

In the Matter of

Ryan Allen Hite.

Case No. 58-09

Final Order of Commissioner Brad Avakian

Issued November 18, 2009

SYNOPSIS

The Agency paid out \$3,444 in unpaid wages to two wage claimants from the Wage Security Fund and sought reimbursement of that amount from Respondent, plus a 25 percent penalty of \$861. The forum ordered Respondent to repay \$3,444 to the Wage Security Fund and a 25 percent penalty of \$861. ORS 652.140, 652.414.

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 Tuesday, October 13, 2009, at the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries (“BOLI” or “the Agency”) was represented by Linda A. Lohr, an employee of the Agency. Respondent did not appear at hearing and was held in default.

The Agency called Wage and Hour Division compliance specialist Susan Washington as its only witness.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-5 (submitted or generated prior to hearing); and
- b) Agency exhibits A-1 through A-13 (submitted prior to hearing) and A-14 (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 May 23, 2008, Claimants Victor Vera (“Vera”) and Jose Chavez (“Chavez”) filed wage claims with the Agency alleging that Respondent had employed them and failed to pay wages earned and due to them. At the time they filed their wage claims, Vera and Chavez assigned to the Commissioner of the Bureau of Labor and Industries, in trust for themselves, all wages due from Respondent.

2) Claimants filed their wage claims within the statute of limitations.

3) On November 26, 2008, the Agency issued Order of Determination No. 08-2464 based upon the wage claims filed by Claimants Vera and Chavez. The Order of Determination alleged:

(a) Claimant Chavez was employed by Respondent from February 15, 2008, to March 14, 2008; that he was entitled to the agreed pay rate of \$15 per hour; that he performed work, labor, and services; that he was paid nothing for 132 hours regular work, and that he is owed \$1,980 in unpaid wages, plus interest.

(b) Claimant Vera was employed by Respondent from February 15, 2008, to March 14, 2008; that he was entitled to the agreed pay rate of \$12 per hour; that he performed work, labor, and services; that he was paid nothing for 122 hours regular work, and that he is owed \$1,464 in unpaid wages, plus interest.

(c) BOLI has paid Vera and Chavez \$3,444 from the Wage Security Fund (“WSF”) and is entitled to recover from Respondent that amount as wages paid from the WSF, plus a penalty of 25 percent of the sum paid from the WSF, equaling \$861, plus interest.

The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) On December 9, 2008, Respondent filed an answer and request for hearing. He generally denied all the allegations in the Order of Determination. He also alleged that Claimants were subcontractors, that he terminated them on the last project they worked on and paid them in full, that he agreed with them to an hourly wage, that Claimants still had his tile saw, and that Claimant Chavez wanted to be his partner.

5) On July 16, 2009, the Agency filed a "BOLI Request for Hearing" with the forum.

6) On July 24, 2009, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimants stating the time and place of the hearing as October 13, 2009, at the office of the Oregon Bureau of Labor and Industries, W. W. Gregg Hearing Room, 1045 State Office Building, 800 NE Oregon St., Portland, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445.

7) At the time set for hearing, Respondent had not appeared and had not previously announced that he would not appear. Pursuant to OAR 839-050-0330(2), the ALJ waited 30 minutes before commencing the hearing. When Respondent did not appear or contact the hearings unit by telephone during that time, the ALJ declared Respondent in default and commenced the hearing.

8) At the outset of the hearing, the ALJ explained the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing.

9) The ALJ issued a proposed order on October 28, 2009, 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, Ryan Allen Hite (“Respondent”) was an employer in the state of Oregon and a contractor licensed with the Oregon Construction Contractor’s Board.

2) Respondent employed Claimants Chavez and Vera to remodel a bathroom in a house in Oregon owned by Celeste Kirk and Jim Van Osdale. Respondent had previously contracted with Kirk and Van Osdale to perform this remodeling work.

3) Respondent agreed to pay Chavez \$15 per hour and Vera \$12 per hour for their work.

4) From February 16, 2008, through March 14, 2008, Vera worked the following dates and hours for Respondent at the Kirk/Van Osdale residence:

February 16: 7 hours
February 18: 6½ hours
February 19: 7 hours
February 20: 7 hours
February 21: 7 hours
February 22: 6½ hours
February 25: 7½ hours
February 26: 7 hours
February 27: 4½ hours
February 28: 5½ hours
February 29: 5½ hours
March 4: 7 hours
March 5: 5½ hours
March 6: 2 hours
March 7: 7½ hours
March 10: 6 hours
March 11: 7½ hours
March 12: 7 hours

March 13: 3 hours
March 14: 5½ hours

In all, Vera worked 122 hours from February 16 through March 14, 2008. Respondent discharged Vera and paid him nothing for this work.

