

**In the Matter of**

**RICHARD R. MABE dba DICK MABE TRUCKING  
and dba D.M.T.C.**

**Case No. 03-00**

**January 13, 2000**

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**SYNOPSIS**

Respondent employed Claimant as a log truck driver and failed to pay Claimant all wages due upon termination, in violation of ORS 652.140(1). 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(1), 652.150.

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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 December 2, 1999, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Linda Lohr, an employee of the Agency. Respondent Richard R. Mabe was present and was not represented by counsel during the hearing. An Oregon State Police officer was also present throughout the hearing to provide security for the participants.

The Agency called the following witnesses: James B. Bowers, Claimant; and Irene Zentner, Wage & Hour Division Compliance Specialist. Respondent called himself as a witness.

The forum received into evidence:

a) Administrative Exhibits X-1 through X-5 (submitted or generated prior to the hearing).

b) Agency exhibits A-1 through A-8 (submitted prior to hearing with the Agency's case summary).

c) Respondent's Exhibit R-1 (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 January 22, 1999, Claimant filed a wage claim with the Agency. He alleged that Respondent 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 14, 1999, the Agency served Order of Determination No. 99-0245 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 \$447.50 in unpaid wages and \$3,120.00 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 30, 1999, Respondent filed a request for hearing.

6) On August 13, 1999, the Agency sent Respondent a "Notice of Insufficient Answer to Order of Determination" in which Respondent was advised that his "**Answer must include an admission or denial of each fact alleged in the Order and a statement of each relevant defense to the allegations.**" (Emphasis in original).

7) On August 31, 1999, Respondent filed an answer to the Order of Determination and requested a hearing. In his answer, Respondent stated he had withheld money from Claimant's final paycheck because of expenses to repair Respondent's fuel tank that Claimant had damaged.

8) On September 28, 1999, the Agency filed a "BOLI Request for Hearing" with the forum.

9) On October 5, 1999, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and the Claimant stating the time and place of the hearing as December 2, 1999, at 9:00 a.m., in Portland, Oregon. Together with the Notice of Hearing, the forum sent 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.

10) On November 9, 1999, 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 also sent Respondent a "Case Summary Form" designed to assist *pro se* Respondents in complying with the forum's case summary orders. The forum ordered the participants to submit case summaries by November 24, 1999, and notified them of the possible sanctions for failure to comply with the case summary order.

11) The Agency filed its case summary, with attached exhibits, on November 23, 1999. Respondent did not file a case summary.

12) On December 1, 1999, the Agency filed a letter with the Hearings Unit advising that security had been arranged for the hearing based on advice that there was “a possibility for disorder at the hearing.”

13) 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.

14) The evidentiary record of the hearing closed on December 2, 1999.

15) The ALJ issued a proposed order on December 20, 1999, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

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

1) During all times material herein, Richard R. Mabe did business in the state of Oregon under the assumed business names of Dick Mabe Trucking and D. M. T. C.

2) On or about January 5, 1999, the Woodburn office of the Oregon State Employment Department referred Claimant to a log truck driving job with Respondent.

3) On or about January 5, 1999, Claimant met with Respondent and took a driving test in Respondent’s log truck. At the conclusion of the driving test, Respondent agreed to hire Claimant.

4) Respondent and Claimant agreed that Claimant would be paid \$65.00 a load and would be expected to haul two loads of logs per day.

5) Claimant began working for Respondent on January 6, 1999, and worked for Respondent through January 15, 1999.

6) Complainant reported each morning for work at Respondent’s shop, located between Molalla and Silverton, Oregon, then drove Respondent’s log truck from a location in the state of Washington to Willamina, Oregon.

7) Claimant hauled 13 loads of logs during his employment with Respondent, earning a total of \$845.00 in gross wages.

8) It took Claimant five hours to haul one load. Claimant worked a total of 65 hours while employed by Respondent.

