

**In the Matter of**  
**JOSEPH FRANCIS SANCHEZ**  
**dba**  
**XX Concrete Foundations Now**

**Case No. 30-07**

**Final Order of Commissioner Dan Gardner**

**Issued July 9, 2007**

**SYNOPSIS**

Respondent employed Claimant to perform construction work at the agreed rate of \$18 per hour. From September 20 through 30, 2005, Claimant worked 105 hours, including 25.5 overtime hours. At the agreed rate of \$18 per hour, Claimant earned \$2,119.50, including wages for overtime hours, no part of which was paid. Respondent was ordered to pay the full amount of \$2,119.50 in unpaid, due and owing wages. Respondent's failure to pay was willful and he was ordered to pay \$4,320 in penalty wages. Respondent was also ordered to pay a \$4,320 civil penalty based on his failure to pay Claimant overtime for the hours Claimant worked in excess of 40 per week. ORS 652.140; ORS 652.150; ORS 653.055; ORS 653.261; OAR 839-020-0030(1).

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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 April 17, 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 "the Agency"). Dean Seefeldt ("Claimant") was present throughout the hearing and was not represented by counsel. Joseph Francis Sanchez ("Respondent") was present throughout the hearing and was not represented by counsel.

The Agency called as witnesses: Katherine Tucker, purchasing manager for JLS Custom Homes; Todd Jezierski, construction superintendent for JLS Custom Homes;

Bernadette Yap Sam, BOLI Wage and Hour Division compliance specialist; Chris Day, Respondent employee; and Claimant.

Respondent testified on his own behalf and called no other witnesses.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-9;
- b) Agency exhibits A-1 through A-20, and A-22 (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 March 2, 2006, Claimant filed a wage claim with the Agency alleging Respondent had employed him from September 20 through September 30, 2005, and failed to pay his wages for hours he worked during that period.

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

3) On June 28, 2006, the Agency issued Order of Determination No. 06-0673. In the Order, the Agency alleged Respondent had employed Claimant during the period September 20 through September 30, 2005, failed to pay him for all hours worked in that period, including overtime hours pursuant to OAR 839-020-0030, and was liable to him for \$2,119.50 in unpaid wages, plus interest. The Agency also alleged Respondent's failure to pay all of Claimant's wages when due was willful and Respondent was liable to him for \$4,320 as penalty wages, plus interest. In addition to the penalty wages, the Agency alleged Respondent paid Claimant less than the wages

to which he was entitled under ORS 653.010 to 653.261 and was therefore liable to him for \$4,320 as 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.

4) On October 13, 2006, BOLI received two responses or “answers” from Respondent, both dated October 3, 2006. The first one stated, in pertinent part:

“To Whom it May Concern:

“I would like to request a hearing regarding [sic] file # 06-0673 and the wage claim matter of Oregon Bureau of Labor and Industries as assignee of Dean Seefeldt. I am disputing this matter on the grounds that said allegations are false. I have a discrepancy not only on the period of time that is being claimed but also the amount per hour and the days and hours worked. The claimant in no way shape or form earned the amount claimed nor worked the # of hours stated in this allegation. Please inform me on any further proceedings regarding [sic] this case.

“Respectfully, Joe Sanchez”

The second one stated, in pertinent part:

“To Whom it May Concern:

“I am also stating all allegations are false including rate per day. My agreement with Dean was to be paid \$10.00 per hour. No more than \$100.00 per day unless otherwise arranged. We at no point in time made other arrangements. The claimant also did not show for multiple days of work. The job in question was a total of 5 business days that Dean was hired to work. He did not even show up for 2 of those days and was late the rest of the time. Claimant was also paid cash on completion of the job. Thank you for your time.

“Respectfully, Joseph Sanchez”

5) On February 15, 2007, the Agency submitted a request for hearing. On February 23, 2007, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9 a.m. on April 17, 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.

6) On March 23, 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 April 6, 2007, and notified them of the possible sanctions for failure to comply with the case summary order.

7) On March 23, 2007, the ALJ issued a notice pertaining to fax filings and timelines.

8) On April 6, 2007, the Agency timely filed a case summary. Respondent did not file a case summary.

