

In the Matter of

Procom Services, Inc.

Case No. 56-03

Final Order of Commissioner Dan Gardner

Issued June 23, 2003

SYNOPSIS

Claimant, a telemarketer, worked 67 hours for Respondent at the agreed rate of a \$40 commission for every sale, and was only paid \$75 for her work. The Agency presented credible evidence that Claimant was an employee, not an independent contractor as alleged by Respondent, but did not present any evidence of the amount of commissions earned by Claimant in her 67 hours of work. The forum therefore computed Claimant's unpaid wages at \$6.50 per hour, the minimum wage in effect at the time, and concluded that Claimant was owed \$360.50 in unpaid wages. Respondent's failure to pay the wages was willful, and Respondent failed to pay the wages within 12 days after the Agency sent notice of the wage claim to Respondent on Claimant's behalf. The forum ordered Respondent to pay \$1,560 in penalty wages in addition to the unpaid wages. ORS 653.010, ORS 653.035, ORS 652.140, ORS 652.150, OAR 839-001-0470.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 13, 2003, at the Bureau's office at 3865 Wolverine NE, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Cynthia L. Domas, an employee of the Agency. Wage claimant Alicia L. Duncan ("Claimant") was present throughout the hearing. Respondent did not appear at the hearing and was found in default.

In addition to Claimant, the Agency called Newell Enos, Wage & Hour Division Compliance Specialist, and Arlan Heath, Claimant's former supervisor, as witnesses.

The forum received into evidence:

a) Administrative exhibits X-1 through X-6 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-6 (submitted prior to hearing), and A-7 and A-8 (submitted at hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On September 19, 2002, Claimant filed a wage claim with the Agency alleging that Respondent had employed her and failed to pay wages earned and due to her.

2) At the time she filed her 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 December 6, 2002, the Agency issued Order of Determination No. 02-3689 based upon the wage claim filed by Claimant. The Order of Determination alleged that Respondent Procom Services, Inc. owed a total of \$394 in unpaid wages and \$1,680 in penalty wages, plus interest, and required that, within 20 days, Respondents 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.

4) On January 13, 2003, Respondent filed an answer and request for hearing. Respondent designated Russell Leitch, corporate president, as its authorized representative. In its answer, Respondent alleged that Claimant was an “independent contract agent” and was paid for all work completed.

5) On February 7, 2003, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimant stating the time and place of the hearing as 9:30 a.m. on May 13, 2003, at 3865 Wolverine Street NE, Bldg. E-1, Salem, Oregon.

6) On February 12, 2003, 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; and a brief statement of the elements of the claim, 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 case summaries by May 2, 2003, and notified them of the possible sanctions for failure to comply with the case summary order.

7) Respondent filed a case summary on February 18, and the Agency filed its case summary on April 30, 2003.

8) On May 13, 2003, at 9:30 a.m., Respondent did not appear for the hearing. The ALJ went on the record and announced that he would wait until 10 a.m. to commence the hearing and that Respondent would be in default if it did not make an appearance by that time.

9) At 10 a.m., Respondent had not appeared at the hearing. Pursuant to OAR 839-050-0330, the ALJ declared Respondent to be in default. The ALJ then explained the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing.

10) On May 28, 2003, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Procom Services, Inc. was a corporation doing business under the assumed business name of Direct View in Dallas,

Oregon, that sold and installed television satellite dishes and employed one or more individuals in Oregon.

2) Arlan Heath, Respondent's manager, hired Claimant on or about July 18, 2002, as a telemarketer. Heath agreed to pay Claimant \$7 per hour. Claimant was hired to sell television satellites and service.

3) Claimant worked for Respondent from on or about July 18, 2002, through September 16, 2002, at which time Respondent closed its business in Dallas. She was paid in full for all her work prior to September 3.

4) On July 18, 2002, Heath had Claimant sign an agreement entitled "Independent Contractor Agreement." This agreement purported to make Claimant an independent contractor.

5) From her date of hire until September 3, 2002, Claimant was paid on an hourly basis at the rate of \$7 per hour plus \$10 per sale, and was only paid for hours that she actually worked. Respondent deducted taxes from Claimant's checks. Claimant worked five days per week at times and days set by Heath. She was hired for an indefinite period of time and had no investment in Respondent's business. Although she was an experienced telemarketer, no prior experience was necessary to perform her job. All the equipment and materials she used to perform her job, including a telephone, writing supplies, and a place to work, was provided by Respondent. She only called prospective customers who were on a list provided to her by Respondent and was not allowed to deviate from the scripted sales pitch provided to her by Respondent. Along with Respondent's other telemarketers, she performed her job at Heath's house, then at an office in Dallas, Oregon.

6) Respondent's regularly scheduled payday was Monday.

7) On or about September 3, 2002, Respondent unilaterally changed the pay rate of Claimant and the other telemarketers in her office to a straight commission of \$40 per sale.

