussed *infra*.

12) The evidentiary record closed on July 9, 1999, after the Agency presented its case.

13) The ALJ issued a proposed order on July 16, 1999, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The forum received no exceptions.

FINDINGS OF FACT – THE MERITS

1) Respondent Belanger General Contracting, Inc. ("Respondent," "employer," or "the corporation") employed Claimant Pablo Mercado as a siding installer on Respondent's Cascade Summit job from November 7, 1998, through December 3, 1998. Prior to November 1998, Respondent had employed Claimant on other jobs and had paid him wages for that earlier work.

2) Claimant is not a licensed contractor. Respondent supplied all tools, equipment, and supplies that Claimant used on the Cascade Summit job.

3) Claimant recorded the number of hours he worked for Respondent each day he installed siding on the Cascade Summit job. Claimant worked a total of 188.5 hours

for Respondent from November 7, 1998, through December 3, 1998, 33.5 of which were hours worked in excess of 40 hours per week.¹ Claimant worked six days per week, Monday through Saturday.

4) Respondent agreed to pay Claimant a piece rate of \$50.00 for every 12 square feet of siding that Claimant installed on the Cascade Summit job. Claimant installed 101.5 such units of siding² on the Cascade Summit job from November 7, 1998, to December 3, 1998.

5) Respondent paid Claimant no wages for the work he did on the Cascade Summit job.

6) Claimant no longer works for Respondent. Claimant voluntarily quit working for Respondent because Respondent did not pay him the wages he was due.

7) Claimant filed his wage claim within a few weeks after he stopped working for Respondent. Gerhard Taeubel, a BOLI compliance specialist, was assigned to investigate the claim. Taeubel spoke with Joel Belanger, Respondent's owner and registered agent, who admitted that he had worked with Claimant. Despite repeated requests from Taeubel, neither Belanger nor Respondent ever provided the Agency with any records of the hours Claimant worked or the amount of wages, if any, Respondent had paid him.

8) During his investigation, Taeubel spoke with Respondent's attorney, who said she could provide copies of payroll documents. Taeubel never received any such documentation.

9) Taeubel also spoke with several other individuals who confirmed that Claimant had worked for Respondent during the time period in question and had not been paid.

10) Shane Wilson Wallis, Belanger's brother-in-law and Respondent's former employee, testified under subpoena. Wallis, who worked as Respondent's superintendent for the Cascade Summit project, confirmed that Claimant had worked for Respondent on that job during the fall of 1998. Wallis also confirmed that Respondent did not pay Claimant for his work, and that Claimant quit because he was not being paid. The forum infers from these facts that Wallis was aware that Respondent was not paying Claimant wages as they became due.

11) Wallis also testified that Claimant had worked six days per week, Monday through Saturday, on the Cascade Summit contract. That testimony confirms Claimant's report of the days he worked.

12) Claimant did not appear at the hearing in person, but the Agency submitted his affidavit, in both English and Spanish, as evidence. The two versions of the affidavit initially were prepared by someone other than Rogers. During a June 1999 meeting with Claimant and case presenter Domas, interpreter Rogers read an early version of the Spanish affidavit to Claimant, who indicated that some changes should be made. After incorporating those corrections into the English and Spanish versions of the affidavit, Rogers again read the entire Spanish affidavit to Claimant. Claimant stated that he understood the affidavit and that it was a true and accurate statement of events. Rogers verified that the English affidavit was an accurate translation of Claimant's Spanish affidavit.³

13) The forum has accepted the assertions in Claimant's affidavit and wage claim calendar as fact because: the affidavit is a sworn statement; Claimant indicated at the time he signed the affidavit that he would not be available for hearing; certain facts in the affidavit were corroborated by Wallis; Belanger admitted to Taeubel that he worked with Claimant; other individuals told Taeubel that Claimant had worked for

Respondent and had not been paid; Respondent provided Taeubel with no time or payroll records for Claimant; and no information in the record controverts the affidavit or wage claim calendar.

14) Claimant's earned and unpaid wages total **\$5075.00** (101.5 units x \$50.00/unit).

