

**In the Matter of**

**GARY LEE LUCAS dba Gary Lucas Construction and dba Gary Lucas  
Construction, Inc.,**

**Case Nos. 100-03 & 101-03**

**Final Order of Commissioner Dan Gardner**

**Issued March 31, 2005**

**SYNOPSIS**

Respondent Gary Lee Lucas employed two Claimants as framers at the agreed rate of \$15 per hour and did not pay them all their earned, due and owing straight time or overtime wages. Respondent was ordered to pay \$6,194.65 and \$4,557.84, respectively, to the Claimants. Respondent's failure to pay the wages was willful and the forum awarded \$3,600 in penalty wages to each Claimant. Respondent was also assessed \$2,000 in civil penalties for two violations of ORS 653.261. The Agency also alleged that Respondent committed 24 recordkeeping violations and failed to provide itemized statements of deductions of 12 occasions, but did not prove those allegations by a preponderance of the evidence. ORS 652.140(1) & (2), ORS 652.150, ORS 653.045, ORS 653.256, ORS 653.261.

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The above-entitled case came on regularly for hearing before Alan McCullough, 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 January 19, 2005, at the Bureau's Salem office located at 3865 Wolverine NE, E-1, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Jeffrey C. Burgess, an employee of the Agency. Wage claimants Mike Munro and Mark Fisler were present throughout the hearing and were not represented by counsel. Respondent Gary Lucas was present throughout the hearing and was represented by Gary G. Norris, attorney at law.

The Agency called the following witnesses: Mike Munro and Mark Fisler, wage claimants; Newell Enos, Wage & Hour Division compliance specialist; Gary Lee Lucas, Respondent; and Christy Patton, customer service program manager at the Oregon Construction Contractor's Board.

Respondent called the following witnesses: Gary Lee Lucas, Respondent; and Kimberly Wilson, Respondent's insurance agent.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-9 (submitted or generated prior to hearing);
- b) Agency exhibits A-1 through A-19, A-20 (page 4 only), and A-21 through A-25 (submitted prior to hearing);
- c) Respondent exhibits R-1 through R-15, R-20 through R-23, R-26 through R-28, and R-31 (submitted prior to hearing).

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 December 19, 2002, Claimants Mike Munro ("Munro") and Mark Fisler ("Fisler") filed wage claims with the Agency alleging Respondent Gary Lucas had employed them and failed to pay wages earned and due to them.
- 2) At the time they filed their wage claims, Claimants assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimants, all wages due from Respondent Lucas.
- 3) Claimants brought their wage claims within the statute of limitations.

4) On or about April 14, 2003,<sup>i</sup> the Agency issued Order of Determination No. 03-0012 based upon the wage claims filed by Claimants Munro and Fisler and the Agency's investigation. The Order of Determination alleged that Respondent Gary Lee Lucas owed a total of \$11,680.80 in unpaid wages<sup>ii</sup> and \$7,401.60 in penalty wages,<sup>iii</sup> plus interest, to Claimants Munro and Fisler 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 May 27, 2003, Respondent, through counsel, filed an answer and request for hearing. Respondent asserted that Claimants were independent contractors and that "all sums due and owing for work performed by wage claimants have been paid in full."

6) On April 9, 2004, the Agency issued a Notice of Intent to Assess Civil Penalties in which it alleged that Respondent "Gary Lee Lucas, individually and doing business as Gary Lucas Construction and doing business as Gary Lucas Construction, Inc." had committed 44 violations of Oregon's wage and hour laws with respect to Claimant Munro's employment from "July 2, 2002 through November 30, 2002" and Claimant Fisler's employment from "July 27, 2002 through November 30, 2002." The Agency sought to impose \$44,000 in civil penalties. The Notice of Intent alleged the following specific violations:

"[Respondent willfully] failed to make required payroll and other records in violation of ORS 653.045 and OAR 839-020-0080; 12 violations;

"[Respondent willfully] failed to keep available required payroll and other records in violation of ORS 653.045 and OAR 839-020-0080; 12 violations;

"[Respondent willfully] failed to supply Claimants with itemized statements of amounts and purposes of deductions in the manner provided in ORS 652.610 in violation of ORS 653.045 and OAR 839-020-0012 and 839-020-0080; 12 violations; and

“[Respondent willfully] failed to pay overtime for all hours worked over forty (4)) in violation of ORS 653.261 and OAR 839-020-0030; 8 violations.”

7) On May 20, 2004, Respondent, through counsel, filed an answer and request for hearing.

8) On December 2, 2004, the Agency filed two separate “BOLI Request for Hearing” forms with the forum, one related to the Order of Determination and the other related to its Notice of Intent.

9) On December 8, 2004, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimants stating the time and place of the hearing as January 19, 2005, at 3865 Wolverine Street NE, Bldg. #E-1, Salem, Oregon. Together with the Notice of Hearing, the forum sent copies of the Order of Determination and Notice of Intent to Assess Civil Penalties, 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.

10) On January 7, 2005, the Agency moved to consolidate the cases involving its Order of Determination and its Notice of Intent on the basis that the cases involved much of the same evidence and identical parties. Respondent did not object and the ALJ granted the Agency’s motion.

11) At the start of the hearing, pursuant to ORS 183.415(7), the ALJ orally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

12) At the start of the hearing, the Agency moved to amend the Order of Determination as follows:

a) Allege that Claimant Fisler was paid \$4,202.16 and is owed \$4,647.84 in unpaid wages;

- b) Allege that Claimant Fisler is owed \$3,636 in penalty wages;
- c) Allege that the respective wage claim periods for Claimants Munro and Fisler are “7/2/02 to 11/30/02” and “7/29/02 to 12/2/02.”