9) At the start of hearing, the ALJ verbally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

10) The ALJ issued a proposed order on April 25, 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 an individual conducting a construction contracting business under the assumed business name of XX Concrete Foundations Now. As of March 2006, Respondent's Construction Contractor's Board ("CCB") license was suspended due to an "insurance problem." CCB records show that Respondent was classified as a sole proprietor and his particular class of independent contractor was listed as "Exempt (Cannot Have Employees Has No Workers' Comp Coverage)."

2) In 2005, general contractor JLS Custom Homes (“JLS”) awarded Respondent the bid on concrete work for a residential development project in Aloha, Oregon. As part of the subcontract, Respondent “set up, stripped and poured” concrete foundations for the Stillwater and Marty Meadows construction projects in August and September 2005. Respondent submitted invoices by the 20<sup>th</sup> of each month and JLS paid Respondent the following month on the 10<sup>th</sup>. In September 2005, JLS paid Respondent approximately \$11,351.50 for concrete work on the Stillwater project. In October and November 2005, JLS paid Respondent approximately \$25,395 and \$28,415, respectively, for concrete work on the Marty Meadows project.

3) On or about September 19, 2005, Respondent’s employee, Chris Day, telephoned Claimant about possible employment on the Marty Meadows project. Day previously had worked with Claimant at Bedford Construction and knew Claimant was laid off and, at that time, unemployed. Respondent needed some extra help on the Marty Meadows job and, after Day handed him the telephone, Respondent offered Claimant a job working with the concrete crew. Respondent agreed to pay Claimant \$18 per hour, the same hourly rate Claimant earned while working for Bedford Construction. Claimant would not have accepted Respondent’s offer unless he agreed to pay Claimant his previous hourly rate. Claimant’s first work day was September 20, 2005.

4) Claimant worked with a five person crew, including Day, setting up and stripping a large foundation for a “four or five plex” at the Marty Meadows site. Claimant recorded his work hours each day on his own time cards left over from other construction jobs. By the end of the first week, from September 20 through 24, Claimant had recorded 49.5 work hours. By the end of the second week, from September 25 through 30, he had recorded 58 work hours. The first day, he started

work at 7 a.m. After that, he usually started work around 9 a.m. and worked until dark each day with a 30 minute lunch. The job included weekend work and was completed approximately 11 days after Claimant started working for Respondent. Claimant's last work day was September 30, 2005.

5) During his last work week, Claimant asked about his wages and Respondent was unresponsive. On or about October 1, 2005, Claimant tried to discuss his wages with Respondent and Respondent "got in his truck and drove away." Respondent did not pay Claimant any wages for the work he performed from September 20 through September 30, 2005. Chris Day also was not paid for the work he performed on the Marty Meadows project. Claimant and Day both complained to JLS that Respondent had not paid them for their work and each complained to the CCB who advised them that Respondent was not insured. Claimant eventually filed a wage claim with BOLI. Day did not file a wage claim because he and Respondent were long-time friends and he was also collecting unemployment benefits and did not want to report his cash earnings.

6) On March 9, 2006, BOLI sent Respondent a Notice of Wage Claim ("Notice") that stated, in pertinent part:

"You are hereby notified that DEAN S. SEEFELDT has filed a wage claim with the Bureau of Labor and Industries alleging:

"Unpaid wages of \$1,935.00 at the rate of \$18.00 per hour from September 20, 2005 to September 30, 2005.

"IF THE CLAIM IS 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."

The Notice was mailed to Foundations Now, 4803 SW 172<sup>nd</sup> Ave., Aloha, OR 97007, and was returned to BOLI by the U. S. Post Office on April 10, 2006. The envelope

included a handwritten notation stating, "NOT AT THIS ADDRESS," and a Post Office sticker stating, "NOT DELIVERABLE AS ADDRESSED UNABLE TO FORWARD."

7) On May 23, 2006, BOLI compliance specialist Yap Sam mailed a letter to Respondent that stated in pertinent part:

"I am the Compliance Specialist who has been assigned the above noted wage claim for further investigation.

