

In the Matter of

**TAILOR MADE FENCING & DECKING, INC. dba
Tailor Made Construction and
Thomas Sciborski**

Case No. 04-09

Final Order of Commissioner Brad Avakian

Issued May 28, 2009

SYNOPSIS

Respondent Thomas Sciborski, individually operating a construction business under an unregistered assumed business name, employed Claimants and failed to pay them wages totaling \$2,118.00. Respondent Sciborski acted willfully by failing to pay the wages and was ordered to pay \$10,080.00 in penalty wages in addition to the \$2,118.00 in unpaid wages, plus interest. At all times material, Respondent Tailor Made Fencing & Decking, Inc. was a defunct corporation; therefore, the wage claims alleging unpaid wages and penalty wages against Respondent Tailor Made Fencing & Decking, Inc. were dismissed. ORS 652.140, ORS 652.150, ORS 652.332.

The above-entitled case was scheduled for hearing on April 7, 2009, before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. Case Presenter Patrick Plaza, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "Agency"). Neither Respondent Thomas Sciborski nor Respondent Tailor Made Fencing & Decking, Inc. was represented by counsel. Thomas Sciborski was Respondent Tailor Made Fencing & Decking, Inc.'s authorized representative. Before the scheduled hearing date, the ALJ granted the Agency's motion for summary judgment and canceled the 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 or about April 14, 2008, the Agency issued an Order of Determination alleging that “employers” Tailor Made Fencing & Decking, Inc., “an inactive corporation,” dba Tailor Made Construction, and Thomas Sciborski had employed Claimants Alfredo Gonzalez and Jon C. Irvine and failed to pay them \$2,538.00 in earned wages. The Agency further alleged that the failure to pay wages was willful and the employers, therefore, owed Claimants \$10,080 in penalty wages. The Order of Determination required the employers, within 20 days, either to pay these sums, plus interest, 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.

2) On or about June 27, 2008, Respondent Thomas Sciborski filed an Answer and Request for Hearing, stating that he was the owner and authorized representative of Respondent Tailor Made Fencing & Decking, Inc., and the owner of Tailor Made Construction. In that Answer, Respondent Sciborski admitted Claimants were employed by Tailor Made Construction and that they were paid all wages “except an amount of \$2,118.00 that is currently outstanding.” Respondent Sciborski stated that “this figure is different than the amount claimed of \$2,538 due to the fact that Alfredo Gonzalez was employed for a total of 45/hrs @ \$30 and not 59 hours.” Respondent Sciborski further stated that he did not pay Claimants the earned and due wages because one of his clients did not pay him for the work he “contracted and completed” for his client.

3) On November 13, 2008, the Hearings Unit received the Agency’s request for hearing.

4) The Hearings Unit issued a Notice of Hearing on November 17, 2008, setting forth the time and place of hearing. The Notice was served on Respondents together with a copy of the Order of Determination, a language notice, a

Servicemembers Civil Relief Act notification, a Summary of Contested Case Rights and Procedures, a copy of the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

5) On January 23, 2009, the ALJ ordered the Agency and Respondents 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 March 27, 2009, and notified them of the possible sanctions for failure to comply with the case summary order.

6) The Agency filed a motion for summary judgment on March 12, 2009. In its motion, the Agency stipulated that Claimant Gonzalez worked 45 hours and earned \$1,350 during the wage claim period. The forum issued an interim order notifying Respondents that their response to the summary judgment motion was due on March 23, 2009. Respondents did not file a response to the motion.

7) On March 26, 2009, the Agency filed a case summary.

8) On March 30, 2009, the ALJ issued an order granting the Agency's motion for summary judgment and canceling the contested case hearing. That order stated:

"The Agency alleged in the Order of Determination that Respondents employed Claimants Gonzalez and Irvine in Oregon from February 7 through February 22, 2008, and December 17 through December 30, 2007, respectively, and unlawfully failed to pay them wages totaling \$2,538.00. The Agency further alleged that 30 days had elapsed since the wages became due and owing, that Respondents' failure to pay the wages was willful, and that Respondents, therefore, owed Claimants Gonzalez and Irvine penalty wages totaling \$10,080.00.

