

In the Matter of

HICKOX ENTERPRISES, INC.,

Case No. 104-01

Final Order of the Commissioner Jack Roberts

Issued June 27, 2001

SYNOPSIS

Respondent owed \$46,602.37 in unpaid wages to 50 wage claimants when it ceased doing business. BOLI determined that the wage claimants were entitled to receive payment from the Wage Security Fund and paid the claimants in full. The Commissioner found Respondent liable to reimburse the Wage Security Fund for the \$46,602.37 in wages paid out, plus a 25 percent penalty of \$11,650.59. ORS 652.140, 652.310, 652.332, 652.414

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 conducted in writing. The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David K. Gerstenfeld, case presenter and an employee of the Agency. Respondent was represented by Kevin O'Connell, attorney at law.

The forum received into evidence:

a) Administrative exhibits X-1 through X-5 (submitted or generated prior to 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 November 29, 2000, the Agency issued Order of Determination No. 00-4692 in which it alleged the following:

(a) Fifty (50) separate wage claimants filed wage claims with the Agency and assigned those claims to the Agency, alleging that Respondent employed them all in Oregon between March 1 and April 1, 2000, and that they performed work, labor and services for Respondent and were paid all sums due and owing except the sum of \$46,602.37, which is due and owing along with interest at the legal rate per annum from May 1, 2000, until paid. The names of the claimants and amounts alleged due and owing were as follows:

Ashton, Victoria:	\$ 834.75
Barrie, Kimberly:	1,045.46
Bidgood, Alysia:	705.34
Budd, Darby:	498.96
Butenschoen, Jennifer:	678.56
Christensen, Penelope:	1,155.70
Clark, Jessica:	698.70
Clift, Susanne:	1,292.30
Collins, Mary:	613.29
Davis, Nina:	325.80
Diego, Juana:	162.00
Edwards, Valarie:	1,362.38
Ensey, Kristy:	1,214.67
Gedrose, Mary:	740.83
Gehrig, Jennifer	1,241.35
Georgeades, Julieta:	315.90
Gessman, Melissa:	604.09
Hall, Julie:	852.06
Hardin, Monica:	1,228.02
Hathaway, Tamara:	710.06
Hiatt, Sheila:	986.39
Houk, Carly:	593.25
Kerr, Grace:	1,080.41
Kraner, Nicole:	1,332.18
Laske, Heidi:	2,873.07
Lemke, Gina:	185.50
Lucas, Kristen:	326.70
Luczkow, Alyse:	373.53
Madsen, Britt:	433.13
Miller, Mary:	236.00
Milne, Kristen:	635.88
Mobley, David:	484.62
Montgomery, Ryan:	955.92
Morton, Cha:	1,146.07

Mull, Josh:	1,118.44
Odegaard, Robert:	759.19
Olsen, Kristen:	1,564.10
Petersen, Philip:	435.05
Rabizadeh, Fatemah:	3,041.34
Richardson, Danielle:	4,000.00
Riley, Miyuki:	727.85
Rutledge, Jesse:	126.00
Sabin, Angela:	985.50
Segui, Jennie:	808.57
Steele, Troy:	808.70
Tavus, Anne:	274.95
Thomas, Jennifer:	1,765.37
Webster, Lynne:	495.72
Wingfield, Candice:	889.87
Zapata, Christy:	878.10

(b) Pursuant to ORS 652.414, the Agency determined that the wage claimants were entitled to receive payment from the Wage Security Fund ("WSF") in the sum of \$46,602.37.

(c) The wage claimants received payment in the amount of \$46,602.37 from the WSF.

(d) The Commissioner of the Bureau of Labor and Industries is entitled by ORS 652.414(2) to recover from the employer the amount paid from the WSF, together with a penalty of 25 percent of the sum paid from the Fund, which amount is \$11,650.59, along with interest at the legal rate per annum from June 1, 2000, until paid.

2) The Order of Determination was served on Respondent on December 5, 2000. On January 5, 2001, the Agency sent Respondent a Notice of Intent to Issue Final Order by Default, stating that no answer or request for hearing or court trial had been received and that if none was received by January 15, 2001, the Agency would issue a Final Order by Default.

3) On January 12, 2001, Respondent, through counsel, filed an answer and request for hearing that stated: "Employer contests the assertion of a penalty in the amount of \$11,650.59 and he requests a hearing on that issue."

4) On March 1, 2001, the Agency filed a "BOLI Request for Hearing" with the forum.

5) On April 5, 2001, the Hearings Unit issued a Notice of Hearing to Respondent and the Agency stating the time and place of the hearing as September 11, 2001, at 9:00 a.m., at the Hearings Room, 10th Floor, 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.

