

In the Matter of

G & G Gutters, Inc.

**Case No. 04-02
Final Order of Commissioner Jack Roberts
Issued May 28 2002**

SYNOPSIS

Respondent failed to pay two Claimants all wages earned and due after termination, in violation of ORS 652.140(1) and (2). Respondent's failure to pay the wages was willful and Respondent was ordered to pay civil penalty wages to both claimants, pursuant ORS 652.150. ORS 652.140(2), ORS 652.150, ORS 653.025; OAR 839-001-0470(1).

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 April 23, 2002, in the 10th floor hearing room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Peter McSwain, an employee of the Agency. Wage claimants Chris Jones and Michael Quigley ("Claimants") were present throughout the hearing and were not represented by counsel. Respondent did not make an appearance at the hearing and was found in default.

In addition to the Claimants, the Agency called Kathleen Johnson, Wage & Hour Division Compliance Specialist, as a witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-8 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-17 (submitted prior to hearing), and A-18 (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 January 4, 2001, Claimant Chris L. Jones filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him.

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

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

4) On or about January 25, 2001, Claimant Michael J. Quigley filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him.

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

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

7) On June 15, 2001, the Agency issued Order of Determination No. 01-0048 based upon the wage claims filed by Claimants Jones and Quigley and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of \$14,198.99 in unpaid wagesⁱ and \$8,296.80 in civil penalty wages,ⁱⁱ plus interest, and required that, within 20 days, Respondent 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.

8) On July 12, 2001, the Agency sent Respondent a letter stating its intent to issue a Final Order by Default if the Agency did not receive an answer and request for hearing or court trial by July 23, 2001.

9) On July 13, 2001, Respondent filed an answer and request for hearing through counsel Michael D. O'Brien. The answer denied that any money was owed to the Claimants.

10) On January 25, 2002, the Agency filed a "BOLI Request for Hearing" with the forum.

11) On February 5, 2002, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and the Claimants stating the time and place of the hearing as April 23, 2002, in the 10th floor hearings room in the Portland State Office Building, located at 800 N.E. Oregon, Portland, 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.

12) On November 13, 2001, the forum ordered the Agency and Respondent 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 and wage calculations (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); and a statement of any agreed or stipulated facts. The forum ordered the participants to submit case summaries no later than April 12, 2002.

13) On March 29, 2002, the Agency submitted its case summary.

14) On April 12, 2002, the ALJ held a brief pre-hearing conference with McSwain and O'Brien. During the conference, O'Brien moved to withdraw as Respondent's counsel and the ALJ granted his motion. O'Brien stated that Curtis Gibson, Respondent's president, desired to represent Respondent in the capacity of authorized representative.

15) On April 16, 2002, the ALJ issued an interim order to the Agency and Curtis Gibson stating that G & G Gutters, Inc., as a corporation, must be represented by an authorized representative or attorney. The ALJ instructed Gibson to fax written authorization for him to appear as Respondent's authorized representative directly to the ALJ and mail the original to the Hearings Unit. The ALJ amended the case summary to delete the requirements that Respondent submit "a brief statement of any defenses to the claim" and "a statement of any agreed or stipulated facts." The ALJ also sent a copy of the original case summary order to Gibson, along with a form designed to assist unrepresented Respondents in filing a case summary. The ALJ faxed his interim order to Gibson and McSwain.

16) At 10 a.m. on April 23, 2002, the time scheduled for hearing, Respondent had not made an appearance. Subsequently, no one appeared on behalf of Respondent and no one contacted the Hearings Unit to state that Respondent would be late or would not appear. At 10:30, the ALJ declared Respondent to be in default and commenced the hearing.

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

18) 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) During all times material herein, Respondent G & G Gutters, Inc. was an Oregon corporation that engaged the personal services of one or more employees in Oregon.

2) Claimant Quigley (“Quigley”) was employed by Respondent from May 15, 2000, through January 18, 2001.

3) In June and July 2000, Quigley supervised jobs for Respondent. Quigley and Curtis Gibson, Respondent’s corporate president, agreed that Quigley would be paid \$3000 per month, plus a bonus when each job was completed. Respondent paid him \$750 less than he earned in both June and July, resulting in \$1500 in wages owed to Quigley.

4) In August 2000, Quigley began working as an estimator and salesperson for Respondent. Gibson and Quigley agreed that Quigley would be paid \$2,000 per month, plus a 10% commission on total sales, for working fulltime for Respondent.

5) Shortly after Quigley became an estimator/salesperson, Gibson told Quigley that he was unable to accurately calculate his commissions because of problems with Respondent’s computer. Gibson agreed to pay Quigley \$3,000 per month, with \$1,000 of that amount to be considered an advance on commissions, until such time as Respondent’s computer problems were fixed and he could accurately calculate Quigley’s commissions.

