

**In the Matter of**

**PAUL ANDREW FLAGG**

**dba Paul Flagg Construction and The House Doctor**

**Case No. 67-02**

**Final Order of the Commissioner Jack Roberts**

**Issued January 3, 2003**

**SYNOPSIS**

Where Respondent contracted with a homeowner to provide labor and materials on a residential construction project and agreed to pay Claimant \$15 per hour for performing labor on the contract, the forum found that Claimant was an employee covered by state wage and hour provisions. Additionally, where Respondent admitted Claimant worked 173 hours and Claimant acknowledged receiving \$2,560, the forum ordered Respondent to pay Claimant \$35 in due and unpaid wages. Respondent's failure to pay was willful and the forum ordered him to pay \$3,600 in civil penalty wages. ORS 652.140(2); *former* ORS 652.150.

---

The above-entitled case came on regularly for hearing before Linda A. Lohr, 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 November 14, 2002, in the Adult and Family Services Conference Room, located at 4670 East Third, Tillamook, Oregon.

Peter McSwain, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Raymon E. Beasley ("Claimant") was present by telephone throughout the hearing and was not represented by counsel. Paul Andrew Flagg ("Respondent") was present throughout the hearing and was not represented by counsel.

The Agency called Claimant and Arthur Livermore as witnesses (both telephonic).

Respondent called DeElda Kay Childs, Arthur Livermore (telephonic), and himself as witnesses.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-4;
- b) Agency exhibits A-1 through A-5 (filed with the Agency's case summary) and A-6 (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 August 8, 2001, Claimant filed a wage claim form stating Respondent had employed him from March 6 through May 25, 2001, and failed to pay him at the agreed upon rate of \$15 per hour for all hours worked.

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 November 9, 2001, the Agency issued an Order of Determination, numbered 01-3778. The Agency alleged Respondent had employed Claimant during the period March 6 through May 25, 2001, at the rate of \$15 per hour for 317 hours of work, no part of which had been paid except \$2,560, leaving a balance due and owing of \$2,195. 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 \$3,600 as penalty wages, plus interest. The Order of Determination was personally served on Respondent and gave him 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 December 24, 2001, Respondent filed an answer and requested a hearing. In his answer, Respondent denied he was Claimant's employer and alleged that both Respondent and Claimant were Arthur Livermore's employees. Respondent's answer also stated, in pertinent part:

"Mr. Beasley worked a total of 173 hours on the project and was paid by Mr. Livermore for his work performance. Mr. Beasley was paid \$600.00 for roof job in advance that he failed to complete. He was fired because of his lack of attendance and alcohol use on the job.

"Mr. Livermore gave [R]ay Beasley another chance for work by putting shingles on the house at \$125 pr [sic] square but Mr. Beasley would show up for work for two to three hours pr [sic] day and would not perform required work so Mr. Livermore paid him for the work performed and asked him to leave the property. Mr. Beasley was never denied any money and was paid in full for the work he performed."

5) On April 22, 2002, the Agency requested a hearing. On May 13, 2002, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9 a.m. on November 14, 2002. With the Notice of Hearing, the forum included a copy 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 September 30, 2002, the Agency filed its case summary, with attached exhibits.

7) On October 3, 2002, the forum issued a case summary order requiring the Agency and Respondent to submit case summaries that included: 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); and a statement of any agreed or stipulated facts and any wage and penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by November 4, 2002, and advised them of the possible sanctions for failure to comply with the case summary order. Respondent did not file a case summary.

8) On November 13, 2002, Respondent contacted the Hearings Unit by telephone to request a postponement of the scheduled hearing. On the same date, the ALJ convened a prehearing conference by telephone that included Agency case presenter McSwain and Respondent. Respondent stated he was concerned his failure to submit his evidence in a case summary prior to hearing would result in his inability to submit evidence that he believed was important to his case. Respondent acknowledged receiving the ALJ's order requiring case summaries and copies of potential exhibits be submitted by November 4, 2002, but stated that he did not read it carefully and missed the deadline for submitting documents.

