

**In the Matter of**  
**TROY R. JOHNSON,**  
**dba PACIFIC FRAMING,**  
**Respondent.**

Case Number 06-99  
Final Order of the Commissioner  
Jack Roberts  
Issued January 20, 1999

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**SYNOPSIS**

Respondent, who operated a house framing business, employed two Claimants as framers and failed to pay Claimants all wages due upon termination, in violation of ORS 652.140(2). Respondent's failure to pay the wages was willful, and Respondent was ordered to pay civil penalty wages, pursuant to ORS 652.150. ORS 652.140(2), 652.150.

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The above-entitled contested 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 (BOLI) for the State of Oregon. The hearing was held on October 20 and 21, 1998, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by David Gerstenfeld, an employee of the Agency. Timothy Mark Johnson (Claimant Johnson) and Benjamin Glen Suby (Claimant Suby) were present throughout the hearing, except that Claimant Suby was excluded while Claimant Johnson was testifying. Troy Johnson

(Respondent) was present throughout the hearing and was represented by Mark Maisel, Attorney At Law.

The Agency called the following witnesses: Timothy Mark Johnson and Ben Suby, Claimants; Troy Johnson, Respondent; Gerhard Teaubel, Wage and Hour Division Compliance Specialist; Paul Kaminski, building contractor (telephonic); and Ricky Wayne Johnson, cousin to Timothy Johnson (telephonic).

Respondent called the following witnesses: Troy Johnson, Respondent; and Jeff Cox, Respondent's foreman.

Administrative exhibits X-1 to X-15 and Agency exhibits A-1 through A-6 were offered and received into evidence. The record closed on October 20, 1998.

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries 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 2, 1998, Claimant Timothy Mark Johnson filed a wage claim with the Agency. He alleged that he had been employed by Respondent and that Respondent had failed to pay wages earned and due to him.

2) On February 2, 1998, Claimant Benjamin Suby filed a wage claim with the Agency. He alleged that he had been employed by Respondent and that Respondent had failed to pay wages earned and due to him.

3) At the same time that they filed the wage claims, Claimants Johnson and Suby assigned to the Commissioner of Labor, in trust for Claimants, all wages due from Respondent.

4) On July 6, 1998, the Agency served on Respondent an Order of Determination based upon the wage claims filed by Claimants and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of \$1,111.00 in wages and \$5,280.00 in civil penalty wages based on work Claimants had performed for Respondent from December 8 to December 20, 1997. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency, or request an administrative hearing and submit an answer to the charges.

5) On July 9, 1998, Respondent filed an answer to the Order of Determination.

6) On July 9, 1998, the Agency sent a letter to Respondent advising that his answer was insufficient because it failed to request a hearing. The Agency gave Respondent until August 6, 1998, to request a hearing. On August 14, 1998, the Agency received a request for hearing from Respondent.

7) In his answer and request for hearing, Respondent denied all the allegations in the Order of Determination.

8) On September 14, 1998, the Agency sent the Hearings Unit a request for a hearing date. The Hearings Unit issued a Notice of Hearing to the Respondent, the Agency, and the Claimants indicating the time and place of the hearing. Together with the Notice of Hearing, the forum sent a document entitled "Notice 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 839-050-0000 to 839-050-0440.

9) On September 23, 1998, the ALJ issued a discovery order directing each participant to submit a summary of the case, including a list of the witnesses to be

called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-50-210(1). The summaries were due by October 12, 1998. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary.

10) On October 5, 1998, the Agency filed a motion for a discovery order seeking pay records and timecards for Claimants and a co-worker.

11) On October 6, 1998, the ALJ issued an Interim Order making Respondent's response to the Agency's motion due on October 12.

12) On October 9, 1998, the Agency submitted its Case Summary.

13) On October 13, 1998, the ALJ issued a discovery order in response to the Agency's motion dated October 5, requiring Respondent to provide the Agency with all records related to payment received or hours worked by Claimants and a co-worker by October 19, 1998.