6) In August, September, October, November, December 2000, Quigley earned commissions based on his total sales that exceeded \$1,000 each month. In

January 2001, Quigley earned commissions based on his total sales that exceeded \$250 per week.ⁱⁱⁱ

7) Based on a salary of \$3,000 per month, Respondent underpaid Quigley by \$6,650 between August 2000 and January 18, 2001.

8) Between June 2000 and January 18, 2001, Quigley routinely worked 40 or more hours per week for Respondent.

9) A few days before January 18, 2001, Gibson promised Quigley that he would give him a check for several thousand dollars on January 18, 2001. Gibson did not pay Quigley the promised amount of January 18, 2001, and Quigley quit Respondent's employment that same day.

10) Respondent has not paid any wages to Quigley since January 18, 2001, and owes Quigley a total of \$8,150 in unpaid wages.

11) Quigley worked a total of 174 hours between December 19, 2000, and January 18, 2001, earning a total of \$3,000 in wages. His average hourly wage was \$17.24 ($\$3,000 \div 174$).

12) Civil penalty wages for Quigley, computed in accordance with ORS 652.150 and OAR 839-001-0470 ($\$17.24$ per hour x 8 hours x 30 days), equal \$4,138.

13) Claimant Jones ("Jones") was employed by Respondent from October 2 until December 21, 2000. His primary duties included installing, repairing, and cleaning gutters and downspouts. He also did some sales and estimating for Respondent when there weren't enough jobs to keep him busy.

14) When Jones was hired, Quinn Kline, Respondent's general manager, told him he would be paid the following rates:

- a) 45¢ per linear foot for all gutter and downspout installed, to be split equally between all employees working on the project;
- b) 25% of the total cost of any job cleaning gutters and downspouts, to be split equally between all employees working on the project;

c) \$15 per hour for time spent performing repairs, small cleaning jobs, or while waiting for materials.

15) Subsequently, Gibson and Kline told Jones he would be paid a 10% commission on all jobs that he obtained for Respondent.

16) Throughout his employment, Jones maintained a contemporaneous record of the types of work he performed each day and computed the amount he earned each day and wrote those numbers of work tickets that he gave to Gibson.

17) Jones worked approximately eight hours per day throughout his employment with Respondent.

18) Gibson never questioned the accuracy of the figures that Jones wrote on his work tickets.

19) On December 22, 2000, Jones told Gibson that he wouldn't install any gutters that day unless he was paid, and Gibson told Jones it would probably be best for him to find work elsewhere. Jones believed he had been fired and did no more work for Respondent.

20) Jones earned a total of \$7,570.68 during his employment with Respondent. This includes eight days when he worked eight hours, with Respondent's knowledge, doing work other than installation of gutters and downspouts, repairs, or cleaning gutters and downspouts. Those eight days were October 30, November 27 and 29, and December 4, 5, 12, 18, and 20, 2000. The forum has computed Jones's wages on each of those days as \$54, based on the state minimum wage (\$6.50 per hour x 8 hours).^{iv} It also includes October 31, a date on which Jones credibly testified that he obtained \$890 in job orders for Respondent, earning a 10% commission of \$89. The forum relied on Jones's contemporaneous records to determine the rest of Jones's total earnings.

21) Jones was paid a total of \$2,921.72 in gross wages for his work for Respondent, leaving a total of \$4,648.96 in unpaid, due and owing wages.

22) Jones worked a total of 152 hours between November 22 and December 21, 2002, earning a total of \$2,107.12 in wages. His average hourly wage was \$13.86 ($\$2,107.12 \div 152$).

23) Civil penalty wages for Jones, computed in accordance with ORS 652.150 and OAR 839-001-0470 ($\$13.86$ per hour x 8 hours x 30 days), equal \$3,326.

24) Quigley and Jones were both articulate witnesses who had a clear recollection of the circumstances of their employment with Respondent and the forum found their testimony credible in its entirety. In addition, the forum found the written records created by Quigley and Jones to be an accurate record of the hours they worked, the types and amounts of work they performed, and the amounts they earned and were paid.

25) Johnson was a credible witness.

ULTIMATE FINDINGS OF FACT

1) Respondent G & G Gutters, Inc. at all times material herein operated a business that engaged the personal services of one or more employees in Oregon.

2) Oregon's minimum wage rate in 2000 was \$6.50 per hour.

3) Respondent engaged the personal services of Claimant Quigley to perform work for it between May 15, 2000 and January 18, 2001.