5) From February 15, 2008, through March 14, 2008, Chavez worked the following dates and hours for Respondent at the Kirk/Van Osdale residence:

February 15: 10 hours
February 16: 7 hours
February 18: 6½ hours
February 19: 7 hours
February 20: 7 hours
February 21: 7 hours
February 22: 6½ hours
February 25: 7½ hours
February 26: 7 hours
February 27: 4½ hours
February 28: 5½ hours
February 29: 5½ hours
March 4: 7 hours
March 5: 5½ hours
March 6: 2 hours
March 7: 7½ hours
March 10: 6 hours
March 11: 7½ hours
March 12: 7 hours
March 13: 3 hours
March 14: 5½ hours

In all, Chavez worked 132 hours from February 15 through March 14, 2008. Respondent discharged Chavez and paid him nothing for this work.

6) At one point during the wage claim period, Claimants needed more building supplies but were unable to pick them up from because they were not licensed contractors. Van Osdale had to pay for and pick up the supplies.

7) There was no evidence that Claimants worked for anyone else during the wage claim period.

8) Respondent did not pay Vera or Chavez for any of the hours they worked from February 15, 2008, through March 14, 2008.

9) On March 3, 2008, Respondent submitted a statement to Vera's potential landlord in which he certified that Vera had worked for him as a laborer since "1/17/07," and that Vera's current wage was \$12 per hour.

10) On May 28, 2008, the Agency sent a Notice of Wage Claim to Respondent. The letter stated that Claimants had filed wage claims alleging they were each owed \$1,725 in unpaid wages.

11) On June 5, 2008, the Agency received a completed "Wage Claimant Investigation/Employer Response" form from Respondent. Among other things, Respondent stated that he closed his business on "April 3rd, 2008" and that Claimants began working for him on "3/10/07."

12) Susan Washington, an Agency compliance specialist, was assigned to investigate Claimants' wage claims. She reviewed the existing file, interviewed Van Osdale, Kirk, both Claimants, and Respondent. Respondent told her that his insurance was cancelled on March 23, 2008, that he had not performed any work after that date, that he was shutting down his business, that he had no assets from which to pay Claimants except for his house, and that he had sold his truck and used the proceeds to pay all of his other workers except for Claimants. Respondent claimed he had proof that Claimants were independent contractors or partners in the form of emails, witness statements, and business cards. Washington asked Respondent to provide that evidence but Respondent never did. Respondent also accused Claimants of taking \$2,000 worth of his tools.

13) Based on her interviews with Claimants, the time records they provided, her interviews with Kirk and Van Osdale, Respondent's failure to provide any time records, and Respondent's admission that Claimants performed work on Respondent's project, Washington determined that Chavez was owed \$1,980 in unpaid, due and

owing wages (132 hours x \$15/hour = \$1,980) and that Vera was owed \$1,464 in unpaid, due and owing wages (122 hours x \$12/hour = \$1,464).

14) On August 1, 2008, Vera signed and dated a "Wage Security Fund Assignment of Wages." On August 17, 2008, Chavez signed and dated an identical form.

15) After receiving the WSF Assignment of Wages forms signed by Claimants, Washington completed the Agency's WH-105 form entitled "Wage Security Fund Wage Claim Case Summary" in which she summarized the wage claims and forwarded it to her supervisor for review. On August 21, 2008, Washington's supervisor approved the claims for payment from the WSF. In late August 2008, the Agency caused the WSF to issue checks in the amount of \$1,980 to Chavez and in the amount of \$1,464 to Vera, less statutory deductions.

16) Twenty-five percent of \$3,444 is \$861.

17) As of the date of hearing, Respondent had not paid Claimants any of the \$3,444 in unpaid wages due and owing to them or repaid the WSF.

18) Washington was a credible witness.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent was an employer and contractor in the state of Oregon and engaged the personal service of one or more employees.

2) Respondent employed Claimants Chavez and Vera in Oregon in February and March 2008 to remodel a residential bathroom. Respondent agreed to pay Chavez \$15 per hour and Vera \$12 per hour.

3) From February 15 through March 14, 2008, Chavez worked 132 hours for Respondent, earning \$1,980 in gross wages. As of the date of hearing, Respondent had not paid Chavez any of these wages.

4) From February 16 through March 14, 2008, Vera worked 122 hours for Respondent, earning \$1,464 in gross wages. As of the date of hearing, Respondent had not paid Vera any of these wages.

5) The Agency investigated Chavez's and Vera's wage claims and determined that they were owed \$1,980 (Chavez) and \$1,464 (Vera) in unpaid, due and owing wages for work performed within 60 days of their last day of work. The Agency further determined that Respondent lacked sufficient assets to pay the wage claims and that the wage claims could not otherwise be fully and promptly paid.

6) In late August 2008, the Agency caused the WSF to issue checks in the amount of \$1,980 to Chavez and in the amount of \$1,464 to Vera, less statutory deductions.