14) Respondent did not provide any documents to the Agency in response to the ALJ's October 13 discovery order.

15) On October 16, 1998, Respondent FAXed a request for postponement to the Hearings Unit from Durango, Colorado. The request asked that the hearing be postponed until November 3 based on his absence on a hunting trip, his failure to receive notice of the hearing until October 14 and consequent inability to prepare adequately for the hearing, and his amazement that the case had actually been set for hearing.

16) On October 19, 1998, the Agency objected to the motion for postponement.

17) On October 19, 1998, the ALJ issued an Interim Order denying Respondent's motion for postponement. The motion was denied because Respondent failed to establish "good cause," in that Respondent, after filing his answer and request for hearing, had failed to notify the forum or the Agency of a change of address and because the request for postponement was untimely, coming four days before the hearing was scheduled.

18) At the start of the hearing, Mr. Maisel, the attorney for Respondent, indicated he had just been retained by Respondent. The ALJ gave Mr. Maisel time to review the notice of Contested Case Rights and Procedures. After reading them, Mr. Maisel he had no questions about it.

19) At the commencement 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.

20) On December 15, 1998, the ALJ issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten days for filing exceptions. The Hearings Unit received no exceptions.

#### **FINDINGS OF FACT -- THE MERITS**

1) During all times material herein, the Respondent, a person, did business as a sole proprietorship under the assumed business name of Pacific Framing and engaged the personal services of one or more persons in the State of Oregon.

2) Claimants Johnson and Suby were both employed by Respondent beginning on November 19, 1997. They were hired as a framing crew to frame houses in a five house framing contract Respondent had in Silverton, Oregon. Eric Shoue was the third member of the framing crew when they were hired.

3) Respondent and Claimant Johnson entered into an agreement that Claimant Johnson would work for \$12.00 per hour.

4) Respondent and Claimant Suby entered into an agreement that Claimant Suby would work for \$10.00 per hour.

5) Respondent has employees complete time cards that show hours and dates worked on one side and type of work performed by day on the other side.

6) On or about December 7, 1997, Shoue quit Respondent's employ and Rick Johnson, Tim Johnson's cousin, was hired to replace him.

7) On November 22, 1997, Respondent issued check #1176, in the amount of \$80.00, to Tim Johnson as a pay advance.

8) On December 11, 1997, Respondent issued check #72, in the amount of \$902.64, to Tim Johnson. This was a regular paycheck. Claimant Johnson's payroll stub states "pay period 11/06/97 to 12/05/97".

9) On December 11, 1997, Respondent issued check #76, in the amount of \$744.64, to Ben Sube (sic). This was a regular paycheck and paid Claimant Suby in full for all hours worked through December 5, 1997.

10) Respondent paid the amounts cited in Findings 7-9 knowingly and intentionally. Respondent was a free agent.

11) Claimants and Rick Johnson worked the same dates and hours between December 8, 1997, and December 20, 1997.

12) Claimants worked 3 hours on December 8, 8 hours on December 9, and 5 hours on December 12, 1997.

13) Claimants worked during the week of December 15-19, 1997, but the forum is unable to determine the specific dates or hours that Claimants worked in this time period because of the internal inconsistencies within Claimants' testimony, the

external inconsistencies between Claimants' testimony, and the inconsistencies between Claimants' testimony and their written records.

14) On December 20 or 21, Claimants met Respondent at a Gresham bank in hopes of getting a pay advance. Respondent did not give them a pay advance. Later that day, Claimant Johnson telephoned Respondent and told him the number of hours they had worked since December 5. Claimant Johnson also told Respondent that he and Suby were quitting Respondent's employ.

15) Claimants quit work on December 21, 1998, without giving prior notice.

16) The last paycheck given to Claimants was issued by Respondent on December 11, 1997.

17) December 29, 1997, was the five days after December 21, 1998, excluding Saturdays, Sundays, and holidays. Claimants' wages were due and owing on December 29, 1997.

18) At the time Claimants quit, Respondent owed Claimant Johnson \$192 in unpaid wages and Claimant Suby \$160 in unpaid wages.

