

In the Matter of
PAVEL BULUBENCHI
dba
Benchi Homes
Case No. 67-06
Final Order of Commissioner Dan Gardner
Issued July 26, 2007

SYNOPSIS

Respondent, who was engaged in residential construction, failed to pay three wage claimants all wages due when they quit their employment, in violation of ORS 652.140(2). Respondent's failure to pay was willful and he was ordered to pay each claimant penalty wages pursuant to ORS 652.150. Additionally, Respondent was ordered to pay each claimant civil penalties pursuant to ORS 653.055, based on his failure to pay the wage claimants overtime for the hours they worked in excess of 40 per week, in violation of ORS 653.261 and OAR 839-020-0030(1). ORS 652.140; ORS 652.150; ORS 653.055; ORS 653.261; OAR 839-020-0030(1).

The above-entitled case came on regularly for hearing before Linda A. Lohr, 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 June 12, 2007, in the W.W. Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Patrick Plaza, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "Agency"). Martin Perez-Dominguez ("Claimant M. Perez") and Adrian Zuniga-Ramirez ("Claimant A. Zuniga") were present throughout the hearing and not represented by counsel. Raymundo Perez-Dominguez ("Claimant R. Perez") appeared by telephone to give testimony and was not represented by counsel. Pavel Bulubenchí ("Respondent") failed to appear for hearing in person or through counsel.

The Agency called as witnesses: Claimants M. Perez, R. Perez, and Zuniga; Elsa Berna, BOLI Wage and Hour Division Compliance Specialist; Vee Sourymat,

BOLI Wage and Hour Division Order Processor/Judgment Clerk; and Carlos Zuniga-Munoz, former Respondent employee.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-10;
- b) Agency exhibits A-1 through A-36 (filed with the Agency's case summary).

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 June 17, 2005, Claimant M. Perez filed a wage claim with the Agency alleging Respondent had employed him from May 1, 2004, to May 30, 2005, and failed to pay his wages for hours he worked from April 1 to May 30, 2005.

2) At the time he filed his wage claim, Claimant M. Perez assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant M. Perez, all wages due from Respondent.

3) On June 17, 2005, Claimant R. Perez filed a wage claim with the Agency alleging Respondent had employed him from December 27, 2004, to May 31, 2005, and failed to pay his wages for hours he worked from April 1 to May 31, 2005.

4) At the time he filed his wage claim, Claimant R. Perez assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant R. Perez, all wages due from Respondent.

5) On June 17, 2005, Claimant A. Zuniga filed a wage claim with the Agency alleging Respondent had employed him from March 16 to May 31, 2005, and failed to pay his wages for all of the hours he worked during that period.

6) On February 17, 2006, the Agency issued Order of Determination No. 05-1779. In the Order, the Agency alleged Respondent had employed Claimants during the period March 16 through May 31, 2005, failed to pay them for hours worked in that period, including overtime hours pursuant to OAR 839-020-0030, and was liable to them for \$16,385.50 in unpaid wages, plus interest. The Agency also alleged Respondent's failure to pay all of Claimants' wages when due was willful and Respondent was liable to them for \$9,600 as penalty wages, plus interest. In addition to the penalty wages, the Agency alleged Respondent paid Claimants less than the wages to which they were entitled under ORS 653.010 to 653.261 and was therefore liable to them for \$9,600 in civil penalties, pursuant to ORS 653.055(1)(b), plus interest. The Order gave Respondent 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.

7) On March 7, 2006, Respondent timely filed an answer through counsel. In his answer, Respondent admitted all allegations except those alleging the amount of unpaid wages owed to Claimants and that Claimants were owed penalty wages and civil penalties. Respondent alleged:

"1. Adrian was due \$4,500, but paid \$1,500 in cash at his request. Thus, he is due \$3,040.

"2. Ray was due \$5,902, but he requested that employer deduct from his pay \$3,500 as payment for a truck that he purchased from employer.