"Respondent Sciborski filed a response to the Order of Determination, on his own behalf, and as Respondent Tailor Made Fencing and Decking, Inc.'s authorized representative. Respondent Sciborski requested a contested case hearing and made the following assertions:

Re: Paragraph II, I do agree that the wage claimants were employed by Tailor Made and both were paid all wages due except an amount of \$2,118 that is currently outstanding. This figure is less than the amount claimed of \$2,538 due to the fact that Alfredo Gonzalez was employed for a total of 45/hrs @ \$30.00 per hour and not 59 hours.

Re: Paragraph III, the reason I have not paid the claimants has not been due to negligence, but rather I have been unable to pay the wage claimants, due to the fact that a client of mine, who currently owes me \$15,000, has failed to pay me for the work I contracted and completed for him. Unfortunately, my business is small enough that such a shortage directly affected my ability to pay the way [sic] claimants. I, myself, have not even been paid my earned time and material costs. Given the sizeable amount due to me, I have contacted an attorney and filed a lien against this client and his numerous businesses. I am hopeful that this action will resolve this issue quickly. In light of these circumstances beyond my control, I do not feel the penalty wages are warranted at this time, so long as we can make an agreement and possible [sic] a payment plan to get both parties paid the outstanding wages actually incurred while working for Tailor Made. (Summary Judgment Motion, Agency Exhibit C)

“On March 12, 2009, the Agency filed a motion for summary judgment claiming that no genuine issues of material fact remained in dispute, and that Respondent Sciborski is individually liable for the unpaid wages and penalty wages due and owing. The forum issued an order stating that Respondents’ response to the summary judgment motion was due on Monday, March 23, 2009. To date, the forum has received no response from Respondents.

“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. *In the Matter of Barbara Coleman*, 19 BOLI 230, 241 (2000).

“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 he or she was not properly compensated; and 4) the amount and extent of work the claimant performed for the respondent. *Coleman*, 19 BOLI at 262-63. In this case, none of the elements are disputed. Therefore, the following undisputed facts in the record are deemed determinative for the purposes of this order:

“1) On March 17, 2008, Claimant Alfredo Gonzalez filed a wage claim against ‘Tailor Made Construction,’ a business owned and operated by Respondent Thomas Sciborski. Claimant Gonzalez worked for Sciborski from November 15, 2007, through February 22, 2008, at the agreed upon wage rate of \$30 per hour. Claimant Gonzalez worked 45 hours for which he was not paid and he is owed \$1,350 in unpaid wages. (Summary Judgment Motion, Order of Determination, Agency Exhibits A and C)

“2) On February 19, 2008, Claimant Jon C. Irvine filed a wage claim against ‘Tailor Made Construction,’ a business owned and operated by Respondent Thomas Sciborski. Claimant Irvine worked for Sciborski from September 17, 2007, through January 7, 2008, at the agreed upon wage rate of \$12 per hour. Claimant Irvine worked 64 hours for which he was not paid and he is owed \$768 in unpaid wages. (Summary Judgment Motion, Order of Determination, Agency Exhibits B, C)

“3) Respondent Sciborski knew Claimants were owed wages totaling \$2,118 when Claimants left their employment. (Summary Judgment Motion, Agency Exhibit C)

“4) Respondent Tailor Made Fencing and Decking, Inc. has been a defunct corporation since June 29, 2007. On September 9, 2002, Respondent Tailor Made Fencing and Decking, Inc. registered an assumed business name - Tailor Made Construction - with the Oregon Secretary of State Corporation Division. Respondent Sciborski was Respondent Tailor Made Fencing and Decking, Inc.’s owner and president. The registration expired on September 23, 2004. (Summary Judgment Motion, Agency Exhibits C, D, F)

