

In the Matter of
R. L. CHAPMAN ENT. LTD.,
dba Aghast Productions,
Respondent.

Case Number 53-98
Final Order of the Commissioner
Jack Roberts
Issued January 15, 1999.

SYNOPSIS

Where Respondent submitted an answer to the Order of Determination and requested a hearing, but failed to appear at the hearing, the Commissioner found Respondent in default of the charges set forth in the charging document. Where the Agency made a prima facie case supporting the Agency's Order of Determination on the record, the Commissioner found that Respondent willfully failed to pay Claimants all wages due after Claimants quit their employment, in violation of ORS 652.140(2) and OAR 839-20-030 (overtime wages). The Commissioner ordered that Respondent pay civil penalty wages, pursuant to ORS 652.150.

The above-entitled contested case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on

July 1, 1998, in Room 1004 of the Portland State Office Building, 800 N.E. Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by David Gerstenfeld, an employee of the Agency. Dorie Lyn Bowers (Claimant Bowers) was present throughout the hearing. Debra Eagle Goertler (Claimant Goertler) was not present at the hearing. R. L. Chapman Ent. Ltd., dba Aghast Productions (Respondent), after being duly notified of the time and place of this hearing, failed to appear and no representative appeared for Respondent.

The Agency called as witnesses Dorie Lyn Bowers, Claimant; Iola Simmons, former Respondent employee; and, Lois Banahene, Compliance Specialist, Bureau of Labor and Industries.

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, 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 November 10, 1997, Claimant Dorie Lyn Bowers filed a wage claim with the Agency, alleging that she had been employed by Respondent and that Respondent had failed to pay wages earned and due to her.

2) At the same time she filed the wage claim, Claimant Bowers assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant Bowers, all wages due from Respondent.

3) On November 20, 1997, Claimant Debra Eagle Goertner filed a wage claim with the Agency, alleging that she had been employed by Respondent and that Respondent had failed to pay wages earned and due to her.

4) At the same time she filed the wage claim, Claimant Goertler assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant Goertler, all wages due from Respondent.

5) On March 25, 1998, the Commissioner of the Bureau of Labor and Industries served on Respondent's registered agent an Order of Determination based upon the wage claims filed by Claimants and the Agency's investigation. The Order of Determination found that Respondent owed a total of \$1,033.50 in wages and \$2,640.00 in civil penalty wages. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency, or request an administrative hearing and submit an answer to the charges.

6) On April 23, 1998, Respondent's then counsel, having been granted an extension of time by the Agency, filed a written answer to the Order of Determination and requested a contested case hearing. The answer denied that Claimants ever worked for Respondent, denied that Respondent ever hired employees, and alleged by way of affirmative defenses that Respondent engaged independent contractors to perform specific jobs at a specific rate per job, that if Claimants did work for Respondent they worked as independent contractors, and that if Claimants were owed money by Respondent, Respondent was financially unable to pay them.

7) On May 20, 1998, the Agency sent the Hearings Unit a request for a hearing date. The Hearings Unit issued a Notice of Hearing to the Respondent, the Agency, and the Claimants indicating the time and place of the hearing. Together with the Notice of Hearing, the forum sent a document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the Forum's contested case hearing rules, OAR 839-050-0000 to 839-050-0420.

8) On June 1, 1998, Respondent's counsel notified this forum that as of May 18, 1998, she no longer represented Respondent and withdrew as attorney of record.

9) On June 2, 1998, the ALJ issued an interim order providing as follows:
"OAR 839-050-0110(1) provides that all corporations must be represented by an attorney in accordance with ORS 9.320 and either 9.160 or 9.241. Respondent's failure to appear by counsel in the matter scheduled for hearing on July 1, 1998, will result in a default.

"This order is issued on the ALJ's own motion so that hearing will not be delayed by last minute retention of counsel or complicated by untimely requests for relief from default. For Respondent to avoid default, counsel must appear on Respondent's behalf with notice to the ALJ by June 9, 1998." (emphasis in original)

Respondent did not respond to the order and no attorney appeared for Respondent.

