

**In the Matter of**

**KILMORE ENTERPRISES, INC.**

**Case No. 58-04**

**Final Order of Commissioner Dan Gardner**

**Issued December 14, 2004**

**SYNOPSIS**

Claimant filed a wage claim alleging \$3,242 in unpaid wages. Respondent, who had ceased doing business, alleged it had insufficient funds to pay the wages earned, due and owing. The Agency determined that Claimant's claim was valid and paid Claimant \$2,160 from the Wage Security Fund. The forum made an independent determination that Claimant worked 203.5 hours for Respondent at the agreed upon rate of \$12 per hour, later entered into an independent contract to perform a painting job for Respondent at the flat rate of \$1,500 after he obtained his contractor license, and had a valid claim of unpaid wages in the amount of \$1,742, for which he was overpaid \$418 from the Wage Security Fund. The forum concluded the Agency was entitled to reimbursement only for the amount that comprised Claimant's valid claim which did not include the flat rate Claimant bid for as an independent contractor. The forum ordered Respondent to repay the Agency \$1,742, plus a 25 percent penalty. Additionally, the forum determined that Respondent's failure to pay Claimant's wages when due was willful and Respondent is liable for penalty wages in the amount of \$2,880, pursuant to ORS 652.150. ORS 652.140; ORS 652.150; ORS 652.332; ORS 652.414; OAR 839-001-0470(1)(b)&(c); OAR 839-001-0500 through 839-001-0520.

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The above-entitled case came on regularly for hearing before Linda A. Lohr, 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 September 28, 2004, in the U.S. Fish & Wildlife conference room, located at 2127 SE Marine Science Drive, Newport, Oregon.

Cynthia L. Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Glen A. Rager ("Claimant") was present throughout the hearing and was not represented by counsel. Lyle Kilthau, president of Kilmore Enterprises, Inc. ("Respondent"), appeared as Respondent's authorized

representative. Edith Moore was present during the entire hearing as Respondent's corporate representative.

In addition to Claimant, the Agency called as witnesses: Kirk G. Smith, general contractor; Jack Hamilton, Respondent client; Marjorie Hamilton, Respondent client; and Newell Enos, BOLI Wage and Hour compliance specialist.

Respondent called no witnesses.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-16;
- b) Agency exhibits A-1 through A-26 (filed with the Agency's case summary).

Respondent did not offer any exhibits.

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 August 15, 2003, Claimant filed a wage claim form in which he stated that Respondent had employed him during the wage claim period of October 21, 2002, through February 25, 2003, and failed to pay him all wages that were due when he quit his employment.

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

3) On January 21, 2004, the Agency issued an Order of Determination numbered 04-0035 ("Order"). In the Order, the Agency alleged Respondent had employed Claimant during the period October 21, 2002, through February 25, 2003, failed to pay Claimant for all hours worked in that period and was liable to Claimant for

\$3,942 in unpaid wages, plus interest. The Agency also alleged Respondent's failure to pay all of Claimant's wages when due was willful and Respondent was liable to Claimant for \$2,880 as penalty wages, plus interest. Additionally, the Agency alleged that it had determined Claimant was entitled to and had received payment from the Wage Security Fund ("Fund") in the amount of \$2,160, and that the Commissioner was entitled to recover from Respondent the disbursed amount, together with a 25 percent penalty (\$540), with interest at the legal rate per annum from February 1, 2004, until paid. The Order gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) On February 18, 2004, Respondent, through its president, Lyle Kilthau, filed an answer and request for hearing. In its answer, Respondent alleged it had "paid all monies due with the exception of \$1,200 owed to [Claimant] from [the] Hamilton job." The Agency subsequently notified Respondent that the answer was insufficient because it was not filed by counsel or an authorized representative as required by statute. On March 11, 2004, the Agency received written confirmation that Lyle Kilthau was authorized to represent Respondent in the contested case proceeding.

5) On June 9, 2004, the Agency requested a hearing. On June 15, 2004, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9 a.m. on September 28, 2004. With the Notice of Hearing, the forum included copies of the Order of Determination, a "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES" and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

6) On August 12, 2004, the ALJ ordered the Agency and Respondent each to submit a case summary that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of

any agreed or stipulated facts; and a brief statement of the elements of the claim and any wage and penalty calculations (for the Agency only). The ALJ ordered the participants to submit their case summaries by September 17, 2004, and notified them of the possible sanctions for failure to comply with the case summary order.

