

VAL HOYLE
COMMISSIONER



DUKE SHEPARD
DEPUTY COMMISSIONER

BUREAU OF LABOR AND INDUSTRIES

**BEFORE THE COMMISSIONER
OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON**

In the Matter of:

BG CONSTRUCTION, INC.,

Respondent.

Case No. **06-20**

FINDINGS OF FACT
CONCLUSIONS OF LAW
OPINION
ORDER

SYNOPSIS

The wage claimant worked for Respondent from December 29, 2018, through January 3, 2019. He earned \$902.34 in wages and was paid nothing. The forum awarded claimant \$902.34 in wages. Respondent's failure to pay claimant was willful and claimant was awarded a total of \$4,320.00 in penalty wages.

The above-entitled case was originally assigned to Kari Furnanz, designated as Administrative Law Judge ("ALJ") by Val Hoyle, Commissioner of the Bureau of Labor and Industries for the State of Oregon. On November 18, 2020, the case was transferred from ALJ Furnanz to ALJ Cynthia Domas.

1 The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by
2 administrative prosecutor Adam Jeffries, an employee of the Agency. Respondent was
3 represented by Benjamin Garrick, acting as Respondent's authorized representative.

4 After the Agency issued an Amended Order of Determination (AOOD), the
5 Agency moved for Summary Judgment. The ALJ granted the Agency's motion.

6 Having fully considered the entire record in this matter, I Val Hoyle,
7 Commissioner of the Bureau of Labor and Industries, hereby make the following
8 Findings of Fact (Procedural and on the Merits), Conclusions of Law, Opinion and
9 Order.¹

10 FINDINGS OF FACT – PROCEDURAL

11 1) Jeremy Thomas Orwig (Orwig or Claimant) filed a wage claim with the
12 Agency's Wage and Hour Division alleging that Respondent owed him unpaid wages
13 and assigned his wage claim to the Agency. (Ex. A1)

14 2) The Wage and Hour Division ("WHD") issued Order of Determination No.
15 19-0300 ("OOD") on April 15, 2019. The OOD alleged that Orwig was employed by
16 Respondent from December 26, 2018, through January 3, 2019, and was owed \$902.34
17 in unpaid wages. The OOD further alleged that Respondent owed \$4,320.00 in penalty
18 wages, along with interest, to Orwig because more than 30 days had elapsed since the
19 wages became due and owing based on ORS 652-140(1)-(3), ORS 652.150(1)-(2) and
20 OAR 839-001-0479(1)-(2). (OOD)

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23 ¹ The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the
24 Findings of Fact – The Merits.

1 3) Respondent's registered agent was served with the OOD on April 23,
2 2019. On May 13, 2019, Respondent filed a document contesting the wage claim and
3 requesting a trial. At the same time, Respondent filed an authorized representative
4 form naming Benjamin Garrick as the authorized representative. (Exs. A5 and A7)

5 4) On June 4, 2019, the Agency filed an Amended OOD. (AOOD)

6 5) Respondent filed an Answer to the AOOD and requested a hearing on
7 June 14, 2020. (Answer, Ex. A9)

8 6) On June 25, 2020, the forum issued a Notice of Hearing to Respondent, to
9 the Agency, and to Orwig setting the time and place of hearing for 9:30 a.m. on January
10 19, 2021, in Coos Bay, Oregon. Together with the Notice of Hearing, the forum sent a
11 copy of the AOOD, a copy of the OOD, a document entitled "Summary of Contested
12 Case Rights and Procedures" containing the information required by ORS 183.413, a
13 document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of
14 the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445. (Notice
15 of Hearing)

16 7) On October 12, 2020, the forum issued an interim order that stated in part:

17 "Due to the impact of the COVID-19 outbreak, the forum is taking
18 measures in BOLI contested cases to assist the parties in filing documents and
19 receiving interim orders issued by the forum. BOLI offices may not be staffed for
20 periods of time, and some interim orders may be issued by email only. The
Agency indicated by email that it consents to accept filings by email.
Respondent did not respond to the ALJ's email asking whether the parties would
consent to email service.