10) On June 18, 1998, the forum received the Agency's request for a discovery order pursuant to OAR 839-050-0200 encompassing items requested by the Agency from Respondent on June 8, 1998, but not received. On June 19, 1998, the ALJ issued by first class mail a discovery order for the requested items and a discovery order requiring both participants to submit a summary of the case pursuant to OAR 839-050-0200 and 839-050-0210. The Agency submitted a timely summary. The discovery orders were directed to Respondent at 1637 SW Alder Street, Portland, Oregon 97209 and PO Box 55607, Portland, Oregon 97238.

Respondent did not produce the requested documents nor did it file a summary.

11) At the time and place set forth in the Notice of Hearing for this matter, the Respondent did not appear or contact the Agency or the Hearings Unit. At the conclusion of the hearing, Respondent had still not appeared or contacted the Agency or the Hearings Unit. The ALJ then found Respondent in default as to the Order of Determination, pursuant to OAR 839-050-0330(2), for failure to attend the hearing

12) Pursuant to ORS 183.415(7), the ALJ explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

13) The proposed order, containing an exceptions notice, was issued on August 4, 1998. Exceptions, if any, were due August 14, 1998. The hearings unit received no exceptions.

FINDINGS OF FACT - THE MERITS

1) During times material herein, the Respondent was an Oregon corporation engaged in the retail fish business and, under the assumed business name, Aghast Productions, operated an independent video production company. Richard Leroy Chapman ("Dick") Panek is Respondent's registered agent. Both businesses were located in Portland, Oregon. Respondent employed one or more persons in the State of Oregon.

2) From on or about September 24, 1997, to on or about September 26, 1997, Respondent employed Claimant Bowers to perform clerical tasks during the evening hours between 5:00 p.m. and 10:00 p.m. Although Claimant Bowers believed she was hired as a screenwriter, her actual duties for the three days she worked consisted of filing, typing, and working with document format. Respondent assigned Claimant Bowers' tasks and furnished the equipment and materials she used on the job. Respondent detailed and controlled how Claimant Bowers was to perform her duties. Claimant Bowers worked for Respondent for three days for five hours each day.

3) Claimant Bowers understood that she would receive minimum wage for the hours she worked. Minimum wage during Claimant's wage claim period was \$5.50 per hour. Claimant Bowers recorded her hours on weekly time cards that were attached to a clipboard and kept in an office. She did not make copies of her time cards.

4) Claimant Bowers quit her employment without notice on September 26, 1997, after Dick Panek became verbally abusive to her during a discussion about his request that she work additional hours into the night. After Claimant quit, Panek told her that she would receive her paycheck after she returned a pager and key provided to her by Respondent when she was initially employed. Claimant returned the pager and key and requested her paycheck. She did not receive her paycheck and Panek told Claimant that since she was in charge of billing, it was her fault if she didn't get paid. Claimant didn't know she was in charge of the billing. To date, Claimant has not been paid any wages earned since the date of her hire.

5) Claimant Bowers' record and testimony, which are accepted as fact, show that she worked 15 total hours. She earned \$82.50 in wages (15 hours x \$5.50 = \$82.50). Claimant was paid nothing; the balance of earned, unpaid, due and owing wages equals \$82.50.

6) The forum computed civil penalty wages, in accordance with ORS 652.150 and OAR 839-001-0470, as follows: \$5.50 (Claimant Bowers' hourly rate) multiplied by 8 (hours per day) equals \$44.00. This figure of \$44.00 is multiplied by 30 (the maximum number of days for which civil penalty wages continue to accrue) for a total of \$1,320.00. The Agency set forth this figure in its Order of Determination.

7) From September 25, 1997, to October 15, 1997, Respondent employed Claimant Goertler to perform receptionist and clerical tasks. Her duties included billing, typing, and "setting up" actors, writers, interviews, and live auditions.

8) Claimant Goertler was hired by Dick Panek. Panek told Claimant Goertler that she would receive \$5.00 per hour and that her pay would go up later on in her employment. She was unaware at the time of hire that the minimum wage was \$5.50 per hour.

9) Respondent assigned the tasks Claimant Goertler was to perform, furnished the equipment and materials she used, and detailed and controlled the manner in which she performed her duties.

10) Claimant Goertler recorded her work hours on "Weekly Time Cards" provided by Respondent. According to Claimant's time cards, she worked a total of four weeks, 24 hours the first week, 44 hours the second week, 66 hours the third week, and 33 hours the fourth week.

