

**BEFORE THE COMMISSIONER
OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON**

In the Matter of:

**WESTLAND RESOURCES GROUP
LLC,**

Respondent.

Case No. 158-01

FINDINGS OF FACT
ULTIMATE FINDINGS OF FACT
CONCLUSIONS OF LAW
OPINION
ORDER

SYNOPSIS

Respondent willfully failed to pay an employee all wages earned. The commissioner ordered Respondent to pay the employee \$11,591.36 in unpaid wages plus \$6,487.00 in civil penalty wages. ORS 652.140, ORS 652.150, ORS 653.261, OAR 839-001-0030.

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 January 8, 2001, at the Salem office of the Bureau of Labor and Industries located at 3865 Wolverine NE, E-1, 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. Glenn D. Woods (“Claimant”) was present throughout the hearing and was not represented by counsel.

1 Respondent, after being duly notified of the time and place of the hearing, failed to
2 appear at the hearing and no one appeared on Respondent's behalf.

3 The Agency called Claimant Woods as its only witness.

4 The forum received into evidence:

5 a) Administrative exhibits X-1 through X-16 (submitted or generated prior to
6 hearing);

7 b) Agency exhibits A-1 through A-16 (submitted prior to hearing) and A-17
8 (submitted after the hearing);

9 c) Exhibit ALJ-1 (created by the Administrative Law Judge after the hearing).

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

14 **FINDINGS OF FACT – PROCEDURAL**

15 1) On July 10, 2000, Claimant filed a wage claim with the Agency. He
16 alleged that Respondent had employed him and failed to pay wages earned between
17 June 12, 1999, and April 7, 2000, and due to him. (Testimony of Claimant; Exhibit A-1)

18 2) At the time he filed his wage claim, Claimant assigned to the
19 Commissioner of Labor and Industries, in trust for Claimant, all wages due from
20 Respondent. (Testimony of Claimant; Exhibit A-2)

21 3) Claimant brought his wage claim within the statute of limitations.
22 (Testimony of Claimant; Exhibit A-1; Official Notice)

23 4) On January 16, 2000, the Agency served Order of Determination No. 00-
24 2933 on Timothy Murphy, Respondent's registered agent, based upon the wage claim
25 filed by Claimant and the Agency's investigation. The Order of Determination alleged
that Respondent owed a total of \$11,591.36 in unpaid wages and \$5,685.60 in civil

1 penalty wages, plus interest, and required that, within 20 days, Respondent either pay
2 these sums in trust to the Agency, request an administrative hearing and submit an
3 answer to the charges, or demand a trial in a court of law. The Order of Determination
4 also alleged that Claimant had earned \$17.00 per hour and \$25.00 per hour during the
5 wage claim period. (Exhibits X-1a, X-1b, X-1c)

6 5) On February 15, 2001, Respondent, through counsel Timothy J. Heinson,
7 filed an answer and written request for hearing. In its answer, Respondent admitted
8 that Claimant was employed by Respondent on or about June 12, 1999, to April 7,
9 2000, and that Respondent owed Claimant \$11,591.39 in unpaid wages. The answer
10 also raised the affirmative defense that Respondent was financially unable to pay the
11 wages at the time they accrued. (Exhibit X-1d)

12 6) On June 29, 2001, the Agency served a "BOLI Request for Hearing" on
13 the forum. (Exhibit X-1)

14 7) On July 30, 2001, the Hearings Unit issued a Notice of Hearing to
15 Respondent, the Agency, and the Claimant stating the time and place of the hearing as
16 January 8, 2002, and successive days thereafter, at 9:30 a.m., at BOLI's Salem office,
17 3865 Wolverine NE, Building E-1, Salem, Oregon. Together with the Notice of Hearing,
18 the forum sent a document entitled "Summary of Contested Case Rights and
19 Procedures" containing the information required by ORS 183.413, and a copy of the
20 forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440. (Exhibit X-
21 2, X-2b, X-2c, X-2d)