21 "The parties in this case may temporarily file documents by email only,
22 without the need to file the original document with BOLI's Contested Case
23 Coordinator. Email filings must be sent to all parties, the ALJ
(kari.furnanz@state.or.us) and BOLI's Contested Case Coordinator
(diane.anicker@state.or.us). **Since Respondent has not yet consented to
24 receiving filings by email, the Agency must still send a copy of all filings to**

1 **Respondent by mail, in addition to sending the email copy.** Parties may still
2 file documents in the manner provided in BOLI's contested case rules, but must
3 also provide courtesy email copies to the other parties and the ALJ as it may be
4 some time before mail is delivered or processed. Any documents filed by email
 must be submitted no later than 11:59 p.m. PDT on the due date in order to be
 considered timely filed. These provisions will remain in effect until further notice
 from the ALJ."

5 (10/12/2020 Interim Order)

6 8) On November 18, 2020, the Agency filed a motion for summary judgment,
7 contending it was entitled to judgment as a matter of law. On November 18, 2020, the
8 ALJ issued an interim order transferring the case from ALJ Furnanz to ALJ Domas.

9 (Agency motion for summary judgment, 11/18/2020 Interim Order)

10 9) On November 18, 2020, the ALJ issued an interim order setting a deadline
11 for a written response by Respondent. Respondent did not file a response.

12 (11/18/2020 Interim Order)

13 10) On December 17, 2020, the ALJ issued an interim order **GRANTING** the
14 Agency's motion for summary judgment. The ALJ's interim order is reprinted below:

15 **"INTRODUCTION**

16 "The Wage and Hour Division ('WHD') issued an Order of Determination
17 ('OOD') on April 15, 2019. (Agency Ex. 4) The OOD was served on
18 Respondent's registered agent on April 23, 2019. (Agency Ex. 5) The OOD
19 alleged that Respondent employed Wage Claimant Jeremy Thomas Orwig
20 ('Claimant') from December 26, 2018, through January 3, 2019, but failed to
 compensate him for the work he performed. The alleged amount of unpaid
 wages was \$902.34 less lawful deductions. The OOD also asserted that
 Respondent owed \$4,320.00 in penalty wages to Claimant pursuant to ORS
 652.140(1)-(3), ORS 652.150(1)-(2) and OAR 839-001-0470(1)-(2) because 30
 days had elapsed since the wages became due and owing.

21 "On May 13, 2019, Respondent filed an authorized representative form
22 naming Benjamin Garrick ('Garrick') as Respondent's authorized representative.

1 (Agency Ex.7) At the same time, Garrick filed a document contesting the wages
2 owed to Claimant. Garrick also requested a hearing or a trial in court.²

3 "On June 4, 2019, the Division filed an Amended OOD (AOOD) and
4 served Respondent with a copy of both the AOOD and the OOD. (Agency Ex. 8)
5 On June, 14, 2019, Respondent filed an Answer to the AOOD and requested a
6 hearing in court and contested Claimant's wage claim. (Agency Ex.9) A Notice of
7 Hearing was issued on June 25, 2020, setting the hearing date for January 19,
8 2021.

9 **"SUMMARY JUDGMENT STANDARD"**

10 "A motion for summary judgment may be granted where no genuine issue
11 as to any material fact exists and a participant is entitled to a judgment as a
12 matter of law, as to all or any part of the proceedings. OAR 839-050-
13 0150(4)(B). The standard for determining if a genuine issue of material fact
14 exists and the evidentiary burden on the participants is as follows:

15 '* * * No genuine issue as to a material fact exists if, based upon
16 the record before the court viewed in a manner most favorable to
17 the adverse party, no objectively reasonable juror could return a
18 verdict for the adverse party on the matter that is the subject of the
19 motion for summary judgment. The adverse party has the burden
20 of producing evidence on any issue raised in the motion as to which
21 the adverse party would have the burden of persuasion at
22 [hearing].'