Respondent did not object and the ALJ granted the Agency’s motion.

13) The ALJ issued a proposed order on February 16, 2005, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

### **FINDINGS OF FACT – THE MERITS**

1) At all times material herein, Respondent Gary Lee Lucas was licensed as an exempt<sup>iv</sup> general contractor with the Oregon Construction Contractors Board (“CCB”). He has been licensed as a general contractor with the CCB since 1992.

2) On May 10, 2002, Respondent<sup>v</sup> contracted with Kenneth and Patricia Williams to build four “commonwall townhouses of 1560 sq. ft. to 1598 sq. ft.” (the “townhouse job”). Abel Ovalle was a co-general contractor on the townhouse job with Respondent until the end of September 2002.

3) At that time, the construction business was booming in McMinnville and Respondent was not able to contract with any subcontractors with whom he had previously worked in McMinnville.

4) In late June 2002, Claimant Munro (“Munro”) met Respondent at the house of a mutual acquaintance. Respondent and Munro began talking, and Respondent asked Munro if he wanted to help frame some townhouses. Munro agreed and Respondent told Munro to meet him at the townhouse job in a couple of days. Respondent did not inquire at the time if Munro was a CCB licensed contractor, but became aware during Munro’s employment that Munro was not a CCB licensed contractor.

5) Munro has never been licensed as a contractor with the CCB.

6) Prior to Munro's first day of work, Respondent and Munro did not have an agreement as to Munro's specific rate of pay. However, Munro understood that he would be paid on an hourly basis.

7) Although Respondent paid Munro \$100 as a "draw on July's"<sup>vi</sup> earnings on July 3, 2002, Munro's first actual day of work was July 8, 2002. At first, he helped Respondent and Ovalle set up footings and walls. Later, he did framing. He worked alongside Respondent throughout his employment and did the same type of work as Respondent and Ovalle. Later, he worked alongside Respondent, Fislser and Gettman, doing the work that they did.

8) Munro rode to and from work each day with Respondent. Munro did not have a driver's license at that time and it was convenient for him to ride with Respondent. Work usually commenced at 8 a.m. and finished at 4:30 p.m.

9) On July 29, 2002, Munro, Ovalle, and Respondent met at Respondent's house and Munro was given a check in the amount of \$599.99. Respondent handwrote on the check "casual labor" for "May and June." During the same meeting, Respondent asked Munro what wage he wanted. Munro said \$15 per hour and Respondent agreed to this rate. Munro cashed his check and loaned Respondent \$250, which Respondent repaid by check later that same day.

10) Munro worked 148 hours during the period July 8-29, including 28 overtime hours. Calculated at \$15 per hour, he earned \$2,220.<sup>vii</sup>

11) On August 9, 2002, Respondent gave Munro a check in the amount of \$273.93 on which Respondent wrote "sub-framing." (Testimony of Munro, Respondent; Exhibits A-5, A-19)

12) On September 25, 2002, Respondent gave Munro a check in the amount of \$1733.23.<sup>viii</sup>

13) Munro worked 301 hours during the period August 10 to September 25, including 18 overtime hours. Calculated at \$15 per hour, he earned \$4,575.

14) On November 20, 2002, Respondent gave Munro a check in the amount of \$1393.15 on which Respondent wrote "contract framing."

15) Munro worked 205 hours during the period September 26 to November 20, including 16 overtime hours. Calculated at \$15 per hour, he earned \$3,075.

16) While employed with Respondent, Munro provided no tools except the hand tools he carried in his nail bag. He did not have a hand saw or a level and used Respondent's air compressor, air hoses, radial arm saw, and nail gun and Fislser's level. Munro provided no materials or supplies used in building the townhouses and did not work for anyone else while employed with Respondent. He was not free to hire anyone to work for him on the townhouse job.

17) Munro worked for Respondent on the townhouse job until November 30, 2002, when he walked off the job.

18) During his employment with Respondent, Munro's regular work schedule was Monday through Friday. He also worked 12 Saturdays and four Sundays.

19) In total, Munro worked 745.25 hours for Respondent. 69 of those hours were hours worked in excess of 40 in a given workweek. Those 69 hours were worked in the weeks of July 8-14, July 15-21, July 22-28, August 26-September 1, September 9-15, October 28-November 3, and November 11-17, 2002.

20) On or about December 11, 2002, Respondent gave Munro a check dated December 11, 2002, for \$633.70 with a notation "sub-work" on it and a note attached to it that read:

"MIKE  
60 HOURS  
22.7%

353.20  
SHORT 280.50  
633.70"

21) Munro received no other documentation in which Respondent indicated he was being paid on a percentage basis.

22) Calculated at \$15 per hour, Munro earned \$11,178.75 while employed by Respondent. He was paid a total of \$4,984.10, leaving \$6,194.65 in due and owing unpaid wages.

23) In late July 2002, Respondent contacted Claimant Fisler ("Fisler") and asked him if he wanted to work with Respondent on the townhouse job. Respondent and Fisler had previously worked together framing houses and Fisler had a CCB license during one of the jobs. Fisler did not have a CCB license in 2002 and Respondent did not ask Fisler if he had a CCB license. At some point during his employment, Fisler told Respondent that he was not a CCB licensed contractor.