22 8) On October 1, 2001, the ALJ issued a case summary order requiring the
23 Agency and Respondent each to submit a list of witnesses to be called, copies of
24 documents or other physical evidence to be introduced, and a statement of any agreed
25 or stipulated facts. The Agency was additionally ordered to submit wage and penalty

1 calculations and a brief statement of the elements of the claim. Respondent was
2 additionally ordered to submit a brief statement of any defenses to the claim. The ALJ
3 ordered the participants to submit case summaries by December 21, 2001, and notified
4 them of the possible sanctions for failure to comply with the case summary order.
5 (Exhibit X-3)

6 9) On October 5, 2001, the forum received a letter from Mr. Heinson stating
7 that he no longer represented Respondent. (Exhibit X-4)

8 10) On November 13, 2001, the Agency filed a motion for a discovery order
9 requesting that Respondent produce seven categories of documents and respond to
10 five requests for admissions. (Exhibits X-5, X-7)

11 11) On November 13, 2001, the forum issued an interim order setting a 7-day
12 timeline for Respondent's response to the Agency's motion and requiring that
13 Respondent, as a corporation, file its response and be represented by counsel or an
14 authorized representative. Included in the order was a statement that Respondent
15 would be found in default and would not be allowed to participate in the hearing unless it
16 was represented by counsel or an authorized representative. (Exhibit X-6)

17 12) On December 19, 2001, the Agency filed a motion for summary judgment,
18 supporting it with affidavits and documents reflecting Respondent's financial status
19 during Claimant's wage claim period. On the same day, the Agency filed a motion to
20 amend the amount of penalty wages sought upwards to \$5,786.40. Exhibits X-11, X-
21 12)

22 13) On December 20, 2001, the Agency filed its case summary. (Exhibit X-
23 13)

24 14) On December 21, 2001, the forum issued an interim order requiring that
25 Respondent's objections, if any, to the Agency's motion for summary judgment be filed

1 no later than December 28, 2001. In the interim order, the forum also set forth the
2 forum's standard for considering summary judgment motions. (Exhibit X-14)

3 15) Respondent filed no objections to the Agency's motion to amend the
4 amount of civil penalties sought, and on January 2, 2002, the forum issued an interim
5 order granting the Agency's motion. (Exhibit X-15)

6 16) On January 2, 2002, the forum issued an interim order granting the
7 Agency's motion for summary judgment as to the amount of unpaid wages due and
8 owing to Claimant and to the legal conclusion that penalty wages were owed. The
9 forum ruled that the hearing would commence as scheduled for the sole purpose of
10 determining the total amount earned and total number of hours worked by Claimant in
11 the wage claim period. The interim order read as follows:

12 **“INTRODUCTION**

13 “This action arises from an Order of Determination issued by the Agency
14 on January 9, 2001, seeking unpaid wages in the amount of \$11,591.36
15 as assignee of wage claimant Glenn D. Woods (“claimant”), along with
16 \$5,685.60 as penalty wages pursuant to ORS 652.150. Respondent filed
17 an answer and request for hearing on February 15, 2001, in which
18 Respondent admitted owing \$11,591.39 in unpaid wages to claimant, but
19 denied that Respondent willfully failed to pay the wages and affirmatively
20 alleged that Respondent was financially unable to pay the wages at the
21 time the wages accrued.

22 “On December 19, 2001, the Agency filed a motion for summary
23 judgment, contending that Respondent's admission of unpaid wages and
24 evidence submitted by the Agency in support of its motion entitled the
25 Agency to summary judgment. On December 21, 2001, the forum issued
an interim order notifying Respondent that it must file any objections to the
Agency's motion by December 28, 2001. As of today, Respondent has
filed no objections to the Agency's motion.