8) Claimant worked 67 hours for Respondent between September 3 and 16, 2002. No evidence was provided as to the commissions she earned during that period of time. Computed at \$6.50 per hour, Claimant earned \$435.50. She was only paid \$75 for that work, leaving \$360.50 due and owing.

9) As of the date of hearing, Claimant had not been paid any additional wages by Respondent.

10) On October 3, 2002, the Agency sent a "Notice of Wage Claims" to Respondent in which it stated that Alicia L. Duncan had filed a wage claim for \$629 for work performed from September 3 to September 23, 2002, and asked that Respondent "immediately tender to this office the amounts due." That letter was returned to the Agency by the U.S. Postal Service on October 18, 2002, because of "insufficient address."

11) On October 9, 2002, the Agency faxed the same "Notice of Wage Claims" letter to Respondent. Respondent received the letter and faxed a response back to Enos on October 18, 2002. In its response, Respondent claimed that Claimant was paid by "[c]ommissions only" and stated that "[a]ll documented sales have been paid in full."

12) Penalty wages for Claimant, computed in accordance with ORS 652.150 and OAR 839-001-0470, equal \$1,560 ($\$6.50 \text{ per hour} \times 8 \text{ hours} \times 30 \text{ days} = \$1,560$).

13) The Agency's witnesses were all credible.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Procom Services, Inc. did business in Dallas, Oregon under the assumed business name of Direct View and employed one or more individuals in Oregon.

2) Respondent hired Claimant in July 2002 as a telemarketer to sell television satellites and satellite service. She was hired at the agreed rate of \$7 per hour plus a \$10 commission for every sale. Claimant was employed by Respondent until September 16, 2002, when she was involuntarily terminated when Respondent closed its office.

3) On September 3, Claimant's rate of pay changed to a straight commission of \$40 per sale. Claimant worked 67 hours between September 3 and 16, 2002, and was only paid \$75 for her work.

4) Computed at \$6.50 per hour, Respondent owes Claimant \$360.50 in unpaid, due and owing wages.

5) On October 9, 2002, written notice of nonpayment of Claimant's wages was made by the Agency and received by Respondent. More than 12 days have passed and Respondent has not paid Claimant the wages due and owing to her.

6) Respondent's failure to pay all unpaid, due and owing wages to Claimant was willful and she is entitled to penalty wages in the amount of \$1,560.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an Oregon employer who suffered or permitted Claimant to work. ORS 653.010(3) & (4).

2) 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 653.040, ORS 653.261.

3) Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid by September 17, 2002, the first business day after her termination. Respondent owes Claimant \$360.50 in unpaid, due and owing wages.

4) Respondent is liable for \$1,560 in penalty wages to Claimant. ORS 652.150; OAR 839-001-0470(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 her earned, unpaid, due and payable wages, and the penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

DEFAULT

When a Respondent files an answer and request for hearing, but then fails to appear at hearing and is held in default, the Agency's burden is to establish a prima facie case to support the allegations in its charging document. *In the Matter of Usra Vargas*, 22 BOLI 212, 220 (2001). The forum may give some weight to unsworn assertions contained in an answer unless other credible evidence controverts them. If a respondent is found not to be credible the forum need not give any weight to the assertions, even if they are uncontroverted. *In the Matter of Keith Testerman*, 20 BOLI 112, 127 (2000).

PRIMA FACIE CASE

The Agency's prima facie case consists of proof the following elements: 1) that Respondent employed Claimant; 2) Claimant's agreed rate of pay, if other than the minimum wage; 3) that Claimant performed work for which she was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. *Vargas* at 220.

CLAIMANT WAS EMPLOYED BY RESPONDENT

In its answer, Respondent alleged the affirmative defense that Claimant was an independent contractor and attached a copy of an “Independent Contractor Agreement” signed by Claimant on July 18, 2002. This document is only part of the “totality of the circumstances” the forum must examine in determining whether a wage claimant is an employee or an independent contractor. *In the Matter of Triple A Construction, LLC*, 23 BOLI 79, 93 (2002). This forum applies an “economic reality” test to the circumstances determine whether a wage claimant is an employee or independent contractor under Oregon’s wage collection laws. *In the Matter of Heiko Thanheiser*, 23 BOLI 68, 75-76 (2002). The focal point of the test is whether the alleged employee, as a matter of economic reality, is economically dependent upon the alleged employer. The forum considers five factors to gauge the degree of the worker’s economic dependency, with no single factor being determinative: (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. *Id.* at 75-76.

In this case, the Agency presented credible evidence that Claimant was an employee. Respondent engaged Claimant’s personal services and suffered or permitted her to work. Respondent directed Claimant’s work and supplied all of the equipment and supplies necessary to perform the work. Claimant had no investment in Respondent’s business. Claimant had no opportunity to earn a profit or suffer a loss, as Respondent agreed to pay her a specific wage or commission and she had no investment other than her time. The job required no training, and Claimant was only allowed to call persons on her call list and was provided sales scripts that she was

required to use. She was hired for an indefinite period of time; and there was no evidence that anyone else employed Claimant while she worked for Respondent. This credible evidence showing the actual substance of Claimant's working conditions outweighs Respondent's assertion in its answer that Claimant was an independent contractor and the "Independent Contractor Agreement" signed by Claimant.