24) Fisler agreed to work with Respondent on the townhouse job and started work on July 29, 2002. At that time, Fisler and Respondent had not agreed to a specific rate of pay. Not long afterward, Respondent agreed to pay Fisler \$15 per hour.

25) During his employment with Respondent, Fisler's regular work schedule was Monday through Friday, the same as Munro's. He also worked 12 Saturdays and three Sundays. He worked alongside Respondent, Munro, Ovalle, and Gettman, and performed the same work that they did.

26) Fisler brought his nail bag and the hand tools in it, a skill saw, and a level to the townhouse job. Respondent provided the main power extension cord from the power box to the building site, an air compressor, air hoses, a big radial arm saw, and a nail gun. While employed with Respondent, Fisler provided no materials or supplies

used in building the townhouses and did not work for anyone else. He was not free to hire anyone else to work for him on the townhouse job.

27) On August 9, 2002, Respondent gave Fisler a check in the amount of \$300.00 on which Respondent wrote "sub-framing."

28) On September 25, 2002, Respondent gave Fisler a check in the amount of \$1469.52 on which Respondent wrote "sub frame 3140."

29) Fisler worked 305 hours from August 10 to September 25, including 11 overtime hours. Calculated at \$15 per hour, he earned \$4,515.

30) On October 17, 2002, Respondent gave Fisler a check in the amount of \$450.00 on which Respondent wrote "sub labor."

31) On November 20, 2002, Respondent gave Fisler a check in the amount of \$1467.65 on which Respondent wrote "contract labor frame."

32) Fisler worked 160.5 hours from October 18 to November 20, including one overtime hour. Calculated at \$15 per hour, he earned \$2,407.50.

33) Starting in September 2002, Matt Gettman also worked with Respondent, Munro, and Fisler as a framer on the townhouse job.

34) Fisler's last day of work with Respondent was December 1, 2002. Respondent decided that Fisler's services were no longer needed after observing that Fisler's solo framing work on the north unit of the townhouse job was unsatisfactory.

35) On or about December 11, 2002, Respondent gave Fisler a check dated December 11, 2002, for \$514.99 with a notation "sub-work" on it."

36) In total, Fisler worked 584 hours for Respondent. 12 of those hours were hours worked in excess of 40 in a given workweek. Those 12 hours were worked in the weeks of September 1-7, September 15-21, and November 3-9, 2002.

37) Calculated at \$15 per hour, Fisler earned \$8,760 while employed by Respondent. He was paid a total of \$4,202.16, leaving \$4,557.84 in due and owing unpaid wages.

38) Neither Munro nor Fisler ever received a statement showing itemized deductions taken from their paychecks. Respondent never took any deductions from their paychecks.

39) Fisler received no documentation in which Respondent indicated he was being paid on a percentage basis.

40) With Munro's aid, Respondent wrote down the hours worked by Munro and Fisler at the end of each work day in a spiral notebook. Respondent wrote down the type of work performed, the dates on which the work was performed, the total hours worked each day by himself, Ovalle, Munro, Fisler, and Gettman, and also totaled the hours in each pay period. Respondent kept this record and provided a copy to Enos during his investigation of the Claimants' wage claims. Munro and Fisler also kept a separate record of their hours.

41) Neither Munro nor Fisler ever signed a subcontractor agreement or any type of contract with Respondent related to the townhouse job.

42) Munro and Fisler never filled out an employment application or any tax documents while working for Respondent or during their employment with Respondent.

43) Respondent did not have a regular payday. Respondent issued checks after receiving "draw" payments from Kenneth Williams, who paid Respondent whenever a defined amount of progress had been made on the townhouse job and the bank paid him.

44) Respondent determined the amount he paid out to Munro, Fisler, Gettman, and himself each time he received a draw by computing the total number of

hours they each worked during the draw period, computing the percentage of total hours worked by each individual, then paying each person the same percentage of the total draw.<sup>ix</sup>

45) On January 7, 2003, BOLI's Wage & Hour Division sent a letter to Respondent notifying him that Munro and Fisler had filed wage claims against him and demanding payment of \$5,259 in unpaid wages at the rate of \$15 per hour from July 2 to November 30, 2002, and \$5,768 in unpaid wages at the rate of \$15 per hour from July 27 until November 30, 2002.

46) On February 6, 2003, Enos sent another demand letter to Respondent seeking Claimants' unpaid wages.

47) Respondent did not pay Claimants any additional wages in response to Enos's letters and has not paid Claimants any additional wages since December 11, 2002.

48) Respondent owes Claimants \$3600 each in penalty wages ( $\$15/\text{hour} \times 8 \text{ hours} = \$120 \times 30 \text{ days} = \$3600$ ).

49) There is no evidence in the record to establish the existence of a corporation named Gary Lucas Construction, Inc.

50) No evidence was presented to show whether or not Respondent made a record of Claimant's addresses.

51) Munro and Fisler were credible witnesses. Their testimony, though somewhat general, was internally consistent and straightforward. The only contradictory evidence was Respondent's less than credible testimony and the testimony of Enos concerning statements made to him by Abel Ovalle and Mr. Stephens of Nice Electric that their "understanding" was that Claimants "were working on a percentage basis of the draw." However, Enos did not testify that Ovalle and Stephens

stated how they arrived at this “understanding.” Consequently, the only testimony that Claimants actually agreed to this method of payment is that of Respondent. Respondent’s attempt to impeach Claimants through the testimony of Kym Wilson also failed because of Wilson’s lack of credibility. In conclusion, the forum has credited the testimony of Munro and Fisler whenever their testimony on a material issue conflicted with Respondent’s testimony.

