

In the Matter of

JAMIE SUE SZIISZ dba Jamie Sziisz Salon Studio & Spa,

Case No. 41-05

Final Order of Commissioner Dan Gardner

Issued May 17, 2005

SYNOPSIS

Respondent owed \$452.44 in unpaid wages to two 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 \$452.44 in wages paid out, plus a 25 percent penalty of \$113.11. 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 Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 5, 2005, at the Bureau's Salem office located at 3865 Wolverine NE, E-1, Salem, Oregon. The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Cynthia L. Domas, case presenter and an employee of the Agency. Tonya McCammon ("Claimant McCammon") and Susan McDonald ("Claimant McDonald") were present throughout the hearing and not represented by counsel. Respondent did not appear at the hearing and was held in default.

The Agency called Claimants McCammon and McDonald and Wage & Hour Division Compliance Specialist Katy Bayless as witnesses.

The forum received into evidence:

a) Administrative exhibits X-1 through X-7 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-24 (submitted or generated prior to hearing).

Having fully considered the entire record in this matter, I, Dan Gardner, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On December 9, 2003, Claimant McDonald filed a wage claim with the Agency alleging that Respondent had employed her and deducted money from her paycheck to pay insurance premiums, then never paid the premiums.

2) At the time she filed her wage claim, McDonald assigned to the Commissioner of the Bureau of Labor and Industries, in trust for McDonald, all wages due from Respondent.

3) On May 29, 2004, McDonald signed a “Wage Security Fund Assignment of Wages” in which she assigned to the Commissioner of the Bureau of Labor and Industries all wages due from Respondent.

4) On December 26, 2003, Claimant McCammon filed a wage claim with the Agency alleging that Respondent had employed her and failed to pay wages earned and due to her.

5) At the time she filed her wage claim, McCammon assigned to the Commissioner of the Bureau of Labor and Industries, in trust for McCammon, all wages due from Respondent.

6) On May 24, 2004, McCammon signed a “Wage Security Fund Assignment of Wages” in which she assigned to the Commissioner of the Bureau of Labor and Industries all wages due from Respondent.

7) On June 17, 2004, the Agency issued Order of Determination No. 04-2359 in which it alleged the following:

(a) Claimants McCammon and McDonald performed work, labor and services for Respondent and were paid all sums due and owing except the sum of \$452.44, representing \$358.80 in earned and unpaid wages to Claimant McCammon and \$93.64 in money deducted from Claimant McDonald's check to pay a medical insurance premium that was not paid. The Agency determined these sums were due and owing to them, along with interest at the legal rate per annum from December 1, 2003, until paid;

(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 \$452.44.

(c) The wage claimants received payment in the amount of \$452.44 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 \$113.11, along with interest at the legal rate per annum;

(e) Respondent willfully failed to pay the due and owing wages and Claimants are entitled to \$3,312 in penalty wages, along with interest at the legal rate per annum.

8) On August 11, 2004, Respondent filed an answer and request for hearing in which she alleged, in an unsworn statement, that Claimant McDonald's insurance premium had been paid and that Claimant McCammon had been paid fully for the time that she worked.

9) On January 31, 2005, the Agency filed a "BOLI Request for Hearing" with the forum.

10) On February 1, 2005, the Hearings Unit issued a Notice of Hearing to Respondent and the Agency stating the time and place of the hearing as April 5, 2005, at 9:30 a.m., at BOLI's Salem office located at 3865 Wolverine St. NE, Bldg. E-1, Salem, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and

Procedures” containing the information required by ORS 183.413, a Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum’s contested case hearings rules, OAR 839-050-000 to 839-050-0440.

11) On March 22, 2005, the Agency filed a motion to amend the Order of Determination to withdraw its request for penalty wages. Respondent did not object and the ALJ orally granted this motion at hearing.

12) Respondent did not make an appearance at the hearing. The ALJ waited until 10 a.m. to commence the hearing, then declared Respondent in default and commenced the hearing.

13) On April 19, 2005, 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) In 2003, Respondent was a person who operated a hair salon and spa and engaged the personal services of one or more persons in Salem, Oregon.

2) Respondent hired both Claimants in 1998. During their employment, McCammon cut hair and performed permanent cosmetics and McDonald cut and colored hair and performed manicures and pedicures. Respondent and Claimants agreed that Claimants’s wage would consist of a 45 percent commission of their gross sales.

3) Claimants were Respondent’s employees in 2003.

4) Claimant McCammon quit Respondent’s employment on November 13, 2003. Before she quit, she worked the following hours in November:

November 3: 12 hours

November 5: 7 hours

November 6: 7 hours

November 10: 12 hours

November 12: 7 hours

November 13: 7 hours

Calculated at \$6.90 per hour,¹ McCammon earned \$358.80 in gross wages in November 2003 (52 hours x \$6.90).