23 'ORCP 47C. In reviewing a motion for summary judgment, this forum
24 draws all inferences of fact from the record against the participant filing the
25 motion for summary judgment and in favor of the participant opposing the motion.
26 In reviewing a motion for summary judgment, this forum "draw[s] all inferences of
27 fact from the record against the participant filing the motion for summary
28 judgment * * * and in favor of the participant opposing the motion * * *.' *In The
29 Matter of Derrick's Custom Painting, Inc.*, 37 BOLI 271, 275 (2020).

30 "The record considered by the forum in deciding this motion consists of:
31 (1) the AOOD, argument made in support of the Agency's motion for summary
32 judgment, and the exhibits submitted with the Agency's motion; and (2)
33 Respondent's response to the ODD and its Answer to the AOOD with supporting
34 documentation.

35 ² The forum assumes that Respondent was requesting a contested case hearing rather than a court trial.
36 A request for a court trial does not require the employer/respondent to file an Answer but an Answer is
37 required when the employer/respondent requests a contested case hearing.

1 **"ANALYSIS**

2 **"LIABILITY FOR UNPAID WAGES**

3 "The Agency alleges that Respondent owes Claimant \$902.34 in unpaid
4 wages pursuant to ORS 652.140(2)(b) for the time period of December 26, 2018,
5 through January 4, 2019. The Agency further alleges that Respondent owes
6 Claimant \$4,320.00 in penalty wages because it did not pay Claimant's wages
when he was terminated. The calculations are based on Claimant working 50
hours and 8 minutes at an hourly rate of \$18.00. (Agency Ex. 1, pages 1, 2, 5
and 6)

7 "In order to prevail in a wage claim case, the Agency must first establish a
8 prima facie case supporting the allegations of its charging document. *In The*
9 *Matter of Derrick's Custom Painting, Inc.*, 37 BOLI 271, 276 (2020). In this case,
10 the elements of the Agency's prima facie case are: 1) Respondent employed the
Claimant; 2) the agreed upon pay rate, if other than the minimum wage; 3) the
amount and extent of work the Claimant performed for Respondent; and 4) the
Claimant performed work for which he was not properly compensated.

11 "Respondent does not dispute that: 1) it employed Claimant; 2) it agreed
12 to pay Claimant \$18.00 per hour; 3) Claimant performed work of 50 hours and 8
minutes for Respondent from December 26, 2018 to January 4, 2019; and 4)
13 Claimant's wages earned during that time period were \$902.34.³ (Agency Ex. 9,
pages 1 through 4) In its Answer, Respondent submitted a paystub with
14 Claimant's last paycheck showing what appears to be mandatory withholding
which reduced the final paycheck to \$831.87. (Agency Ex. 9 page 3) The Agency
15 does not object to the withholding amounts. (Motion for Summary Judgment)
Respondent withheld the entire wages earned and due Claimant.

16 "In its Answer, Respondent provided a copy of a check dated June 29,
17 2018, made out to Claimant in the amount of \$1,336.38. Respondent stated that
the check was given to Claimant so Claimant could obtain a bond and license to
18 become a licensed contractor but Claimant failed to do so. (Agency Ex. 9 pages
1, 2 and 4.)⁴ Respondent further maintains that Claimant took a leave of
19 absence shortly after receiving the check for \$1,336.38, but when Claimant
wanted to return to work several months later, it was agreed that Claimant must
20 pay back Respondent. Respondent states that Claimant was issued several

21 ³ The paystub submitted by Respondent, Ex. A9 Page 3, shows that Claimant earned \$902.40 but
22 Respondent apparently accepted the Agency's calculation of \$902.32 as evidenced by Ex. A9 page 1.

23 ⁴ Ex. A9 is Respondent's Answer to the AOOD. Page 4 of Ex. A9 is a check written to Claimant from
24 Respondent dated June 29, 2018, in the amount of \$1,336.38 with "Bond/Insurance" written on the memo
line.

1 verbal warnings about his inability to show up for work on time before
2 Respondent terminated Claimant. Respondent alleges that Claimant was told on
3 several occasions after his termination that he would not receive a final paycheck
4 because of the \$1,336.38 Claimant owed Respondent for bonding and insurance.
Respondent did not respond to the Agency's Motion for Summary Judgment and
did not provide any evidence of an agreement with Claimant to pay back any
sums alleged to be owed to Respondent.