7) On August 17, 2004, the Hearings Unit received the Agency's request for an extension of time to file case summaries. Respondent did not respond to the request and the forum extended the time for filing case summaries to September 21, 2004.

8) On September 1, 2004, the Agency moved to amend the Order of Determination to add Lyle Kilthau as a respondent because it had "recently received information that Mr. Kilthu [sic] [was] an employer within the meaning of ORS 653.310 and should be added as a Respondent." Respondent did not file a response to the motion. On September 13, 2004, the forum denied the Agency's motion based on its failure to allege sufficient facts on which the forum could find the amendment should be allowed.

9) On September 21, 2004, the Agency timely filed a case summary. Respondent did not file a case summary.

10) On September 21, 2004, the Agency filed a second motion to amend the Order of Determination to reduce the amount of wages sought by \$700. The Agency stated that "it has come to light that Respondent paid the Wage Claimant \$700, in cash, on or about December 15, 2003, and Respondent should be credited with having paid that amount." On September 21, 2004, the forum granted the Agency's motion and amended the Order of Determination by interlineation to reflect the \$700 reduction and change the amount sought to \$3,242.

11) On September 21, 2004, the Agency filed addenda to its case summary.

12) On September 22, 2004, the Agency filed a third motion to amend the Order of Determination to change the amount of penalty wages sought from \$2,880 to \$4,356, based on the Agency's revised penalty wage computation in accordance with OAR 839-001-0470(1)(e). Through Kilthau, Respondent timely filed its response to the Agency's motion before the start of hearing on September 28, 2004. In its response, Respondent objected to the "way someone computed the hours & flat rate." Respondent also stated that Claimant was paid \$12 per hour, in cash, for the work he performed "with the exception of the Hamilton job which was never completed." Respondent also stated that Claimant "contracted to do a job at the Ridge for \$1,500 flat rate which he was paid." After considering the Agency's motion and Respondent's response, the forum granted the motion after the hearing convened on September 28, 2004.

13) At the start of hearing, the ALJ verbally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

14) During the hearing, Respondent did not present any evidence other than the testimony elicited on cross-examination.

15) The ALJ issued a proposed order on November 10, 2004, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither Respondent nor the Agency filed exceptions.

#### **FINDINGS OF FACT – THE MERITS**

1) At all times material, Respondent was an Oregon corporation and was licensed by the Oregon Construction Contractor Board ("CCB") as a general contractor.

2) At all times material, Lyle Kilthau was Respondent's president.

3) Sometime prior to or during the summer of 2002, Respondent, through Kilthau, entered into a subcontract with Kirk Smith of Kirk Smith Painting and Drywall to

paint eight units of the Spyglass Ridge apartment complex ("Ridge project"). Smith hired Claimant to work on the Ridge project and paid him \$10 per hour to paint apartments. The painting project entailed more work than he anticipated for the six week project and, with Kilthau's agreement, Smith subcontracted with James Norman Construction to complete the remaining four units. Claimant worked for Smith on the Ridge project through the end of July 2002. After that, he worked "off and on" for Smith on different projects.

4) In early September 2002, Respondent, through Kilthau, agreed to pay Claimant \$12 per hour to perform labor on some of Respondent's construction projects.

5) On or about August 1, 2002, Respondent entered into a contract with Jack and Marjorie Hamilton to build an addition to their residence ("the Surfland project"). Claimant performed labor on the contract and his duties, which varied from day to day, included painting, "sweeping up," "tearing out" sheet rock, digging holes, and "putting up" siding. Kilthau was on the job site almost every day and the Hamiltons observed him instructing Claimant on what to do, telling Claimant what time to show up the next day, and showing Claimant how to operate a "chop saw." Claimant used his own hammer, but Respondent provided the rest of the equipment and machinery used on the job.

6) The Surfland project was not completed. The contract ended by mutual agreement at the end of November 2002, due to a pending CCB investigation. The Hamiltons paid Respondent for all of the work performed through November 2002.

7) Claimant prepared a log that showed he worked 119 hours on the Surfland project between October 21 and November 24, 2002. Respondent did not pay Claimant for any of the work he performed during that period. Claimant worked 22 days and averaged 5.4 hours per day on the Surfland project.