4) Respondent agreed to pay Quigley \$3,000 per month for his work in June and July, and \$2,000 per month, plus a 10% commission on total sales, during the remainder of his employment. Between August 1 and December 31, 2000, Quigley's commissions exceeded \$1,000 per month. Between January 1 and January 18, 2001, Quigley's commissions exceeded \$250 per week. Based on a salary of \$3,000 per

month, Respondent underpaid Quigley by \$8,150 between June 2000 and January 18, 2001 and owes Quigley \$8,150 in due and unpaid wages.^v

5) Quigley quit Respondent's employment without prior notice on January 18, 2001.

6) Respondent engaged the personal services of Claimant Jones to perform work for it between October 2 and December 21, 2000. Respondent suffered or permitted Jones to work for it during that time period.

7) Respondent agreed to pay Jones several different rates of pay, depending on the job he was performing. Between October 2 and December 21, 2000, Jones earned \$7,570.68 and was paid only \$2,921.72. Respondent owes Jones \$4,648.96 in due and unpaid wages.

8) Respondent fired Jones on December 22, 2000.

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

10) Civil penalty wages for Quigley, computed in accordance with ORS 652.150 and OAR 839-001-0470 (\$17.24 per hour x 8 hours x 30 days), equal \$4,138.

11) Civil penalty wages for Jones, computed in accordance with ORS 652.150 and OAR 839-001-0470 (\$13.86 per hour x 8 hours x 30 days), equal \$3,326.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimants were employees subject to the provisions of 652.310 to 652.405 and ORS 653.010 to ORS 653.055. During all times material herein, Respondent was the employer of Claimants and Claimants were Respondent's employees. ORS 652.310.

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, ORS 653.055(3).

3) ORS 653.025 provides, in pertinent part:

“* * *[F]or each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages computed at a rate lower than:

“* * * * *

“(3) For calendar years after December 31, 1998, \$6.50. * * *”

Respondent was required to pay Claimant Jones at least \$6.50 per hour for each hour he performed work for Respondent other than at an agreed rate. Respondent owes Jones \$432 in wages for the work he performed on October 30, November 27 and 29, and December 4, 5, 12, 18, and 20, 2000.

4) At times material, ORS 652.140(1) and (2) provided:

“(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 schedule payday after the employee has quit, whichever event first occurs.”

Respondent violated ORS 652.140(1) by failing to pay Claimant Jones all wages earned and unpaid by the end of the first business day after their discharge. Respondent violated ORS 652.140(2) by failing to pay Claimant Quigley all wages earned and unpaid within five days, excluding Saturdays, Sundays and holidays, after they quit. Respondent owes Jones a total of \$4,648.96 in due and unpaid wages, including those wages computed at the state minimum wage rate.^{vi} Respondent owes Quigley a total of \$8,150 in due and unpaid wages.

5) 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(1) 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 \$4,138 in civil penalty wages under ORS 652.150 to Claimant

Quigley. Respondent is liable for \$3,326 in civil penalty wages to Claimant Jones.

6) 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 claimants their 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 Respondent 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 Usra Vargas, 22 BOLI 212, 220 (2001)*. To establish a prima facie case supporting the wage claims in this case, the Agency must prove: 1) that Respondent employed Claimants; 2) any pay rate upon which Respondent and Claimants agreed, if it exceeded the minimum wage; 3) that Claimants performed work for Respondent for which they were not properly compensated; and 4) the amount and extent of work Claimants performed for Respondent. *Id.* at 220.

A. Respondent Employed Claimants.

In its answer, Respondent admitted employing both Claimants.

B. Claimants' Wage Rate.

1. Claimant Quigley.

Quigley had two different agreed wage rates during the wage claim period. In June and July, Respondent's president Gibson agreed to pay him \$3,000 per month, plus a bonus for completed jobs. In August, when he became a salesperson/estimator, Gibson agreed to pay him a base salary of \$2,000 per month, plus a 10% commission on all sales. Shortly thereafter, when Gibson claimed an inability to accurately track Quigley's sales and thereby accurately compute his commissions, Gibson agreed to pay him \$3,000 per month, with \$1,000 of that amount constituting an advance against earned commissions.

2. Claimant Jones.

Claimant Jones had several different wage rates during his employment with Respondent. First, Respondent agreed to pay him 45¢ per installed linear foot of gutter

and downspout, to be split equally between all employees working on the project. Second, Respondent agreed to pay him 25% of the total cost of any job cleaning gutters and downspouts, to be split equally between all employees working on the project. Third, Respondent agreed to pay him \$15 per hour for time spent performing repairs, small cleaning jobs, or while waiting for materials. Fourth, Respondent agreed to pay him a 10% commission on all jobs that he obtained for Respondent. Fifth, Claimant was entitled to the state minimum wage of \$6.50 per hour for all time worked at other than an agreed rate. *In the Matter of Ann L. Swanger*, 19 BOLI 42, 56 (1999). This includes days when he performed other work for Respondent, including unsuccessful sales solicitation, or days on which he earned commissions but has no record or memory of the specific amount.