9) At the start of hearing, Respondent stated he had received the Notice of Contested Case Rights and Procedures and had no questions.

10) 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.

11) On November 15, 2002, the ALJ reopened the evidentiary record and convened the participants by teleconference to take additional testimony from Arthur Livermore. The participants were afforded the opportunity to question Livermore about the matters raised by the ALJ.

12) The ALJ issued a proposed order on December 10, 2002 that notified the participants they were entitled to file exceptions to the Proposed Order within ten days of its issuance. On December 19, 2002, the Hearings Unit received a letter from Respondent that stated, in pertinent part:

"I am in receipt of BOLI Case # 67-02 regarding a hearing before Administrative Law Judge Linda A. Lohr on November 14, 2002.

"In accordance with ORS chapter 183 and OAR 839-050-0380, I am officially filing for exceptions to the Proposed Order – 16 in regards to FlaggPO.doc.

"I have hired an attorney to appeal the outcome of this Order. By receipt of this letter, I have met the required 10 days for filing exceptions. My attorney will prepare all legal documents on my behalf and file them in your office.

"As noted below, I have send [sic] registered mail copies of this intent to appeal to BOLI Case Presenter Peter McSwain, Administrative Law Judge Linda A. Lohr, and Claimant Raymon Beasley."

On the same date, the Agency filed a response to Respondent's letter that stated, in pertinent part:

"To the extent that Respondent's 'Filing for Exceptions' may be read as a motion for extension of time in which to file exceptions, the agency resists the motion except on the conditions set forth below.

" \* \* \*

"To the extent that exceptions are soon filed by licensed counsel who recites for the record that, as of December 19, 2002, counsel had been retained by Respondent to represent Respondent in this matter, the agency has no objection to a brief extension of time in which to file exceptions.

"Otherwise the agency resists further delay because the agency received information on which to base a good faith belief that Respondent intends to avoid any financial consequences that may arise from this matter by absenting himself from the State."

13) On December 20, 2002, the forum issued an order granting Respondent and the Agency a brief extension of time until December 27, 2002, with which to file exceptions to the Proposed Order. No exceptions were filed.

### **FINDINGS OF FACT – THE MERITS**

1) At all times material herein, Respondent Paul Andrew Flagg was a construction contractor operating a business under the assumed business names of Paul Flagg Construction and The House Doctor.

2) In May 2000, Respondent agreed to construct a two-story garage and office at Arthur Livermore's private residence. Respondent and Livermore signed a typewritten document, on "Paul Flagg Construction" letterhead, entitled "Legal Contract" ("Livermore contract") that stated:

"This is regarding a 1555 sq. ft two level garage with office and bath.

"I agree to provide all labor [sic] and materials from the start of framing to the completion of project[.] I agree that all work performed will meet all building codes and pass all inspections before final payment is to be received[.] I will provide all costs of any sub contractors that may be used[.] I will also provide labor and materials for the walkway between the to [sic] houses[.] This includes all window and doors[,] all finish work[.] sheet rock insulation [sic], whirring[,] plumbing [sic][,] painting and siding and flooring[.] Final payment will be made when owners can occupy and inspections are made[.]

"Total cost 31.00 per ft[.] 48,650.00

"Fifty four thousand four hundred and twenty five."

Livermore and Respondent signed the contract on May 31, 2000, but the construction work did not begin until March 6, 2001.

3) Livermore was present on or near the job site every day to do some of the work and to monitor the progress of the work. When not working or monitoring the work directly, Livermore observed the construction activity from his home office window, which was approximately 30' from the construction site.

4) Livermore did not hire or pay any of the subcontractors or laborers who performed work at the site. During most of the construction, only two or three workers were present each day. Livermore performed some of the work himself, including the wiring, and assisted Respondent with the "trusses." Respondent and a worker named "Fred" performed most of the construction work until about mid April, early May 2001.

5) In early March 2001, Respondent told Claimant he needed help on the Livermore contract and asked if Claimant would "do the roof" on the project. Initially, they discussed a piece rate for the roof job, but when Claimant learned that the "sheeting" and "paper" were not yet finished and that he would be also expected to do the siding and sheetrock, both agreed to an hourly rate of \$15.