“5) From September 17, 2007, through February 22, 2008, Respondent Sciborski, individually, operated a construction business under the unregistered assumed business name of Tailor Made Construction. (Summary Judgment Motion, Agency Exhibits A, B, C)

“Liability For Unpaid Wages

“Based on the record herein, including Respondent Sciborski’s admissions, there is no dispute that Respondent Sciborski, using the unregistered assumed business name of Tailor Made, employed Claimants, agreed to pay them the alleged pay rates, and failed to compensate them for some of the hours they worked during the wage claim periods and in the amounts claimed. Consequently, there is no

genuine dispute of fact regarding Respondent Sciborski's obligation to pay \$2,118 in unpaid wages, plus interest. See ORS 652.320(7); 652.330(1).

"Additionally, the undisputed facts demonstrate that Respondent Tailor Made Fencing and Decking, Inc. was a defunct corporation well before Respondent Sciborski employed Claimants and has remained inactive ever since. Accordingly, there being no connection between Respondent Tailor Made Fencing and Decking, Inc. and the wage claimants, the wage claims against Respondent Tailor Made Fencing and Decking, Inc. hereby are **dismissed**.

"Liability For Penalty Wages

"The Agency also seeks penalty wages for Claimants totaling \$10,080.00. A respondent must pay penalty wages when the respondent 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 his answer, Respondent Sciborski claims his failure to pay wages was not 'negligent' but due to a client's failure to pay for Respondent Sciborski's performance on a contract. There is no dispute that Respondent Sciborski knew the amount of wages due to Claimants when the wages accrued and that he intentionally failed to pay those wages based on his client's failure to pay on a contract. Those facts alone establish that Respondent Sciborski acted voluntarily and as a free agent and, therefore, acted willfully. However, an employer who willfully fails to pay wages may avoid paying penalty wages by proving that the failure to pay was due to the employer's financial inability to pay the wages at the time they accrued. *In the Matter of U.S. Telecom International*, 13 BOLI 114, 122 (1994). Financial inability to pay wages is an affirmative defense for which an employer has the burden of proof. In this case, Respondent Sciborski had the burden of producing evidence to support the allegation that he was financially unable to pay the wages owed Claimants at the time the wages accrued. See ORCP 47C(nonmoving participant has the burden of producing evidence on any issue raised in the motion as to which the nonmoving participant has the burden of persuasion at hearing). See also *In the Matter of R.L. Chapman Ent. Ltd.*, 17 BOLI 277, 284-85 (1999)(when a respondent's answer includes this defense but the respondent produces no supporting evidence, a claimant's right to penalty wages is not overcome). Respondent produced no evidence to support his affirmative defense and there is nothing in the record that shows he was unable to pay Claimants their wages at the time the wages accrued. The undisputed evidence also establishes that more than 30 days have passed since Respondent Sciborski failed to pay Claimants' wages. Under these circumstances, 'as a penalty for such nonpayment,' Claimant's wages 'shall continue' as a

matter of law. ORS 652.150. The amount of penalty wages owing is calculated pursuant to statute and Agency rule as follows:

“Claimant Gonzalez - 30 days x 8 hours/day x \$30/hour = \$7,200.00;

“Claimant Irvine – 30 days x 8 hours/day x \$12/hour = \$2,880.00.

“See ORS 652.150; OAR 839-001-0470(1).

“The Agency's motion for summary judgment is **GRANTED**. The hearing scheduled to commence on April 7, 2009, is **canceled**. Within the next few weeks, I will issue a proposed order based on this interim order granting the Agency's summary judgment motion.

“IT IS SO ORDERED.” (Footnotes omitted)

The procedural findings made in the interim order granting summary judgment are incorporated in this Final Order.

9) The ALJ issued a proposed order on April 20, 2009, 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 AND ULTIMATE FINDINGS OF FACT

The forum decides no factual issues in ruling on a summary judgment motion. The following are the undisputed material facts in the record, construed favorably to Respondent Sciborski.