15) The Agency calculated penalty wages in accordance with ORS 652.150, OAR 839-001-0470, and Agency policy, as follows: \$5075.00 (total wages earned) divided by 188.5 (total hours worked) equals an average hourly rate of \$26.92. This figure is multiplied by 8 (hours per day) and then by 30 (the maximum number of days for which civil penalty wages accrue) for a total of \$6460.80. The forum agrees with this calculation. Pursuant to Agency policy, this figure generally would be rounded up to \$6461.00. However, because the Agency sought only \$6460.80 in the Order of Determination, the forum instead rounds the figure down to **\$6460.00**, the amount this forum hereby awards Claimant as penalty wages.

16) The Oregon minimum wage was \$6.00 per hour in 1998, and employers then were required to pay an overtime rate of \$9.00 per hour for all hours worked in excess of 40 per week. If Respondent and Claimant had not agreed that Claimant would be paid \$50.00 for each 12 square sheet of siding he installed, Respondent would have owed Claimant a total of \$1,231.50 (155 hours x \$6.00/hour + 33.5 hours x \$9.00/hour). The amount Respondent agreed to pay Claimant exceeded the amount it was required to pay pursuant to the minimum wage and overtime laws.

17) The evidence in the record does not establish Respondent's affirmative defense of inability to pay wages when they accrued. Nor does any evidence support Respondent's other affirmative defense -- that it paid Claimant \$2500.00 in satisfaction of his claim.

18) The testimony of all three witnesses was credible. The forum does find, however, that Claimant's affidavit is more accurate than Wallis's testimony regarding the number of hours Claimant worked. (See note 1, *supra*).

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent was an Oregon corporation that engaged the personal services of one or more persons in the state of Oregon, including Claimant, who was Respondent's employee.

2) Pursuant to their wage agreement, Respondent owed Claimant \$50.00 for each of the 101.5 units (12 square feet) of siding he installed on the Cascade Summit job from November 7, 1998, through December 3, 1998. Respondent paid Claimant none of that money and, therefore, owes Claimant \$5075.00 in unpaid wages.

3) Respondent's failure to pay Claimant's wages was willful and more than 30 days have passed since Claimant's wages became due.

4) Civil penalty wages, computed in accordance with ORS 652.150 and OAR 839-001-0470, then rounded down, equal \$6460.00.

5) Respondent defaulted and did not meet its burden of proving either affirmative defense asserted in its answer and request for hearing.

CONCLUSIONS OF LAW

1) ORS 653.010 provides, in pertinent part:

"(3) 'Employ' includes to suffer or permit to work; * * * .

"(4) 'Employer' means any person who employs another person * * *
* ."

ORS 652.310 provides, in pertinent part:

"As used in ORS 652.310 to 652.414, unless the context requires otherwise:

"(1) 'Employer' means any person who in this state, directly or through an agent, engages personal services of one or more employees and includes * * * any successor to the business of any employer * * * .

"(2) 'Employee' means any individual who otherwise than as copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled."

Respondent was Claimant's employer and Claimant was Respondent's employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.414.

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

3) ORS 652.140 provides, in pertinent part:

"(1) Whenever an employer discharges an employee or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge or termination shall become due and payable not later than the end of the first business day after the discharge or termination.

"(2) 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."

Claimant's credible affidavit proves that December 3, 1998, was his last day of work, but the record does not establish whether Claimant gave Respondent notice before he quit. Even assuming, however, that Claimant quit without notice to Respondent, his wages would have been due on December 10, 1998. Respondent violated ORS 652.140 by failing to pay Claimant all wages earned and unpaid by that date.

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 a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140.

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 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

DEFAULT

Respondent failed to appear at hearing and the forum held it in default pursuant to OAR 839-050-0330. When a respondent defaults, the Agency must establish a prima

facie case to support the allegations of the charging document. *In the Matter of Vision Graphics and Publishing, Inc.*, 16 BOLI 124, 136 (1997). The Agency met that burden in this case, as discussed *infra*.

AGREED RATE OF PAY AND WAGES OWED

To establish a prima facie case supporting a wage claim, the Agency must prove: 1) that respondent employed claimant; 2) that respondent and claimant agreed upon a rate of pay (if that agreed rate exceeded the minimum wage); 3) that claimant performed work for respondent for which he or she was not properly compensated; and 4) the amount and extent of work claimant performed for respondent. *See In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 260 (1999).