5 **"PAYMENT OF FINAL WAGES**

6 "Payment of all wages earned when an employee is terminated, absence a
7 collective bargaining agreement, are due and payable no later than the end of
the first business day after the end of employment. ORS 652.140(1).

8 "In this matter, both the Claimant and the Respondent agree that
9 Claimant was terminated. (Agency Ex. 1, page 2 and Agency Ex. 9, page 1).⁵
10 The evidence provided indicates that Claimant worked 40 hours per week,
Monday through Friday with some work on Saturday. (Agency Ex. 1, pages 1, 5
11 and 6). Therefore, Claimant was owed his final pay check no later than the close
of business on Friday, January 4, 2019.

12 "ORS 652.610(3) provides that an employer may not withhold, deduct or
13 divert any portion of an employee's wages unless certain criteria is met. The
14 criteria include that the employer is required by law to make the withholding, that
15 deductions are voluntarily authorized *in writing* by the employee, (emphasis
16 added), that the deduction is authorized by a collective bargaining agreement, or
that the deduction is authorized by ORS 18.736 (relating to the garnishment of
wages). Most of the criteria include that the Claimant must voluntarily agree to
the withholding in writing. No evidence has been presented in this case that the
Claimant authorized any withholding in writing.

17 "Therefore, \$902.34 is due Claimant for unpaid wages less lawful
18 withholding. The Agency's Motion for Summary Judgment regarding unpaid
wages is **GRANTED**.

19 **"LIABILITY FOR PENALTY WAGES**

20 "The Agency is seeking penalty wages under ORS 652.150(1) and (2)
21 which provide in pertinent part:

22
23 ⁵ Exs. A1 and A2, pages 1 and 2 are essentially identical. Therefore, reference is only being made to Ex.
24 A1.

1 “(1) Except as provided in subsections (2) and (3) of this section, if
2 an employer willfully fails to pay any wages or compensation of any
3 employee whose employment ceases, as provided in ORS 652.140 * * *,
4 then, as a penalty for the nonpayment, the wages or compensation of the
5 employee shall continue from the due date thereof at the same hourly rate
6 for eight hours per day until paid or until action therefor is commenced.

7 (2) If the employee or a person on behalf of the employee sends a
8 written notice of nonpayment, the penalty may not exceed 100 percent of
9 the employee's unpaid wages or compensation unless the employer fails
10 to pay the full amount of the employee's unpaid wages or compensation
11 within 12 days after receiving the written notice. If the employee or a
12 person on behalf of the employee fails to send the written notice, the
13 penalty may not exceed 100 percent of the employee's unpaid wages or
14 compensation. * * *

15 *“In the Matter of Christopher Lee Ruston and Christine M. Stahler, 34*
16 *BOLI 56, 64 (2015).*

17 “The forum may award penalty wages when a respondent's failure to pay
18 wages is willful. Willfulness does not imply or require blame, malice, or moral
19 delinquency. Rather, a respondent commits an act or omission ‘willfully’ if he or
20 she acts (or fails to act) intentionally, as a free agent, and with knowledge of what
21 is being done or not done. *Id.* at 63.

22 “In this matter, Respondent admitted that it did not provide a final
23 paycheck to Claimant. However, Respondent did provide the Agency with a final
24 paystub showing that Claimant had performed 50.08 hours of work at a rate of
\$18.00 per hour, earning \$902.40 but with an adjustment to net pay of minus
\$831.87 for a cash advance repayment resulting in a net pay of \$0.00. (Agency
Ex. 9, page 3). Although Respondent was given the opportunity to provide
documentation supporting its claim that there was an agreement between
Respondent and Claimant for repayment of the June 29, 2018, check for bond
and insurance, Respondent has not provided any documentation as required by
ORS 652.610(3). Therefore, Respondent owes penalty wages in the amount of
\$4,320.00⁶ less lawful deductions. The Agency's Motion for Summary Judgment
for penalty wages is **GRANTED**.