"3. Martin was due \$4,944, but employer paid taxes on his behalf of \$2,444. Thus, he is due \$2,500."

8) On May 9, 2007, the Agency submitted a request for hearing. The Agency included a motion to amend the Order of Determination to correct a misspelling in the caption and to include attachments previously omitted. On May 11, 2007, the ALJ granted the Agency's motion and a Notice of Hearing issued from the Hearings Unit stating the hearing would commence at 9 a.m. on June 12, 2007. With the Notice of Hearing, the forum included copies of the Order of Determination, a language notice, a

Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440. The Notice of Hearing was mailed to Respondent at 10920 NE Eugene Street, Portland, Oregon, and 415 SW Park Street, Camas, Washington. Neither mailing was returned to the Hearings Unit by the U.S. Post Office as undeliverable.

9) At the Agency's request, the Hearings Unit appointed two court certified Spanish speaking interpreters to simultaneously interpret the proceedings for Claimants and to interpret their testimony during the hearing.

10) On May 14, 2007, the ALJ ordered the Agency and Respondent each to submit a case summary that included: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and, for the Agency only, a brief statement of the elements of the claim and any wage and penalty calculations. The ALJ ordered the participants to submit their case summaries by June 1, 2007, and notified them of the possible sanctions for failure to comply with the case summary order.

11) On May 14, 2007, the ALJ issued a notice pertaining to fax filings and timelines.

12) On May 23, 2007, the Agency filed a motion for partial summary judgment alleging that no genuine issue of material fact existed regarding 1) the minimum amount owed to each Claimant or 2) whether Respondent owed penalty wages or civil penalties for the unpaid amounts he admitted were owed. Respondent did not file a response to the Agency's motion.

13) On June 1, 2007, the Agency timely filed a case summary. Respondent did not file a case summary.

14) On June 6, 2007, the ALJ granted the Agency's motion for partial summary judgment based on the pleadings and Respondent's admissions. The ruling stated, in pertinent part:

"The Agency alleged in the amended Order of Determination that Respondent employed Claimants Martin Perez-Dominguez, Raymundo Perez-Dominguez, and Adrian Zuniga-Ramirez in Oregon from March 16 to May 31, 2005, and unlawfully failed to pay them wages totaling \$16,385.50. The Agency further alleged that 30 days had elapsed since the wages became due and owing, that Respondent's failure to pay the wages was willful, and that Respondent, therefore, owed Claimants penalty wages totaling \$9,600. The Agency also alleged Respondent paid Claimants less than the wages to which they were entitled under ORS 653.010 to 653.261 and is liable for civil penalties totaling \$9,600. In response to the original Order of Determination, issued on August 30, 2005, Respondent, through counsel, sent a letter to BOLI on November 3, 2005, and made the following assertion:

Mr. Bulubenchi believes that the wages due were \$15,306, minus various setoffs. As a result of the setoffs, he believes that \$6,942 is actually due. This is computed as follows:

1. Adrian [Zuniga-Ramirez] was due \$4,540, but was paid \$1,500 in cash at his request. Thus, he is due \$2,040.
2. Ray [Perez-Dominguez] was due \$5,902, but he agreed to have \$3,500 deducted from his pay for a truck he purchased from Mr. Bulubenchi. Thus, he is due \$2,402.
3. Martin [Perez-Dominguez] was due \$4,944, but Mr. Bulubenchi paid taxes on his behalf. Thus, his [sic] is due approximately \$2,500.

(Summary Judgment Motion, Exhibit AA)

"According to the Agency and the record herein, due to a service problem with the original Order of Determination, an identical Order of Determination issued on February 17, 2006. In response, Respondent, through counsel, filed a formal Answer and Request for Contested Case Hearing, in which he denied the Agency's allegations in paragraphs two and three of the Order of Determination except he repeated his original assertion that the Claimants were owed wages totaling \$6,942, minus certain deductions.