7) Twenty-five percent of \$3,444 is \$861.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer subject to the provisions of ORS 652.110 to 652.414, and Vera and Chavez were Respondent's employees.

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

3) Respondent violated ORS 652.140(1) by failing to pay Vera and Chavez all wages earned and unpaid not later than the end of the first business day after their discharge.

4) The Agency paid out a total of \$3,444 from the WSF to Vera and Chavez and is entitled to recoup \$3,444, plus a 25 percent penalty of \$861, from Respondent. ORS 652.414(1), ORS 652.414(3).

5) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has

the authority to order Respondent to reimburse the WSF and to pay a 25 percent penalty on the amount paid out by the WSF, plus interest on all sums until paid. ORS 652.332, ORS 652.414(3).

OPINION

RESPONDENT'S INDEPENDENT CONTRACTOR DEFENSE

Although Respondent did not appear at hearing and was held in default, Respondent raised an independent contractor defense in its answer that the forum must consider. In a default case, unsworn and unsubstantiated assertions contained in a respondent's answer may be considered, but are overcome whenever they are contradicted by other credible evidence in the record. *In the Matter of MAM Properties, LLC*, 28 BOLI 172, 187 (2007).

This forum uses an "economic reality" test to determine whether a wage claimant is an employee or independent contractor under Oregon's wage and hour laws. The focal point of the test is "whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which [she] renders [her] services." The forum uses five factors to gauge the degree of the worker's economic dependency, with no single factor being determinative: (1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and alleged employer; (3) the degree to which the worker's opportunity for profit and loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship. *In the Matter of Adesina Adeniji*, 25 BOLI 162, 169-70 (2004). Respondent has the burden of proving its affirmative defense that claimants were independent contractors and not Respondent's employees. *In the Matter of Gary Lee Lucas*, 26 BOLI 198, 210 (2005).

The record is devoid of evidence as to the degree of control exercised by the Respondent or the skill and initiative required of Claimants to perform the job. Based on

Respondent's claim to Washington that \$2,000 of his tools were missing from the job, the forum infers that Respondent provided the tools necessary to perform the work. There is no evidence that Claimants had any investment in the job, other than their time and labor. Because Claimants were paid an hourly wage for their work, they had no opportunity to make a profit or suffer a loss. Finally, Respondent's written statements that Claimants began working for him on "1/17/07" and "3/10/07" shows that Claimants had worked for him for at least a year and there was no evidence that they worked for anyone else in that time period. Based on this evidence, the forum agrees with the Agency's conclusion that Claimants were Respondent's employees and not independent contractors.

WAGE SECURITY FUND RECOVERY

In cases involving payouts from the WSF, when (1) there is credible evidence that a determination on the validity of the claim was made; (2) there is credible evidence as to the means by which that determination was made; and (3) the Agency has paid out money from the Fund and seeks to recover that money, there is a rebuttable presumption that the Agency's determination is valid for the sums actually paid out. *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 260 (1999).

In this case, the Agency established that rebuttable presumption through credible documentary evidence and witness testimony showing:

- (1) It determined that the Claimants' wage claims were valid for \$3,444 in wages earned within 60 days before the last day Claimants were employed, that Respondent had ceased doing business on March 23, 2008, and that Claimants' wage claims could not otherwise be fully and promptly paid;
- (2) It based its determination on an investigation that included interviews of all material witnesses and an inspection of available, relevant documents; and
- (3) It paid out \$3,444 from the WSF, an amount equal to Claimants' unpaid, due, and owing wages, and seeks to recover that money.

Respondent's unsworn assertions in its answer that Claimants were subcontractors who were paid in full are insufficient to rebut this presumption, and the forum concludes that Respondent is liable to repay the WSF the \$3,444 paid out to Claimants.

WAGE SECURITY FUND PENALTY

Pursuant to ORS 652.414(3), the Commissioner is entitled to recover a 25 percent penalty on \$3,444, the amount of wages paid out, or \$200, whichever is greater. In this case, a 25 percent penalty of \$861 is greater and Respondent is liable to the Commissioner for that amount.

ORDER

NOW, THEREFORE, as authorized by ORS 652.414 and as payment of the amounts paid from the Wage Security Fund as a result of Respondent's violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Ryan Allen Hite** 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 the amount of FOUR THOUSAND THREE HUNDRED AND FIVE DOLLARS (\$4,305), representing \$1,980 paid to Jose Chavez from the Wage Security Fund, \$1,464 paid to Victor Vera from the Wage Security Fund, and a 25 percent penalty of \$861 on the sum of \$3,444, plus interest at the legal rate on the sum of \$3,444 from April 1, 2008, until paid, and interest at the legal rate on the sum of \$861 from August 25, 2008, until paid.