

**In the Matter of**

**PETER N. and PATSY A. ZAMBETTI**

**dba Safe-T-Tek**

**Case No. 66-01**

**Final Order of the Commissioner Jack Roberts**

**Issued July 10, 2002**

**SYNOPSIS**

Where Respondents submitted an answer to the Order of Determination and requested a hearing, and failed to appear at the hearing, they were found in default of the charges in the charging document. The Agency made a prima facie case establishing that Respondents failed to pay Claimant all wages earned and due after Claimant quit his employment, in violation of ORS 652.140(2). Respondents' failure to pay the wages was willful and Respondents were ordered to pay civil penalty wages, pursuant to ORS 652.150. ORS 652.140(2); ORS 652.150.

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The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 13, 2002, in the hearing room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Cynthia Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Robert K. Douglas ("Claimant") was present throughout the hearing and was not represented by counsel. Peter N. and Patsy A. Zambetti ("Respondents") failed to appear for hearing in person or through counsel.

In addition to Claimant, the Agency called as witnesses: Alan Woolley, Oregon Employment Department JOBS Plus representative; Michael Wells, former BOLI Wage and Hour Division Compliance Specialist; Vicki S. Larson-Scorvo, Oregon Employment

Department JOBS Plus Processing Unit; and Larry McNamee, Respondents' former employee.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-17;<sup>i</sup>
- b) Agency exhibits A-1 through A-10 (filed with the Agency's case summary).

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 August 9, 2000, Claimant filed a wage claim form stating Respondents had employed him from June 1 until July 28, 2000, and failed to pay him the agreed upon rate of \$13.00 per hour for all hours worked.

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 Respondents.

3) On November 13, 2000, the Agency issued an Order of Determination, numbered 00-3463. The Agency alleged Respondents had employed Claimant during the period July 3 through July 28, 2000, at the rate of \$13.00 per hour for 154 hours of work, no part of which had been paid, leaving a balance due and owing of \$2,080. The Agency also alleged Respondents' failure to pay all of Claimant's wages when due was willful and Respondents, therefore, were liable to Claimant for \$3,120 as penalty wages, plus interest. The Order of Determination was personally served on Patsy Zambetti at 1906 28<sup>th</sup> Avenue, Forest Grove, Oregon, and gave Respondents 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 January 8, 2001, Respondents filed an answer and requested a hearing. Respondents alleged in the answer that Claimant was hired as a salesman and worked 51 hours in July 2000 for \$6.50 per hour. Respondents acknowledged in their answer that Claimant was not paid for hours worked in July 2000 stating, “[h]e has never asked us for [his pay] nor come in to retrieve [his pay].”

5) On January 30, 2001, the Agency requested a hearing. On February 16, 2001, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9 a.m. on June 6, 2001. With the Notice of Hearing, the forum included a copy of the Order of Determination, a “SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES” and a copy of the forum’s contested case hearings rules, OAR 839-050-0000 to 839-050-0440. The Notice of Hearing and accompanying documents were mailed to Peter and Patsy Zambetti at 9850 SW Frewing Street, #45, Tigard, Oregon 97223. The U.S. Post Office did not return the Notice of Hearing documents to the Hearings Unit.

6) On April 30, 2001, the forum issued a case summary order requiring the Agency and Respondents to submit case summaries that included: 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 Respondents only); and 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 their case summaries by May 25, 2001, and advised them of the possible sanctions for failure to comply with the case summary order. The case summary order was mailed to Peter and Patsy Zambetti at 9850 SW Frewing Street, #45, Tigard, Oregon 97223, and was not returned by the U.S. Post Office.

7) On May 25, 2001, the Agency advised the forum that Respondents had filed bankruptcy under Chapter 13 and requested the scheduled hearing be removed from the docket "until further notice." On May 29, 2001, the forum issued an order that cancelled the hearing, but left the Hearings Unit file open until the Agency either requested a new hearing date or withdrew the charging document. The order canceling the hearing was mailed to Peter and Patsy Zambetti at 9850 SW Frewing Street, #45, Tigard, Oregon 97223, and was not returned by the U.S. Post Office.

8) On January 16, 2002, the Agency requested that the hearing be rescheduled for June 13, 2002, and submitted a copy of a notice issued by the U.S. Bankruptcy Court stating that Respondents' bankruptcy case, after notice and hearing, was dismissed and administratively closed.