8) Between November 25 and December 23, 2002, Claimant worked for Respondent installing a metal roof on Randy and Linda Harmer's rental house in Newport. Claimant's log shows he worked eight days and a total of 29.5 hours on the Harmer rental, averaging 3.7 work hours per day. Between January 7 and 14, 2003, Claimant also worked on the Harmer residence, installing a deck, siding, and eaves. His log shows he worked 32.5 hours over a six day period, averaging 5.4 hour work days on the Harmer residence.

9) In mid-December 2002, Respondent paid Claimant \$700, in cash, as wages.

10) In early January 2003, Claimant obtained a contractor license through the Oregon CCB. By early February 2003, Claimant had started his own painting and construction business.

11) Following several lawsuits involving the Ridge project, Kilthau asked Claimant what he would charge for repainting the four units James Norman Construction had painted at the Spyglass Ridge apartment complex during the summer 2002. Claimant told Kilthau he would do the job for \$1,500. Based on their mutual agreement, Claimant repainted four units at the Spyglass Ridge apartment complex between January 20 and 28, 2003. In his log, Claimant recorded that he worked eight hours per day for seven days. He worked eight hour days because he was "on [his] own time."

12) From February 11 through February 25, 2003, Claimant worked as a laborer for Respondent on the "Otis deck project" at the agreed upon rate of \$12 per hour. Claimant's log shows he worked 22.5 hours during a four day period, averaging 5.6 hours per day.

13) Respondent did not ask Claimant to fill out any time sheets. Claimant wrote down his hours on a sheet of paper that showed his work hours by date and project.

14) After the Otis deck project, Claimant did not work as a laborer for Respondent. Claimant asked for his wages, but Kilthau “never made an effort” to pay him.

15) Excluding work on the Spyglass Ridge painting project, Claimant worked 203.5 hours at the rate of \$12 per hour from October 21, 2002, through February 25, 2003. He earned a total of \$2,442, but was paid only \$700 for those hours as of the hearing date. Respondent had not paid Claimant for all of the hours he worked at the time Claimant quit his employment, leaving an amount still due and owing of \$1,742.

16) Respondent did not pay Claimant \$1,500, as agreed, for the paint job Claimant completed on the Spyglass Ridge apartment complex.

17) On August 9, 2003, Claimant filed a wage claim against Respondent because he was not paid for all of the hours he “worked and was never paid for services.” On the wage claim form, Claimant stated he was owed \$3,242 for “framing of an addition and painting of apts.”

18) On August 21, 2003, the Agency notified Respondent that Claimant had filed a wage claim with BOLI alleging Respondent owed “[u]npaid regular wages of \$3,242 at the rate of \$12 per hour and \$1,500 per job from October 31, 2002 to February 25, 2003.”

19) In a response dated August 25, 2003, Kilthau, on Respondent’s behalf, stated that Respondent had “no employees,” but that he had “hired” Claimant on a “piece rate” basis. He also stated Respondent owed Claimant \$1,200, but that Claimant

had “elected to keep scaffolding in lieu of money owed.” Kilthau represented that Respondent was still operating as a business in August 2003.

20) On September 22, 2003, Agency compliance specialist Enos sent Respondent a letter requesting records, including time cards, proof of payment, copies of any contracts or wage agreements between Respondent and Claimant, copies of any W-2 or 1099 forms, copies of pay stubs or wage statements, and other documentation pertaining to Claimant’s employment. Respondent did not respond to Enos’s request.

21) In late September 2003, Kilthau advised Enos by telephone that Respondent was no longer in business. Kilthau also told Enos that he had paid Claimant in cash for some of the work he performed, still owed Claimant \$1,200, and had no time cards or any other records pertaining to Claimant. In November 2003, Kilthau provided Enos with a completed “Employer Information” form in which he stated that Respondent’s business had ceased operating in “July or August” and had no assets.

22) Enos found that Respondent’s CCB bond had lapsed and the business had closed as of September 30, 2003. When his investigation concluded, Enos determined that Claimant was Respondent’s employee, was not paid for all of the hours he worked for Respondent, and was owed total wages of \$3,942. Enos also determined that Respondent was no longer in business and had no assets.