“SUMMARY JUDGMENT STANDARD

“A motion for summary judgment may be granted where no genuine issue
as to any material fact exists and a participant is entitled to a judgment as
a matter of law, as to all or any part of the proceedings. *OAR 839-050-
0150(4)(B)*. The standard for determining if a genuine issue of material
fact exists follows:

1 ‘ * * * No genuine issue as to a material fact exists if, based upon
2 the record before the court viewed in a manner most favorable to
3 the adverse party, no objectively reasonable juror could return a
4 verdict for the adverse party on the matter that is the subject of the
5 motion for summary judgment. The adverse party has the burden
6 of producing evidence on any issue raised in the motion as to which
7 the adverse party would have the burden of persuasion at [hearing].
8 *In the Matter of Cox and Frey Enterprises, Inc.*, 21 BOLI 175, 178
9 (2000).’

6 **“UNPAID WAGES**

7 “In the Order of Determination, the Agency alleged claimant was due
8 \$11,591.36 in unpaid wages, based on an hourly rate of pay of \$17.00 and
9 \$25.50 per hour plus expense reimbursement. Respondent admitted
10 owing claimant that amount in its answer, and did not deny that claimant’s
11 rates of pay were \$17.00 and \$25.50 per hour. Based on Respondent’s
12 admission, no genuine issue of material fact exists as to whether or not
13 the alleged unpaid wages are due claimant and the Agency is entitled to
14 judgment as a matter of law. The Agency’s motion regarding its allegation
15 in the Order of Determination that \$11,591.36 in unpaid wages is due and
16 owing to claimant is **GRANTED**.

13 **“PENALTY WAGES**

14 “In its Order of Determination, the Agency alleged that claimant is entitled
15 to \$5,685.60 in penalty wages pursuant to ORS 652.150 based on
16 Respondent’s alleged willful failure to pay claimant’s wages. On
17 December 19, 2001, the Agency filed a motion to amend to increase that
18 figure to \$5,786.40. I have issued a separate interim order today granting
19 that motion. In its answer, Respondent denied that its failure to pay
20 claimant his wages was willful, and alleged the affirmative defense of
21 financial ability to pay at the time the wages accrued.

22 “Under ORS 652.150, an award of penalty wages turns on the issue of
23 willfulness. Willfulness does not imply or require blame, malice, wrong,
24 perversion or moral delinquency, but only requires that that which is done
25 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 Usra Vargas*, 22
 BOLI 212, 222 (2001). Respondent’s admission that it owes \$11,591.36
 in unpaid wages to claimant establishes Respondent’s knowledge that it
 failed to pay claimant those of in wages. The forum infers from this
 knowledge that Respondent did acted voluntarily and as a free agent in
 failing to pay those wages, and there is no evidence that would allow the
 forum to view Respondent’s failure to pay claimant in any other light. *In*
 the Matter of R.L. Chapman Ent. Ltd., 17 BOLI 277, 284 (1999). The
 forum therefore concludes that Respondent’s failure to pay claimant’s
 wages was willful.

1 “In support of its motion for summary judgment, the Agency has produced
2 several affidavits and documents showing Respondent’s financial
condition during the wage claim period that ended on April 7, 2000.

3 “The affidavits establish that Respondent has operated its business since
4 April 2000 and was still operating on July 21, 2001.

5 “Quarterly reports submitted by Respondent to the Oregon Employment
6 Department show that Respondent paid wages to its employees in the
second, third, and fourth quarters of 2000, and the first, second, and third
quarters of 2001.

7 “Respondent’s non-response to the Agency’s request for admissions is a
8 third piece of evidence that must be considered by the forum. On
9 November 26, 2001, this forum issued an interim order ruling that
10 Respondent must respond to the Agency’s November 13, 2001, request
11 for admissions by December 4, 2001, or those admissions would be
12 deemed admitted. As of this date, Respondent had not responded and
13 the statements of alleged fact contained in the Agency’s requests for
14 admissions are deemed admitted. Those admissions include the following
– From May 1, 1999, through June 30, 2000, Respondent did not close its
doors for business other than for holidays and other regular non-business
days; Respondent made payments to its creditors; Respondent made
payments to employees; Respondent made payments to utility companies
for services provided to Respondent; and Respondent made rent or lease
payments to the owner of their office for the use of said office.