6) Respondent and Claimant had their discussions about the Livermore contract and Claimant's wages while both were incarcerated in the Tillamook County

jail. Respondent was released from jail on or about March 1, 2001, and Claimant was released the next day. Claimant began work on the Livermore contract after the framing was completed and the “trusses” were “put up.” Claimant was unable to drive at the time and relied on his friend, John Dunn, to drive him to and from work each day.

7) Claimant kept track of some of his hours on bits of paper but believed Respondent was keeping an independent record of his hours. Neither Claimant nor Respondent produced a written record of Claimant’s hours at the hearing.

8) In May 2001, Livermore became distressed about the lack of progress on the construction project. He began noticing that Claimant was not showing up regularly on the job site and when he did show up, that he did not spend a full day working. By the end of May, all of the work had “ground to a halt” because Respondent had not been on the job for a week and Claimant did not show up to work at all during the week Respondent was absent. In early June 2001, Claimant called Livermore and asked about coming back to work. Livermore was upset that Claimant was a no show for over a week and told Claimant he was no longer welcome on the job site. Claimant asked if he could return to pick up his tools and Livermore reiterated that he was not welcome on the property and that he would have to wait for Respondent to return the tools to him. Despite Livermore’s warning to stay away from the property, Claimant returned to pick up his tools. When Livermore confronted him, Claimant asked Livermore to pay him for wages he claimed Respondent owed. Livermore told Claimant to refer that issue to Respondent. Claimant then threatened to have a lien put on Livermore’s property. Following the confrontation, Livermore was upset with Claimant and believed Claimant was falsely accusing Respondent of not paying his wages. Claimant did not complain to Livermore about unpaid wages until the day he returned to the job site to pick up his tools.

9) During the course of the Livermore contract, Claimant received wages totaling \$2,560, which included a van Claimant valued at \$800.

10) Claimant's last day of work was May 25, 2001.

11) Respondent completed the Livermore contract in October 2001. Livermore did not withhold any disbursements due to Respondent for labor and materials during the course of the contract.

12) Livermore was the only witness who had no vested interest in the outcome of this case. He showed no bias toward or against Respondent and readily acknowledged that his only knowledge of Claimant and Respondent's wage agreement derived from Respondent's unsolicited assertion made to him the day before hearing. Although he also acknowledged he harbored some ill will toward Claimant, Livermore's sentiments evolved from his frustration with the slow progress of construction on his personal residence, which he attributed to Claimant's unreliability on the job. Livermore's antipathy increased when Claimant returned to the construction site, contrary to Livermore's instruction, and threatened to file a lien against Livermore's property. Livermore's feelings about Claimant, however, did not impair his testimony. He had the opportunity and capacity to observe Claimant's presence on the work site and testified confidently that he did not see Claimant at the construction site prior to mid April. He observed Claimant thereafter only three or four days per week until Claimant failed to show up at all at the end of May 2001. Livermore also verified his contract with Respondent and confirmed that Respondent was responsible for providing all labor under the contract and that he did not know who Claimant was prior to his appearance on the job site. There is no evidence in the record showing Livermore had any reason to enhance Respondent's case by being untruthful. The forum, therefore, relied entirely

on Livermore's testimony regarding the time period during which Claimant was present at the work site and every other material fact of which he had personal knowledge.

13) Claimant's testimony that he worked on the Livermore contract in March and April 2001 is contradicted by credible evidence to the contrary. Livermore had personal knowledge about Claimant's presence on the construction site and had nothing to gain by exaggerating his observations. Claimant's credibility is diminished further and Livermore's testimony bolstered by the notable absence of testimony from another witness who had first hand knowledge of Claimant's work schedule. Claimant, Respondent, and Livermore testified that because Claimant was unable to drive, John Dunn provided Claimant with rides to and from work. Dunn was listed by the Agency as a witness and was available at hearing to testify. For reasons unknown to the forum, both participants excused Dunn from the hearing and he left without testifying. The forum infers from those facts that Dunn's testimony would not have contradicted Livermore's testimony that Claimant did not appear on the job until around mid April 2001 and worked less than five days per week. Additionally, Claimant acknowledged he was upset with Respondent and friction between them occurred when "Neldy" Childs left her relationship with Claimant for one with Respondent during the course of the Livermore contract. The forum finds that Claimant's feelings toward Respondent may have motivated him to exaggerate the number of hours he worked. For those reasons, the forum believed Claimant's testimony only when other credible testimony corroborated it or it was logically credible.