23) Based on his determination, Enos recommended that Claimant’s wages be paid from the Wage Security Fund (“Fund”). Subsequently, the Agency paid Claimant \$2,160 from the Fund.

24) Claimant’s testimony was generally credible and significantly bolstered by Jack and Marjorie Hamilton’s credible testimony. Although he was somewhat evasive about the agreement he had with Respondent to complete the Spyglass Ridge

apartment painting project, Claimant acknowledged and the forum finds as fact that (1) he determined the flat rate he charged Respondent for completing the project, (2) he determined the number of hours he worked each day on the project, and (3) he was working under his recently obtained CCB license and starting his own business during the period he worked on the project. Additionally, the forum accepts Claimant's record of his work hours because it was consistent with the Hamiltons' observations and Respondent did not refute the hours claimed. The forum credits Claimant's testimony in its entirety.

25) Both Jack and Marjorie Hamilton testified credibly. They did not exhibit any bias toward or against Respondent or Claimant and were not impeached in any way. They were closely involved in the remodeling project involving their home and had firsthand knowledge of key facts. The forum credited the testimony of each in its entirety.

26) All of the other witnesses testified credibly.

27) Respondent did not plead or show a financial inability to pay Claimant's wages at the time the wages accrued.

#### **ULTIMATE FINDINGS OF FACT**

1) At all times material, Respondent was an Oregon corporation that engaged the personal services of one or more persons in Oregon, including Claimant, who was Respondent's employee.

2) Claimant worked as a laborer on various projects for Respondent between October 21, 2002 and February 25, 2003, at the agreed wage rate of \$12 per hour.

3) From October 21, 2002 through February 25, 2003, Claimant worked 203.5 hours as Respondent's employee. At the time Claimant left Respondent's employment, Respondent owed him total wages of \$2,442 for these hours and to date

has paid only \$700, leaving unpaid wages of \$1,742. At the time of hearing, Respondent still had not paid any of the remaining unpaid wages.

4) Claimant filed a wage claim. Written notice of nonpayment of wages was sent to Respondent on Claimant's behalf on August 21, 2003. After investigation, the Agency determined that Claimant's claim was valid, Respondent had ceased doing business and was without sufficient assets to pay the wage claim, and Claimant's wage claim could not otherwise be fully and promptly paid.

5) The Agency paid Claimant \$2,160 from the Wage Security Fund based on the Agency's investigation and determination, which exceeded the amount Respondent owed to Claimant.

6) Claimant contracted with Respondent to complete a project that a previous contractor had failed to properly complete and, upon completion, Respondent failed to pay Claimant the contract amount of \$1,500.

7) Respondent willfully failed to pay Claimant wages owed to him in the amount of \$1,742 and is liable for penalty wages.

8) Penalty wages, computed in accordance with ORS 652.150 and OAR 839-001-0470(1)(c), equal \$2,880 ( $\$12 \text{ per hour} \times 8 \text{ hours per day} = \$96 \text{ per day} \times 30 \text{ days} = \$2,880$ ).

#### **CONCLUSIONS OF LAW**

1) At times material herein, Respondent was an Oregon employer who engaged the personal services of one or more employees, including Claimant. ORS 652.310.

2) The actions, inaction, statements, and motivations of Lyle Kilthau, Respondent's president, are properly imputed to Respondent.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent. ORS 652.310 to ORS 652.332; ORS 652.409 to ORS 652.414.

4) Respondent violated ORS 652.140(2) by failing to pay Claimant \$1,742 in earned and unpaid wages after he left Respondent's employment.

5) Respondent is liable for \$2,880 in penalty wages under ORS 652.150 for willfully failing to pay all wages or compensation due Claimant when his employment terminated, as provided in ORS 652.140(2).

6) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to reimburse the Wage Security Fund in the amount of \$1,742, plus 25 percent thereof, or \$435.50, plus interest on both sums until paid. ORS 652.414.