"On March 9, 2006, we mailed a notice of Mr. Seefeldt's wage claim and an Employer Response form (copies enclosed) but the correspondence was returned by the US postal service. On May 18, I called 503-473-2649 and left a voicemail message asking that you call me. I have not heard from you.

"Please review the enclosed correspondence and respond as directed therein by no later than **June 6, 2006**. Your response should be directed to my attention at the Eugene address noted below. If you are no longer carrying on business **and** you are unable to pay Mr. Seefeldt any wages that you admit are due and owing, please call me immediately.

"Payment of any undisputed wages should be remitted by check or money order payable solely to Dean Seefeldt but sent to my attention at the Eugene office.

"Please note that if you fail to cooperate as requested, the Division will most likely invoke the administrative process. In that event, not only will we seek the wages that I determine are due and owing to Mr. Seefeldt, but also penalty wages in the amount of \$4,320 for failure to pay final wages in a timely manner, interest on both the outstanding wages and penalty wages; and, reimbursement for the costs incurred by the Division during the administrative process."

The letter was mailed to Joseph Francis Sanchez, XX Concrete Foundations Now, at 18333 NW Chemeketa Ln., #C, Portland, OR 97229-3532. Yap Sam also sent copies of the letter to Respondent at PO Box 3278, Newberg, OR 97132, and 8830 NE Saint Paul Hwy., Newberg, OR 97132-7149. On May 30, 2006, the U. S. Post Office returned the letter addressed to 18333 NW Chemeketa Ln., #C, Newberg, noting a forwarding address of PO Box 3278, Newberg, OR, and that the "forward time" had expired. On the same date, the letter addressed to 8830 NE Saint Paul Hwy., Newberg, OR, was also returned with the notation: "RETURN TO SENDER NO MAIL RECEPTACLE

UNABLE TO FORWARD.” The letter addressed to PO Box 3278, Newberg, OR, was not returned to BOLI by the U. S. Post Office.

8) On June 7, 2006, Respondent left a telephone message for Yap Sam stating he had not had any employees in “7 or 8 yrs.” In a later telephone conversation, on the same date, Respondent told Yap Sam that he did not know Claimant or Chris Day, was not allowed to have employees and had not had any for years, and had not subcontracted with JLS Custom Homes to prepare and pour concrete foundations.

9) Following the wage claim investigation, Yap Sam concluded that Respondent employed Claimant from September 20 through 30, 2005, and owed Claimant \$2,119.50 in unpaid wages. Respondent did not pay the wages owed and the Agency issued an Order of Determination on June 29, 2005, based on Claimant’s wage claim and the Agency’s investigation.

10) Claimant was a credible witness. His testimony was straightforward and unembellished. His testimony about his pay rate and the number of hours he worked was corroborated by other credible evidence and, in any event, was more believable than Respondent’s version of events. The forum credited Claimant’s testimony in its entirety.

11) Tucker and Jeziarski were credible witnesses. They each testified to their knowledge of the subcontract between JLS and Respondent and neither appeared to have a bias toward or against Respondent or Claimant. Jeziarski acknowledged he had received complaints about unpaid wages from workers, including Claimant, after the Marty Meadows project was completed. The forum credited Tucker’s and Jeziarski’s testimony in its entirety.

12) Chris Day was a credible witness. Although he acknowledged a long-term friendship with Respondent and had not been paid for his work on the Marty Meadows

project, Day did not demonstrate any bias toward or against Respondent or Claimant. Rather, his testimony was straightforward and he testified, without rancor, to only those matters within his personal knowledge. The forum credited Day's testimony in its entirety.

13) Yap Sam was a credible witness. During the wage claim investigation, she maintained contemporaneous notes that support her independent recollection of her contacts with Respondent. She clearly remembered Respondent's statements that he had not employed anyone for seven or eight years, did not know Claimant or Chris Day, and had not worked for JLS during times material. The forum credits Yap Sam's testimony in its entirety.

