

**In the Matter of**  
**THOMAS J. HEYWOOD, dba**  
**PETER PAN ENTERPRISES,**  
**Respondent..**

Case Number 57-98  
Final Order of the Commissioner  
Jack Roberts  
Issued October 14, 1998.

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**SYNOPSIS**

Respondent, who WAS ENGAGED IN METAL ROOF CONSTRUCTION, failed to pay two wage claimants all wages due upon termination, in violation of ORS 652.140(2). Respondent's failure to pay the wages was willful, and the Commissioner ordered Respondent to pay civil penalty wages, pursuant to ORS 652.150. ORS 652.140(2), 652.150.

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The above-entitled contested 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 (BOLI) for the State of Oregon. The Bureau of Labor and Industries (the Agency) was represented by David Gerstenfeld, an employee of the Agency. Thomas Heywood (Respondent) represented himself.

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 March 11, 1997, Claimant Adrian S. Mancillas filed a wage claim with the Agency. He alleged that he had been employed by Respondent and that Respondent had failed to pay wages earned and due to him.

2) On March 11, 1997, Claimant Jorge Villa filed a wage claim with the Agency. He alleged that he had been employed by Respondent and that Respondent had failed to pay wages earned and due to him.

3) At the same time that they filed the wage claims, Claimants Mancillas and Villa assigned to the Commissioner of Labor, in trust for Claimants, all wages due from Respondent.

4) On December 16, 1997, the Agency served on Respondent an Order of Determination based upon the wage claims filed by Claimants and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of \$760.00 in wages and \$2,880.00 in civil penalty wages based on work Claimants had performed for Respondent from February 14-25, 1997. 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.

5) On January 7, 1998, Respondent filed an answer to the Order of Determination and requested a contested case hearing.

6) In his answer and request for hearing, Respondent admitted he employed both wage claimants at \$6.00/hr., stated he had paid some wages to both Claimants, and admitted owing Claimant Mancillas \$37.00 in unpaid wages and Claimant Villa \$98.00 in unpaid wages. Respondent also stated that at the end of their employment,

both claimants failed to show up for work. Respondent did not contest the dates of Claimants' employment as represented in the order of Determination.

7) On January 7, 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 hearings rules, OAR 839-050-0000 to 839- 050-0440.

8) On June 17, 1998, the Administrative Law Judge issued a discovery order directing each participant to submit a summary of the case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-50-210(1). The summaries were due by August 11, 1998. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary.

9) On July 8, 1998, the Agency filed a motion for summary judgment, reciting therein that no genuine issue of material fact existed and that the Agency was entitled to judgment as a matter of law in the amount of \$37.00 in unpaid wages for Claimant Mancillas and \$98.00 in unpaid wages for Claimant Villa, based on the admissions in Respondent's answer. The Agency also contended that Respondent was liable for \$1,440.00 in civil penalty wages for each Claimant pursuant to ORS 652.150, in that Respondent knew wages were owed Claimants at the time of Claimants' termination and willfully failed to pay Claimants' wages within the time limits set out in ORS 652.140.

10) On August 7, 1998, the ALJ denied the Agency's motion for summary judgment for two reasons. First, because the motion was unaccompanied by documentary evidence showing that the Claimants had filed wage claims and assigned them to BOLI. Second, because the motion sought an amount of unpaid wages less than the amounts sought in the Order of Determination and the Agency did not move to amend the Order of Determination to reflect the lesser amounts.

11) On August 10, 1998, the Agency filed a second motion for summary judgment, seeking \$37.00 in unpaid wages for Claimant Mancillas, \$98.00 in unpaid wages for Claimant Villa, and \$1,440.00 in civil penalty wages for each Claimant. The Agency included several new exhibits, including wage claims, wage assignments, and calendars of hours worked by both Claimants. It also included a motion to amend the Order of Determination.

12) On August 10, 1998, the ALJ denied the Agency's second motion on the basis that the Agency's motion to amend asked for the same amount of unpaid wages as the original Order of Determination.

13) On August 11, 1998, the Agency repeated its motion for summary judgment, accompanying it with an amended Order of Determination seeking \$37.00 in unpaid wages for Claimant Mancillas, \$98.00 in unpaid wages for Claimant Villa, and \$1,440.00 in civil penalty wages for each Claimant.