52) Respondent’s testimony was filled with internal inconsistencies and inherently improbable statements. As a result, the forum has credited his undisputed testimony and his testimony that was supported by credible documentary evidence, but has disbelieved his testimony whenever it was contradicted by testimony of the Claimants.

The following examples highlight the internal inconsistencies in Respondent’s testimony. Respondent testified that that both Claimants made it clear they weren’t licensed contractors and said he didn’t know they weren’t licensed contractors, then testified that he brought Kym Wilson in to talk to them about getting insurance so they could become contractors. Respondent testified that he provided Enos with a list of all subcontractors and suppliers on the townhouse job, with the exception of Claimants, yet Matt Gettman, whom Respondent claimed was also a subcontractor, is conspicuously absent from the list. Respondent first testified that Munro started work for him in July 2002, then later testified that he believed Munro may have worked for him for half a day in May when attempting to explain why he wrote on Munro’s first check that it was for “casual labor” for “May and June.”

Respondent’s testimony that Munro told him he was licensed through the state “as a labor” (sic) was completely improbable. Respondent testified that:

“[a] licensed labor contractor is an individual who has the license to either hire people to work on a job for cleanup, pound nails, or whatever, or do it

themselves. They can work on construction sites; they can work just about anywhere except high steel and so on and so forth. They're not governed by the CCB but they are labor contractors and there are several of them. There's a lot of them in the agricultural business."

Given Respondent's long history as a contractor, this testimony about a non-existent licensing status is disingenuous. Of a similar nature was Respondent's testimony that Claimants were studying at work to be an "LLC."<sup>x</sup> Given the relative lack of sophistication of both Claimants, the fact that neither were licensed contractors, and Fislser's credible claim of ignorance as to the nature of an "LLC," the forum finds this testimony to be preposterous.

53) Enos was a credible witness and the forum has credited his testimony in its entirety. However, the forum has given no weight to his testimony concerning his conclusion that Claimants were not independent contractors. That is a legal conclusion for the forum to make.

54) Kym Wilson's credibility was eroded by her poor recollection. She did not recall seeing or talking to either Claimant, recalling only that she talked to "three persons" at Respondent's job site and that Respondent said there were guys working with Respondent who needed insurance because they were looking to be contractors on their own. She said two of the three did not qualify for insurance because they had not had insurance before, but the third, whom she twice named as Mike Holland, qualified because of his prior insurance coverage. There is no evidence that anyone named Mike Holland ever worked on the townhouse job. Since Claimant Fislser had previously been insured and presumably would have qualified for insurance, the forum concludes that Wilson did not talk to Fislser. Respondent attempted to bolster Wilson's testimony through Exhibit R-22, a letter from Wilson to Respondent thanking him "for the leads" Respondent gave her "to talk to Mike and Mark regarding their insurance needs." However, the letter is undated. Based on Wilson's poor recollection about her

visit to the townhouse job, her testimony about Mike Holland and the reason she couldn't insure the other two persons, the forum gives the letter no weight. The only credible evidence supporting any of Wilson's testimony is Munro's statement that he recalls talking to her at the job site "about insurance or something." In light of the above, the forum has not given any weight to Wilson's testimony about her discussions with specific persons other than Respondent on the townhouse job.

Based on her specific recollection of the content of a conversation between herself and Respondent, the forum does credit one part of Wilson's testimony, even though it is not clear that it was related to these specific Claimants. That testimony came on direct and concerned her conversation with Respondent about why he wanted her to visit Respondent's job site. Her testimony was as follows:

Q. "Why did Mr. Lucas say these individuals [with respect to three persons on Respondent's job site] needed insurance?"

A. "Because they were looking to become contractors on their own and needed insurance to be able to work jobs."

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

1) At all times material herein, Respondent Gary Lee Lucas was a CCB licensed contractor and an employer who engaged the personal services of one or more employees in the state of Oregon whom he agreed to pay at a fixed rate.

2) Claimant Munro was hired by Respondent to work as a framer in the construction of four townhouse units in McMinnville. His first day of work was July 8, 2002. Respondent agreed to pay Munro \$15 an hour for his work.

3) While employed with Respondent, Respondent set Munro's hours of work and Munro provided no tools except the hand tools he carried in his nail bag. Munro provided no materials or supplies used in building the townhouses and did not work for anyone else while employed with Respondent. He used Respondent's power tools and air compressor. He was not free to hire anyone to work for him on the townhouse job.

4) Munro worked for Respondent on the townhouse job until November 30, 2002, when he walked off the job.

5) In total, Munro worked 745.25 hours for Respondent. 69 of those hours were hours worked in excess of 40 in a given workweek. Munro was not paid time and a half for some or all of those 69 hours.

6) Calculated at \$15 per hour, Munro earned \$11,178.75 while employed by Respondent. He was paid a total of \$4,984.10, leaving \$6,194.65 in due and owing unpaid wages.

7) Claimant Fisler was hired by Respondent to work as a framer in the construction of the same four townhouse units as Munro. His first day of work was July 29, 2002. Respondent agreed to pay Fisler \$15 an hour for his work.

8) While employed with Respondent, Respondent set Fisler's hours of work and Fisler provided no tools except the hand tools he carried in his nail bag, a skill saw, and a level. Fisler provided no materials or supplies used in building the townhouses and did not work for anyone else while employed with Respondent. He used Respondent's power tools and air compressor. He was not free to hire anyone to work for him on the townhouse job.