6) On April 9, 2001, the Agency filed a motion for summary judgment, contending that Respondent’s failure to dispute any facts in the Order of Determination except for the Agency’s entitlement to a 25 percent penalty on the sum paid out from the WSF entitled the Agency to summary judgment on all issues as a matter of law.

7) On April 12, 2001, the forum issued an interim order notifying Respondent that it had seven days after service of the Agency’s motion to file a written response. Respondent did not file a response.

8) On April 26, 2001, the forum issued an interim order granting the Agency’s motion for summary judgment, ruling in pertinent part as follows:

“INTRODUCTION

“This action arises from an Order of Determination issued by the Agency on November 29, 2000, seeking reimbursement for \$46,602.37 paid out by the Wage Security Fund (‘WSF’), along with a 25 percent penalty of \$11,650.59 on that sum. The Order of Determination alleges that the \$46,602.37 paid out by the WSF was to compensate wage claimants for wages earned, due and owing to them from Respondent. Respondent filed an answer and request for hearing on January 12, 2001. Respondent’s answer consisted of a one-sentence assertion – ‘Employer contests the assertion of a penalty in the amount of \$11,650.59 and he requests a hearing on that issue.’

“On April 6, 2001, the Agency filed a motion for summary judgment, contending that undisputed facts from the pleadings entitle the Agency to judgment as a matter of law. Respondent filed no objections to the motion.

“SUMMARY JUDGMENT STANDARD

“A motion for summary judgment may be granted where no genuine issue as to any material fact exists and a participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings. OAR 839-050-0150(4)(B). The standard for determining if a genuine issue of material fact exists follows:

‘ * * * No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at [hearing].’

In the Matter of Cox and Frey Enterprises, Inc., 21 BOLI 175, 178 (2000).

“RECOVERY OF WSF FUNDS

“In the Order of Determination, the Agency plead the following relevant facts:

- 1) Between March 1 and April 1, 2000, Respondent employed the 50 wage claimants listed in Exhibit A to the Order of Determination and paid them wages owing for their services except the sum of \$46,602.37.
- 2) BOLI made a determination that these 50 wage claimants were entitled to payment from the WSF in the amount of \$46,602.37.
- 3) BOLI paid these 50 wage claimants \$46,602.37 from the WSF.
- 4) 25 percent of \$46,602.37 is \$11,650.59.

Respondent’s failure to deny any of these alleged facts constitutes an admission to all of them, including an admission to the validity of the underlying wage claims. OAR 839-050-0130(2). These alleged facts constitute a prima facie case under ORS 652.414, as well as 652.140, where Respondent has admitted the validity of the underlying wage claims. The Agency’s motion for summary judgement regarding recovery of the \$46,602.37 paid out from the WSF to reimburse Respondent’s employees for wages due and owing is **GRANTED**.

“WSF 25 PERCENT PENALTY

“The Agency contends that recovery of a 25 percent penalty on the sum paid out of the WSF should be automatic, once liability for recovery of the primary sum has been established. ORS 652.414(3) provides, in pertinent part:

'The commissioner may commence an appropriate * * * proceeding to recover from the employer * * * liable for the unpaid wages, amounts paid from the Wage Security Fund under subsection (1) of this section. In addition to costs and disbursements, the commissioner is entitled to recover * * * a penalty of 25 percent of the amount of wages paid from the Wage Security Fund or \$200, whichever amount is the greater.'

A plain reading of the statute shows that the only condition precedent to recovering this 25 percent penalty is a determination that the Agency is entitled to recover wages paid from the WSF. In this case, the forum has made a determination that the Agency is entitled to recover \$46,602.37 paid out by the WSF. 25 percent of that sum is \$11,650.59. The Agency's motion for summary judgement regarding whether the commissioner is entitled to recover a 25 percent penalty in the amount of \$11,650.59 is **GRANTED**.

"CONCLUSION

"This ruling resolves all issues raised in the pleadings. Since there is no longer any necessity for hearing, the hearing set for September 11, 2001, is cancelled. This interim order will become part of a Proposed Order that will be issued by the undersigned ALJ."

9) On May 21, 2001, the ALJ issued a proposed order that notified the participants that 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) From March 1 to April 1, 2000, Respondent was an employer in Oregon. During that time, the 50 persons listed in Finding of Fact – Procedural 1 performed work, labor and services for Respondent.

2) From March 1 to April 1, 2000, these 50 employees earned \$46,602.37 in wages that Respondent has not paid to them. The specific amounts earned by each employee are listed in Finding of Fact – Procedural 1.