19) The testimony of Claimants Johnson and Suby regarding their general terms and conditions of employment with Respondent was credible. It was clear, based on the additional testimony of Rick Johnson and Paul Kaminski, an unbiased witness, that they performed some work during the week of December 15-19, 1997. However, due to the inconsistencies and contradictions in their testimony and between their testimony and time records, the forum found it impossible to determine what days and hours they worked that week.

20) The testimony of Jeff Cox was biased in favor of Respondent. He was Respondent's first employee and was Respondent's leadperson up until eight weeks before the hearing. He picked up Respondent at the airport the night before the

hearing. He wore a long-sleeve T-shirt at the hearing with a logo that read "Pacific Framing". Neither he nor Respondent provided any time cards for the pay period covering the period December 15-19, 1997, to back up his testimony that he, Justin Savery, and Kevin Blackburn took over the work Claimants had been performing that week. Accordingly, the forum did not believe his testimony except where it was corroborated by other credible evidence.

21) The testimony of Troy Johnson was suspect in several areas. He had a poor memory and relied extensively on documents to refresh his memory. Instead of calling witnesses or offering documents under his control that would have provided objective support to his assertions, he relied exclusively on his own testimony and that of Jeff Cox. Specifically, he did not provide any time cards to support his testimony regarding where Jeff Cox, Justin Savery, and Kevin Blackburn worked the week of December 15-19, 1997, and there was no evidence that he was unable to do so. Likewise, he failed to call a witness from Paychex, his payroll service, to corroborate his assertion that Claimants and his other employees were paid through December 10 on the December 11, 1997 paycheck when the payroll stub contained a statement that read "pay period 11/06/97 to 12/05/97". The forum found these omissions to be significant and does not believe his testimony except where it was corroborated by other credible evidence.

22) The Forum computed civil penalty wages, in accordance with ORS 652.150, as follows for Claimant Johnson: \$12.00 (Claimant Johnson's hourly rate) multiplied by 8 (hours per day) equals \$96.00. This figure of \$96.00 is multiplied by 30 (the maximum number of days for which civil penalty wages continued to accrue) for a total of \$2,880.00 for Claimant Johnson.

23) The Forum computed civil penalty wages, in accordance with ORS 652.150, as follows for Claimant Suby: \$10.00 (Claimant Suby's hourly rate) multiplied by 8 (hours per day) equals \$80.00. This figure of \$80.00 is multiplied by 30 (the maximum number of days for which civil penalty wages continued to accrue) for a total of \$2,400.00 for Claimant Suby.

24) Respondent did not allege in his answer an affirmative defense of financial inability to pay the wages due at the time they accrued; nor did he provide any such evidence for the record.

### **ULTIMATE FINDINGS OF FACT**

1) During all times material herein, Respondent was a person who engaged the personal services of one or more employees in the State of Oregon.

2) Respondent employed Claimants Johnson and Suby in Oregon from mid-November 1997 until on or about December 20, 1997.

3) Each Claimant was paid for all work performed through December 5, 1997.

4) Each Claimant quit Respondent's employment without notice on December 21, 1997.

5) When Claimants quit, Respondent owed Claimant Johnson \$192.00 in unpaid wages and Claimant Suby \$160.00 in unpaid wages.

6) Respondent willfully failed to pay Claimant Johnson \$192.00 and Claimant Suby \$160.00 in earned, due, and payable wages within five days, excluding Saturdays, Sundays, and holidays, after they quit, and more than 30 days have elapsed from the date their wages were due.

## **CONCLUSIONS OF LAW**

1) During all times material herein, Respondent was an employer and Claimants were employees subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.405.

3) ORS 652.140(2) provides:

"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(2) by failing to pay Claimants all wages earned and unpaid within five days, excluding Saturdays, Sundays, and holidays, after Claimants quit employment without notice.

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."

Respondent is liable for civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimants 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 Claimants their earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

### **OPINION**

There are two primary issues in this case. First, what specific days and hours between December 8 and December 20, 1997, did Claimants work? Second, which of these days and hours did Respondent pay them for in Claimants' December 11, 1997, paycheck?