11) Claimant Goertler's last day of work was on October 15, 1997; Goertler quit her employment without notice because she wasn't receiving her wages.

12) Based on the credible testimony in the record and the time cards, which are accepted as fact, Claimant Goertler worked during the period between September 25 and October 15, 1997, 167 total hours in 18 days; of the total hours, 30 were hours worked in excess of 40 hours per week.

13) Pursuant to ORS 653.261 and OAR 839-020-0030 (Payment of Overtime Wages), Claimant Goertler's total earnings for the period between September 25 and October 15, 1997, were \$1,001.00. The total reflects the sum of the following:

137 hours @ \$5.50 per hour	\$753.50
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30 hours @ the overtime rate

of \$8.25 per hour (one and one

half times the minimum wage)	<u>\$247.50</u>
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TOTAL EARNED	\$1,001.00
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14) Respondent paid Claimant Goertler \$50.00 for work performed during the period of the wage claim; the balance of earned, unpaid, due and owing wages equals \$951.00.

15) The forum computed civil penalty wages, in accordance with ORS 652.150 and OAR 839-001-0470, as follows: \$5.50 (Claimant Goertler's hourly rate) multiplied by 8 (hours per day) equals \$44.00. This figure of \$44.00 is multiplied by 30 (the maximum number of days for which civil penalty wages continue to accrue) for a total of \$1,320.00. The Agency set forth this figure in its Order of Determination.

16) Respondent alleged in its answer an affirmative defense of financial inability to pay the wages due at the time they accrued but did not provide any such evidence for the record.

17) The testimony of Claimant Bowers, in general, was found to be credible. She had the facts readily at her command and her statements were supported by other credible testimony. There is no reason to determine the testimony of the Claimant to be anything except reliable and credible.

18) The testimony of the other witnesses was credible. The ALJ observed the demeanor of each witness and found each to be believable.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was an Oregon corporation and utilized and controlled the personal services of one or more persons in the State of Oregon who were not independent contractors. ORS 652.310 (1) and (2); 653.010(3) and (4).

2) Respondent employed the following Claimants as clericals on the dates listed, during which each Claimant had the earnings listed, and were paid the amounts listed. Respondent owes to each Claimant the sums indicated:

CLAIMMNT	DATES	EARNED	PAID	OWED
Dori Lyn Bowers	9/24- 9/26/97	\$82.50	\$0	\$82.50
Debra R. Goertler	9/25- 10/15/97	\$1,001	\$50	\$951

3) Respondent willfully failed to pay the Claimants all wages within five days, excluding Saturdays, Sundays, and holidays, after each Claimant ceased working, and more than 30 days have elapsed from the date each Claimant's wages were due.

4) Civil penalty wages, computed in accordance with ORS 652.150 and OAR 839-001-0470, total \$2,640.00 for both Claimants.

5) Respondent made no showing that it was financially unable to pay the Claimants' wages at the time they accrued.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimants were employees subject to the provisions of ORS 652.110 to 652.200 and ORS 652.310 to 652.414, and 653.010 to 653.261.

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) ORS 652.140(2) provides:

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

Respondent violated ORS 652.140(2) by failing to pay Claimants all wages earned and unpaid within five days, excluding Saturdays, Sundays, and holidays, after Claimants quit employment without notice.

4) ORS 653.261(1) provides:

"The commissioner may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to, minimum meal periods and rest

periods, and maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of such employees when computed without benefit of commissions, overrides, spiffs and similar benefits."

OAR 839-20-030(1) provides in part:

"[A]ll work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed without benefit of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1)."

Respondent was obligated by law to pay Claimant Goertler one and one-half times her regular hourly rate of \$5.50, in this case, \$8.25, for all hours worked in excess of 40 hours in a week. Respondent failed to do so.

5) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent is liable for a civil penalty under ORS 652.150 for willfully failing to pay each Claimant all wages or compensation when due as provided in ORS 651.140.

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

OPINION

Default

The Respondent filed an answer and request for hearing through counsel but did not appear at the hearing nor did any representative appear for Respondent. Respondent was found to be in default. OAR 839-050-0330 (1)(d). In a default situation, the forum's task is to determine whether the Agency has made a prima facie case supporting the Order of Determination. ORS 183.415 (5) and (6); OAR 839-050-0330(2); *In the Matter of S.B.I., Inc.*, 12 BOLI 102 (1993); *In the Matter of Mark Vetter*, 11 BOLI 25 (1992).