3) When Respondent ceased business operations, those 50 persons filed wage claims and the commissioner determined that the wage claims were valid. Subsequently, the commissioner caused the \$46,602.37 claimed by the 50 wage claimants to be paid to those claimants from the WSF.

- 4) Twenty-five percent of \$46,602.37 is \$11,650.59.

ULTIMATE FINDINGS OF FACT

- 1) From March 1 to April 1, 2000, Respondent was an employer in Oregon. During that time, the 50 persons listed in Finding of Fact – Procedural 1 performed work, labor and services for Respondent.

- 2) From March 1 to April 1, 2000, these 50 employees earned \$46,602.37 in wages that Respondent has not paid to them. The specific amounts earned by each employee are listed in Finding of Fact – Procedural 1.

- 3) When Respondent ceased business operations, those 50 persons filed wage claims and the commissioner determined that the wage claims were valid. Subsequently, the commissioner caused the \$46,602.37 claimed by the 50 wage claimants to be paid to those claimants from the WSF.

- 4) Twenty-five percent of \$46,602.37 is \$11,650.59.

CONCLUSIONS OF LAW

- 1) ORS 652.310 provides, in pertinent part:

“(1) ‘Employer’ means any person who in this state, directly or through an agent, engages personal services of one or more employees * * *.”

During all times material herein, Respondent was an employer is subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.414 and the 50 wage claimants listed in Finding of Fact – Procedural 1 were Respondent’s employees.

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

- 3) ORS 652.140(1) and (2) provide:

“(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.”

Respondent violated ORS 652.140 by failing to pay the 50 wage claimants listed in Finding of Fact – Procedural 1 all wages earned and unpaid not later than the end of the business day on April 7, 2000, five days, excluding Saturdays, Sundays and holidays, after termination of the wage claimants’ employment.

4) ORS 652.414 provides, in pertinent part:

“Notwithstanding any other provision of law:

(1) When an employee files a wage claim under this chapter for wages earned and unpaid, and the Commissioner of the Bureau of Labor and Industries determines that the employer against whom the claim was filed has ceased doing business and is without sufficient assets to pay the wage claim and the wage claim cannot otherwise be fully and promptly paid, the commissioner, after determining that the claim is valid, shall pay the claimant, to the extent provided in subsection (2) of this section:

“(a) The unpaid amount of wages earned within 60 days before the date of the cessation of business; or

“(b) If the claimant filed a wage claim before the cessation of business, the unpaid amount of wages earned within 60 days before the last day the claimant was employed.

“(2) The commissioner shall pay the unpaid amount of wages earned as provided in subsection (1) of this section only to the extent of \$4,000 from such funds as may be available pursuant to ORS 652.409 (2).

“(3) The commissioner may commence an appropriate action, suit or proceeding to recover from the employer, or other persons or property liable for the unpaid wages, amounts paid from the Wage Security Fund under subsection (1) of this section. In addition to costs and disbursements, the commissioner is entitled to recover reasonable attorney fees at trial and on appeal, together with a penalty of 25 percent of the amount of wages paid from the Wage Security Fund or \$200, whichever amount is the greater. All amounts recovered by the commissioner under this subsection and subsection (4) of this section are

appropriated continuously to the commissioner to carry out the provisions of this section.”

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 may recover from Respondent the \$46,602.37 paid to the 50 wage claimants from the Wage Security Fund and sought in the Order of Determination, along with a 25 percent penalty of \$11,650.59 assessed on that sum, plus interest until paid. ORS 652.332, ORS 652.414(2).

OPINION

The facts in this case are undisputed, and the issue of liability for both the principal sum of \$46,602.37 paid out by the WSF and the 25 percent penalty of \$11,650.59 on that sum were resolved in the ALJ’s interim order granting the Agency’s motion for summary judgment. That ruling is confirmed.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and ORS 652.414 and as payment of the unpaid wages and penalty assessed as a result of Respondent’s violations of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders **Hickox Enterprises, 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 the amount of FIFTY EIGHT THOUSAND TWO HUNDRED FIFTY TWO DOLLARS AND NINETY SIX CENTS (\$58,252.96), representing \$46,602.37 paid out of the Wage Security Fund to the 50 wage claimants listed in Finding of Fact – Procedural 1 and \$11,650.59 as a 25 percent penalty on the sum of \$46,602.37, plus interest at the legal rate on the sum of \$46,602.37 from May 1, 2000, until paid and interest at the legal rate on the sum of \$11,650.59 from June 1, 2000, until paid.