9) Fisler's last day of work with Respondent was December 1, 2002, when he was involuntarily terminated by Respondent.

10) In total, Fisler worked 584 hours for Respondent. 12 of those hours were hours worked in excess of 40 in a given workweek. Fisler was not paid time and a half for some or all of those 12 hours.

11) Calculated at \$15 per hour, Fisler earned \$8,760 while employed by Respondent. He was paid a total of \$4,202.16, leaving \$4,557.84 in due and owing unpaid wages.

12) Neither Munro nor Fisler ever received a statement showing itemized deductions taken from their paychecks. Respondent never took any deductions from their paychecks.

13) With Munro's aid, Respondent wrote down the hours worked by Munro and Fisler at the end of each work day in a spiral notebook. Respondent wrote down the type of work performed, the dates on which the work was performed, the total hours worked each day by himself, Claimants, and two others who worked on the job and also totaled the hours in each pay period. Respondent kept this record and provided a copy to Enos during his investigation of the Claimants' wage claims.

14) No evidence was presented to show whether or not Respondent made a record of Claimant's addresses.

15) On January 7, 2003, BOLI's Wage & Hour Division sent a letter to Respondent notifying him that Munro and Fisler had filed wage claims against him and demanding payment of \$5,259 in unpaid wages at the rate of \$15 per hour from July 2 to November 30, 2002, and \$5,768 in unpaid wages at the rate of \$15 per hour from July 27 until November 30, 2002.

16) Respondent did not pay Claimants any additional wages in response to Enos's letters and has not paid Claimants any additional wages since December 11, 2002.

17) Respondent owes each Claimant \$3600 in penalty wages ( $\$15 \text{ per hour} \times 8 \text{ hours} = \$120 \times 30 \text{ days} = \$3600$ ).

### **CONCLUSIONS OF LAW**

1) At all times material herein, Respondent Gary Lee Lucas was an employer and Claimants were employees subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and 653.010 to 653.261. At all times material, Respondent employed Claimants.

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, ORS 653.055, ORS 653.261.

3) Respondent violated ORS 652.140(1) by failing to pay Claimant Fisler all wages earned and unpaid not later than December 2, 2002, the end of the first business day after Fisler's termination, and Respondent owes Fisler \$4,557.84 in unpaid wages..

4) Respondent violated ORS 652.140(2) by failing to pay Claimant Munro all wages earned and unpaid not later than December 6, 2002, five business days, excluding Saturdays, Sundays, and holidays, after Munro quit, and Respondent owes Munro \$6,194.65 in unpaid wages.

5) Respondent's failure to pay Claimants all wages due and owing was willful and Respondent owes each Claimant \$3600 in penalty wages. ORS 652.150; OAR 839-001-0470.

6) Claimants each worked overtime hours for which they were not paid, constituting two violations of ORS 253.261.

7) 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 Claimants their earned, unpaid, due and payable wages, the penalty wages, and civil penalties, plus interest on all sums until paid. ORS 652.332, ORS 653.256.

### **OPINION**

This case involves wage claims by Claimants Munro and Fisler, whom the Agency alleges worked for Respondent as framers. Respondent acknowledges that Claimants performed work on four townhouse units, but denies he employed Claimants or owes them any money. Instead, Respondent affirmatively alleges that Claimants were independent contractors working as subcontractors.

In order to prevail in this matter, the Agency is required to prove, by a preponderance of the evidence, the following four elements: 1) Respondent employed Claimants; 2) The pay rate upon which Respondent and Claimants agreed, if it exceeded the minimum wage; 3) Claimants performed work for which they were not properly compensated; and 4) The amount and extent of work Claimants performed for Respondent. *In the Matter of William Presley*, 25 BOLI 56, 69 (2004).

**A. Respondent employed Claimants.**

Respondent asserted in his answer that Claimants were independent contractors who worked on the townhouse job as subcontractors and were never his employees. This is an affirmative defense that Respondent has the burden of proving. *In the Matter of Leslie Elmer DeHart*, 18 BOLI 199, 206-07 (1999). This forum uses an “economic reality” test to determine whether a wage claimant is an employee or independent contractor under Oregon’s wage collection laws. *In the Matter of Ann L. Swanger*, 19 BOLI 42, 53 (1999). The focal point of the test is “whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which [he] renders [his] services.” *Id.* The forum considers five factors to gauge the degree of the worker’s economic dependency, with no single factor being determinative: (1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and alleged employer; (3) the degree to which the worker’s opportunity for profit and loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship. *Id.*

In this case, a preponderance of the evidence established that Respondent controlled the hours that Claimants worked. Munro and Fislser credibly testified that Munro rode to and from work with Respondent, that Munro, Respondent, and Fislser worked a similar, though not completely identical, schedules, and that Munro and Fislser

worked alongside Respondent and Ovalle. Claimants also credibly testified that Respondent told them how he wanted the work performed. Respondent attempted to downplay the extent of his control over Claimants by asserting that Claimants and Gettman were subcontractors who had signed subcontract agreements with Respondent. In support of this allegation, Respondent offered a copy of a subcontract agreement purportedly signed by Fisler. When the Agency challenged the authenticity of the agreement, Respondent testified that he could not provide the original of Fisler's subcontract because Fisler had never returned it to him. The forum gave this testimony little weight in light of Respondent's general lack of credibility and unexplained failure to provide a copy or the original of his subcontract agreement with Munro. Respondent could have bolstered his testimony by providing a copy of his subcontract agreement with Gettman, or called Gettman and Ovalle as witnesses but did not do this. As a result, the forum has believed Fisler's testimony that he never signed the agreement. Respondent also produced a copy of Respondent's own CCB license, which showed him to be an "exempt"<sup>xi</sup> contractor. However, the fact that Respondent was not licensed to have employees does not *per se* establish that he did not have employees.