"On May 22, 2007, the Agency filed a motion for partial summary judgment, claiming that no genuine issue of material fact exists as to whether Claimants are owed wages totaling \$6,942. Respondent had seven days, until May 28, 2007, to file a response to the partial summary judgment motion, but, to date, has [not] filed a response.

“A participant in a BOLI contested case hearing is entitled to summary judgment only if the participant demonstrates that ‘[n]o genuine issue as to any material fact exists and the participant is entitled to a judgment as a matter of law * * *.’ OAR 839-050-0150(4)(B). In reviewing a motion for summary judgment, this forum ‘draw[s] all inferences of fact from the record against the participant filing the motion for summary judgment * * * and in favor of the participant opposing the motion * * *.’ *In the Matter of Efrain Corona*, 11 BOLI 44, 54 (1992), *aff’d without opinion, Corona v. Bureau of Labor and Industries*, 124 Or App 211, 861 P2d 1046 (1993). In considering summary judgment motions, this forum gives some evidentiary weight to unsworn assertions contained in the participants’ pleadings and other filings. *Cf. In the Matter of Tina Davidson*, 16 BOLI 141, 148 (1997)(considering contents of the Respondent’s answer in making factual findings in a default hearing).

“In a typical wage claim case, the Agency has the burden of proving 1) that the respondent employed the claimant; 2) any pay rate upon which the respondent and the claimant agreed, if other than minimum wage; 3) that the claimant performed work for the respondent for which the claimant was not properly compensated; and 4) the amount and extent of work the claimant performed for the respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230, 262-63 (2000). In this case, only the fourth element is disputed. Respondent apparently does not dispute that he 1) employed Claimants during the time period claimed, 2) agreed to the individual pay rates alleged, and 3) failed to pay Claimants all of the wages earned and due. The only issue in dispute is the amount and extent of the work Claimants performed for Respondent, i.e., the Agency contends Claimants worked hours that resulted in earnings totaling \$16,385.50, and Respondent contends Claimants worked hours that resulted in earnings totaling \$15,306, minus certain setoffs. Although the amount and extent of work performed is a factual question that cannot be resolved by summary judgment when disputed, Respondent admits he owes Claimants back wages totaling at least \$6,942. Consequently, there is no genuine dispute of fact regarding Respondent’s obligation to pay \$6,942 in unpaid wages, plus interest. See ORS 652.320(7); 652.330(1).

“The Agency also seeks penalty wages for Claimants totaling \$9,600. A respondent must pay penalty wages when it has ‘willfully fail[ed] to pay any wages or compensation of any employee whose employment ceases * * *.’ ORS 652.150. An employer acts ‘willfully’ when it ‘knows what [it] is doing, intends to do what [it] is doing, and is a free agent.’ *Vento v. Versatile Logic Systems Corp.*, 167 Or App 272, 277, 3 P3d 176, 179 (2000); see *Wyatt v. Body Imaging*, 163 Or App 526, 531-32, 989 P2d 36 (1999), *rev den* 320 Or 252 (2000).

“In this case, Respondent denied he willfully failed to pay wages in his answer. However, the record shows he agreed certain amounts were due to each Claimant and that Claimants were not paid those amounts. Those

facts prove that Respondent acted knowingly, intentionally, and as a free agent in withholding Claimants' wages and, therefore, he acted willfully. The undisputed evidence also establishes that more than 30 days have passed since Respondent withheld Claimants' wages. Under these circumstances, 'as a penalty for such nonpayment,' Claimants' wages 'shall continue' as a matter of law. ORS 652.150. The amount of penalty wages owing for each Claimant is calculated pursuant to statute and Agency rule as follows: Martin Perez-Dominguez's penalty wages total \$3,120 (30 days x 8 hours/day x \$13/hour = \$3,120); Ramon Perez-Dominguez's penalty wages total \$4,080 (30 days x 8 hours/day x \$17/hour = \$4,080); and Adrian Zuniga-Ramirez's penalty wages total \$2,400 (30 days x 8 hours/day x \$10/hour = \$2,400). See ORS 652.150; OAR 839-001-0470(1).