### **OPINION**

The Agency alleged Respondent employed Claimant between October 21, 2002, and February 25, 2003, and willfully failed to pay him all wages earned and due when Claimant left his employment. The Agency also alleged that the Wage Security Fund ("Fund") paid Claimant's unpaid wages to the extent allowed under ORS 652.414, and it seeks recovery of the full amount the Fund disbursed, along with payment of the remaining amount of unpaid wages owed to Claimant. According to the Agency, Claimant earned \$3,242<sup>i</sup> during the wage claim period at the agreed rate of \$12 per hour and a flat rate of \$1,500 for a commercial paint job on four apartment units. Of the amount alleged, the Fund paid Claimant \$2,160 and the Agency seeks an additional 25 per cent as a penalty, pursuant to ORS 652.414(3). Respondent admits it owes Claimant \$1,200 for the "Hamilton job,"<sup>iii</sup> but asserts that it otherwise paid Claimant "all

monies due” at the rate of \$12 per hour. Respondent further asserts Claimant was paid “in full” for the job he “contracted” to do for the flat rate of \$1,500.

### **UNPAID WAGES – ORS 652.140**

The Agency was required to 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 which he was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230, 262-63 (2000).

#### **A. Employment Relationship**

The Agency at all times has the burden of proving Respondent was an employer and Claimant was an employee as defined by the applicable statute.<sup>iii</sup>

ORS 652.310(1) defines “employer” as:

“[A]ny person who in this state, directly or through an agent, engages personal services of one or more employees \* \* \*.”

ORS 652.310(2) defines “employee” as:

“[A]ny individual who otherwise than as copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, **based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled.**” (Emphasis added)

Here, the Agency presented a preponderance of credible, unrefuted evidence that shows Claimant rendered personal services in this state to Respondent in exchange for a fixed rate of \$12 per hour on the Surfland project, the Harmer residence and rental, and the Otis deck project. Moreover, Respondent admitted that Claimant rendered personal services at the \$12 hourly rate. However, Respondent argued that Claimant was not an employee when he worked on the Spyglass Ridge apartment complex paint job for the flat rate of \$1,500, as the Agency contended, but instead was

working independently under his own contractor license to complete a project a previous contractor had failed to properly complete.

This forum has held that where an employment relationship previously has been established, as it was in this case, the burden is on the employer to prove any change in the status of that relationship. *In the Matter of Rodrigo Ayala Ochoa*, 25 BOLI 12, 40 (2003), *revised final order on reconsideration*; see also *In the Matter of Superior Forest Products*, 4 BOLI 223, 231 (1984) (“Where a wage claimant has been a regular, hourly employee, and an employer seeks to deny liability for wages by asserting that at a certain point during employment the claimant’s status changed from employee to either independent contractor or partner, and the claimant disputes this, the employer has the burden of proving such change in status.”). To carry its burden in this case, Respondent was required to prove Claimant was an independent contractor when he performed the Spyglass Ridge paint job.

The test for distinguishing an employee from an independent contractor requires full inquiry into the true “economic reality” of the employment relationship based on a particularized inquiry into the facts of each case. *Ochoa* at 41-42, *citing In the Matter of Geoffrey Enterprises, Inc.*, 15 BOLI 148, 164 (1996) and *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947). This forum measures the degree of economic dependency in any given case by analyzing the facts presented in light of the following factors and no one factor is dispositive: (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. *In the Matter of Ann L. Swanger*, 19 BOLI 42, 53-55 (1999).

In this case, Respondent elicited testimony from Claimant on cross-examination that established the following: Respondent asked for and received a \$1,500 bid from Claimant to complete work on a commercial project left undone by another subcontractor; Claimant worked on the project “on his own time,” in contrast to working specific hours Respondent established on previous jobs; Claimant obtained a contractor license in early January 2003 prior to performing the project and began his own contracting business soon thereafter; and, except for four days in February 2003, ceased performing labor for Respondent at a fixed hourly rate.

The forum finds from these facts that a reasonable inference may be drawn that Claimant was no longer economically dependent on Respondent when he agreed to take on a commercial painting job for a flat fee. First, evidence shows Respondent did not supervise or control Claimant’s work schedule or pay rate on the January 2003 Spyglass Ridge paint job as it did on the hourly residential projects. In fact, Claimant acknowledged that he was on his “own time” when he worked on the paint job and that he chose to work full eight hour days rather than the shorter work schedule Respondent dictated on the residential projects. Claimant admitted that he, not Respondent, determined the rate he would “charge” to do the work and the record as a whole shows Respondent asked for and accepted Claimant’s “bid” on the Spyglass Ridge paint job.