#### **1. What Dates Between 12/8/97 and 12/20/97 did Claimants Work?**

Both wage claimants and Rick Johnson allege they worked exactly the same hours in this time period. It is undisputed that they worked together as a framing team, and the forum finds this allegation to be true. It is also undisputed that they worked three hours on December 8 and five hours on December 9. Claimant Johnson testified that his crew framed a wall and decked a floor on December 15, but the forum concludes that his testimony misstated the date and that this work actually occurred on December 12, the date on which "deck and frame" is recorded in his journal and time card. Accordingly, the forum concludes that the Claimants worked five hours on December 12.

As stated in Finding of Fact #12 (The Merits), the forum also concludes that claimants worked during the week of December 15-19, but the forum is unable to determine the specific dates or hours worked in this time period because of the lack of

credible evidence as to specific dates. Without credible data to rely on, the forum cannot compute or award back wages for this period of time.

## **2. What Hours Between 12/8/97 and 12/20/97 were Claimants Paid For?**

This question hinges on the period of time covered by the December 11 paycheck issued to Claimants. Respondent asserts it covers the period through December 10 and explained that the dates on his own payroll printout and on Claimant Johnson's payroll stub should not be relied on because he telephoned in the hours worked through December 10 on that date. In the absence of testimony from Respondent's payroll service to corroborate this explanation, the forum finds it unconvincing and concludes that Claimants were paid on December 11, 1997, for the payroll period extending from November 6, 1997, through December 5, 1997, the dates stated on Claimant Johnson's payroll stub.

Claimants were not paid for the work they performed on December 8, 9, and 12, 1997.

## **3. Civil Penalty Wages**

Respondent did not allege a financial inability to pay claimants' wages at the time they accrued in his answer. Therefore, both claimants are entitled to civil penalty wages if Respondent "willfully" failed to pay claimants' wages. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

The evidence showed that Respondent acted voluntarily and as a free agent in employing claimants and deciding when and how much to pay them. The evidence also showed that Claimants were paid through December 5, and that Respondent knew, at a

minimum, that Claimants worked on December 8 and 9 and were not paid for the work performed on those dates. Whether or not Respondent actually knew of the exact hours worked by Claimants on those dates is immaterial. It is the employer's duty to maintain an accurate record of an employee's time worked. OAR 839-020-0080. Where the employer does not produce records and an employee provides credible testimony and a record of the number of hours worked, the forum may rely on that evidence as a basis for determining the extent of unpaid wages. *In the Matter of Jewel Schmidt*, 15 BOLI 236 (1997); *In the Matter of Samuel Loshbaugh*, 14 BOLI 224, 229 (1995). The forum concludes that claimants are entitled to civil penalty wages in the amount sought by the Agency.

### **ORDER**

NOW, THEREFORE, as authorized by ORS 652.332, and as a result of Respondent's violations of ORS 652.140(2), the Commissioner of the Bureau of Labor and Industries hereby orders TROY R. JOHNSON 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 Timothy M. Johnson in the amount of THREE THOUSAND SEVENTY-TWO DOLLARS (\$3,072.00), less appropriate lawful deductions, representing \$192.00 in gross earned, unpaid, due, and payable wages; and \$2,880.00 in penalty wages; plus interest at the rate of nine percent per year on the sum of \$192.00 from December 29, 1997, until paid and nine percent interest per year on the sum of \$2,880.00 from January 29, 1998, until paid;

(2) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR Benjamin G. Suby in the amount of TWO THOUSAND FIVE HUNDRED SIXTY DOLLARS (\$2,560.00), less appropriate lawful deductions, representing \$160.00 in gross earned, unpaid, due, and payable wages; and \$2,400.00 in penalty wages; plus interest at the rate of nine percent per year on the sum of \$160.00 from December 29, 1997, until paid and nine percent interest per year on the sum of \$2,400.00 from January 29, 1998, until paid.