"The Agency also seeks civil penalties payable to Claimants totaling \$9,600. A respondent is liable for civil penalties as provided in ORS 652.150 when it 'pays an employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261.' ORS 653.055. The Commissioner's rules governing overtime requirements were promulgated pursuant to ORS 653.261 and are within the range of wage entitlements encompassed by ORS 653.055. Respondent did not dispute the claims for overtime and, in fact, admitted Claimants collectively were owed at least \$15,306, albeit less certain setoffs, during the wage claim period. That amount differs from the Agency's calculation of \$16,385.50 by only \$1,079.50 and necessarily includes the overtime amounts alleged in the Agency's Order of Determination. Respondent's admission that collectively Claimants were owed at least \$15,306 is sufficient to prove Respondent failed to pay Claimants at one and one-half times their regular rate of pay for the hours they worked in excess of 40 hours per week as required under OAR 839-020-0030(1). Respondent is therefore liable to Claimants for civil penalties, computed pursuant to ORS 652.150, as follows: Martin Perez-Dominguez's penalty wages total \$3,120 (30 days x 8 hours/day x \$13/hour = \$3,120); Raymundo Perez-Dominguez's penalty wages total \$4,080 (30 days x 8 hours/day x \$17/hour = \$4,080); and Adrian Zuniga-Ramirez's penalty wages total \$2,400 (30 days x 8 hours/day x \$10/hour = \$2,400). See ORS 652.150; OAR 839-001-0470(1).

"The Agency's motion for partial summary judgment is **GRANTED**. There are still issues of fact about the amounts owed Claimants in excess of the amounts admitted by Respondent and the participants should be prepared to address those issues at the hearing scheduled to commence on June 12, 2007. This order will become part of the Proposed Order that is issued subsequent to the hearing."

- 15) Respondent did not appear at the time and place set for hearing and no one appeared on his behalf or advised the ALJ of any reason for his failure to appear.

The ALJ ruled that Respondent was in default, having been properly served with the Notice of Hearing, and having failed to appear at the hearing.

16) At the start of hearing, the Agency waived the ALJ's recitation of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

17) The ALJ issued a proposed order on July 6, 2007, 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) At times material, Respondent was a licensed general contractor conducting a residential construction business in Oregon using the assumed business name of Benchi Homes. Respondent was licensed with the Oregon Construction Contractor's Board ("CCB") as a sole proprietor and not permitted to have employees because he had no workers' compensation coverage.

2) In May 2004, Claimant M. Perez began working for Benchi Homes as a framer on new residential construction. Respondent paid his wages in cash every two weeks or when a particular house was completed. In December 2004, Claimant M. Perez went to Mexico for a visit and when he returned in February 2005 Respondent rehired him and agreed to pay him \$17 per hour to frame houses.

3) After hearing about Respondent's business from his brother, Claimant M. Perez, Claimant R. Perez and a friend, Carlos Zuniga Munoz ("C. Zuniga"), came to Oregon in December 2004 and started framing houses for Respondent. Respondent agreed to pay Claimant R. Perez \$13 per hour.

4) In March 2005, Claimant A. Zuniga began working for Respondent as a laborer with the residential construction crew. Respondent agreed to pay him \$10 per hour.

5) Claimants each recorded their work hours in a notebook or on a notepad at the end of each work day or at the end of the work week and showed them to Respondent, who subsequently paid them by cash or check.

6) Starting in April 2005, Claimants had difficulty obtaining their wages from Respondent for the work they performed. All three continued to work and record their work hours until late May 2005, based on Respondent's promises to pay their wages. Eventually, Respondent paid Claimant M. Perez and Claimant R. Perez \$2,000 each for some of the hours they worked after April 2005. Respondent gave Claimant A. Zuniga a check for \$2,000 that Zuniga was unable to cash because Respondent did not have sufficient funds in his bank account to cover the check amount. Respondent did not pay Claimant A. Zuniga any wages for the hours he worked after April 2005.