Claimants had no investment in Respondent's townhouse job. They were not licensed contractors, did not bid on the job, and had no opportunity to make more money by working more efficiently and finishing the job in fewer hours. Other than Fisler's skill saw, they provided no power tools and used Respondent's air compressor, air hoses, radial arm saw, and nail guns to perform their job.

Claimants had no opportunity for profit or loss because they were hourly employees.

The skill and initiative required of Claimants was that of an ordinary framer; as they worked alongside and took directions from Respondent and Ovalle, the general

contractors. They did not bid on the job, did no design work associated with the job, and there was no evidence that they did any work independently, except for Fislser's final work on the north unit that resulted in his termination due to unsatisfactory work. Respondent's testimony about "casual labor" bolsters the conclusion that Claimants did not exercise any special skill and initiative. When asked the meaning of the notation "casual labor" that he wrote on one of Munro's checks, Respondent testified that "casual labor is an individual who is a helper. Their responsibilities are only to follow the crowd but to produce. One without the expertise to be left alone at all times but capable of doing the work."

Claimants testified that Respondent told them there might be other projects in the future. This is insufficient evidence from which to conclude that Respondent hired them for an indefinite period of time. Given the contractual nature of Respondent's business, the forum concludes that Respondent hired Claimants with the intent that they would work on the townhouse job until the framing was complete, not for the indefinite future.

In summary, four of the five factors used by the forum in determining whether individuals are independent contractors or employees indicate that Claimants were employees.

Both Claimants credibly testified that they did not work anywhere else while working for Respondent. Respondent's claim that Claimants were subcontractors and independent contractors was further undermined by the testimony of Wilson, his insurer. Wilson testified that Respondent asked her to talk to persons working with him "because they were looking to become contractors on their own and needed insurance to be able to work jobs," casting further doubt on Respondent's claim that he employed no one and only used the services of subcontractors. Finally, Respondent inexplicably failed to list

Gettman, whom he claimed was another “subcontractor” on the townhouse job, on the list of his subcontractors on the townhouse job that he provided during Enos’s investigation.

Based on all of the above, the forum concludes that Respondent’s townhouse job was Claimants’ “economic reality” while Claimants worked with Respondent, and that Claimants were employees of Respondent and not subcontractors or independent contractors.

**B. Respondent agreed to pay Claimants \$15 per hour.**

Claimants credibly testified that Respondent agreed to pay them \$15 per hour. Respondent claimed that Claimants agreed to being paid a percentage of the draw that corresponded to the comparative number of hours they worked during each draw period. Based on Respondent’s lack of credibility and the lack of any evidence to show that \$15 per hour was an unusual wage rate for a framer at that time, the forum concludes that Respondent agreed to pay Claimants \$15 per hour.

**C. Claimants performed work for which they were not properly compensated.**

Munro worked 745.25 hours for Respondent. Calculated at \$15 per hour, he earned \$11,178.75. He was only paid \$4,984.10. Fisler worked 584 hours. Calculated at \$15 per hour, he earned \$8,760 and was only paid \$4,202.16. Both Claimants performed work for which they have not been properly compensated.

**D. The amount and extent of Claimant’s work.**

The forum relies on Respondent’s records to conclude that Munro worked 745.25 hours and Fisler worked 584 hours.

In conclusion, Claimants were Respondent’s employees on the townhouse job. Calculated at \$15 per hour, Respondent owes Munro \$6,194.65 and Fisler \$4,557.84 in unpaid wages.

## **CLAIMANTS ARE NOT ENTITLED TO OVERTIME PAY**

Although Claimants collectively worked more than 40 hours in a given workweek during 10 separate weeks, the Agency's claim for overtime pay fails because of the insufficiency of the pleadings. ORS 183.415(2)(c) requires that the notice in a contested case shall include "[a] reference to the particular sections of the statutes and rules involved." The Oregon Court of Appeals has recently interpreted this language to require a citation to all administrative rules and statutes that are substantially relevant, as well as to the statutes and rules allegedly violated. *Drayton v. Department of Transportation*, 186 Or App 1, 62 P3d 430 (2003). ORS 653.261 gives the Commissioner the power to adopt rules requiring overtime pay "at a rate [no] higher than one and one-half times the regular rate of pay" after 40 hours of work in one week. The Commissioner has adopted rules requiring overtime pay. Those rules are set out in OAR 839-020-0030, which states that "all work performed in excess of forty (40) hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay \* \* \*." There is no mention of ORS 653.261, OAR 839-020-0030, or the word "overtime" in the Agency's Order of Determination. The Agency's computation of wages due to the Claimants is contained in Exhibit A attached to the Order of Determination. Exhibit A contains no indication that overtime was a factor in determining the wages due to the Claimants. Because the Agency's Order of Determination lacks a citation to the overtime statute and rule allegedly violated, the Agency's claim for overtime must be denied.