14) Respondent's testimony was not reliable. Although he ultimately admitted he was a subcontractor for JLS, had employed Claimant to work on the Marty Meadows project, and had known Chris Day for 14 years, Respondent's prior statements to Yap Sam denying any knowledge of Claimant, Day or the JLS construction project, demonstrate his willingness to prevaricate when it suits a purpose, which was at that time to deter the wage claim investigation. At hearing, his apparent purpose was to reduce his potential liability by denying he agreed to pay Claimant \$18 per hour and by challenging the number of Claimant's work hours. In any event, based on his prior false statements to the Agency and his failure to provide any evidence to support his claims at hearing, the forum did not credit Respondent's testimony unless it was an admission, statement against interest, or corroborated by other credible evidence.

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

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

2) Respondent employed Claimant from September 20 through September 30, 2005.

- 3) Respondent agreed to pay Claimant \$18 per hour.
- 4) Between September 20 and September 30, 2005, Claimant worked 105 hours, 25.5 of which were hours that exceeded 40 hours in a given work week.
- 5) Claimant's last day of work was September 30, 2005.
- 6) From September 20 through September 30, 2005, Claimant earned \$2,119.50. Respondent did not pay Claimant any part of the wages earned and owes Claimant \$2,119.50 in due and unpaid wages.
- 7) On Claimant's behalf, BOLI sent Respondent written notice of nonpayment of wages on March 9 and March 23, 2006, before issuing an Order of Determination on June 29, 2006.
- 8) Respondent willfully failed to pay Claimant the \$2,119.50 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.
- 9) Penalty wages for Claimant, computed pursuant to ORS 652.150, equal \$4,320.
- 10) Respondent paid Claimant less than the wages to which he was entitled and civil penalties, computed pursuant to ORS 652.150, equal \$4,320.

#### **CONCLUSIONS OF LAW**

- 1) At all times material herein, Respondent was an employer and Claimant was an employee 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 Claimant all wages earned and unpaid after Claimant's 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 Claimant when his employment terminated, as provided in ORS 652.140.

5) Respondent is liable for civil penalties under ORS 653.055 for failing to pay Claimant overtime wages to which he was entitled pursuant to 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 Claimant his earned, unpaid, due and payable wages, penalty wages, and civil penalties, plus interest on those sums until paid. ORS 652.332.

## OPINION

### WAGE CLAIM

The Agency was required to prove 1) Respondent employed Claimant, 2) any pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage, 3) Claimant performed work for which he was not properly compensated, and 4) the amount and extent of work Claimant performed for Respondent. *In the Matter of Tallon Kustom Equip., LLC*, 28 BOLI 32 (2006). Respondent does not dispute that he employed Claimant in September 2005 or that he owes Claimant some wages. Respondent disputes the agreed upon pay rate and the amount and extent of work Claimant performed for Respondent.

#### A. Agreed Upon Pay Rate

Claimant credibly testified that Respondent agreed to pay him the same \$18 per hour pay rate that he earned while working for Bedford Construction Company. Claimant's testimony was corroborated by Respondent's employee, Chris Day, who credibly testified that, at the time Claimant was hired, he understood that Respondent

agreed to match what Claimant's former employer had paid him prior to his lay-off. Respondent's assertion that he hired Claimant without a wage agreement, and that he told Claimant he wanted to see how well Claimant performed before he agreed to a wage rate, was not credible. The forum finds more plausible Claimant's testimony that his agreement to work on the Marty Meadows project was contingent upon his receiving the same pay he received from his previous employer and that he communicated that contingency to Respondent. Consequently, the forum concludes that Respondent agreed to pay Claimant \$18 per hour for his work on the Marty Meadows project.

**B. Amount and Extent of Work**

ORS 653.045 requires employers to keep and maintain proper records of wages, hours and other conditions and practices of employment. When the forum concludes an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. When the employer produces no records, the Commissioner may rely on evidence produced by the Agency "to show the amount and extent of the employee's work as a matter of just and reasonable inference and then may award damages to the employee, even though the result be only approximate." *In the Matter of Diran Barber*, 16 BOLI 190 (1997), quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946).

Here, Respondent kept no record of the days or hours Claimant worked. This forum has previously accepted, and will accept, the credible testimony of a claimant as sufficient evidence to prove work was performed and from which to draw an inference of the extent of that work. *In the Matter of Graciela Vargas*, 16 BOLI 246 (1998). Claimant's testimony was credible as to the amount and extent of the work he performed. In addition, he kept a contemporaneous record of the hours he worked.