7) From April 1 through May 30, 2005, Claimant M. Perez worked 446 hours, including 118.5 overtime hours, earning \$8,589.25.

8) From April 1 through May 31, 2005, Claimant R. Perez worked 453 hours, including 117.5 overtime hours, earning \$6,652.75.

9) From April 1 through May 31, 2005, Claimant A. Zuniga worked 453 hours, including 117.5 overtime hours, earning \$5,117.50.

10) Claimants did not return to work after May 31, 2005, because Respondent refused to pay them for all of the hours they worked. They each filed a wage claim with BOLI and filled out a calendar, using the written records they maintained during their employment, showing the dates and hours each worked for Respondent.

11) On June 27, 2005, BOLI sent Respondent a Notice of Wage Claim ("Notice") that stated, in pertinent part:

"You are hereby notified that MARTIN PEREZ-DOMINGUEZ, ET AL. have filed wage claims with the Bureau of Labor and Industries alleging:

"[Claimant M. Perez] claims unpaid regular and statutory overtime wages of \$3,902.00 at the rate of \$13 per hour from April 1, 2005 to May 31, 2005.

"[Claimant R. Perez] claims unpaid regular and statutory overtime wages of \$5,463.00 at the rate of \$17 per hour from April 1, 2005 to May 31, 2005.

"[Claimant A. Zuniga] claims unpaid regular and statutory overtime wages of \$4,590 at the rate of \$10 per hour from April 1, 2005 to May 31, 2005.

"IF THE CLAIMS ARE CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address."

12) On July 15, 2005, BOLI compliance specialist Freytag mailed a letter to Respondent inquiring about whether the wages had been paid and requesting that Respondent send to BOLI either proof of payment or wage claim checks no later than July 29. Respondent replied by facsimile transmission on July 29, 2005, in a note that stated in pertinent part:

"You have made a mistake on Martin Perez and Raymundo Perez.

Martin Perez \$17 per hour.

Raymundo Perez \$13 per hour.

Martin Perez owes taxes for 1994 and 1995.

Raymundo Perez not return [sic] 1996 Mazda truck which is worth \$3,500.

Adrian Zuniga has a [illegible] for \$2,000.

"Therefore, they all owe money or truck.

"If there is [sic] more questions, I will give all information to my lawyer.

"They all start work [illegible] independent contractors.

"They failed to give me all information for 3 months.

"If you have any questions about taxes call my CPA Kevin."

Respondent included copies of "Benchi Homes" payroll summaries for January through December 2004 and 2005 showing that Claimant M. Perez was paid \$17 per hour; Claimant R. Perez was paid \$13 per hour; and Claimant A. Zuniga was paid \$10 per

hour. The payroll summaries do not show Claimants were paid for the work they performed from April 1 through May 31, 2005.

13) After determining that Respondent's information was not responsive to her request, BOLI compliance specialist Freytag sent Respondent another letter requesting payroll records for each Claimant. When Respondent failed to reply, Freytag sent him a final letter on August 16, 2005, informing him that "it has become necessary to begin the Administrative Process" and that Respondent could "stop this action by responding no later than August 29, 2005, with payment in full of the wages owed." By letter dated November 3, 2005, Respondent's counsel at the time followed up on a conversation with Freytag stating, in pertinent part:

"Mr. Bulubenchi believes that the wages due were \$15,306, minus various setoffs. As a result of those setoffs, he believes that \$6,942 is actually due. This is computed as follows

1. Adrian was due \$4,540, but was paid \$1,500 in cash at his request. Thus, he is due \$2,040.
2. Ray was due \$5,902, but he agreed to have \$3,500 deducted from his pay for a truck he purchased from Mr. Bulubenchi. Thus, he is due \$2,402.
3. Martin was due \$4,944, but Mr. Bulubenchi paid taxes on his behalf. Thus, his [sic] is due approximately \$2,500."