14) On August 11, the ALJ issued an Interim Order giving Respondent until 5 p.m., August 17, 1998, to respond to the Agency's motion for summary judgment and motion to amend the Order of Determination. The ALJ ordered the Agency to use appropriate means to ensure that Respondent actually received a copy of all documents associated with the Agency's motions prior to August 17 and to provide the forum with documentation of Respondent's receipt of these documents.

15) On August 17, 1998, the Agency provided documentation showing that service pursuant to the ALJ's order dated August 11, 1998 had been attempted by certified mail and by a process server. The certified mail had been signed for by someone other than Respondent at the private mail service where Respondent receives his mail. The process server had not been able to personally serve Respondent because Respondent refused to cooperate and make himself available for service when called on the phone by the process server. The process server reached Respondent at 541-385-8856, a number that Respondent identified to the ALJ as a business number located in his home.

16) Respondent did not file a response to any of the Agency's motions for summary judgment or motions to amend.

17) On August 18, 1998, the ALJ issued an Interim Order finding that Respondent had been constructively served by the Agency with all documents associated with the Agency's motions. The ALJ granted the Agency's motion to amend the Order of Determination on the bases that no objection was filed and justice required that the amendment be granted. The ALJ also granted the Agency's motion for summary judgment, ruling in pertinent part as follows:

"4. Motion for Summary Judgment.

"OAR 839-050-0150(4) governs summary judgment proceedings in this forum. It provides, in relevant part::

""(a) A motion for summary judgment may be made by a participant \* \* \* as to all or part of the issues raised in the pleadings. The motion may be based on any of the following conditions:

"" \* \* \*

""(B) No genuine issue as to any material fact exists and the participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings[.]'

"When considering a motion for summary judgment, this forum will draw all inferences of fact from the record against the participant filing the motion and in favor of the participant opposing the motion. *In the Matter*

*of Efrain Corona*, 11 BOLI 44 (1992), *aff'd without opinion*, *Corona v. Bureau of Labor and Industries*, 124 Or App 211, 861 P2d 1046 (1993).

"In order to prevail, the Agency must establish that 1) Claimants were employed by Respondent; 2) Claimants have not been paid all wages due and owing; 3) More than 30 days has elapsed since the wages became due and owing; and 4) Respondent's failure to pay Claimants' wages was willful.

"In his answer and request for hearing, Respondent admits having employed claimants Villa and Mancillas at the wage rate of \$6.00/hr. Respondent further admits owing Villa \$98.00 and claimant Mancillas \$37.00 in back wages. The Order of Determination alleges that claimants' last day of employment was February 25, 1997. This date is not disputed by Respondent. For purposes of this summary judgment motion, the forum will assume that claimants quit and apply the most lenient timeline for determining when their wages became due and owing. Under ORS 652.140(2), Respondent was obligated to pay claimants their wages no later than March 4, 1997. Respondent's answer is dated December 20, 1997, at which time Respondent admitted still owing \$98.00 and \$37.00 in back wages to claimants Villa and Mancillas, respectively.

"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 \* \* \*, then, as a penalty for such nonpayment, the wages \* \* \* 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.'

"Respondent did not allege a financial inability to pay claimants' wages at the time they accrued in his answer. Therefore, both claimants are entitled to civil penalty wages in the amount of \$1,440 (\$6.00/hr. x 8 hrs./day x 30 days) if Respondent "willfully" failed to pay claimants' wages. 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.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent's answer shows that he acted voluntarily and as a free agent in employing claimants and deciding when and how much to pay them, and that he had (sic) knew he owed claimants back wages. The forum concludes that claimants

are entitled to civil penalty wages in the amount sought by the Agency.

"The Agency's motion for summary judgment is GRANTED in its entirety."

17) In the same Interim Order, the ALJ canceled the hearing and the discovery order requiring the submission of case summaries.

18) The proposed order, containing an exceptions notice, was issued September 9, 1998. Exceptions, if any, were due September 21, 1998. The hearings unit received no exceptions.