CLAIMANT'S RATE OF PAY

Claimant credibly testified that her starting rate of pay was \$7 per hour, plus a \$10 commission for each sale, and that her pay rate was changed on September 3, 2002, to a straight commission of \$40 per sale. Consequently, the forum must compute her earned wages at the commission rate instead of the figure of \$7 per hour sought by the Agency in its Order of Determination. ORS 653.035(2) provides that an employer "may include commission payments to employees as part of the applicable minimum wage" but "[i]n any pay period where the combined wage and commission payments to the employee do not add up to the applicable minimum wage under ORS 653.010 to 653.261, the employer shall pay the minimum rate as prescribed in ORS 653.010 to 653.261. Claimant's claimed unpaid wages all accrued during the period from September 3 through September 16, 2002. She testified that she was paid \$75 for her work during that period and worked 67 hours in total. Because the Agency provided no evidence of specific amount of commissions she earned in that time period, the forum has no way of determining whether her earned commissions exceeded her earnings computed at the minimum wage of \$6.50 per hour.ⁱ Pursuant to ORS 653.035(2), the forum determines that her pay rate was \$6.50 per hour.

CLAIMANT PERFORMED WORK FOR WHICH SHE WAS NOT PROPERLY COMPENSATED

Claimant credibly testified that she was only paid \$75 for work she performed from September 3 through September 16 and that this only compensated her for part of

the work that she performed. Respondent's unsupported assertion in its answer that Claimant "was paid for all work completed" from "7-15-02 to 9-8-02" and denial that Claimant "is owed any monies" is overcome by Claimant's credible testimony.

THE AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT

Claimant credibly testified that she worked 67 hours for Respondent between September 3 and September 16, 2002, basing her testimony on a contemporaneous record of her hours worked that she maintained on her personal calendar and transferred to a blank calendar provided by the Agency at the time she filed her wage claim. That Agency calendar was offered and received into evidence. It shows that Claimant worked 67 hours between September 3 and September 16, 2002. Respondent provided no evidence controverting that figure and the forum has accepted those hours as the amount of work performed by Claimant in the wage claim period. In total, Claimant earned \$435.50 in the wage claim period and has only been paid \$75, leaving \$360.50 due and owing.

PENALTY WAGES

An employer is liable for penalty wages when it "willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in 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. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

Calculated at minimum wage, Claimant earned \$435.50 between September 3 and September 16, 2002, and was only paid \$75. Respondent's claim that Claimant was an independent contractor, when Heath, Respondent's manager, was aware of

Claimant's actual conditions of employment and hours worked and the forum has determined that Claimant was an employee, is not a defense.ⁱⁱ There is no evidence that Respondent acted other than voluntarily and as a free agent in failing to pay Claimant the wages she earned and the forum concludes that Respondent's failure to pay Claimant's wages was willful.

When the forum has determined that a respondent's failure to pay wages was willful, ORS 652.150 provides that "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 is commenced" for a maximum of "30 days from the due date." ORS 652.150(2) further limits the amount of penalty to not more than "100 percent of the employee's unpaid wages or compensation unless the employer fails to pay the full amount of the employee's unpaid wages or compensation within 12 days after written notice of such nonpayment is sent to the employer by or on behalf of the employee." Here, the Agency sent written notice on behalf of Claimant that was received by Respondent on October 9, 2002. More than 12 days have expired since that date and Respondent has not paid Claimant's unpaid wages. Claimant is therefore entitled to 30 days penalty wages, computed as follows: \$6.50 per hour x 8 hours x 30 days = \$1,560. ORS 652.150, OAR 839-001-0470.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages Respondent owes as a result of its violation of ORS 652.140(1), the Commissioner of the Bureau of Labor and Industries hereby orders **Procom Services, Inc.** 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 Alicia L. Duncan in the amount of ONE THOUSAND NINE HUNDRED TWENTY DOLLARS AND FIFTY CENTS (\$1,920.50), less appropriate lawful deductions, representing \$360.50 in gross earned, unpaid, due and payable wages and \$1,560 in penalty wages, plus interest at the legal rate on the sum of \$360.50 from October 1, 2002, until paid, and interest at the legal rate on the sum of \$1,560 from November 1, 2002, until paid.

ⁱ Effective January 1, 2003, the Oregon's minimum wage was increased to \$6.90 per hour.

ⁱⁱ See, e.g., *In the Matter of Scott Miller*, 23 BOLI 243, 262 (2002) (respondent's failure to apprehend the correct application of the law and actions based on this incorrect application did not exempt respondent from a determination that he willfully failed to pay wages earned and due).