

In the Matter of
E. H. GLAAB, GENERAL CONTRACTOR, INC.,

Case No. 82-10

Final Order of Commissioner Brad Avakian

Issued May 17, 2012

SYNOPSIS

Respondent employed Claimant from June 15 through August 12, 2009, at the agreed wage rate of \$17 per hour. Claimant worked 328 hours and earned \$5,576, but was only paid \$4,550, leaving \$1,026 in unpaid due and owing wages. Respondent's failure to pay Claimant was willful and Respondent was ordered to pay \$4,080 in penalty wages. ORS 652.140(1), ORS 652.150.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 1, 2012, in the Lyon Room of Deschutes County's offices, located at 1300 N.W. Wall Street, Bend, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Chet Nakada, an employee of the Agency. Wage claimant Rene Arellano Sanchez ("Claimant") was present throughout the hearing and was not represented by counsel. Respondent did not make an appearance at the hearing and was held in default.

The Agency called the following witnesses: Claimant; BOLI Wage and Hour Division compliance specialist Dylan Morgan (telephonic); and Maximo Arellano, Claimant's brother and former co-worker. Alita Pavani and Adolfo Alonso, both Oregon

court-certified Spanish language interpreters, interpreted the testimony of Claimant and Maximo Arellano and also interpreted the entire proceeding to Claimant.

The forum received into evidence:

a) Administrative exhibits X-1 through X-11 (submitted or generated prior to hearing); and

b) Agency exhibits A-1 through A-16 (submitted prior to hearing), and A-17 through A-19 (submitted at hearing).

Having fully considered the entire record in this matter, I, Brad Avakian, 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 October 13, 2009, Claimant filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him. At the same time, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent. At the Agency's request, Claimant filed a second wage claim on November 9, 2009, that was identical to the first except that he added the amount of wages he believed Respondent owed to him.

2) On January 21, 2010, the Agency issued Order of Determination No. 09-3153 ("OOD") based on the wage claim filed by Claimant and the Agency's investigation. In pertinent part, the OOD alleged that:

- Claimant was employed by Respondent and earned wages at the agreed wage rate of \$17.00 per hour from June 14 through August 12, 2009.
- Respondent paid Claimant \$4,550 and still owes Claimant \$1,026 in unpaid, due and owing wages, with interest thereon at the legal rate per annum from September 1, 2009, until paid.

- Respondent willfully failed to pay these wages and owes Claimant \$4,080 in penalty wages, with interest thereon at the legal rate per annum from September 1, 2009, until paid.

3) On February 18, 2010, Respondent, through its president and authorized representative Edward Glaab, filed an answer and request for hearing in which it denied the OOD's allegations and further alleged that Claimant was overpaid.

4) On September 23, 2011, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimant setting the time and place of hearing for 9:00 a.m. on May 1, 2012, at the Deschutes Services Building, Bend, Oregon.

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

6) At the hearing, the ALJ granted the Agency's motion to amend its OOD to allege that penalty wages were due from October 1, 2009, instead of September 1, 2009.

7) The ALJ issued a proposed order on May 4, 2012, 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 was an Oregon domestic business corporation based in La Pine, Oregon, that engaged the personal services of one or more employees, and Edward Glaab was its president.

2) Claimant worked for Respondent from March 2007 through August 12, 2009. Between June 15 and August 12, 2009 (the "wage claim period"), Claimant worked for Respondent as a paver installer on Respondent's Oxford Hotel project at the agreed wage rate of \$17 per hour. Claimant was laid off at the end of the project.

3) Claimant maintained a contemporaneous written record of the hours he worked on the Oxford Hotel project.

4) Claimant worked a total of 328 hours on the Oxford Hotel project, summarized as follows:

<u>Week Ending</u>	<u>Hours Worked</u>
6/20/09	40
6/27/09	40
7/4/09	40
7/11/09	40
7/18/09	24
7/25/09	40
8/1/09	40
8/8/09	40
8/15/09	24

5) Calculated at \$17 per hour, Claimant earned \$5,576 in gross wages for his work on the Oxford Hotel project.