C. Claimants Performed Work for Which They Were Not Properly Compensated.

Although Respondent never calculated or paid Quigley's commissions, Quigley credibly testified that they amounted to more than \$1,000 per month from August through December 2000, and more than \$250 per week in January 2001. He was also entitled to a salary of \$3,000 per month in June and July 2000 and a base salary of \$2,000 per month from August until he left Respondent's employment in January 2001. He testified credibly that he worked fulltime during this time period, thereby earning his agreed salary, and that he was paid considerably less than the amount he earned. This testimony establishes the third element of the Agency's prima facie case with regard to Quigley.

As for Jones, his credible testimony and contemporaneous records of the work he performed, amounts he earned, and the amount he was paid established that he performed work for which he was not paid by Respondent.

D. The Amount and Extent of Work Claimants Performed for Respondent.

When the forum concludes that an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. Where the employer produces no records, as happened in this case, the commissioner may rely on evidence produced by the agency "to show the amount and extent of the employee's work as a matter of just and reasonable inference and then may award damages to the employee, even though the result be only approximate." See, e.g., *In the Matter of Ilya Simchuk*, 22 BOLI 186, 196 (2001), quoting *Anderson v. Mt. Clemens Pottery Co.*, 3289 US 680 (1946).

Respondent defaulted and did not present any evidence at hearing. As a result, the forum has relied on the credible testimony and reliable contemporaneous records created by Quigley and Jones to determine the amount and extent of work they performed for Respondent. Quigley's testimony and records show that he performed work entitling him to roughly \$20,250 in wages, and that Respondent underpaid him by \$8,150. Jones's testimony and records show that he performed work entitling him to \$7,570.68 in wages, and that Respondent only paid him \$2,921.72, underpaying him by \$4,648.96.

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 Respondent and that Respondent's president was aware of the amount and extent of the work they performed. There is no evidence to show that Respondent acted other than intentionally and as a free agent in underpaying Quigley and Jones.

Based on the foregoing, the forum concludes that Respondent acted willfully and assesses penalty wages in the amount of \$4,138 for Quigley and \$3,326 for Jones.

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 violations of ORS 652.140(1) and (2), the Commissioner of the Bureau of Labor and Industries hereby orders **G & G Gutters, 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:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Chris L. Jones in the amount of SEVEN THOUSAND NINE HUNDRED SEVENTY FOUR DOLLARS AND NINETY SIX CENTS (\$7,974.96), less appropriate lawful deductions, representing \$4,648.96 in gross earned, unpaid, due, and payable wages and \$3,326 in penalty wages, plus interest at the legal rate on the sum of \$4,648.96 from January 1, 2001, until paid, and interest at the legal rate on the sum of \$3,326 from February 1, 2001, until paid.

(2) A certified check payable to the Bureau of Labor and Industries in trust for Michael J. Quigley in the amount of TWELVE THOUSAND TWO HUNDRED AND EIGHTY EIGHT DOLLARS (\$12,288), less appropriate lawful deductions, representing \$8,150 in gross earned, unpaid, due, and payable wages and \$4,138 in penalty wages, plus interest at the legal rate on the sum of \$8,150 from February 1, 2001, until paid, and interest at the legal rate on the sum of \$4,138 from March 1, 2001, until paid.

ⁱ The Agency alleged that Jones was entitled to \$6,048.99 and Quigley was entitled to \$8,150 in unpaid wages.

ⁱⁱ The Agency alleged that Jones was entitled to \$4,144.80 and Quigley was entitled to \$4,152 in penalty wages.

ⁱⁱⁱ Respondent did not provide Quigley with a record of his total sales; however, Quigley's credible testimony convinced the forum that he earned commissions exceeding \$1,000 per month between August and December 2000, and commissions exceeding \$250 per week between January 1 and 18, 2001.

^{iv} Where there is no agreed rate of pay, an employer is required to pay at least the state minimum wage, which was \$6.50 per hour in 2000. See, e.g., *In the Matter of Jo-El, Inc.*, 22 BOLI 1, 7 (2001).

^v Quigley's credible testimony convinced the forum that he earned more than \$1,000 per month in commissions from August through December 2001 and more than \$250 per week from January 1 through January 18, 2001. Quigley testified that he calculated his unpaid wages of \$8,150 based on a salary of \$3,000 per month, a lesser amount than he actually earned. The reason for this was because Respondent never provided him with a list of his total sales so that he could calculate the amount of commission he earned with any specificity, other than it exceeded \$1,000 per month from August through December 2000 and \$250 per week from January 1 through January 18, 2001. Although \$3,000 per month is not the exact sum that Quigley earned, the forum has adopted it because of the Agency's reliance on it and because it is less than the amount actually earned.

^{vi} See Conclusion of Law 3, *supra*.