15 “Previously, this forum has rejected a ‘financial inability to pay’ defense
16 where respondents paid other bills related to their business during the
17 time they failed to pay claimant all wages due and continued to operate
their business during that time. *In the Matter of Debbie Frampton*, 19
BOLI 27, 41 (1999); OAR 839-001-0480.

18 “Respondent’s defense of financial inability to pay wages at the time they
19 accrued is an affirmative one and Respondent bears the burden of
20 persuasion to establish it. Consequently, Respondent has the burden of
21 producing evidence to support this defense if it wishes to avoid summary
22 judgment. A showing of financial inability to pay wages at the time they
23 accrued requires specific information as to the financial resources and
24 expenses of the business. *In the Matter of U.S. Telecom International*, 13
BOLI 114, 123 (1994). Respondent has produced no evidence. Because
no genuine issue of material fact remains as to Respondent’s alleged
financial inability to pay claimant’s wages at the time they accrued, the
Agency’s motion regarding its allegation in the Order of Determination that
penalty wages are due is **GRANTED**.

24 “**AMOUNT OF PENALTY WAGES**

25 “Although the forum has ruled that the Agency is entitled to penalty wages,
the amount of those wages is a different matter. Calculations for penalty

1 wages are based on the hourly rate paid to the claimant. ORS 652.150,
2 OAR 839-001-0470. Where more than one wage rate is paid during the
3 wage claim period, penalty wages are computed by taking the total earned
4 during the wage claim period, dividing that figure by the total number of
5 hours worked during the wage claim period, multiplying that figure by eight
6 hours, and multiplying again by 30 days. *In the Matter of Burrito Boy, Inc.*,
7 16 BOLI 1, 20 (1997). Respondent's denial that penalty wages are due
8 carries with it the implicit denial of the specific amount of penalty wages
9 owed. In addition, Respondent's answer denies the Agency's allegation
10 that no portion of the wages earned by claimant during the wage claim
11 period has been paid. Consequently, unresolved questions remain as to
12 the total amount earned and total number of hours worked by claimant in
13 the wage claim period. Those questions must be resolved at hearing.

8 **"SUMMARY**

9 "The Agency is granted summary judgment as to the total amount of
10 unpaid wages due and owing and the legal conclusion that penalty wages
11 are owed. The hearing will commence as scheduled for the sole purpose
12 of establishing the total amount earned and total number of hours worked
13 by claimant in the wage claim period."

12 This ruling is modified to award the Agency \$11,591.39 in unpaid wages, the amount
13 admitted by Respondent in its answer, instead of \$11,591.36, the amount sought in the
14 Order of Determination. This ruling is AFFIRMED. (Exhibit X-16)

15 17) At the start of the hearing, Respondent had not appeared or notified the
16 forum that it would not be appearing at the hearing. The ALJ waited 30 minutes past
17 the time set for hearing before declaring Respondent in default and commencing the
18 hearing. (Statement of ALJ)

19 18) At the outset of the hearing, pursuant to ORS 183.415(7), the ALJ verbally
20 advised the Agency of the issues to be addressed, the matters to be proved, and the
21 procedures governing the conduct of the hearing. (Statement of ALJ)

22 19) During the hearing, the Agency moved to amend the Order of
23 Determination, based on Claimant's testimony at hearing, to allege that Claimant
24 earned \$17.00 per hour and \$25.00 per hour during his employment. The ALJ granted
25 the Agency's motion. (Statement of ALJ)

1 4) Claimant's work week began on Monday and ended on Sunday.
2 (Testimony of Claimant)

3 5) Between June 12, 1999, and February 20, 2000, Claimant worked an
4 average of 55 hours per week. On the average, he spent 50 of those hours driving
5 truck and 5 hours working as a mechanic. He worked the 5 hours as a mechanic in the
6 latter part of each week after he had already worked 40 hours. He took unpaid leave on
7 the 4th of July, on the Friday before Labor Day and on Labor Day, on Thanksgiving and
8 the day after Thanksgiving, and for a week between Christmas and New Year's Day.
9 (Testimony of Claimant)