9) On February 1, 2002, the forum issued an interim order rescheduling the hearing for June 13, 2002, and on the same date issued a second case summary order requiring the Agency and Respondents to submit their case summaries by June 3, 2002. The interim order rescheduling the hearing and the case summary order were mailed to Peter N. and Patsy A. Zambetti dba Safe-T-Tek at two separate addresses provided by the Agency: P O Box 115, Forest Grove, Oregon 97116-0115 and 1906 28<sup>th</sup> Avenue, Forest Grove, Oregon 97116. Neither order was returned by the U.S. Post Office.

10) On February 28, 2002, the forum sent Respondents a copy of the amended contested case hearing rules and a revised Summary of Contested Case Rights and Procedures, effective February 15, 2002. The amended rules and revised summary were mailed to Peter and Patsy Zambetti at PO Box 115, Forest Grove, Oregon 97116-0115 and 1906 28<sup>th</sup> Avenue, Forest Grove, Oregon 97116 and were not returned by the U.S. Post Office.

11) On April 30, 2002, the Agency moved for a discovery order requiring Respondents to produce four categories of documents. The Agency included a copy of its informal discovery request, marked as "Agency Exhibit A," which was mailed to Respondents at PO Box 115, Forest Grove, Oregon 97116, on April 16, 2002. The relevance of the documents sought was readily apparent. Respondents filed no response to the Agency's motion. On May 13, 2002, the forum issued an interim order that granted the Agency's motion and required Respondents to produce all of the requested documents to the Agency no later than May 17, 2002.

12) The Agency filed its case summary, with its attached exhibits, on June 3, 2002. Respondents did not file a case summary.

13) On June 11, 2002, the Agency filed an addendum to its case summary and by separate letter the same date, provided the name of a witness scheduled to testify by telephone at the hearing. On June 12, 2002, the Agency filed a second addendum to its case summary.

14) On June 13, 2002, at the time set for hearing, Respondents did not appear at the hearing and no one appeared on their behalf. After waiting 30 minutes, the ALJ declared Respondents to be in default and commenced the hearing, pursuant to OAR 839-050-0330(2).

15) The Agency waived the ALJ's recitation of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

16) On June 14, 2002, at approximately 9 a.m., a male called the Hearings Unit and identified himself as Peter Zambetti. He stated to the Hearings Unit Coordinator that he and his wife, Patsy Zambetti, had not been notified of the hearing date. He denied receiving mail from the Hearings Unit and stated that he and his wife only receive mail at PO Box 115, Forest Grove, Oregon 97116. The caller further stated

the Zambettis do not receive mail at their home address, which they keep confidential. The home address the caller provided does not match the street address recorded in the Hearings Unit's file. The Hearings Unit Coordinator advised the caller that the Hearings Unit mailed all notices and correspondence pertaining to the rescheduled hearing to PO Box 115, Forest Grove, Oregon 97116.

17) The ALJ issued a proposed order on June 17, 2002 that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The proposed order was mailed to Respondents at their last known addresses: PO Box 115, Forest Grove, Oregon 97116-0115, and 1906 28<sup>th</sup> Avenue, Forest Grove, Oregon 97116. Neither the Agency nor Respondents filed exceptions.

#### **FINDINGS OF FACT – THE MERITS**

1) At all times material herein, Respondents Peter N. and Patsy A. Zambetti jointly operated a business that sold emergency preparedness products under the assumed business name Safe-T-Tek and employed one or more individuals in Oregon. Respondents jointly registered their assumed business name with the Secretary of State's office on April 21, 2000. The address listed for each Respondent was 9850 SW Frewing Street, #45, Tigard, Oregon 97223. Patsy Zambetti was listed as the "authorized representative" of the business.

2) Respondents employed Claimant as a sales manager from approximately June 1 until July 28, 2000. When Respondents hired him, Claimant was receiving unemployment benefits from the Oregon Employment Department. Claimant was Respondents' friend and had given them advice while they negotiated the purchase of their business in March 2000. After he was hired, Claimant was responsible for marketing, selling, and delivering emergency preparedness products to customers. Claimant also worked in Respondents' warehouse assembling "survival kits" for sale and delivery.

3) Respondents agreed to pay Claimant \$13.00 per hour. Claimant's wage rate remained \$13.00 per hour during his employment.