## **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. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

Respondent was well aware of the hours worked by Claimants, as he kept a written record of their hours as required by law. Instead of paying them the agreed wage rate of \$15 per hour, he unilaterally chose to pay them a percentage of the draw, a considerably smaller sum. There was no evidence that Respondent acted other than voluntarily or as a free agent in not paying Claimants their agreed wage rate for the work they performed during the wage claim period. Instead, the evidence shows that Respondent underpaid Claimants based on his perception that Claimants were independent contractors. This misguided perception is not a defense to an award of penalty wages, and the forum finds that Claimants are entitled to penalty wages. *In the Matter of Adesina Adeniji*, 25 BOLI 162, 174 (2004), *appeal pending*.

Claimant Munro voluntarily quit without advance notice, and his wages became due on December 6, 2002, five days after his last day at work and not counting Saturday or Sunday. Claimant Fisler was involuntarily terminated and his wages became due on December 2, 2002, the end of the first business day after his termination. More than 12 days have elapsed since written notice of Claimants' wage claim was sent to and received by Respondent, and more than 30 days have elapsed since Claimants' last workday. Penalty wages are therefore assessed for both Claimants and calculated pursuant to ORS 652.150 (8 hours x \$15 per hour x 30 days = \$3,600).

**RESPONDENT DID NOT FAIL TO MAKE AND KEEP AVAILABLE REQUIRED PAYROLL AND OTHER RECORDS IN VIOLATION OF ORS 653.045 AND OAR 839-020-0080**

In its Notice of Intent to Assess Civil Penalties, the Agency sought \$24,000 in civil penalties based on Respondent's alleged willful failure to make and keep available

required payroll and other records in violation of ORS 653.045 and OAR 839-020-0080. Because the Agency does not specifically allege which of the many subsections of OAR 839-020-0800 was violated, the forum looks to language of ORS 653.045 to determine if one or more violations occurred. *In the Matter of Alphabet House*, 24 BOLI 262, 282 (2003). ORS 653.045(1)(a) and (b) correspond to the Agency's allegation. Those subsections require employers to make and keep a record of:

“(a) The name, address and occupation of each of the employer's employees;

“(b) The actual hours worked each week and each pay period by each employee.”

In this case, it is undisputed that Respondent kept a daily record of the hours worked by Munro and Fisler and totaled those hours each pay period. That same record also lists the names of Claimants Munro and Fisler and states the type of work performed. The fact that Respondent provided the record to Enos shows he kept the record. This evidence satisfies every requirement of ORS 653.045(1)(a) and (b) except for the record of Claimants' addresses. No evidence was presented as to whether Respondent maintained a written record of the addresses of Munro and Fisler. The Agency bears the burden of proof on that issue and did not meet that burden. Accordingly, the forum finds that Respondent did not violate ORS 653.045 and OAR 839-020-0080 as charged.

**RESPONDENT DID NOT VIOLATE ORS 653.045(3), OAR 839-020-0012, OR OAR 839-020-0080 BY FAILING TO SUPPLY CLAIMANTS WITH ITEMIZED STATEMENTS OF AMOUNTS AND PURPOSES OF DEDUCTIONS IN THE MANNER PROVIDED IN ORS 652.610**

The Agency alleged that Respondent violated ORS 653.045, OAR 839-020-0012, and OAR 839-020-0080 on 12 occasions by failing to provide Claimants “with itemized statements of amounts and purposes of deductions.” In order to prevail, the Agency must prove that (1) Respondent made wage payments to Claimants; (2) Respondent made deductions from Claimants' wage payments; and (3) Respondent did

not provide the itemized statement required by ORS 652.610 at the time Respondent made the wage payments. *Alphabet House*, at 285.

The Agency proved that Respondent made wage payments to the Claimants and did not provide an itemized statement of deductions, but presented no evidence to show that Respondent made any deductions from any of the Claimants' paychecks. Since Respondent did not make any deductions, Respondent did not violate ORS 653.045, OAR 839-020-0012, or OAR 839-020-0080 by failing to provide Claimants "with itemized statements of amounts and purposes of deductions."

### **RESPONDENT FAILED TO PAY OVERTIME FOR ALL HOURS WORKED OVER 40 IN VIOLATION OF ORS 653.261 AND OAR 839-020-0030**

In its Notice of Intent, the Agency alleged that Respondent failed "to pay overtime for all hours worked over forty (40) in violation of ORS 653.261 and OAR 839-020-0030." The Agency alleged "8 violations" and sought to assess \$8,000 in civil penalties.

Undisputed evidence contained in Respondent's time records established that Claimants collectively worked more than 40 hours in a given workweek during 10 separate weeks. Munro worked overtime in three pay periods, and Fisler worked overtime in two pay periods. Calculated at \$15 per hour, Claimants were paid less than half the wages that they earned,<sup>xii</sup> and Respondent substantially underpaid them in each pay period. Given Respondent's "percentage" method of payment, it is impossible to determine the exact weeks for which overtime was not paid. However, based on the substantial underpayment of wages in each pay period in which Claimants worked overtime, the forum concludes that Claimants were not paid overtime wages that they earned.

The Agency did not articulate how it determined Respondent had committed eight separate violations of ORS 653.261, and the forum is at a loss to determine how the Agency arrived at that figure. Without a means of determining the specific number

of violations, the forum concludes that Respondent committed two violations of ORS 653.261, one relating to Munro and the other to Fisler.

## **CIVIL PENALTY**

OAR 839-020-1020 sets out six mitigating and aggravating circumstances that may be considered by the commissioner in determining the amount of civil penalty to be assessed.

