

In the Matter of

SREEDHAR THAKKUN,

Case No. 68-01

Final Order of the Commissioner Jack Roberts

Issued August 29, 2001

SYNOPSIS

Respondent failed to pay Claimant all wages earned and due upon termination, in violation of ORS 652.140(2). Respondent's failure to pay the wages was willful and Respondent was ordered to pay civil penalty wages, pursuant ORS 652.150. ORS 652.140(2); ORS 652.150; OAR 839-001-0470(1).

The above-entitled 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 hearing was held on July 10, 2001, at BOLI's office located at 1400 Executive Parkway, Suite 200, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Cynthia Domas, an employee of the Agency. Christopher Callender ("Claimant") was present throughout the hearing and was not represented by counsel. Sreedhar Thakkun ("Respondent") was present throughout the hearing and was not represented by counsel.

The Agency called Claimant and Margaret Pargeter, BOLI Wage & Hour Division compliance specialist as witnesses. Respondent called himself as his only witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-18 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-5 and A-7 through A-10 (submitted prior to hearing).

Having fully considered the entire record in this matter, I, Jack Roberts, 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 September 13, 2000, Claimant filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him.

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) Claimant brought his wage claim within the statute of limitations.

4) On November 14, 2000, the Agency issued Order of Determination No. 00-3921 based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of \$199.38 in unpaid wages earned by Claimant between August 14 through August 25, 2000, and \$3,300.00 in civil penalty wages, plus interest, and 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.

5) On December 4, 2000, Respondent filed an answer and request for hearing. Respondent's answer alleged that Claimant was paid up to and through August 25, 2000.

6) On February 22, 2001, the Agency filed a "BOLI Request for Hearing" with the forum.

7) On March 14, 2001, 2000, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and the Claimant stating the time and place of the hearing as July 10, 2001, at 9:00 a.m., at 165 E. 7th, Suite 220, Eugene, Oregon (State Office Building). 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, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440. These documents were mailed to Respondent at 988 River Road, Eugene, OR 97404, Respondent's business address. None of these documents were returned to the Hearings Unit by the U.S. Postal Service.

8) On June 4, 2001, the ALJ ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any wage and penalty calculations (for the Agency only). The forum ordered the participants to submit case summaries no later than July 29, 2001, and notified them of the possible sanctions for failure to comply with the case summary order. The interim order included a case summary form designed to assist *pro se* Respondents and authorized representatives in filing a case summary.

9) On June 6, 2001, the ALJ issued an amended case summary order changing the due date for case summaries from July 29 to June 29, 2001.

14) On June 18, 2001, the Agency filed a motion for a discovery order seeking six categories of documents. The Agency identified the relevancy of the documents in its motion.

15) On June 18, 2001, the ALJ issued an interim order informing Respondent that he had seven days after the service of the Agency's motion for a discovery order to file a written response.

16) The Agency filed its case summary, with attached exhibits, on June 28, 2001.

17) At the outset of the hearing, pursuant to ORS 183.415(7), the ALJ made an opening statement in which he verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

18) During the ALJ's opening statement, and again during the testimony of Pargeter, Respondent requested that the hearing be recessed so he could obtain legal counsel to assist him in understanding the legal ramifications of the exhibits and the forum's procedures. Respondent stated he had a limited ability to comprehend and communicate in English. The ALJ put Respondent under oath and asked him a number of questions to determine Respondent's ability to comprehend and communicate in English and the circumstances of Respondent's "breakdown" that allegedly prevented him from filing a case summary.ⁱ For reasons stated in the Opinion, Respondent's request was denied.

19) At the outset of the hearing, Respondent stated that he wanted to call Linda Edwards and Aprilⁱⁱ as witnesses. Both were present at the hearing during the ALJ's opening statement. Respondent stated that Edwards would testify as to his character, and April to testify that he did not open his mail for a long time because he had a "breakdown." The Agency objected to the testimony of both individuals on the grounds of relevancy and that Respondent had not filed a case summary naming them

as witnesses. The ALJ sustained the Agency's objection and Edwards and April left the hearing together.

20) Prior to the Agency's opening statement, the Agency case presenter noted that the ALJ had not issued a discovery order in response to the Agency's June 18, 2001, motion for a discovery order. The Agency case presenter requested a ruling on the Agency's motion. In response, the ALJ granted the Agency's motion and ordered Respondent to turn over to Ms. Domas, for inspection and copying, any documents he brought with him to the hearing that were responsive to the discovery order. Respondent stated that he had no such documents with him, but had information in his shop computer that was responsive to the discovery order.