4) While receiving unemployment benefits, Claimant became aware of the JOBS Plus program administered through the Oregon Employment Department ("Department"). The program is designed to help unemployed Oregon residents re-enter the work force by offering incentives to employers for hiring workers receiving unemployment benefits or public assistance. The program reimburses a participating employer \$6.50 per hour for wages paid to the eligible worker and also reimburses the employer's share of wage taxes and workers' compensation insurance. Claimant introduced the concept to Respondents who, after meeting with JOBS Plus Coordinator Woolley at Respondents' work site on June 6, 2000, signed a "work site agreement" that provided them a subsidy for wages paid to Claimant from June 5 until the agreement automatically terminated December 5, 2000.

5) On June 20, 2000, Respondents paid Claimant gross wages of \$1,144, less lawful deductions, for 88 hours of work at the rate of \$13.00 per hour for the pay period June 1 to June 15, 2000.

6) On June 21, 2000, Respondents certified to the Department that Claimant worked 88 hours during the wage period June 5 through June 15, 2000. On June 27, 2000, the Department reimbursed Respondents at the rate of \$6.50 per hour for 88 hours, plus taxes and insurance, for a total gross reimbursement of \$638.92.

7) On July 5, 2000, Respondents paid Claimant gross wages of \$1,144, less lawful deductions, for 88 hours of work at the rate of \$13.00 per hour for the pay period June 16 to June 30, 2000.

8) On July 24, 2000, Respondents certified to the Department that Claimant worked 168 hours during the wage period June 16 through July 15, 2000. On July 27,

2000, the Department reimbursed Respondents at the rate of \$6.50 per hour for 168 hours, plus taxes and insurance, for a total gross reimbursement of \$1,155.76.

9) Throughout his employment, Claimant kept a daily mileage record that he also used to track the number of hours he worked per day. He transferred the hours he recorded on his mileage record to a calendar provided by the Agency when he filed his wage claim.

10) Between July 1 and July 28, 2000, Claimant worked 158 hours, 4 of which were in excess of 40 hours per week, earning a total of \$2,080 in gross wages.

11) Respondents have not paid Claimant for any of the hours he worked in July 2000.

12) Claimant quit his employment without notice on July 28, 2000, because he was not receiving any pay for the work he performed.

13) On August 18, 2000, Respondents certified to the Department that Claimant worked 80 hours during the wage period July 16 through August 15, 2000. The Department reimbursed Respondents a total of \$500.84, including taxes and insurance, for the 80 hours reported.

14) Claimant's civil penalty wages, computed in accordance with ORS 652.150, equal \$3,120 (\$13.00 per hour x 8 hours per day x 30 days).

15) Claimant was an articulate witness who had a clear recollection of the circumstances of his employment. His testimony was consistent with prior statements on his wage claim. The forum credited his testimony in its entirety.

16) Woolley, Larson-Scorvo, and Wells were all credible witnesses.

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

1) Respondents at all times material herein conducted a business that engaged the personal services of one or more employees in Oregon.

2) Respondents engaged Claimant's personal services between June 1 and July 28, 2000.

3) Respondents and Claimant agreed Claimant would be paid \$13.00 per hour.

4) Claimant quit his employment without notice to Respondents on July 28, 2000.

5) Claimant worked 158 hours during July 2000, 4 of which were in excess of 40 hours per week. For all of these hours, Claimant earned a total of \$2,080. Respondents paid Claimant nothing and therefore owed Claimant \$2,080 in earned and unpaid compensation on the day his employment terminated.

6) Respondents owe Claimant \$2,080 for wages earned.

7) Respondents willfully failed to pay Claimant the \$2,080 in earned, due and payable wages no later than August 4, 2000, the fifth business day after Claimant quit his employment without notice to Respondents. Respondents have not paid the wages owed and more than 30 days have elapsed from the date the wages were due.

8) Civil penalty wages, computed pursuant to ORS 652.150 and OAR 839-001-0470, equal \$3,120 (\$13.00 per hour x 8 hours per day x 30 days).

### **CONCLUSIONS OF LAW**

1) During all times material herein, Respondents were employers and Claimant was an employee 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 Respondents herein. ORS 652.310 to 652.414.

3) ORS 652.140(2) provides in part:

"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."

Respondents violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid within five days, excluding Saturdays, Sundays and holidays, after Claimant quit his 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."

Respondents are liable for \$3,120 in civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(1).

