

In the Matter of

**HEIKO THANHEISER
dba The Fire Protection**

**Case No. 07-02
Final Order of the Commissioner Jack Roberts
Issued March 28, 2002**

SYNOPSIS

Respondent willfully failed to pay a wage claimant earned wages. The Commissioner ordered Respondent to pay the claimant \$9,012.25 in unpaid wages, plus \$3,876 in civil penalty wages. ORS 652.140, ORS 652.150, ORS 653.025, OAR 839-001-0470, OAR 839-020-0010.

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 February 20, 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 David K. Gerstenfeld, an employee of the Agency. Wage claimant Salem El-Dousoky ("Claimant") was present throughout the hearing and was not represented by counsel. Respondent Heiko Thanheiser was present during the hearing and was not represented by counsel.

In addition to the Claimant, the Agency called Gerhard Taeubel, former Wage & Hour Division Compliance Specialist, as a witness.

Respondent called himself as a witness.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-9 (submitted or generated prior to hearing);
- b) Agency exhibits A-1 through A-6, A-8, A-9, A-11 (submitted prior to hearing) and A-12 and A-13 (submitted at hearing).
- c) Respondent exhibits R-1 and R-2 (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 February 13, 2001, Claimant filed a wage claim with the Agency. He alleged 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 assigned to the Commissioner of Labor and Industries, in trust for Claimant, all wages due from Respondent.
- 3) Claimant brought his wage claim within the statute of limitations.
- 4) On June 18, 2001, the Agency served Order of Determination No. 01-0753 on Respondent based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of \$9,012.25 in unpaid wages and \$3,786 in civil penalty wages, 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.
- 5) On June 6, 2001, Respondent, through counsel Sona Jean Joiner, filed an answer and request for hearing. Respondent's answer denied all the substantive

allegations in the Order of Determination and affirmatively alleged that Claimant was a subcontractor and was never an employee of Respondent and that Respondent owed no money to Claimant.

6) On September 13, 2001, the Agency filed a "BOLI Request for Hearing" with the forum.

7) On December 7, 2000, the Hearings Unit issued a Notice of Hearing to Respondent, Respondent's counsel, the Agency, and the Claimant stating the time and place of the hearing as February 20, 2002, at 10 a.m. in the 10th floor Hearings Room, State Office Building, 800 NE Oregon Street, 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.

8) On December 4, 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 (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 and penalty calculations (for the Agency only). The forum ordered the participants to submit case summaries by February 8, 2002, and notified them of the possible sanctions for failure to comply with the case summary order.

9) On January 15, 2002, the Agency moved for a discovery order requiring Respondent to produce documents related to Claimant's relationship to Respondent, payments made by Respondent to Claimant, work performed by Claimant for Respondent, as well as other documents related to Respondent's affirmative defenses.

The Agency provided documentation that the documents requested had previously been sought by informal request in September and early December 2001 and represented that the documents had not yet been provided. In addition, the Agency also provided a statement indicating the relevancy of all documents sought.

10) On January 22, 2002, the ALJ issued an interim order stating that, pursuant to OAR 839-050-0150, Respondent had seven days after service of the Agency's motion to file a written response.

11) On February 6, 2002, the Agency sent a letter to the ALJ inquiring about the status of the Agency's motion. The Agency also indicated its understanding that Sona Joiner was no longer representing Respondent.

12) On February 6, 2002, the ALJ issued an interim order granting the Agency's motion for discovery order in its entirety. The ALJ required Respondent to provide the requested documents to the Agency no later than 5 p.m. on February 11, 2002. The interim order was sent by first class mail to Joiner and Respondent, and Respondent received it.

13) On February 8, 2002, the Agency filed its case summary, with attached exhibits.

14) On February 13, 2002, the forum received a letter from Sona Joiner stating that Respondent had fired her in December 2001 after she "told him for the umpteenth time that we needed to produce documents, and that I needed his assistance." Joiner stated she was formally withdrawing from the case.

15) At the start of the 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.

16) Respondent filed a case summary at 9:20 a.m. on the morning of the hearing. The case summary listed eight witnesses that Respondent intended to call. Two exhibits, R-1 and R-2, were attached to it. At the same time, Respondent also filed a document entitled "Response to Agency's Motion to Discovery Order." Attached to this document were a number of documents that Respondent represented were responsive to the ALJ's discovery order. Respondent stated at hearing that his attorney had all his paperwork and that he was unable to provide these documents sooner because he had no access to his paperwork until February 17, 2002, when he picked them up at Joiner's house.