10 6) Claimant maintained contemporaneous records of the hours he worked for
11 the weeks beginning February 21, 2000, and March 6 through April 3, 2000.
12 (Testimony of Claimant; Exhibit A-14)

13 7) Respondent provided no records of the hours worked by Claimant or
14 amounts earned by Claimant during his employment. (Entire Record)

15 8) Claimant's overtime rate as a mechanic was \$25.50 per hour (\$17.00 x
16 1.5) and overtime rate as a truck driver was \$37.50 per hour (\$25.00 x 1.5). (Official
17 Notice)

18 9) Between June 12, 1999, and April 7, 2000, Claimant worked 1639.75
19 hours straight time and 391.5 overtime hours as a truck driver. In the same period of
20 time, Claimant worked 45.25 hours straight time and 204.5 overtime hours as a
21 mechanic. (Testimony of Claimant; Exhibit ALJ-1)

22 10) Between June 12, 1999, and April 7, 2000, Claimant earned a total of
23 \$61,659.03. Claimant was paid all his wages except for the sum of \$11,591.39.
24 (Testimony of Claimant; Exhibits X-1a, X-1d, ALJ-1)

25

1 **CONCLUSIONS OF LAW**

2 1) During all times material herein, Respondent was an employer and
3 Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and
4 652.310 to 652.405. During all times material, Respondent employed Claimant.

5 2) The Commissioner of the Bureau of Labor and Industries has jurisdiction
6 over the subject matter and the Respondent herein. ORS 652.310 to 652.414.

7 3) At times material, ORS 652.140(2) provided:

8 "When an employee who does not have a contract for a definite period
9 quits employment, all wages earned and unpaid at the time of quitting
10 become due and payable immediately if the employee has given to the
11 employer not less than 48 hours' notice, excluding Saturdays, Sundays
12 and holidays, of intention to quit employment. If notice is not given to the
13 employer, the wages shall be due and payable within five days, excluding
14 Saturdays, Sundays and holidays, after the employee has quit, or at the
15 next regularly schedule payday after the employee has quit, whichever
16 event first occurs."

17 The Agency provided no evidence as to whether Claimant quit or was fired. Therefore,
18 the forum has determined the date the Claimant's wages were due and payable based
19 on the assumption that Claimant quit without notice, the circumstances most favorable
20 to Respondent. Respondent violated ORS 652.140(2) by failing to pay Claimant all
21 wages earned and unpaid not later than April 7, 2000, five business days after Claimant
22 left Respondent's employment. Those wages amount to \$11,591.39.

23 4) ORS 652.150 provides:

24 "If an employer willfully fails to pay any wages or compensation of any
25 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."

1 Respondent is liable for \$6,487.00 in civil penalties under ORS 652.150 for willfully
2 failing to pay all wages or compensation to Claimant when due as provided in ORS
3 652.140(2).

4 5) Under the facts and circumstances of this record, and according to the law
5 applicable to this matter, the Commissioner of the Bureau of Labor and Industries has
6 the authority to order Respondent to pay Claimant his earned, unpaid, due and payable
7 wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

8 **OPINION**

9 The facts in this case are undisputed. Respondent's liability for Claimant's
10 unpaid wages was resolved in the ALJ's interim order granting the Agency's motion for
11 summary judgment, as was Respondent's liability for civil penalty wages. The only
12 issue remaining is the amount of penalty wages to which Claimant is entitled.

13 Claimant received two wages rates during his employment, \$17.00 per hour as a
14 mechanic and \$25.00 per hour as a truck driver, in addition to overtime pay at both
15 rates. Where more than one wage rate is paid during the wage claim period, penalty
16 wages are computed by taking the total earned during the wage claim period, dividing
17 that figure by the total number of hours worked during the wage claim period,
18 multiplying that figure by eight hours, and multiplying again by 30 days. *In the Matter of*
19 *Burrito Boy, Inc.*, 16 BOLI 1, 20 (1997).