9) Respondent discharged Claimant on January 15, 1999.

10) At the time of Claimant's termination, Respondent owed Claimant \$845.00 in unpaid wages.

11) On February 11, 1999, the Agency sent a "Notice of Wage Claim" to Respondent notifying him of Claimant's claim for \$845.00 in wages and the basis for the claim. The Agency requested that Respondent remit a check for \$845.00 if Claimant's claim was "correct." With the Notice, the Agency enclosed an "Employer Response" form for Respondent to complete and return if he disputed the claim.

12) On February 21, 1999, Respondent responded to the Agency's Notice of Wage Claim by submitting the following: (a) a completed "Employer Response" form; (b) a check made out to "Jim Bowers" in the amount of \$397.50; and (c) a statement in which he itemized Claimant's wages earned and deductions taken from those earnings.

13) In his two-page "Employer Response" form, Respondent acknowledged that \$845.00 was the correct amount of wages earned by Claimant, but explained he had deducted \$447.50 "to repair damages to my equipment, incurred by the Claimant." Respondent also noted "I do not reward a driver for damages to my equipment, due to carelessness." Respondent signed and dated the "Employer Response" form at the bottom of the second page, directly beneath a printed statement that read as follows: "I HEREBY CERTIFY THAT THIS IS A COMPLETE, TRUE, AND ACCURATE STATEMENT OF THE FACTS RELATING TO THE CLAIM TO THE BEST OF MY KNOWLEDGE AND BELIEF."

14) Respondent's itemization of Claimant's wages earned and deductions taken from those earnings included the following text:

"Wages & Deductions for truck driving (temporary services) from 1/6/99 to 1/15/99.

"13 loads hauled @ 65.00 per load = \$845.00

"Deductions

"1. 4½ hrs. labor & time to Remove & Repair damaged fuel tank on truck (Driver Carelessness) @ \$55.00 per hour = \$247.50

"2. 1 used tail lite bar for replacement on truck (Driver Carelessness) \$200.00

"Check enclosed, Amount due \$397.50."

15) No evidence was presented to show that: (a) Respondent was required to deduct Claimant's wages by law; (b) Claimant authorized the deductions in writing; (c) The deduction was authorized by a collective bargaining agreement to which Respondent was a party; or (d) The deductions were to repay a loan.

16) The forum computed civil penalty wages as follows for Claimant, in accordance with ORS 652.150: \$845.00 divided by 65 hours worked equals \$13.00 per hour; \$13.00 per hour multiplied by 8 hours equals \$104.00 per day; \$104.00 multiplied by 30 days equals \$3,120.00.

17) Claimant's testimony was consistent with prior statements on his wage claim. He responded to questions in a straightforward, direct manner and did not attempt to embellish the facts surrounding the circumstances of his employment with Respondent. With one exception, the forum has credited his testimony in its entirety. That discrepancy is the statement on his wage claim form that he started work on January 6, compared with the note on the calendar he filled out in conjunction with his wage claim that states he worked five hours on January 5, hauling one load. However, the forum has credited him with working the full 65 hours and hauling the full 13 loads shown on his calendar based on Respondent's admissions.

18) Zentner testified in an objective, straightforward manner. Her testimony has been credited in its entirety.

19) Respondent's testimony was only partly credible. His testimony about the extent of alleged damage to his truck was exaggerated, leading the forum to believe that he actually paid out \$447.50 in cash to repair his truck. Under cross-examination, he acknowledged that he had not paid out any money for labor, but had charged Claimant \$55.00 per hour for his own time when deducting the \$447.50 from Complainant's wages. Respondent's claim that Claimant wasn't his employee, based on the fact that Respondent did not withhold taxes from his check, was disingenuous. He claimed that he does not hire employees, then testified that he had no employees until January 1999, and that he "will never" hire employees again. His general attitude throughout the hearing was that Oregon's wage and hour laws did not apply to him. As a result, Respondent's testimony has been credited only where it was corroborated by other credible evidence in the record.