1) From September 17, 2007, through February 22, 2008, Respondent Sciborski individually operated a construction business under the unregistered assumed business name of Tailor Made Construction.

2) Respondent Sciborski employed Claimant Alfredo Gonzales in Oregon from February 7 to February 22, 2008, and Claimant Jon C. Irvine in Oregon from December 17 to December 30, 2007.

3) Respondent Sciborski agreed to pay Claimant Gonzalez \$30 per hour and Claimant Irvine \$12 per hour.

4) From February 7 to February 22, 2008, Claimant Gonzalez worked 45 hours and earned \$1,350. Respondent Sciborski did not pay Claimant any part of those wages earned and owes Claimant \$1,350 in due and unpaid wages.

5) From December 17 to December 30, 2007, Claimant Irvine worked 64 hours and earned \$768. Respondent Sciborski did not pay Claimant any part of those wages and owes Claimant \$768 in due and unpaid wages.

6) Respondent Sciborski knowingly and intentionally failed to pay Claimants a total of \$2,118.00 in earned, due and payable wages. Respondent Sciborski has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.

7) Penalty wages for Claimants, computed pursuant to ORS 652.150, total \$10,080.00 (Claimant Gonzalez: \$30 per hour x 8 hours x 30 days = \$7,200; Claimant Irvine: \$12 per hour x 8 hours x 30 days = \$2,880).

8) Respondent Tailor Made Fencing and Decking, Inc. was administratively dissolved on June 29, 2007. In September 2002, Respondent Tailor Made Fencing and Decking, Inc. registered an assumed business name - Tailor Made Construction - with the Oregon Secretary of State Corporation Division. The assumed business name registration expired on September 23, 2004.

CONCLUSIONS OF LAW

1) Respondent Sciborski was Claimants' employer for purposes of ORS Chapter 652.

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

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

4) Respondent Sciborski 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) 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 Sciborski pay Claimants their earned, unpaid, due and payable wages and penalty wages, plus interest on those sums until paid. ORS 652.332.

6) Respondent Tailor Made Fencing & Decking, Inc. has been a defunct corporation since June 2007 and at no time employed Claimants Gonzalez and Irvine.

7) 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 dismiss the wage claims filed against Respondent Tailor Made Fencing & Decking, Inc. by Claimants Gonzalez and Irvine. ORS 652.332.

OPINION

The ALJ granted the Agency's pre-hearing motion for summary judgment. That ruling is confirmed for the reasons set forth in the ALJ's interim order granting the motion, quoted above.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages and penalty wages, **Thomas Sciborski dba Tailor Made Construction** is hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Alfredo Gonzalez, in the amount of EIGHT THOUSAND FIVE HUNDRED AND FIFTY DOLLARS (\$8,550), representing \$1,350 in gross earned, unpaid, due and payable wages, less appropriate lawful deductions, and \$7,200 in penalty wages, plus interest at the legal rate on

the sum of \$1,350 from March 1, 2008, until paid, and interest at the legal rate on the sum of \$7,200 from April 1, 2008, until paid.

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Jon C. Irvine, in the amount of THREE THOUSAND SIX HUNDRED AND FORTY EIGHT DOLLARS (\$3,648), representing \$768 in gross earned, unpaid, due and payable wages, less appropriate lawful deductions, and \$2,880 in penalty wages, plus interest at the legal rate on the sum of \$768 from January 1, 2008, until paid, and interest at the legal rate on the sum of \$2,880 from February 1, 2008, until paid.

FURTHERMORE, as Respondent Tailor Made Fencing & Decking, Inc. has been found not to have employed Claimants Gonzalez and Irvine, the Commissioner of the Bureau of Labor and Industries hereby orders that the wage claims filed by Claimants Alfredo Gonzalez and Jon C. Irvine against **Tailor Made Fencing & Decking, Inc.** be and are hereby dismissed.