21) During the presentation of his case, Respondent attempted to call Michael Cortez as a telephonic witness to testify that Cortez had actually performed the work that the Agency alleged Claimant had performed and was not paid for. Respondent represented that Cortez had done the work after Claimant left Respondent's employment. The Agency objected on the grounds that Respondent had not filed a case summary naming Cortez as a witness and the Agency would be unduly prejudiced if Cortez was allowed to testify. For reasons stated in the Opinion, the ALJ did not allow Cortez to testify.

22) The ALJ issued a proposed order on July 24, 2001, 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) Respondent employed Claimant as an auto mechanic between July 8 and August 28, 2000.

2) Between August 14 and August 25, 2000, Claimant, at Respondent's direction, performed work on three vehicles – a 1986 Mazda 626 ("Mazda") owned by

Respondent, a 1989 Dodge Caravan (“Dodge”), and a 1990 Volkswagen Jetta (“VW”) – for which he was not paid by Respondent.

3) Neither Respondent nor Claimant kept a record of the specific number of hours that Claimant worked on the Dodge, Mazda, and VW.

4) Claimant worked on the Dodge for a total of eight hours over three separate days between August 14 and August 25, 2000. Claimant, who had been an auto mechanic for ten years at the time of his employment with Respondent, used an industry guide that states how long it should take to perform specific auto repairs to estimate the number of hours that he worked on the Dodge. Claimant estimated his hours conservatively.

5) Claimant worked on the Mazda for a total of four hours between August 14 and August 25, 2000. Claimant used the industry guide to estimate his hours and estimated his hours conservatively.

6) Claimant worked on the VW for a total of 2.5 hours between August 14 and August 25, 2000. Claimant used the industry guide to estimate his hours and estimated his hours conservatively.

7) Respondent was present at Respondent’s workplace when Claimant worked on the Dodge, Mazda, and Jetta.

8) Claimant quit Respondent’s employment on August 28, 2000. Respondent’s next regular payday was September 8, 2000.

9) When Claimant quit Respondent’s employment, Respondent owed him \$199.38 in gross, unpaid wages. At the time of the hearing, Respondent had not paid Claimant any of those wages.

10) Respondent was aware that he owed Claimant unpaid wages when Claimant quit, but refused to pay Claimant based on his perception that Claimant had stolen Respondent's digital fuel pressure gauge.

11) The forum computed civil penalty wages as follows for Claimant, in accordance with ORS 652.150: \$13.75 per hour multiplied by 8 hours equals \$110; \$110 multiplied by 30 days equals \$3,300.

12) Respondent's testimony was not credible because of significant internal inconsistencies and the forum has not credited it except where corroborated by other credible evidence. Respondent testified that he performed the work on the VW, then minutes afterward, on cross-examination, testified that he did not work on the VW. In support of his motion for a recess to obtain legal counsel and an interpreter, he testified that he had a limited ability to read and understand written English. However, the ALJ observed him taking notes in English and cross-examining Claimant from those notes. Respondent was also able to read Claimant's wage claim and handwritten notes aloud at the hearing. Again related to his reading ability, Respondent testified that he self-diagnosed his depression from reading and research he had done. Pargeter, the Agency compliance specialist who spoke with Respondent during her investigation of the claim, testified that Respondent never indicated that he did not understand the letters she mailed to him or any part of their conversations.

13) Claimant testified in a straightforward manner. His testimony was internally consistent and consistent with documents he provided the Agency in support of his wage claim. In convincing detail, he described the work that he performed on the Dodge, Mazda, and Jetta. The forum has credited his testimony wherever it conflicted with Respondent's.

ULTIMATE FINDINGS OF FACT

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

2) Respondent employed Claimant as an auto mechanic between July 8 and August 28, 2000.

3) Between August 14 and August 25, 2000, Claimant worked 14.5 hours for Respondent at the agreed rate of \$13.75 per hour for which he has not been paid.

4) Claimant quit Respondent's employment on August 28, 2000. At that time, Respondent owed him \$199.38 in gross, unpaid wages. At the time of the hearing, Respondent had not paid Claimant any of those wages.

5) Respondent's failure to pay Claimant's wages was willful and more than 30 days have passed since Claimant's wages became due.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent Sreedhar Thakkun was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405. During all times material, Respondent employed Claimant.