### **FINDINGS OF FACT -- THE MERITS**

1) During all times material herein, the Respondent, a person, did business as a sole proprietorship under the assumed business name of Peter Pan Enterprises and engaged the personal services of one or more persons in the State of Oregon. Respondent operated his business out of Bend, Oregon.

2) Claimant Mancillas was employed by Respondent between February 14, 1997, and February 25, 1997. Claimant Villa was employed by Respondent between February 14, 1997, and February 25, 1997.

3) Respondent and Claimants entered into an agreement that Claimants would work for \$6.00 per hour.

4) Claimants' last day of employment with Respondent was February 25, 1997, after which Claimants quit work without giving notice.

5) During Claimants' employment, Respondent paid Claimant Mancillas \$275.00 and Claimant Villa \$100.00 in wages. Respondent paid these amounts knowingly and intentionally. Respondent was a free agent.

6) At the time Claimants quit, Respondent owed Mancillas \$37.00 in unpaid wages and Villa \$98.00 in unpaid wages.

7) The Forum computed civil penalty wages, in accordance with ORS 652.150, as follows: \$6.00 (Claimants' hourly rate) multiplied by 8 (hours per day) equals \$48.00. This figure of \$48.00 is multiplied by 30 (the maximum number of days for which civil penalty wages continued to accrue) for a total of \$1,440.00 for each Claimant.

8) Respondent did not allege in his answer an affirmative defense of financial inability to pay the wages due at the time they accrued; nor did he provide any such evidence for the record.

#### **ULTIMATE FINDINGS OF FACT**

1) During all times material herein, Respondent was a person who engaged the personal services of one or more employees in the State of Oregon.

2) Respondent employed Claimant Mancillas in Oregon from February 14, 1997, and February 25, 1997. Respondent employed Claimant Villa in Oregon from February 14, 1997, and February 25, 1997.

3) Respondent agreed to pay each Claimant \$6.00 per hour.

4) Each Claimant quit Respondent's employment without notice on February 25, 1997.

5) When Claimants quit, Respondent owed Claimant Mancillas \$37.00 in unpaid wages and Claimant Villa \$98.00 in unpaid wages.

6) Respondent willfully failed to pay Claimant Mancillas \$37.00 and Claimant Villa \$98.00 in earned, due, and payable wages within five days, excluding Saturdays, Sundays, and holidays, after they quit, and more than 30 days have elapsed from the date their wages were due.

## **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 652.310 to 652.405.

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

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 Claimant quit employment without notice.

4) 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 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."

Respondent is liable for civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimants when due as provided in ORS 652.140.

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 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**

The key facts in this case were not in dispute, due to admissions made by Respondent in his answer and request for hearing. Respondent admitted that he employed both wage claimants at the rate of \$6.00 per hour, that he had paid part of the wages due Claimants, and that he still owed the unpaid wages sought by the Agency in their amended Order of Determination. Respondent did not dispute Claimants' dates of employment or raise the affirmative defense of financial inability to pay Claimants' wages when they became due. Based on these facts, the ALJ granted the Agency's motion for summary judgment, finding as a matter of law that Respondent had violated ORS 652.140(2) by not paying Claimants a total of \$135.00 in unpaid wages when due and that each Claimant was entitled to civil penalty wages under ORS 652.150. That ruling is confirmed.

### **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 THOMAS J. HEYWOOD to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

(1) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR Adrian S. Mancillas in the amount of ONE THOUSAND FOUR HUNDRED SEVENTY-SEVEN DOLLARS (\$1,477.00), less appropriate lawful deductions, representing \$37.00 in gross earned, unpaid, due, and payable wages; and \$1,440.00 in penalty wages; PLUS

a) Interest at the rate of nine percent per year on the sum of \$37.00 from March 4, 1997, until paid and nine percent interest per year on the sum of \$1,440.00 from April 3, 1997, until paid;

(2) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR Jorge Villa in the amount of ONE THOUSAND FIVE HUNDRED THIRTY EIGHT DOLLARS (\$1,538.00), less appropriate lawful deductions, representing \$98.00 in gross earned, unpaid, due, and payable wages; and \$1,440.00 in penalty wages; PLUS

a) Interest at the rate of nine percent per year on the sum of \$98.00 from March 4, 1997, until paid and nine percent interest per year on the sum of \$1,440.00 from April 3, 1997, until paid.