14) Respondent's brief testimony was insubstantial and primarily self-serving. His bare assertion that he paid Claimant \$650 "up front" for roofing work on the Livermore contract was inconsistent with his prior statement to the Agency that Livermore paid Claimant \$600 for work he performed. He also contradicted his

testimony that Claimant was hired for the roof work only by later acknowledging that Claimant was expected to put shingles on the siding and do the sheetrock in addition to the roof. Respondent's testimony had little credence, but the forum credits his statement at hearing and in his answer that Claimant worked 173 hours on the Livermore contract as an admission and accepts the statement as fact that Claimant worked at least 173 hours during his employment with Respondent.

15) When Claimant's employment terminated, Respondent owed Claimant \$35 in gross wages ( $173 \times \$15 = \$2,595 - \$2,560$ ).

16) Penalty wages, in accordance with *former* ORS 652.150, are computed as follows:  $\$15 \text{ per hour} \times 8 \text{ hours} = \$120 \times 30 \text{ days} = \$3,600$ .

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

1) Respondent, at all times material herein, conducted a business that engaged the personal services of one or more employees in Oregon.

2) Respondent engaged Claimant's personal services between mid April and May 25, 2001.

3) Respondent and Claimant agreed Claimant would be paid \$15 per hour.

4) Claimant's last day of work was May 25, 2001.

5) Between mid April and May 25, 2001, Claimant worked 173 hours and earned gross wages of \$2,595. Respondent paid Claimant \$2,560 in cash and the value of a van Claimant accepted in lieu of wages.

6) Respondent owes Claimant \$35 in gross wages.

7) Respondent's failure to pay Claimant all wages earned and owed when Claimant's employment terminated was willful and Respondent is liable for \$3,600 in civil penalty wages.

#### **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 \* \* \*.

“(2) ‘Employee’ means any individual who otherwise than as a 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.”

During all times material herein, Respondent was an employer and Claimant was Respondent’s employee, subject to the provisions of ORS 652.310 to 652.414.

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

3) ORS 652.140(2) provides in part:

“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.”

Claimant’s last day of work was May 25, 2001, and the evidence does not clearly establish whether he actually quit before being terminated by the landowner. Even assuming, however, that Claimant quit without notice to Respondent, his wages would have been due on June 1, 2001. Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid by that date.

4) *Former* ORS 652.150<sup>i</sup> provided:

“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 \$3,600 in civil penalties under *former* ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(2).

### **OPINION**

The Agency was required to prove: 1) that Respondent employed Claimant; 2) that Respondent agreed to pay Claimant \$15 per hour; 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 Scott Miller*, 23 BOLI 243, 258 (2002). In his answer, Respondent asserted that Arthur Livermore hired and paid both Respondent and Claimant to perform work on Livermore’s residential property. The Agency established, however, that Respondent employed Claimant at the rate of \$15 per hour at times material and owed Claimant wages that were not paid when Claimant’s employment terminated.

### **RESPONDENT EMPLOYED CLAIMANT**

Respondent’s bare assertion that Livermore employed Claimant to perform work on Livermore’s property is contradicted by credible evidence in the record. Respondent acknowledged and evidence shows that he entered into a construction contract with Livermore and agreed to provide all of the labor and materials for completing a two-level garage with office and bath at Livermore’s personal residence. Livermore credibly testified that he did not hire or pay anyone to perform labor on the contract and that Respondent provided, in accordance with their contract, two or three workers, including Claimant, to do all of the construction work. Although Livermore independently terminated Claimant’s services, evidence shows Livermore’s action was taken as a

property owner, not as an employer. Based on Livermore's credible testimony and the documentary evidence, the forum concludes that Respondent employed Claimant.