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) At times material, ORS 652.140(2) provided:

"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 schedule payday after the employee has quit, whichever event first occurs."

Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid not later than September 1, 1999, five business days after Claimant quit. Those wages amount to \$199.38.

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.”

OAR 839-001-0470(1) provides:

“(1) When an employer willfully fails to pay all or part of the wages due and payable to the employee upon termination of employment within the time specified in OAR 839-001-0420, 839-001-0430 and 839-001-0440, the employer shall be subject to the following penalty:

“(a) The wages of the employee shall continue from the date the wages were due and payable until the date the wages are paid or until a legal action is commenced, whichever occurs first;

“(b) The rate at which the employee’s wages shall continue shall be the employee’s hourly rate of pay times eight (8) hours for each day the wages are unpaid;

“(c) Even if the wages are unpaid for more than 30 days, the maximum penalty shall be no greater than the employee’s hourly rate of pay times 8 hours per day times 30 days.”

Respondent is liable for \$3,300.00 in civil penalties under ORS 652.150, computed by multiplying Claimant’s hourly rate (\$13.75 per hour) x 8 hours per day x 30 days = \$3,300.00, for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(2).

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 Claimant his earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

PRIMA FACIE CASE

To establish a prima facie case for wage claims, the Agency must establish the following elements: (1) Respondent employed Claimant; (2) Claimant's agreed upon rate of pay, if it was other than minimum wage; (3) Claimant performed work for which he was not properly compensated; and (4) the amount and extent of work performed by Claimant. *In the Matter of Contractor's Plumbing Service, Inc., 20 BOLI 257, 270 (2000).*

The Agency established the first two elements by Respondent's stipulation that he employed Claimant and Claimant's undisputed credible testimony that Respondent agreed to pay Claimant \$13.75 per hour for the work he performed between August 14 and August 25, 2000.

The third element of the Agency's prima facie case requires proof that Claimant performed work for which he was not properly compensated. In this case, that proof consists of Claimant's credible testimony that he worked on the Dodge, Mazda, and VW and was not paid for that work.

The final element consists of proof of the amount and extent of work performed by Claimant. The Agency's burden of proof can be met by producing sufficient evidence from which "a just and reasonable inference may be drawn." *In the Matter of Majestic Construction, Inc., 19 BOLI 59, 58 (1999).* A claimant's credible testimony may be sufficient evidence. *In the Matter of Ann L. Swanger, 19 BOLI 42, 56 (1999).*

Respondent testified that Claimant performed no work on the VW or Jetta, and would not admit that Claimant did any work on the Dodge. In contrast, Claimant credibly testified that he worked 14.5 hours on those vehicles and testified as to the

particular repairs he performed with specificity. Although he kept no contemporaneous records of the hours he worked, the method he used to estimate his hours – an industry guide that states how long it should take to perform specific auto repairs – was a credible means of estimating his time, given that Claimant was an experienced auto mechanic and there was no testimony indicating that that he worked at a different speed than the average experienced auto mechanic. This is sufficient evidence to establish the amount and extent of Claimant's work.

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. *Contractor's Plumbing Service*, 20 BOLI at 274. Respondent, as an employer, had a duty to know the amount of wages due its employees. *In the Matter of Robert N. Brown*, 20 BOLI 157, 163 (2000). Based on Claimant's credible testimony that he worked on the Dodge, Mazda, and Jetta at Respondent's request, and that Respondent was at the workplace while Claimant worked on those vehicles, the forum concludes that Respondent knew Claimant's hours of work. There is no evidence that Respondent acted other than voluntarily or as a free agent in not paying Claimant for the 14.5 hours he worked on the Dodge, Mazda, and Jetta. Accordingly, the forum concludes that Respondent acted willfully and assesses penalty wages in the amount of \$3,300.00, the amount sought in the Order of Determination. This figure is computed by multiplying \$13.75 per hour x 8 hours per day x 30 days, pursuant to ORS 652.150 and OAR 839-001-0470.

RESPONDENT'S MOTION TO RECESS HEARING TO OBTAIN LEGAL COUNSEL

During the ALJ's opening statement, and again during Pargeter's testimony, Respondent sought a recess to obtain legal counsel. Respondent also alluded to the need for an interpreter. Respondent's request was made on the basis that he did not understand the legal significance of the administrative or agency exhibits or the forum's procedures, and that he had a limited ability to read and comprehend written English. Respondent testified that his native tongue is an Indian dialect for which there is no written language. When placed under oath and questioned by the ALJ, Respondent testified that he had consulted counsel prior to the hearing and had been advised to come to the hearing and attempt to settle the case.