The forum received these documents as administrative exhibits and later received Exhibits R-1 and R-2 when Respondent offered them and the Agency did not object. During the presentation of his case, Respondent sought to call the eight witnesses listed in his case summary to testify on his behalf. The Agency objected on the basis of untimely submission of Respondent's case summary and the forum sustained the Agency's objection. Respondent also attempted to offer all of the documents accompanying his "Response to Agency's Motion for Discovery Order" into evidence. The Agency objected on the basis of timeliness and the forum sustained the Agency's objection. These rulings are discussed with more particularity in the Opinion.

17) The evidentiary record of the hearing closed on February 20, 2002.

18) On February 25, 2002, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a sole proprietorship doing business in Oregon under the assumed business name of The Fire Protection.

2) Respondent, a contractor licensed with the Construction Contractors Board, hired Claimant on October 16, 2000. Respondent agreed to pay Claimant the salary of \$2,800 per month, which equals a weekly pay rate of \$646.15. Respondent hired Claimant for an indefinite period of time.

3) Claimant had been a contractor prior to his employment with Respondent, but his license and insurance coverage had lapsed when he went to work for Respondent.

4) Claimant performed various jobs while working for Respondent, including cleaning restaurant hoods and vents, installing exhaust pipe for a chimney and fireplace, refilling fire extinguishers at businesses, and cleaning and organizing Respondent's shop. Claimant had never done any of these jobs before.

5) Respondent and Claimant worked together in cleaning restaurant hoods and vents. They used Respondent's pressure washer to do the cleaning.

6) Respondent accompanied Claimant on jobs to refill fire extinguishers and showed Claimant how to do the job. They used Respondent's equipment to refill the fire extinguishers.

7) Respondent showed Claimant how to install the exhaust pipe for the chimney, then Claimant worked by himself. Claimant phoned Respondent for advice on this job whenever he needed it, and Respondent sometimes came out to help him.

8) Respondent, not Claimant, submitted the bids on all of the jobs that Claimant worked on while employed by Respondent.

9) When Respondent and Claimant worked at separate locations, Respondent told Claimant where to go and what to do. Sometimes Claimant picked up materials from suppliers. When Claimant paid for them from his own pocket,

Respondent reimbursed him. At other times, Claimant charged supplies on Respondent's account.

10) Sometimes Claimant drove his own van while working for Respondent. On those occasions, he put two magnetic signs on his van. These magnetic signs were given to him by Respondent and bore Respondent's logo.

11) Respondent gave Claimant a yellow baseball hat with Respondent's logo and the words "The Fire Protection" printed in red on it to wear while working for Respondent.

12) Respondent never instructed Claimant to submit an invoice in order to be paid for his work.

13) Between October 16, 2000, and January 27, 2001, Respondent was Claimant's only employer.

14) Claimant worked an average of 40 hours per week during his employment with Respondent. He was employed through January 27, 2001, on which date he voluntarily quit without prior notice. Claimant worked 15 weeks in total for Respondent.

15) Respondent paid Claimant a total of \$680 for his work.

16) Claimant earned \$9,692.25 during his employment with Respondent. Respondent owes him \$9,012.25 in unpaid, due and owing wages.

17) Civil penalty wages, computed in accordance with ORS 652.150 and OAR 839-001-0470 [$\$16.15$ per hour (Claimant's hourly rate: $\$646.15$ per week \div 40 = $\$16.15$) \times 8 hours = $\$129.20$ \times 30 days], equal \$3,876.

18) Considering what was at risk, Respondent exhibited indifference during a critical part of the proceedings, appearing to be asleep during most of Claimant's testimony. He blamed Joiner, his attorney, for his failure to timely file a case summary and timely respond to the Agency's discovery request, claiming he couldn't get his

papers until February 17, even though he had fired his attorney six weeks earlier. When cross-examined, he testified he'd been convicted of only one felony -- for DUI -- 10 years ago. When the Agency produced documentation that Respondent had been convicted of two additional felonies for driving while suspended in 1996 and 1999, he claimed he didn't realize they were convictions and blamed both on poor legal representation. The forum has believed Respondent's testimony only where it was supported by other credible evidence.