Thereafter, an Order of Determination issued on February 21, 2006, alleging Respondent owed \$16,385.50 in unpaid wages to Claimants.

14) All of the witnesses testified credibly.

ULTIMATE FINDINGS OF FACT

1) At times material, Respondent was an individual conducting business in Oregon and engaged or utilized the services of one or more persons in the operation of that business.

2) Respondent employed Claimant M. Perez in Oregon as a construction worker from April 1 through May 30, 2005.

- 3) Respondent agreed to pay Claimant M. Perez \$17 per hour.
- 4) Between April 1 and May 30, 2005, Claimant M. Perez worked 446 hours, 118.5 of which were overtime hours, earning \$8,589.25. Respondent paid Claimant M. Perez only \$2,000 and owes him \$6,589.25 in due and unpaid wages.
- 5) Respondent employed Claimant R. Perez in Oregon as a construction worker from April 1 through May 31, 2005.
- 6) Respondent agreed to pay Claimant R. Perez \$13 per hour.
- 7) Between April 1 and May 31, 2005, Claimant R. Perez worked 453 hours, 117.5 of which were overtime hours, earning \$6,652.75. Respondent paid Claimant R. Perez only \$2,000 and owes him \$4,652.75 in due and unpaid wages.
- 8) Respondent employed Claimant A. Zuniga in Oregon as a construction worker from April 1 through May 31, 2005.
- 9) Respondent agreed to pay Claimant A. Zuniga \$10 per hour.
- 10) Between April 1 and May 31, 2005, Claimant A. Zuniga worked 453 hours, 117.5 of which were overtime hours, earning \$5,117.50. Respondent paid no wages to Claimant A. Zuniga and owes him \$5,117.50 in due and unpaid wages.
- 11) On Claimants' behalf, BOLI sent Respondent written notice of nonpayment of wages on June 27 and July 15, 2005, before issuing an Order of Determination on February 17, 2006.
- 12) Respondent willfully failed to pay Claimants total wages due of \$16,359.50 in earned, due and payable wages. Respondent has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.
- 13) Penalty wages for Claimants, computed pursuant to ORS 652.150, equal \$4,080 (Claimant M. Perez - \$17 per day x 8 hours per day x 30 days), \$3,120

(Claimant R. Perez - \$13 per day x 8 hours per day x 30 days), and \$2,400 (Claimant A. Zuniga - \$10 per day x 8 hours per day x 30 days).

14) Respondent paid Claimants less than the wages to which they were entitled and civil penalties, computed pursuant to ORS 652.150, total \$4,080 (Claimant M. Perez - \$17 per day x 8 hours per day x 30 days), \$3,120 (Claimant R. Perez - \$13 per day x 8 hours per day x 30 days), and \$2,400 (Claimant A. Zuniga - \$10 per day x 8 hours per day x 30 days).

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer and Claimants were employees subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and ORS 653.010 to 261.

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) Respondent violated ORS 652.140 by failing to pay Claimants all wages earned and unpaid after their employment terminated.

4) Respondent is liable for penalty wages under ORS 652.150 for willfully failing to pay all wages or compensation earned and due to Claimants when their employment terminated, as provided in ORS 652.140.

5) Respondent is liable for civil penalties under ORS 653.055 for failing to pay Claimants overtime wages to which they were entitled pursuant to ORS 653.261 and OAR 839-020-0030(1). ORS 653.055.

6) 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 Claimants their earned, unpaid, due and payable wages, penalty wages, and civil penalties, plus interest on those sums until paid. ORS 652.332.