- “(a) The history of the employer in taking all necessary measures to prevent or correct violations of statutes or rules;
- “(b) Prior violations, if any, of statutes or rules;
- “(c) The magnitude and seriousness of the violation;
- “(d) Whether the employer knew or should have known of the violation;
- “(e) The opportunity and degree of difficulty to comply;
- “(f) Whether the employers’ action or inaction has resulted in the loss of a substantive right of an employee.”

It is the employers’ responsibility to provide mitigating evidence, and the commissioner must consider all mitigating circumstances presented by the employer. OAR 839-020-1020(2) & (3). There was no evidence presented concerning (a) and (b). The magnitude and seriousness of the violations was moderate, as they impacted two workers. As to (d), Respondent claimed he was not responsible for creating records in 2000 because he was not Claimant’s employer. The forum has concluded otherwise and has previously determined that an employers’ failure to apprehend the correct application of the law and actions based on that incorrect application are not a defense. *In the Matter of Toni Kuchar*, 23 BOLI 265, 275 (2002). Respondent, as Claimants’ immediate supervisor and employer, should have known of the violations, in that employers are presumed to know the laws they are required to follow. *In the Matter of John Mathioudakis*, 12 BOLI 11, 20-21 (1993). Complying with the law would have been a simple matter of calculating the overtime pay due to Claimants based on the records Respondent kept and paying them their overtime wages. Finally, Respondent’s

failure to pay overtime to the Claimants resulted in a substantive loss to Claimants of payment of overtime wages for 89 hours of work. There are no mitigating factors. Considering all the aggravating circumstances, the forum assesses a civil penalty of \$1,000 for each violation, for a total of \$2,000.

### **ORDER**

NOW, THEREFORE, as authorized by ORS 652.140(1) and (2), and as payment of the unpaid wages and penalty wages, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondent Gary Lee Lucas** 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:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Mike Munro in the amount of NINE THOUSAND SEVEN HUNDRED NINETY-FOUR DOLLARS AND SIXTY-FIVE CENTS (\$9,794.65), less appropriate lawful deductions, representing \$6,194.65 in gross earned, unpaid, due, and payable wages and \$3,600 in penalty wages, plus interest at the legal rate on the sum of \$6,194.65 from January 1, 2003, until paid, and interest at the legal rate on the sum of \$3,600 from February 1, 2003, until paid.

(2) A certified check payable to the Bureau of Labor and Industries in trust for Mark Fidler in the amount of EIGHT THOUSAND ONE HUNDRED FIFTY-SEVEN DOLLARS AND EIGHTY-FOUR CENTS (\$8,157.84), less appropriate lawful deductions, representing \$4,557.84 in gross earned, unpaid, due, and payable wages and \$3,600 in penalty wages, plus interest at the legal rate on the sum of \$4,557.84 from January 1, 2003, until paid, and interest at the legal rate on the sum of \$3,600 from February 1, 2003, until paid.

NOW, THEREFORE, as authorized by ORS 653.256, and as payment of the civil penalties assessed as a result of his violations of ORS 653.261, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondent Gary Lee Lucas** 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:

(1) A certified check payable to the Bureau of Labor and Industries in the amount of TWO THOUSAND DOLLARS (\$2,000), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order and the date Respondent **Gary Lee Lucas** complies with the Final Order.

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<sup>i</sup> The Agency's Order of Determination is not signed or dated. However, it was served on Gary Lucas on April 21, 2003, and Respondent stated that its answer was submitted to the "Order of Determination issued April 14, 2003."

<sup>ii</sup> The Agency alleged that Claimant Munro's period of employment was "7-8-03 to 11-30-02" and that he was owed \$6,712.15 and that Claimant Fisler's period of employment was "7-29-03 to 12-2-02" and that he was owed \$4,968.65.

<sup>iii</sup> The Agency alleged that Claimant Munro was owed \$3,765.60 and Claimant Fisler was owed "\$3,6360."

<sup>iv</sup> According to Patton, an "exempt" general contractor is a contractor who has represented to the CCB that he or she has no employees.

<sup>v</sup> "Respondent" hereafter refers to Gary Lucas, as there was no evidence presented to establish the existence of Gary Lucas Construction, Inc.

<sup>vi</sup> "Draw on July's" was handwritten on the \$100 check by Respondent.

<sup>vii</sup> For reasons explained in the Opinion, the forum has not awarded overtime wages to either Munro or Fisler and has therefore computed overtime wages due at \$15 hour instead of \$22.50 ( $\$15 \times 1.5 = \$22.50$ )

<sup>viii</sup> Respondent wrote something on this check, but the handwriting is too faint to be legible.

<sup>ix</sup> For example, if a \$10,000 draw was received by Respondent and Respondent, Ovalle, Gettman, Munro and Fisler each worked 200 hours, each person's percentage would be 20% ( $200 \text{ hrs.} \times 5 = 1000 \text{ hrs}$ ;  $200 \div 1000 = 20\%$ ) and each person would receive \$2,000 ( $\$10,000 \times 0.20 = \$2,000$ ).

<sup>x</sup> From the context of Respondent's testimony, the forum infers that Respondent was referring to a limited liability company, a new form of business in Oregon established by the 1993 Oregon Legislature that combines a corporation's limited liability with a partnership's economic and tax flexibility. See *In the Matter of Alpine Meadows Landscape*, 19 BOLI 191, 213 (2000).

<sup>xi</sup> See fn. 4, *supra*.

<sup>xii</sup> See Ultimate Findings of Fact 6 and 11, *supra*.