19) Claimant answered all questions directly and without hesitation. His testimony was internally consistent and consistent with prior statements made to the Agency while filing his wage claim. In marked contrast to Respondent, he exhibited a serious attitude throughout the proceeding. The forum has credited Claimant's testimony in its entirety and believed Claimant wherever his testimony conflicted with Respondent's testimony.

ULTIMATE FINDINGS OF FACT

1) Respondent Heiko Thanheiser at all times material herein owned and operated The Fire Protection, a business that engaged the personal services of one or more employees in Oregon.

2) Respondent engaged the personal services of Claimant to perform work for him between October 16, 2000, and January 27, 2001, at the agreed rate of \$2,800 per month.

3) Claimant worked a total of 15 weeks for Respondent and earned \$9,692.25 in wages.

4) Claimant has only been paid \$680, leaving \$9,012.25 in unpaid wages due and owing.

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

6) Civil penalty wages for Claimant, computed in accordance with ORS 652.150 and OAR 839-001-0470, equal \$3,876.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was the employer of Claimant and Claimant was Respondent's employee. 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.

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

“(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(2) by failing to pay Claimant all wages earned and unpaid payable within five days, excluding Saturdays, Sundays and holidays, after January 27, 2001, the date Claimant quit.

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(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.”

Respondent is liable for \$3,876 civil penalty wages to Claimant, computed at the rate of \$16.15 per hour x 8 hours x 30 days.

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

PRIMA FACIE CASE

To establish a prima facie case supporting the wage claims in this case, the Agency must prove: 1) that Respondent employed Claimant; 2) any pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) that Claimant performed work for Respondent for which he was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. *In the Matter of Jo-El, Inc.*, 22 BOLI 1, 7 (2001).

RESPONDENT EMPLOYED CLAIMANT

Under ORS 652.310, an employer is “any person who in [Oregon] * * * engages personal services of one or more employees.” An employee is “any individual who otherwise than as copartner of the employer or as an independent contractor renders

personal services wholly or partly in [Oregon] to an employer who pays or agrees to pay such individual at a fixed rate.”

In his answer, Respondent alleged that Claimant was an independent contractor. This is an affirmative defense that Respondent has the burden of proving. *In the Matter of Leslie Elmer DeHart*, 18 BOLI 199, 206-07 (1999). This forum uses an “economic reality” test to determine whether a wage claimant is an employee or independent contractor under Oregon’s wage collection laws. *In the Matter of Ann L. Swanger*, 19 BOLI 42, 53 (1999). The focal point of the test is “whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which [he] renders [his] services.” *Id.* The forum considers five factors to gauge the degree of the worker’s economic dependency, with no single factor being determinative: (1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and alleged employer; (3) the degree to which the worker’s opportunity for profit and loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship. *Id.*

In this case, the facts show that Respondent directed Claimant’s work and supplied all of the equipment necessary to perform the work; Claimant had no investment in Respondent’s business; Claimant had no opportunity to earn a profit or suffer a loss, as Respondent agreed to pay him a specific wage; Respondent trained Claimant to perform all the jobs Claimant performed for Respondent; Claimant was hired for an indefinite period of time; and no one else employed Claimant while he worked for Respondent. All these factors point the forum to the conclusion that Claimant was Respondent’s employee, not an independent contractor.

AGREED PAY RATE

Claimant credibly testified that Respondent agreed to pay him \$2800 per month for his work, plus \$200 for vehicle and gas expense. The forum adopts \$2800 per month, the amount sought by the Agency, as Claimant's agreed wage rate.

CLAIMANT PERFORMED WORK FOR RESPONDENT FOR WHICH HE WAS NOT PROPERLY COMPENSATED

Claimant credibly testified that he was paid only \$680 for his 15 weeks of employment with Respondent. His earnings during that time, calculated at the agreed rate of \$2800 per month, amounted to \$9,692.25, establishing that he was not paid for a substantial portion of his work.

THE AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT

Claimant did not maintain a record of his work hours, but credibly testified that he worked an average of 40 hours per week for Respondent during his 15 weeks of employment with Respondent. Respondent provided no records to rebut this testimony.

ORS 653.045 requires an employer to keep and maintain proper records of wages, hours and other conditions and practices of employment. Where the forum concludes 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. *In the Matter of Diran Barber*, 16 BOLI 190 (1997), quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946).