20 In this case, it is impossible to determine the exact number of hours that
21 Claimant worked and corresponding amount that he earned because the employer
22 provided only incomplete records of wages paid and no records of hours worked.
23 Where an employer produces no records of hours or dates and only incomplete records
24 of earnings, the commissioner may rely on evidence produced by the agency, including
25 credible testimony by a claimant, "to show the amount and extent of the employee's
work as a matter of just and reasonable inference" and "may then award damages to

1 the employee, even though the result be only approximate.” *In the Matter of Usra A.*
2 *Vargas*, 22 BOLI 212, 220-21 (2001). In this case, Claimant’s credible testimony and
3 contemporaneous time records lead the forum to conclude that Claimant earned a total
4 of \$61,659.03 during the wage claim period and worked a total of 2,281 hours. As
5 shown in Finding of Fact 11 – The Merits, this works out to \$6,487.00 in penalty wages.
6 This exceeds \$5,786.40, the amount sought by the Agency in its amendment to the
7 Order of Determination. However, this forum has previously held in wage claim cases
8 that the commissioner has the authority to award monetary damages, including civil
9 penalty wages, exceeding those sought in the Order of Determination where they are
10 awarded as compensation for statutory violations alleged in the charging document. *In*
11 *the Matter of Contractor’s Plumbing Service, Inc.*, 20 BOLI 257, 274 (2000).

12 **ORDER**

13 NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the
14 unpaid wages and civil penalty wages owed as a result of its violations of ORS 652.140,
15 the Commissioner of the Bureau of Labor and Industries hereby orders **Westland**
16 **Resources Group LLC** to deliver to the Fiscal Services Office of the Bureau of Labor
17 and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

18 A certified check payable to the Bureau of Labor and Industries in trust for
19 Glenn D. Woods in the amount of EIGHTEEN THOUSAND SEVENTY-
20 EIGHT DOLLARS AND THIRTY-SIX CENTS (\$18,078.39), less
21 appropriate lawful deductions, representing \$11,591.39 in gross, unpaid,
22 due, and payable wages and \$6,487.00 in penalty wages, plus interest at
23 the legal rate on the sum of \$11,591.39 from May 1, 2000, until paid, and
24 interest at the legal rate on the sum of \$6,487.00 from June 1, 2000, until
25 paid.

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DATED this _____ day of _____, 2002.

Jack Roberts, Commissioner
Bureau of Labor and Industries

1 **JUDICIAL REVIEW NOTICE**

2 Pursuant to ORS 183.482, you are entitled to judicial review of this Final Order.

3 To obtain judicial review, you must file a Petition for Judicial Review with the Court of
4 Appeals in Salem, Oregon, within sixty (60) days of service of this Final Order.

5 If you file a Petition for Judicial Review, you must also serve a copy of the
6 Petition on the BUREAU OF LABOR AND INDUSTRIES and the DEPARTMENT OF
7 JUSTICE -- APPELLATE DIVISION at the following addresses:

8 BUREAU OF LABOR AND INDUSTRIES
9 HEARINGS UNIT
10 1005 STATE OFFICE BUILDING
11 800 NE OREGON STREET # 32
12 PORTLAND, OREGON 97232-2162

13 DEPARTMENT OF JUSTICE
14 APPELLATE DIVISION
15 400 JUSTICE BUILDING
16 SALEM, OREGON 97310

17 If you file a Petition for Judicial Review and if you wish to stay the enforcement of
18 this final order pending judicial review, you must file a request with the Bureau of Labor
19 and Industries, at the address above. Your request must contain the information
20 described in ORS 183.482(3) and OAR 137-003-0090 to OAR 137-003-0092.

21 CERTIFIED TO BE A TRUE AND
22 CORRECT COPY OF THE ORIGINAL
23 AND THE WHOLE THEREOF. _____

24 _____
25 Fowhd/Westland Resources Group LLC.doc