5) Respondent has not paid McCammon for any of the hours she worked in November 2003.

6) Respondent issued paycheck number 3781 to McDonald on October 15, 2003. Respondent took a deduction of \$93.64 from that check to pay McDonald's medical insurance premium covering the period October 16-31, 2003. Respondent did not pay McDonald's medical insurance premium and her insurance coverage ended on October 14, 2003. Respondent has not repaid that sum to McDonald.

7) Claimant McDonald quit Respondent's employment on October 18, 2003. (Testimony of McDonald)

8) The investigation of the wage claims filed by Claimants was assigned to Wage & Hour Compliance Specialist Katy Bayless. She investigated the claims by reviewing the documentation submitted by Claimants, which included their wage claims and calendars of hours worked, and interviewing Respondent. At the conclusion of her investigation, she made a determination that Claimants had valid wage claims.

9) Bayless also determined that Respondent's business no longer existed as of January 1, 2004, and that Respondent lacked sufficient assets to pay the wage claims.

10) On June 14, 2004, BOLI caused the WSF to issue checks in the amount of \$331.35 to Claimant McCammon and \$86.47 to Claimant McDonald, representing net wages. Claimants were actually paid gross wages of \$452.44, but BOLI caused the

WSF to take statutory deductions from the gross wages before issuing checks to Claimants.

- 11) Twenty-five percent of \$452.44 is \$113.11.
- 12) Bayless, McCammon, and McDonald were credible witnesses.

ULTIMATE FINDINGS OF FACT

1) In 2003, Respondent directly engaged the personal services of one or more employees in Oregon. During that time, Claimant McCammon and Claimant McDonald rendered personal services to Respondent in Oregon.

2) In November 2003, Claimant McCammon earned \$358.80 in wages that Respondent has not paid to her.

3) In October 2003, Respondent deducted \$93.64 from Claimant McDonald's paycheck to pay McDonald's medical insurance premium covering the period October 16-31, 2003. Respondent did not pay McDonald's medical insurance premium and has not repaid that sum to McDonald.

4) Claimants filed wage claims with BOLI. BOLI determined that the wage claims were valid, that Respondent's business no longer existed, and that Respondent lacked sufficient assets to pay the wage claims. Subsequently, the commissioner caused the \$442.44 claimed by Claimants to be paid to them from the WSF.

- 5) Twenty-five percent of \$452.44 is \$113.11.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer subject to the provisions of ORS 653.010 to 653.025 and 652.110 to 652.414 and Claimants McCammon and McDonald 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) Respondent violated ORS 652.140(2) by failing to pay both Claimants all wages earned and unpaid not later than five days, excluding Saturdays, Sundays and holidays, after termination of their employment.

4) 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 \$452.44 paid to Claimants McCammon and McDonald from the Wage Security Fund and sought in the Order of Determination, along with a 25 percent penalty of \$113.11 assessed on that sum, plus interest until paid. ORS 652.332, ORS 652.414(2).

OPINION

In cases involving payouts from the WSF, where (1) there is credible evidence that a determination on the validity of the claim was made; (2) there is credible evidence as to the means by which that determination was made; and (3) BOLI has paid out money from the WSF and seeks to recover that money, a rebuttable presumption exists that the Agency's determination is valid for the sums actually paid out. *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 260 (1999). The first and second elements of this test are satisfied by Bayless's credible testimony concerning her investigation and eventual determination, credible testimony by both Claimants, and Agency exhibits showing the documents Bayless gathered in her investigation. Bayless's testimony that BOLI paid Claimant \$452.44 from the WSF, coupled with the Order of Determination itself, satisfies the third element. Consequently, Respondent is liable to repay the WSF the sum of \$452.44, the amount actually paid out, plus a 25 percent penalty on that sum, or \$113.11, for a total of \$565.55, plus interest.

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 **Jamie Sue Sziisz** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

A certified check payable to the Bureau of Labor and Industries in the amount of FIVE HUNDRED SIXTY FIVE DOLLARS and FIFTY FIVE CENTS (\$565.55), representing \$452.44 paid out of the Wage Security Fund to wage claimants Tonya McCammon and Susan McDonald and \$113.11 as a 25 percent penalty on the sum of \$452.44, plus interest at the legal rate on the sum of \$565.55 from June 14, 2004, until paid.

ⁱ Although McCammon was paid a 45 percent commission as an agreed rate, the Order of Determination calculated her unpaid wages based on the statutory minimum wage of \$6.90 per hour.