Respondent, on the other hand, produced no persuasive evidence to “negative the reasonableness of the inference to be drawn from the [Claimant’s] evidence.” *Id.* at 255, quoting *Mt. Clemens Pottery Co.*, 328 US at 687-88.

The forum has found that Claimant performed work for which he was improperly compensated and may rely on the evidence Claimant produced showing the hours he worked as a matter of just and reasonable inference. Claimant’s credible testimony establishes that he worked a total of 105 hours for Respondent, 25.5 of which were hours worked in excess of 40 per week. For these hours, Claimant earned a total of \$2,119.50, based on the agreed upon rate of \$18 per hour. Although Respondent claimed he gave Claimant \$65 for gas and food, Claimant credibly testified that he never received any money from Respondent. In any event, Respondent cannot lawfully deduct money he purportedly paid for gas and food from Claimant’s wages without Claimant’s written authorization. See ORS 652.610(3)(b)(“No employer may withhold, deduct or divert any portion of an employee’s wages unless: \* \* \* [t]he deductions are authorized in writing by the employee, are for the employee’s benefit, and are recorded in the employer’s books”). Consequently, absent evidence showing otherwise, the forum finds Respondent owes all of the wages Claimant earned between September 20 and September 30, 2007, and is liable for \$2,119.50 in unpaid wages.

### **PENALTY WAGES - ORS 652.150**

The forum may award penalty wages when it determines that a respondent’s failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. A respondent commits an act or omission “willfully” if the respondent acts or fails to act intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

At hearing, Respondent acknowledged he employed Claimant and, although he claimed in his answer that Claimant was “paid cash on completion of the job,” he testified only that he had given Claimant \$65 for gas and food sometime before the job was completed. He also testified he intended to pay everyone \$200 when the job was completed, but he did not state he actually paid anyone anything at job’s end. During the wage claim investigation, Respondent lied to BOLI compliance specialist Yap Sam when he told her he had not employed anyone for years, did not know Claimant or Chris Day, and only knew of JLS Custom Homes because they were “a big company.” Respondent’s initial attempt to disavow knowledge of Claimant and the construction project and his subsequent admission that he employed Claimant and that Claimant performed work for him, but was paid in cash after the project was completed, demonstrate Respondent’s guilty knowledge of the pertinent facts and that he voluntarily and as a free agent failed to pay Claimant all of the wages he earned between September 20 and September 30, 2005. Consequently, Respondent is liable to Claimant for penalty wages in the amount of \$4,320. This figure is computed by multiplying \$18 per hour by 8 hours per day multiplied by 30 days. See ORS 652.150 and OAR 839-001-0470.

### **CIVIL PENALTIES - ORS 653.055**

If an employer pays an employee “less than the wages to which an employee is entitled under ORS 653.010 to 653.161,” the forum may award civil penalties to the employee. ORS 653.055. The Agency alleged Respondent failed to compensate Claimant at one and one half times his regular rate of pay for each hour he worked over 40 hours in a given work week between September 20 and September 30, 2005. 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. The Agency presented sufficient evidence to show Respondent failed to pay Claimant overtime for the hours he worked in excess of 40 per week, as required under OAR 839-020-0030(1). Respondent is therefore liable to Claimant for \$4,320 in civil penalties as provided in ORS 652.150 (\$18 x 8 hours per day x 30 days). See ORS 653.055(1)(b).

### **ORDER**

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, penalty wages, and civil penalties, Respondent **Joseph Francis Sanchez dba XX Concrete Foundations Now** 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 Dean S. Seefeldt, in the amount of TEN THOUSAND SEVEN HUNDRED FIFTY NINE DOLLARS AND FIFTY CENTS (\$10,759.50), less appropriate lawful deductions, representing \$2,119.50 in gross earned, unpaid, due and payable wages, \$4,320 in penalty wages, and \$4,320, in civil penalties, plus interest at the legal rate on the sum of \$2,119.50 from November 1, 2005, until paid, and interest at the legal rate on the sum of \$8,640 from December 1, 2005, until paid.