OAR 839-050-0110(6) provides, in pertinent part:

“Once the contested case hearing has begun, no party will be allowed a recess to obtain the services of counsel.”

Here, Respondent consulted counsel prior to the hearing and made a conscious choice to come to the hearing without counsel. Respondent also demonstrated his ability to comprehend and communicate in English, to understand the allegations of the wage claim, to cross-examine the Claimant,ⁱⁱⁱ using notes he wrote in English during the Claimant's direct testimony, and to testify as to facts surrounding Claimant's allegations. Under these circumstances, the forum is under no obligation to provide an interpreter or to recess the hearing to allow Respondent to obtain the services of counsel. The forum's ruling on this issue is affirmed.

THE FORUM'S RULING DENYING RESPONDENT'S REQUEST TO CALL MIKE CORTEZ AS A WITNESS

Respondent attempted to call Mike Cortez as a telephone witness, stating that Cortez would testify he did the work on Respondent's Mazda for which Claimant is claiming compensation. The Agency objected on the dual grounds that Respondent did

not file a case summary and the Agency would be unduly prejudiced if Cortez was allowed to testify.

The ALJ's case summary order, issued on June 4, 2001, required that both participants submit "[a] list of all persons to be called as witnesses, according to the requirements of OAR 839-050-0210(1)(a)." OAR 839-050-0210(1)(a) includes "[a] list of all persons to be called as witnesses * * * at the hearing, except that impeachment or rebuttal witnesses need not be included on the witness list." In this case, Cortez's testimony, if allowed, would clearly have been part of Respondent's case-in-chief and not impeachment or rebuttal evidence. Consequently, his testimony was subject to OAR 839-050-0210(5), which governs admission of evidence that has not been disclosed pursuant to a case summary order. In pertinent part, it states:

"The administrative law judge may refuse to admit evidence that has not been disclosed in response to a case summary order, unless the participant that failed to provide the evidence offers a satisfactory reason for having failed to do so or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.415(10)."

The forum first determines if Respondent's reason was "satisfactory." Respondent testified that he had not filed a case summary because he had not opened any of his mail except bills for the last two years due to his "breakdown" and was unaware of the case summary order and, even if he had been aware of the order, he would have been unable to comply with it because of his limited ability to comprehend English. Respondent acknowledged that his address is the same to which the forum's interim orders were mailed. The forum found this was an unsatisfactory reason for two reasons. First, because a respondent cannot escape his legal obligations by failing or refusing to open his mail. Second, because the forum determined that Respondent was able to read and comprehend English.

Having determined that Respondent did not provide a "satisfactory" reason for not filing a case summary that listed Cortez as a witness, the forum must also determine

whether excluding the evidence violated the ALJ's duty to conduct "a full and fair inquiry" under ORS 183.415(10). In this case, the forum concludes it did not violate the duty to conduct a "fair" inquiry. Based either on a conscious choice to ignore his mail or ignore the contents of his mail, Respondent did not file a case summary despite a clearly worded order from the forum that required both participants to file a summary that included a witness list. As a result, the Agency was placed in the untenable and unfair position of trying to cross-examine, by telephone, an important witness who it had no opportunity to interview or gather information about prior to the hearing. The forum's ruling is affirmed.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages and civil penalty wages he owes as a result of his violations of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders **Sreedhar Thakkun** 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 Christopher Allen Callender in the amount of THREE THOUSAND FOUR HUNDRED NINETY NINE DOLLARS AND THIRTY-EIGHT CENTS (\$3,499.38), less appropriate lawful deductions, representing \$199.38 in gross, unpaid, due, and payable wages and \$3,300.00 in penalty wages, plus interest at the legal rate on the sum of \$199.38 from October 1, 2000, until paid, and interest at the legal rate on the sum of \$3,300.00 from November 1, 2000, until paid.

ⁱ See Findings of Fact – Procedural 19 and 21, *infra*.

ⁱⁱ Respondent stated that he did not know April's last name.

ⁱⁱⁱ For example, in response to an Agency objection as to the relevancy of Respondent's question, he stated he was asking it for the purpose of "refreshing recollection."