Second, evidence shows Respondent had previously subcontracted the Spyglass Ridge paint job to a contractor who failed to properly complete the job. In order to meet its original obligation on the commercial project, Respondent either had to complete the job with its own employees and equipment or engage another contractor to finish the project. Here, instead of directing Claimant to work on the job for the previously established hourly rate, Respondent agreed to pay the flat rate Claimant proposed during the time Claimant was starting his own contracting business. There is

no evidence that Respondent purposely changed Claimant's employment status from hourly employee to independent contractor to later deny liability for "wages" Claimant purportedly earned during that period. The Agency did not argue and the forum finds no evidence that the flat rate Respondent agreed to pay was for services "based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled" as required by statute. See ORS 652.310(2). Instead, evidence shows the flat rate was for a single, temporary enterprise that Claimant had the requisite skills and credentials to perform. Moreover, he completed the job in 56 hours and averaged \$27 per hour - considerably more than the \$12 per hour he would have earned had Respondent performed the contract and used Claimant's services on an hourly basis. The forum infers from those facts that when Respondent accepted Claimant's bid to perform the job for \$1,500 on his own time, the opportunity for profit and loss shifted to Claimant who had to depend on his own initiative, judgment, and foresight to complete the job in a manner that would result in such a profit.

Finally, while Claimant regularly performed hourly work for Respondent in the months preceding the Spyglass Ridge paint job, evidence shows he ceased working for Respondent after he launched his own contracting business and made his services available to the general public. Thus, the forum finds Claimant was transitioning from wage earner to entrepreneur when he agreed to do the Spyglass Ridge painting job and was no longer dependent upon Respondent for the opportunity to render services.

Consequently, after examining the totality of circumstances in this case, the forum concludes that as a matter of economic reality Claimant was Respondent's employee between October 21, 2002, and February 25, 2003, except for the period

beginning January 20 through January 28, 2003, when he contracted with Respondent to complete the Spyglass Ridge painting project.

**B. Agreed Upon Rate**

In its response to the Agency's motion to amend, Respondent, through its president, asserted that Claimant was paid \$12 per hour for the work he performed "with the exception of the Hamilton job which was never completed." The forum deems the statement an admission that Claimant worked for an agreed upon rate of \$12 per hour for the work he performed on the Surfland project, Harmer residence and rental, and Otis deck project.

**C. Work Performed**

There is no dispute that Claimant performed work for which he was not paid. The only disagreement between Claimant and Respondent is the precise amount owed.

**D. Amount And Extent Of Work Performed**

ORS 653.045 requires Respondent 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. Where, as in this case, the employer produces no records, the forum may rely on evidence produced by the Agency from which "a just and reasonable inference may be drawn." *In the Matter of Majestic Construction*, 19 BOLI 59, 58 (1999). A claimant's credible testimony may be sufficient evidence. *In the Matter of Graciela Vargas*, 16 BOLI 246 (1998).

Here, Respondent kept no record of the days or hours Claimant worked. Claimant credibly testified that he recorded the dates and hours he worked on each of Respondent's projects. His testimony was bolstered by other credible witnesses and,

despite the opportunity to do so, Respondent produced no evidence to “negative the reasonableness of the inference to be drawn from [Claimant’s] evidence.” *Id.* at 255, quoting *Mt. Clemens Pottery Co.*, 328 US at 687-88. The forum concludes, therefore, that Claimant performed work for which he was not properly compensated and the forum may rely on the credible evidence he produced showing the hours he worked as a matter of just and reasonable inference. Claimant’s testimony established he worked a total of 203.5 hours for Respondent and earned a total of \$2,442, based on the agreed upon rate of \$12 per hour. Respondent paid \$700 of that amount and owed Claimant \$1,742 in unpaid wages when Claimant left Respondent’s employment.<sup>iv</sup>

#### **WAGE SECURITY FUND REIMBURSEMENT – ORS 652.414**

In cases involving payouts from the Fund, 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) the Agency has paid out money from the Fund and seeks to recover that money, there is a rebuttable presumption that the Agency’s determination is valid for the sums actually paid out. *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 260 (1999). In this case, Respondent rebutted the presumption by successfully challenging Claimant’s employment status during part of the wage claim period. The effect was to reduce Respondent’s liability to the Fund by \$1,500, which, absent evidence to the contrary, is the amount Respondent owed Claimant for completing work on the Spyglass Ridge painting job pursuant to their oral contract. The Agency otherwise established that it (1) made a determination on the validity of Claimant’s claim; (2) based its determination on the information available at the time; and (3) paid out money from the Fund and seeks to recover that money. The forum has made an independent determination that Respondent’s liability to the Fund is limited to the amount disbursed that equals the amount Respondent owed Claimant

when he left Respondent's employ. Consequently, Respondent is liable to the Fund for \$1,742, plus an additional 25 percent penalty, or \$435.50, as provided by statute.