Where the employer produces no records, 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. *In the Matter of Usra A. Vargas*, 22 BOLI 212, 221 (2001). This forum will accept testimony of a claimant as sufficient evidence to prove work was performed and from which to draw an inference of the

extent of that work - where that testimony is credible. *In the Matter of Graciela Vargas*, 16 BOLI 246, 254 (1998). In this case, Claimant's testimony that he worked an average of 40 hours per week for Respondent over a period of 15 weeks was credible, and the forum bases its award of back wages on those figures.

RESPONDENT WITNESSES AND EXHIBITS

The ALJ issued an interim order on December 4, 2001, requiring the Agency and Respondent to submit case summaries no later than February 8, 2002. On February 6, the ALJ issued a discovery order requiring Respondent to provide the Agency with a number of documents sought by the Agency witnesses. Forty minutes prior to the start of hearing, Respondent hand-delivered a case summary and documents responsive to the discovery order to the forum and the Agency case presenter. Respondent then sought to include the documents responsive to the discovery order as exhibits to his case summary. After the Agency rested its case, Respondent sought to call eight witnesses listed on his case summary and to offer into evidence all documents produced to the Agency just prior to hearing. Respondent blamed his former attorney, whom he had fired six weeks earlier, for his failure to provide these documents in a timely manner. The Agency objected to the witnesses and documents, and the ALJ sustained the objection. In the presentation of his case, Respondent explained the significance of the documents and the testimony the witnesses would provide, if given an opportunity to testify. The ALJ's ruling is sustained.

OAR 839-050-0210 provides:

"The administrative law judge may refuse to admit evidence that has not been disclosed in response to a case summary order, unless the participant that failed to provide the evidence offers a satisfactory reason for having failed to do so or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.415(10)."

Respondent's reason for not timely filing a case summary was that he was unable to obtain the documents from his attorney, whom he had fired six weeks earlier, until three days before the hearing. This does not meet the "satisfactory reason" standard for two reasons. First, based on Respondent's lack of credibility, the forum did not believe this excuse. Second, this is not a situation where Respondent's counsel voluntarily withdrew, then left Respondent high and dry. According to Respondent's counsel, Respondent fired her when she attempted to get him to cooperate in the discovery process. At the point where Respondent decided to represent himself, he became responsible for complying with the forum's discovery orders, including the case summary order. Having made the decision to represent himself at hearing, the responsibility to comply with the forum's discovery orders must rest squarely on his own shoulders.

A "full and fair inquiry" is an inquiry that is both full *and* fair. In this case, as in any other case, it can be argued that the hearing is not "full" unless every piece of evidence relevant to the charges and answer offered by the Agency and Respondent are admitted into the record. However, it is hardly fair to allow a participant to provide witness names and exhibits to support its case in chief for the first time at hearing, where the forum ordered them to be produced earlier, and the other participant has had no prior opportunity to interview the witnesses or investigate the veracity of the exhibits. *See, e.g., In the Matter of Martin's Mercantile*, 12 BOLI 262, 264-65 (1994). The forum concludes that the ALJ's exclusion of Respondent's witnesses and exhibits produced for the first time at the start of hearing did not violate Respondent's right to a full and fair hearing.

CIVIL PENALTY WAGES

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).

Claimant earned almost \$10,000 while working for Respondent at the agreed rate of \$2800 per month, and Respondent only paid him \$680. Respondent denied having employed Claimant, but all credible evidence in the record points to the contrary. There was no evidence to show that Respondent acted other than intentionally and as a free agent in underpaying Claimant.

Based on the foregoing, the forum concludes that Respondent acted willfully and assesses penalty wages in the amount of \$3,876.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages and civil penalty wages he owes as a result of his violation of ORS 652.140 and (2), the Commissioner of the Bureau of Labor and Industries hereby orders **Heiko Thanheiser** 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 Salem M. El-Dousoky in the amount of TWELVE THOUSAND EIGHT HUNDRED AND EIGHTY EIGHT DOLLARS AND TWENTY FIVE CENTS (\$12,888.25), less appropriate lawful deductions, representing \$9,012.25 in gross earned, unpaid, due, and payable wages and \$3,876 in penalty wages, plus interest at the legal rate on the sum of \$9,012.25 from March 1, 2001, until paid, and interest at the legal rate on the sum of \$3,786 from April 1, 2001, until paid.