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 Respondents 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**

### **DEFAULT**

When Respondents failed to appear and no one appeared on their behalf at hearing, the forum found Respondents in default pursuant to OAR 839-050-0330. The Agency, therefore, needed only to establish a prima facie case on the record to support

the allegations in its charging document. *In the Matter of Usra Vargas*, 22 BOLI 212 (2001). Although the forum may consider Respondents' answer when making factual findings, unsworn and unsubstantiated assertions in the answer are overcome whenever controverted by other credible evidence. *In the Matter of Nova Garbush*, 20 BOLI 65, 71 (2000). Other than acknowledging that Claimant was not paid for any hours worked in July 2000, Respondents contributed nothing to the record for the forum to consider. Having considered all of the evidence in the record, the forum concludes the Agency presented a prima facie case in support of its claim that Respondents failed to pay Claimant for all hours worked in July 2000. The forum further concludes Respondents' failure to pay Claimant his wages earned and owed was willful.

### **AGENCY'S PRIMA FACIE CASE**

The Agency was required to prove: 1) that Respondents employed Claimant; 2) Respondents agreed to pay Claimant \$13.00 per hour; 3) that Claimant performed work for which he was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondents. *Vargas* at 220. In this case, the only elements that Respondents contest in their answer are Claimant's pay rate and the amount and extent of work he performed in July 2000.

#### **A. Claimant's wage rate.**

Respondents contended in their answer that Claimant's wage rate during his employment was \$6.50 per hour. However, Claimant's credible testimony and the pay stubs Respondents and Claimant provided during the wage claim investigation overcome Respondents' unsworn and unsubstantiated assertion. The pay stubs show that in June 2000 Respondents paid Claimant \$13.00 per hour for two pay periods, for a total of \$2,288. Evidence also shows that in June 2000 Respondents requested and received a \$6.50 per hour wage subsidy for Claimant's wages for each of the June pay

periods from the Oregon Employment Department. Claimant credibly testified that his wage rate did not change at any time during his employment and the forum concludes that Claimant's wage rate in July 2000 was the same as it was in June - \$13.00 per hour.

**B. The amount and extent of work Claimant performed for Respondents.**

Respondents acknowledge in their answer that Claimant worked at least 51 hours for them in July 2000 and was not paid for those hours. Prior to Claimant's wage claim, however, Respondents certified to the Oregon Employment Department that Claimant worked 160 hours in July 2000. Moreover, evidence shows Respondents requested and received a \$6.50 per hour wage subsidy for the wages they purportedly paid for those reported hours. Claimant credibly testified he worked 158 hours in July 2000 and was not paid for those hours.

When the forum concludes, as it does here, that 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. Where the employer has produced no records, as happened in this case, 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 Ilya Simchuk*, 22 BOLI 186, 196 (2001), quoting *Anderson v. Mt. Clemens Pottery Co.*, 3289 US 680 (1946).

Respondents did not appear at hearing with evidence to support their bare assertion that Claimant worked only 51 hours in July 2000. The forum, therefore, has only credited their assertion as an admission that Claimant worked hours for which he was not properly compensated. The forum has relied on Claimant's credible testimony,

which was based on his contemporaneous mileage record, to determine the amount and extent of work he performed for Respondents. The forum also finds Respondents' representation to the Oregon Employment Department regarding Claimant's July 2000 hours to be consistent with Claimant's testimony. The forum concludes that Claimant performed 158 hours of work, including overtime hours, for which he was not properly compensated.

## **CIVIL PENALTIES**

The forum may award civil penalty wages where a respondent's failure to pay wages is willful. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission willfully if he or she 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).

In their answer, Respondents acknowledge they did not pay Claimant for all of the hours he worked in July 2000. Claimant credibly testified that Respondents did not change the agreed upon wage rate at any time during his employment and credible evidence establishes Respondents knew the amount and extent of the work Claimant performed during July. There is no evidence to show Respondents acted other than intentionally and as free agents when they failed to pay Claimant all wages owed at the time Claimant quit his employment. Respondents acted willfully and are liable for penalty wages under ORS 652.150 in the amount of \$3,120.

## **ORDER**

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, Respondents **Peter N. and Patsy A. Zambetti** are 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 Robert K. Douglas, in the amount of FIVE THOUSAND TWO HUNDRED DOLLARS (\$5,200), less appropriate lawful deductions, representing \$2,080 in gross earned, unpaid, due and payable wages and \$3,120 in penalty wages, plus interest at the legal rate on the sum of \$2,080 from August 4, 2000, until paid and interest at the legal rate on the sum of \$3,120 from September 4, 2000, until paid.

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<sup>i</sup> Administrative exhibit X-17 was admitted post-hearing as the original of X-16.