Where a Respondent's total contribution to the record is a request for a hearing and an answer that contains nothing other than unsworn and unsubstantiated assertions, those assertions are overcome wherever they are controverted by other credible evidence on the record. *In the Matter Tom's TV & VCR Repair*, 12 BOLI 110 (1993); *In the Matter of Sealing Technology, Inc.*, 11 BOLI 241 (1993); *In the Matter of Jack Mongeon*, 6 BOLI 194 (1987).

Prima Facie Case

In a wage claim case where the evidence on the record is not only uncontroverted, but is complete, credible, and persuasive that the respondent willfully failed to pay earned, unpaid, due and payable wages to a claimant, a prima facie case is clearly established. *In the Matter of Fred Vankeirsbilck*, 5 BOLI 90 (1986). In this case, a preponderance of credible evidence on the whole record showed Respondent employed each Claimant during the wage claim periods claimed and willfully failed to pay Claimants all of their wages, earned and payable, when due. Respondent owes earned, unpaid, due and payable wages to the Claimants, his former employees, in the amounts specified herein. In addition, Respondent is liable for penalty wages for its willful failure to pay Claimants their wages. The evidence is credible and persuasive and the best evidence available, given the Respondent's failure to appear.

Respondent's only articulated defense, aside from its contention that it was financially unable to pay the wages, was an unsworn and unsubstantiated assertion in its answer that the Claimants were independent contractors. That assertion does nothing to controvert or overcome the credible evidence in the record that Claimants were hired as hourly workers to perform clerical tasks requiring no specialized training. Respondent furnished the equipment and materials Claimants used to perform their work, and Respondent had complete control over how and when they performed their work. The Claimants were Respondent's employees, not independent contractors. See *In the Matter of Geoffroy Enterprises, Inc.*, 15 BOLI 148 (1996).

Penalty Wages

An award of penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 279 Or 1083, 557 P2d 1344 (1976); *State ex rel Nilsen v. Johnson et ux*, 233 Or 103, 377 P2d 331 (1962). Respondent, as an employer, has a duty to know the amount of wages due its employees. *In the Matter of Handy Andy Towing, Inc.* 12 BOLI 284 (1994); *In the Matter of Jack Coke*, 3 BOLI 238 (1983); *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950). The evidence established that Respondent knew it had paid Claimant Bowers nothing and Claimant Goertler only \$50.00 at the time the Claimants quit their employment with Respondent, and that it acted voluntarily and as a free agent. Accordingly, Respondent must be deemed to have acted willfully.

It is Respondent's burden to show its financial inability to pay the Claimants' wages at the time they were due. Where an employer files an answer alleging inability to pay but produces no evidence in support of its defense, a claimant's right to a civil

penalty will not be overcome. *In the Matter of Mega Marketing*, 9 BOLI 133 (1990). Respondent did not present any evidence in support of its affirmative defense of financial inability to pay when the wages came due, and is therefore liable for civil penalty wages under ORS 652.150.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as a result of Respondent's violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders R. L. CHAPMAN ENT. LTD. dba Aghast Productions, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 N.E. Oregon Street, Portland, Oregon 97232-2162, the following:

(1) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR DORI LYN BOWERS in the amount of ONE THOUSAND FOUR HUNDRED AND TWO DOLLARS AND FIFTY CENTS (\$1,402.50), less appropriate lawful deductions, representing \$82.50 in gross earned, unpaid, due and payable wages; and \$1,320.00 in penalty wages; plus interest at the legal rate on the sum of \$82.50, from October 1, 1997, until paid and interest at the legal rate on the sum of \$1,320.00 from November 1, 1997, until paid; PLUS

(2) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR DEBRA EAGLE GOERTLER in the amount of TWO THOUSAND TWO HUNDRED AND SEVENTY ONE DOLLARS (\$2,271.00), less appropriate lawful deductions, representing \$951.00 in gross earned, unpaid, due and payable wages; and \$1,320.00 in penalty wages; plus interest at the legal rate on the sum of \$951.00, from October 20, 1997, until paid and interest at the legal rate on the sum of \$1,320.00 from November 20, 1997, until paid.