## **PENALTY WAGES**

In its Order of Determination, the Agency alleged Respondent willfully failed to pay Claimant the wages due after he left his employment and that 30 days had elapsed since the wages became due and owing, pursuant to ORS 652.140. 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. *In the Matter of Usra Vargas*, 22 BOLI 212, 222 (2001).

Respondent did not dispute that Claimant performed work as a laborer on certain projects for \$12 per hour. In fact, Respondent, through Kilthau, claimed to have paid Claimant in full for his contract work, but readily admitted it still owed Claimant \$1,200 for his labor on the Surfland project. Respondent did not allege it was financially unable to pay Claimant's wages at the time his wages accrued. Moreover, a preponderance of evidence shows Respondent did not cease doing business until several months after Claimant's wages accrued. Respondent did not present any evidence that explains or excuses its failure to pay Claimant all of the wages due when he left Respondent's employ. Based on those facts, the forum infers Respondent voluntarily and as a free agent failed to pay Claimant all of the wages earned between October 21, 2002, and February 25, 2003, for the work he performed on the Surfland project, Harmer residence and rental, and Otis deck project as Respondent's employee. Respondent acted willfully and is liable for penalty wages under ORS 652.150.

In its amended Order of Determination, the Agency sought \$4,356 as a result of a revised penalty wage computation, computed pursuant to OAR 839-001-0470(1)(e),

based on a presumption that Claimant was Respondent's employee when he contracted to complete the Spyglass Ridge painting project. Since the forum has determined otherwise, penalty wages are assessed and calculated by multiplying Claimant's \$12 hourly rate by 8 hours per day multiplied by 30 days, in accordance with ORS 652.150 and OAR 839-001-0470(1)(b)&(c). Consequently, Respondent is liable for \$2,880 in penalty wages.

### ORDER

NOW, THEREFORE, as authorized by ORS 652.414, and as payment of the amount paid from the Wage Security Fund as a result of its violations of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders **Kilmore Enterprises, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 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 TWO THOUSAND ONE HUNDRED SEVENTY SEVEN DOLLARS AND FIFTY CENTS (\$2,177.50), representing \$1,742 of the \$2,160 paid to Glen A. Rager from the Wage Security Fund and a 25 percent penalty of \$435.50 on that sum, plus interest at the legal rate on the sum of \$2,177.50 from February 1, 2004, until paid; and

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Glen A. Rager, in the amount of TWO THOUSAND EIGHT HUNDRED AND EIGHTY DOLLARS (\$2,880), representing \$2,880 in penalty wages, plus interest at the legal rate on the sum of \$2,880 from May 1, 2003, until paid.

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<sup>i</sup> Prior to hearing, the Agency amended the charging document to decrease the amount of wages earned and unpaid, from \$3,942 to \$3242, based on its discovery that Claimant was paid wages totaling \$700, in cash, during the wage claim period.

<sup>ii</sup> Unless referred to in a quotation, the "Hamilton job" is otherwise referred to as the "Surfland project," which is what it was called throughout the hearing.

<sup>iii</sup> This forum long ago adopted and has since consistently used the definitions of "employer" and "employee" in ORS 652.310 for the purposes of interpreting ORS 652.140 and ORS 652.150. See *In the Matter of Anna Pache*, 13 BOLI 249, 267 (1994); see also *In the Matter of Crystal Heart Books Co.*, 12 BOLI 33, 41 (1993) (relying on *Lamy v. Jack Jarvis & Co., Inc.*, 282 Or 307, 574 P2d 1107, 1111 (1978)).

<sup>iv</sup> Other than Kilthau's assertion on Respondent's behalf, there is no evidence Claimant was paid for the work he performed as an independent contractor. However, Claimant must seek his remedy for Respondent's failure to pay the contracted amount in a private action in a different forum.