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

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

2) Respondent employed Claimant in Oregon from January 6, 1999, through January 15, 1999.

3) Claimant earned \$845.00 in wages during his employment with Respondent.

4) Respondent discharged Claimant on January 15, 1999.

5) At the time of Claimant's discharge, Respondent owed Claimant \$845.00 in unpaid wages.

6) On February 21, 1999, Respondent sent a check for \$397.50 to the Agency in payment of Claimant's wages, deducting \$447.50 from Claimant's earned wages based on damages Claimant had allegedly caused to Respondent's truck.

7) This deduction was not authorized in writing by Claimant and was not for Claimant's benefit.

8) Respondent willfully failed to pay Claimant \$845.00 in earned, due, and payable wages no later than January 18, 1999, the first business day Respondent discharged Claimant, and more than 30 days elapsed from the date Claimant's wages were due and the date Respondent sent his check for \$397.50 in payment of Claimant's wages to BOLI.

#### **CONCLUSIONS OF LAW**

1) During all times material herein, Richard R. Mabe, was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405. During all times material herein, Respondent Richard R. Mabe employed Claimant.

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) ORS 652.140(1) provides:

"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."

Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid no later than January 18, 1999, the end of the first business day after Respondent discharged Claimant. Those wages amount to \$845.00.

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 \$3,120.00 in civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(1).

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**

#### **EARNED, UNPAID, DUE AND PAYABLE WAGES**

The Agency alleged, and Respondent admitted that Claimant earned \$845.00 while employed by Respondent. The Agency seeks to recover \$447.50 that Respondent deducted from Claimant’s wages and has not yet paid. The only issue is whether Respondent was entitled to make that deduction.

Oregon law in this matter is set forth in ORS 652.610. In pertinent part, that statute reads as follows:

“(3) No employer may withhold, deduct or divert any portion of an employee’s wages unless:

“(a) The employer is required to do so by law;

“(b) The deductions are authorized in writing by the employee, are for the employee’s benefit, and are recorded in the employer’s books;

“(c) The employee has voluntarily signed an authorization for a deduction for any other item, provided that the ultimate recipient of the

money withheld is not the employer, and that such deduction is recorded in the employer's books;

“(d) The deduction is authorized by a collective bargaining agreement to which the employer is a party[.]”

ORS 652.610 severely limits the circumstances under which an employer may take deductions from an employee's wages. None of those circumstances are applicable here. Consequently, Claimant is due the remaining \$447.50 in unpaid wages sought in the Order of Determination.

### **PENALTY WAGES**

An award of penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion or moral delinquency, but only requires that 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. *In the Matter of Leslie Elmer DeHart*, 18 BOLI 199, 209 (1999), *quoting Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent knew the exact amount of wages owed to Claimant, but intentionally refused to pay any of it until the Agency sent him a demand letter. In response, he sent a partial payment more than 30 days after Claimant's wages were due, intentionally making \$447.50 in illegal deductions. There is no evidence that Respondent acted other than voluntarily or as a free agent. The forum concludes that Respondent acted willfully and assesses penalty wages in the amount of \$3,120.00, the amount sought in the Order of Determination. This figure is computed by multiplying \$13.00 per hour x 8 hours per day x 30 days, pursuant to ORS 652.150 and OAR 839-001-0470.

### **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(1), **RICHARD R. MABE** is hereby ordered 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 trust for James B. Bowers in the amount of THREE THOUSAND FIVE HUNDRED SIXTY SEVEN DOLLARS AND FIFTY CENTS, less appropriate lawful deductions, representing \$447.50 in gross earned, unpaid, due, and payable wages and \$3,120.00 in penalty wages, plus interest at the legal rate on the sum of \$447.50 from January 18, 1999, until paid and interest at the legal rate on the sum of \$3,120.00 from February 17, 1999, until paid.