6) Claimant was only paid \$4,550 in wages for his work on the Oxford Hotel project.

7) On January 6, 2010, the Agency mailed a document entitled "Notice of Wage Claim" to Respondent stating that Claimant had filed a wage claim for unpaid wages and demanding that Respondent pay Claimant \$1,625.09 in unpaid, due and owing wages. This sum also included \$599.09 in unpaid wages for a pre-wage claim period prevailing wage rate project.

8) Respondent's surety issued a check to the Agency for the \$599.09 in unpaid prevailing wages and the Agency issued a check to Claimant in that amount, leaving \$1,026.09 in unpaid, due and owing wages.

9) Respondent has not paid any additional wages to Claimant since the Agency mailed its demand letter.

- 10) All the witnesses were credible.

ULTIMATE FINDINGS OF FACT

- 1) At all times material herein, Respondent was an Oregon corporation. Edward Glaab was Respondent's corporate president and his actions are imputed to Respondent.

- 2) Claimant was employed by Respondent at the agreed rate of \$17 per hour as a paver installer during the wage claim period.

- 3) Claimant worked 328 hours for Respondent during the wage claim period and has only been paid \$4,550 for his work, leaving \$1,026 in unpaid, due and owing wages.

- 4) On January 6, 2010, the Agency mailed a notice to Respondent that notified Respondent of Claimant's wage claim and demanded that Respondent pay the unpaid, due, and owing wages. Respondent has not paid any additional wages to Claimant and still owes Claimant \$1,026 in unpaid, due and owing wages.

- 5) Respondent's failure to pay Claimant his unpaid, due and owing wages was willful. Penalty wages are computed as follows for Claimant, in accordance with ORS 652.150: $\$17 \text{ per hour} \times 8 \text{ hours} \times 30 \text{ days} = \$4,080$.

CONCLUSIONS OF LAW

- 1) At all times material herein, Respondent was an Oregon employer that engaged the personal services of one or more employees, including Claimant, and was subject to the provisions of ORS 652.110 to 652.200 and ORS 652.310 to 652.405.

- 2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 652.310 to 652.405.

- 3) Respondent violated ORS 652.140(1) by failing to pay to Claimant all wages earned and unpaid not later than the end of Respondent's work day on August 12, 2009. Respondent owes Claimant \$1,026 in unpaid, due, and owing wages.

4) Respondent willfully failed to pay Claimant all wages due and owing and owes \$4,080 in penalty wages to Claimant. ORS 652.150.

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

OPINION

CLAIMANT'S WAGE CLAIMS

In a wage claim default case, the Agency needs only to establish a prima facie case supporting the allegations of its OOD in order to prevail. *In the Matter of Letty Lee Seshier*, 31 BOLI 255, 261 (2011). The elements of a prima facie case include the following: 1) Respondent employed Claimant; 2) The pay rate upon which Respondent and Claimant agreed, if other than the minimum wage; 3) The amount and extent of work Claimant performed for Respondent; and 4) Claimant performed work for which he was not properly compensated. *Id.*

RESPONDENT EMPLOYED CLAIMANT

In its OOD, the Agency alleged that Respondent employed Claimant. Respondent did not deny this in its answer and the Agency's allegation is therefore deemed admitted. OAR 839-050-0130(3).

THE PAY RATE TO WHICH RESPONDENT AND CLAIMANT AGREED, IF OTHER THAN MINIMUM WAGE

In its answer, Respondent denied that it agreed to pay Claimant \$17 per hour, alleging that "plaintive [sic] miss understood [sic] his hourly rate of pay, due to pay decreases of \$2.00 per hour starting June first of 2009." In a default case, the forum may consider any unsworn and unsubstantiated assertions contained in a respondent's answer, but those assertions are overcome whenever they are contradicted by other

credible evidence in the record. *In the Matter of Village Café, Inc.*, 30 BOLI 80, 88 (2008). In this case, Claimant credibly testified that his agreed rate of pay was \$17 per hour. The forum relies on this testimony to conclude that Claimant's correct rate of pay during the wage claim period was \$17 per hour.

AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT

When the employer produces no records of the hours that a wage claimant worked, the forum may rely on evidence produced by the agency from which "a just and reasonable inference may be drawn." *Sesher* at 262. A claimant's credible testimony may be sufficient evidence to show the amount of hours worked by the claimant. *Id.* In this case, Claimant credibly testified that the 328 total hours on the handwritten calendar of hours he submitted to the Agency was copied from his contemporaneously maintained, accurate record of hours worked. His brother, Maximo, corroborated this by credibly testifying that he and Claimant worked eight hours a day, five days a week, on the Oxford Hotel project. Respondent did not provide a record of the hours worked by Claimant during the Agency's investigation or with its answer. The forum relies on Claimant's credible testimony to conclude that he worked 328 hours for Respondent during the wage claim period, earning \$5,576.

CLAIMANT PERFORMED WORK FOR WHICH HE WAS NOT PROPERLY COMPENSATED

The Agency's compliance specialist credibly testified that, based on records made available to him and his subsequent computations, he was able to determine that Claimant was paid only \$4,550 for the work his work at the Oxford Hotel, leaving \$1,026 in unpaid, due and owing wages.

CLAIMANT IS OWED PENALTY WAGES

The forum may award penalty wages when a respondent's failure to pay wages was 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).

The Agency established that Claimant was entitled to be paid \$17 per hour for his work on the Oxford Hotel project, that Respondent set Claimant's work hours and was aware of them, that Respondent laid off Claimant and did not pay him for all hours worked, and that the Agency made a written demand for Claimant's unpaid wages and Respondent made no payment in response. There is no evidence that Respondent acted other than voluntarily and as a free agent in underpaying Claimant and the forum concludes that Respondent acted willfully in failing to pay Claimant his wages and is liable for penalty wages under ORS 652.150.

ORS 652.150(1) and (2) provide, in pertinent part:

"(1) Except as provided in subsections (2) and (3) of this section, if an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 * * *, then, as a penalty for the nonpayment, the wages or compensation of the 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. However:

"(a) In no case shall the penalty wages or compensation continued for more than 30 days from the due date; * * *

"(2) If the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 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 receiving the written notice. If the employee or a person on behalf of the employee fails to send the written notice, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation. * * *"

The Agency provided documentary and testimonial evidence that its investigative staff made the written demand contemplated by ORS 652.150(2) for Claimant's wages on January 6, 2010. The Agency's OOD, issued on January 21, 2010, repeated this

demand.¹ Respondent failed to pay the full amount of Claimant's unpaid wages within 12 days after receiving the written notices and has still not paid them. Consequently, the forum assesses penalty wages at the maximum rate set out in ORS 652.150(1) (hourly rate x eight hours per day x 30 days = penalty wages). Using this equation, penalty wages for Claimant equal \$4,080 (\$17 per hour x eight hours x 30 days).

ORDER

NOW, THEREFORE, as authorized by ORS 652.140(1), ORS 652.150, and ORS 652.332, and as payment of the unpaid wages and penalty wages, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **E. H. GLAAB, GENERAL CONTRACTOR, INC.**, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

- (1) A certified check payable to the Bureau of Labor and Industries in trust for Claimant in the amount of FIVE THOUSAND ONE HUNDRED AND SIX DOLLARS (\$5,106.00), less appropriate lawful deductions, representing \$1,026.00 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from September 1, 2009, until paid, and \$4,080.00 in penalty wages, plus interest at the legal rate on that sum from October 1, 2009, until paid.

DATED this _____ day of _____, 2012.

¹ See *In the Matter of Petworks LLC*, 30 BOLI 35, 47 (2008) (Agency's Order of Determination constitutes a written notice of nonpayment of wages under ORS 652.150).