OPINION

The Agency moved for partial summary judgment on the merits based on Respondent's admission in the pleadings that he owed Claimants at least \$6,942 in wages. The Agency also sought judgment on the merits as to the penalty wages and civil penalties sought in the Order of Determination. Based on Respondent's failure to raise a genuine issue of fact in response to the Agency's motion, partial summary judgment was granted. Respondent was deemed liable for unpaid wages totaling \$6,942, penalty wages totaling \$9,600, and civil penalties totaling \$9,600. The ruling granting partial summary judgment is hereby confirmed.

The sole factual issue remaining is whether Respondent owed Claimants an additional \$9,417.50 in unpaid wages. When Respondent failed to appear at hearing, the Agency was required to establish a prima facie case to support its contention that Respondent owed Claimants the additional amount of unpaid wages. *In the Matter of Peter N. Zambetti*, 23 BOLI 234, 241 (2002). Respondent's unsworn assertions contained in his answer may be considered when making factual findings, but those assertions are overcome by other credible evidence. *Id.*

In this case, Respondent did not dispute he employed Claimants for the periods and pay rates Claimants claimed or that they collectively were due at least \$15,346. Rather, Respondent claimed "deductions" for amounts purportedly paid to Claimants or on their behalf. In his answer, Respondent alleged 1) he paid taxes totaling \$2,444 on Claimant M. Perez's behalf and owes him only \$2,500; 2) Claimant R. Perez requested Respondent deduct \$3,500 from his wages "as payment for a truck he purchased from [Respondent]" and therefore is owed only \$2,402; and 3) Claimant A. Zuniga was owed \$4,500, but was paid \$1,500 "in cash at his request" and is therefore due only \$3,040. Respondent did not produce any evidence to support his contentions in response to the Agency's motion for summary judgment and did not appear at hearing to controvert the

Agency's evidence establishing the amounts owed each Claimant. Instead, Respondent's unsworn assertions were overcome by credible testimonial and documentary evidence showing Claimants are owed unpaid wages totaling \$16,359.50, which is only \$1,013.50 more than the amount Respondent admitted was due Claimants, less the alleged deductions. Based on the preponderance of credible evidence in the record and absent evidence that Respondent was entitled to deduct the amounts alleged in his answer, the forum concludes Respondent is liable for the additional amount of unpaid wages earned and owed to Claimants.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, penalty wages, and civil penalties, Respondent **Pavel Bulubenchki dba Benchi Homes** is hereby ordered 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:

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Martin Perez-Dominguez, in the amount of FOURTEEN THOUSAND SIX HUNDRED SIXTY NINE DOLLARS AND TWENTY FIVE CENTS (\$14,669.25), less appropriate lawful deductions, representing \$6,589.25 in gross earned, unpaid, due and payable wages, \$4,080 in penalty wages, and \$4,080, in civil penalties, plus interest at the legal rate on the sum of \$6,589.25 from July 1, 2005, until paid, and interest at the legal rate on the sum of \$8,160 from August 1, 2005, until paid.

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Raymundo Perez-Dominguez, in the amount of TEN THOUSAND EIGHT HUNDRED NINETY TWO DOLLARS AND SEVENTY FIVE CENTS (\$10,892.75), less appropriate lawful deductions, representing \$4,652.75 in gross earned, unpaid, due and payable wages, \$3,120 in penalty wages, and \$3,120, in civil penalties, plus interest at the legal rate on the sum of \$4,652.75 from July 1, 2005, until paid, and interest at the legal rate on the sum of \$6,240 from August 1, 2005, until paid.

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Adrian Zuniga-Ramirez, in the amount of NINE THOUSAND NINE HUNDRED SEVENTEEN DOLLARS AND FIFTY CENTS (\$9,917.50), less appropriate lawful

deductions, representing \$5,117.50 in gross earned, unpaid, due and payable wages, \$2,400 in penalty wages, and \$2,400, in civil penalties, plus interest at the legal rate on the sum of \$5,117.50 from July 1, 2005, until paid, and interest at the legal rate on the sum of \$4,800 from August 1, 2005, until paid.