### **AGREED UPON WAGE RATE**

In weighing their testimony, the forum finds Claimant's statement that Respondent agreed to pay Claimant \$15 per hour for roofing, siding and sheetrock work on the Livermore contract more believable than Respondent's contradictory contentions that he or Livermore agreed to pay Claimant a piece rate of \$600, or \$650, for roof work. The forum notes that at hearing Respondent confirmed the statement in his answer that Claimant worked 173 hours, which is consistent with Claimant's testimony that he believed Respondent was tracking his hours during the course of his employment. Claimant acknowledges Respondent paid him \$2,560 in wages, which is \$35 short of \$15 per hour for 173 hours worked. The forum infers that Respondent tracked Claimant's hours because he was paying an hourly rate and that more likely than not he agreed to pay Claimant \$15 per hour.

### **RESPONDENT FAILED TO PAY CLAIMANT \$35 IN DUE AND UNPAID WAGES**

Claimant bears the burden of proving he performed work for which he was not properly compensated. *In the Matter of Ann L. Swanger*, 19 BOLI 42, 56 (1999). As stated previously, the Agency established that Claimant did not receive all of the pay he was owed for 173 hours of work at the agreed upon rate.

Claimant, however, claimed additional hours were earned, owed and unpaid at the time of hearing. Where an employer has produced no records, as happened in this case, the commissioner may rely on evidence produced by the agency "to show the amount and extent of the employee's work as a matter of just and reasonable inference and then may award damages to the employee, even though the result be only approximate." *In the Matter of Ilya Simchuk*, 22 BOLI 186, 196 (2001), quoting

*Anderson v. Mt. Clemens Pottery Co.*, 3289 US 680 (1946). Here, credible evidence contradicted Claimant's testimony that he performed work in March and early April 2001. Moreover, the Agency declined to call John Dunn as a witness, despite his availability at hearing and his first hand knowledge of the days he drove Claimant to and from work. The forum infers that Dunn's testimony would not have contradicted Livermore's credible testimony that Claimant was not on the construction site until around mid-April 2001. Notwithstanding Claimant's inability to establish additional hours, Respondent admits Claimant worked 173 hours on the Livermore contract and Claimant credibly testified that Respondent agreed to pay him \$15 per hour for all hours worked. Claimant acknowledges receiving \$2,560 in wages from Respondent. Based on those facts and the forum's calculation, Respondent fell short of paying Claimant all of his wages by \$35 (173 x \$15 - \$2,560). Accordingly, the forum finds Respondent owes Claimant \$35 in unpaid wages.

## **CIVIL PENALTIES**

The forum may award civil penalty wages where a respondent's failure to pay wages is willful. 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. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Here, the evidence shows that Respondent voluntarily, intentionally, and as a free agent failed to pay Claimant all of the wages he earned from mid April through May 25, 2001. Respondent acted willfully and is liable for penalty wages under *former* ORS 652.150.

Penalty wages, therefore, are assessed and calculated in accordance with *former* ORS 652.150 in the amount of \$3,600. This figure is computed by multiplying

\$15 per hour by 8 hours per day multiplied by 30 days. See *former* ORS 652.150 and OAR 839-001-0470.

### ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, **Paul Andrew Flagg** 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 Claimant Raymon Beasley, in the amount of THREE THOUSAND SIX HUNDRED AND THIRTY FIVE DOLLARS (\$3,635), less appropriate lawful deductions, representing \$35 in gross earned, unpaid, due and payable wages and \$3,600 in penalty wages, plus interest at the legal rate on the sum of \$35 from June 1, 2001, until paid and interest at the legal rate on the sum of \$3,600 from July 1, 2001, until paid.

---

<sup>i</sup> In 2001, the legislature amended ORS 652.150. The amendment is not relevant to this matter, which involves wages earned prior to its effective date of January 1, 2002.