Credible evidence in the record establishes each of these elements. The first and third elements are established by the testimony of Wallis, Respondent's former project superintendent, who testified credibly that Respondent had employed Claimant and had not paid him. That testimony confirms the allegations in Claimant's wage claim and affidavit. Moreover, Respondent at least tacitly admitted that it employed Claimant by asserting, through counsel, that it could provide the Agency with Claimant's payroll records. Respondent's owner, Belanger, also admitted to Taeubel that he had worked with Claimant.

Wallis's testimony also confirmed Claimant's assertions regarding the days he worked (Monday through Saturday). Given that Wallis's testimony and Respondent's admissions corroborate several of the assertions in Claimant's wage claim calendar and sworn affidavit, and given that no evidence in the record controverts Claimant's other assertions, the forum finds Claimant's affidavit and wage claim calendar to be credible and reliable in their entirety. *See also Factual Finding -- the Merits 13, supra.*

Having concluded that Claimant's affidavit and wage claim calendar are credible and reliable, the forum has no difficulty finding that the agency has proved the second and fourth elements of its claim. Claimant's affidavit establishes that Respondent agreed to pay Claimant \$50.00 for each 12 square feet of siding he installed. That document and Claimant's calendar establish that Claimant installed 101.5 such units of siding and Respondent, therefore, owed him \$5075.00 in wages. The Agency met its burden of establishing a prima facie case that Respondent employed Claimant and failed to pay him \$5075.00 in earned wages.

PENALTY WAGES

The forum may award penalty wages where the 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). Respondent, as an employer, had a duty to know the amount of wages due its employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jake Coke*, 3 BOLI 238, 242 (1983).

Here, Respondent's project superintendent, Willis, was aware that Claimant was not being paid. In addition, Respondent had paid Claimant for his previous work on other contracts. From these facts, the forum infers that Respondent voluntarily, intelligently, and as a free agent failed to pay Claimant any of the wages he earned from November 7 through December 3, 1998. Respondent acted willfully and is liable for penalty wages.

As this forum previously has explained, penalty wages are calculated in accordance with the relevant laws and Agency policy as follows:

"Total earned during the wage claim period divided by the total number of hours worked during the wage claim period, multiplied by eight hours, multiplied by 30 days.' * * * Statement of Agency Policy, July 23, 1996."

In the Matter of Mark Johnson, 15 BOLI 139, 143 (1996). Using that formula and rounding down (to correspond to the amount pleaded in the Order of Determination), Respondent owes Claimant \$6460.00 in penalty wages. See Finding of Fact -- the Merits 15, *supra*.

Respondent raised two affirmative defenses in its answer: inability to pay wages when they accrued; and payment of \$2500.00 in satisfaction of the claim. No evidence in the record supports either of those defenses.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages and civil penalty wages it owes as a result of its violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders **Belanger General Contracting, Inc.** 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 Pablo Mercado in the amount of ELEVEN THOUSAND FIVE HUNDRED THIRTY-FIVE DOLLARS (**\$11,535.00**), less appropriate lawful deductions, representing \$5075.00 in gross earned, unpaid, due, and payable wages and \$6460.00 in penalty wages, plus interest at the legal rate on the sum of \$5075.00 from January 1, 1999, until paid and interest at the legal rate on the sum of \$6460.00 from February 1, 1999, until paid.

¹ Wallis, a former employee of Respondent, testified that Claimant's hours varied and stated that Claimant worked as much as 11 1/2 hours on some days, more than Claimant stated he worked. The forum finds Claimant's affidavit and wage claim calendar more accurate than Wallis's testimony on this point. Claimant's affidavit and wage claim calendar reflect his contemporaneous recording of his hours, while Wallis's testimony was based solely on his recollection of events that occurred several months ago. See Finding of Fact -- the Merits 10, *infra*.

² It is not clear from the record whether the siding came in sheets that measured 12 square feet in area, and Claimant installed 101.5 of those sheets, or whether Claimant installed a total of 1218 (101.5 x 12)

square feet of siding that did not come in discrete 12-square feet-pieces. In either case, Respondent was required to pay Claimant \$50.00 x 101.5 for the work he performed.

³ Rogers wrote Claimant's changes into both the English and Spanish versions of his affidavit. She also made changes on the English affidavit to make that document a more precise translation of the Spanish affidavit. All handwritten notes on the two versions of Claimant's affidavit are Rogers' except for the signatures and notarization.