25 **“FURTHER PROCEEDINGS**

26 “Because this ruling resolves all of the issues in the AOOD, the hearing
27 scheduled for January 19, 2021, and all associated deadlines are CANCELED. A

28 ⁶ Calculated at \$18.00 per hour for 8 hours per day for 30 days.

1 Proposed Order incorporating this ruling will be issued as soon as possible, and
2 the parties will have the opportunity to file exceptions to the Proposed Order
pursuant to ORS Chapter 183 and OAR 839-050-0380.

3 **"IT IS SO ORDERED."**

4 (12/17/2020 Interim Order) The ALJ's ruling on the Agency's motion for summary
5 judgment is hereby CONFIRMED.

6 11) On March 11, 2021, the ALJ issued a Proposed Order that notified the
7 participants that they were entitled to file exceptions of the Proposed Order within 10
8 days of its issuance. The Agency filed exceptions on March 19, 2021. Respondent did
9 not file exceptions.

10 **FINDINGS OF FACT – THE MERITS**

11 1) Respondent engaged the personal services of Jeremy Thomas Orwig
12 from December 26, 2018, through January 3, 2019, at the agreed rate of \$18.00 per
13 hour. Respondent admitted that Orwig worked 50.8 hours during the time period at
14 issue. Respondent unlawfully deducted \$831.87 and deducted mandatory withholdings
15 from Orwig's pay. Orwig was paid nothing and is owed \$902.34. (OOD; Respondent's
16 answer)

17 2) More than 30 days have passed since the Claimant performed work for
18 Respondent and was not compensate for this work. (AOOD, document filed on
19 6/14/2019)

20 3) ORS 652.150 penalty wages are computed as follows: \$18.00/hour x 8
21 hours x 30 days = \$4,320.00.

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2) BOLI's Commissioner has jurisdiction over the subject matter and Respondent herein. ORS 652.330, 652.332.

4) Respondent's failure to pay Claimant all unpaid, due and owing wages after Claimant's employment ceased was willful and Claimant is entitled the penalty wages set out in Finding of Fact #3 – The Merits. ORS 652.150.

5) Under the facts and circumstances of this record, and according to the applicable law, BOLI's Commissioner has the authority to order Respondent to pay Claimant his earned, unpaid, due and payable wages, ORS 652.150 penalty wages, unlawful deductions, plus interest on all sums until paid. ORS 652.332.

All allegations in the Agency's AOOD were resolved in the ALJ's interim order granting the Agency's motion for summary judgment. No further discussion is required.

Agency's Exceptions

The Agency's second and final exception requests that the cite to ORS 652.140 in Proposed Conclusions of Law #3 be changed to ORS 652.330(1)(d) and ORS 652.332(1), (3) because Proposed Finding of Fact #1 – The Merits pertains to the

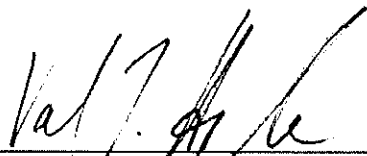
1 amount of unpaid wages that are due and not the amount of penalty wages due on
2 termination of employment.

3 This exception is GRANTED as reflected above.

4 **ORDER**

5 NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the
6 Bureau of Labor and Industries hereby orders Respondent, **BG Construction, Inc.**, to
7 deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State
8 Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

9 A certified check payable to the Bureau of Labor and Industries in trust for
10 Jeremy Thomas Orwig in the amount of **FIVE THOUSAND TWO HUNDRED**
11 **TWENTY-TWO DOLLARS and THIRTY-FOUR CENTS** (\$5,222.34) less
12 appropriate lawful deductions, representing \$902.34 in gross earned, unpaid, due
13 and payable wages and \$4,320.00 in ORS 652.150 penalty wages, plus interest
14 at the legal rate on the sum of \$902.34 from February 1, 2019, until paid, and
15 interest at the legal rate on the sum of \$4,320.00 from March 1, 2019, until paid.

16 

17 Val Hoyle, Commissioner
18 Bureau of Labor and Industries

19 ISSUED ON: _____

20 April 13, 2021