

In the Matter of

TRIPLE A CONSTRUCTION, LLC

Case No. 57-01

Final Order of the Commissioner Jack Roberts

Issued April 19, 2002

SYNOPSIS

Respondent employed Claimants as laborers at the rate of \$9.00 per hour. Claimants were not independent contractors as claimed by Respondent, but employees who were entitled to the agreed upon rate for all hours worked. Respondent kept no records of the hours Claimants worked and the forum awarded Claimants \$2,884.50 in unpaid wages based on Claimants' unrefuted testimony concerning their rate of pay and the amount and extent of work they performed. Respondent's failure to pay was willful and the forum ordered Respondent to pay \$4,320 in civil penalty wages in addition to the unpaid wages. ORS 652.140; ORS 652.150; ORS 653.010; ORS 653.261.

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, 2001, in the Bureau of Labor and Industries conference room located at 3865 Wolverine Street NE, Bldg. E-1, Salem, Oregon.

Cynthia Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Gary Lynn Smith ("Claimant Smith") and David Lee Toquero ("Claimant Toquero") were present throughout the hearing and were not represented by counsel. Michael T. Morris was present throughout the hearing as the authorized representative for Triple A Construction, LLC ("Respondent").

In addition to the Claimants, the Agency called as witnesses: Tamara Roth (telephonic witness), employee of a business located next door to Respondent; Newell Enos, compliance specialist, BOLI Wage and Hour Division; Fred Toquero, Claimant

Toquero's brother; Steve Campbell, former Respondent employee; and, John Weaver (telephonic witness), contractor.

Respondent called as witnesses: Leroy Kammerer, Santiam Auto co-owner; and Kimberly Morris, Michael T. Morris' wife.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-27;
- b) Agency exhibits A-1 through A-15 (filed with the Agency's case summary);
- c) Respondent exhibits R-4, R-5, R-6 (filed with Respondent'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 May 17, 2000, Claimant Smith filed a wage claim form in which he stated Respondent had employed him from April 16 to April 27, 2000, and failed to pay him the agreed upon rate of \$9.00 per hour for all hours worked.

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

3) On May 17, 2000, Claimant Toquero filed a wage claim form in which he stated Respondent had employed him from April 16 to April 27, 2000, and failed to pay him the agreed upon rate of \$9.00 per hour for all hours worked.

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

5) On November 13, 2000, the Agency served Respondent with Order of Determination No. 00-1958. The Agency alleged Respondent had employed Claimant Smith and Claimant Toquero ("Claimants") during the period April 16 to April 27, 2000, at the rate of \$9.00 per hour, and that each Claimant had worked a total of 133.5 hours, 53.5 of which were hours worked in excess of 40 in a given work week. The Agency concluded Respondent owed each Claimant \$1,442.25 in wages, plus interest. The Agency also alleged Respondent's failure to pay was willful and Respondent, therefore, was liable to each Claimant for \$2,160.00 as penalty wages, plus interest. The Order of Determination gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law. Order of Determination No. 00-1958 was served on "Michael T. Morris, Manager, Triple A Construction," in person at 489 E. Ellendale Ave., Dallas, Oregon, at 5:15 p.m., by R. Alexander, Deputy Sheriff, Polk County, Oregon.

6) On December 7, 2000, the Agency issued a Notice of Intent to Issue Final Order by Default to "Michael T. Morris, Manager, 489 Ellendale Avenue, Dallas, OR 97338." Respondent was advised it had until December 18, 2000, to file an answer and request for hearing or court trial or the Agency would issue a final order by default. On December 14, 2000, Michael T. Morris sent a letter to the Agency, with a copy to R. Kevin Hendrick, Attorney at Law, stating in pertinent part:

"Please be advised that at no time was I served with the Order of Determination in case number 00-1958. Specifically, at no time was I served via Personal Service, Substituted Service, Office Service and/or by any other reasonable means as required by Oregon Rules of Civil Procedure (Please see ORCP 7). Please mail to me a true and accurate copy of the Order of Determination in case #00-1958 and an Acceptance of Service. My mailing address is 489 E. Ellendale Ave. Dallas, OR 97338. Upon receipt of these documents, I will sign the Acceptance of Service and mail it back to you within three business days.

"Thank you for your anticipated cooperation in this matter.

"Sincerely, Michael T. Morris"

7) On December 15, 2000, the Agency issued an Extension of Time Allowed for Response to Order of Determination No. 00-1958 allowing Respondent an additional 20 days, until December 28, 2000, to file its response because "It is necessary for the above-named Respondent to retain counsel to adequately prepare and file said Answer and Request for Hearing per telephone conversation on December 15, 2000."

8) On December 28, 2000, Respondent filed an answer and request for hearing. Respondent designated Michael T. Morris as its duly authorized representative. In its answer, Respondent denied the allegations contained in paragraphs two through four of the Order of Determination and alleged as affirmative defenses:

"At all material times herein, Claimants represented themselves as independent contractors.

"At all material times herein, Claimants represented themselves to have the proper authority and appropriate licensing and documentation as required by the Construction Contractors Board and the State of Oregon.

"At all material times herein, Claimants interacted with Triple A Construction LLC, on the basis of the above representations.

"At all material times herein, the services rendered by Claimants for Triple A Construction LLC were rendered on the basis of the above representations.

"At all material times herein, it was reasonable for Triple A Construction LLC, to rely on the above representations that were made by claimants."

9) 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 9:00 a.m. on June 13, 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 was mailed to Michael T. Morris, Manager, Triple A Construction, 489 E. Ellendale Ave., Dallas, Oregon.

10) On April 30, 2001, the forum issued a case summary order requiring the Agency and Respondent 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 Respondent only); a statement of any agreed or stipulated facts; and any wage and penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by June 1, 2001, and advised them of the possible sanctions for failure to comply with the case summary order.

11) On May 3, 2001, the Hearings Unit received a letter from attorney, R. Kevin Hendrick, that stated in pertinent part:

“Enclosed is the Interim Order – Case Summaries previously sent to my office. Please be advised that I am not now, nor have I ever been the attorney of record for Triple A Construction.”

12) On May 4, 2001, the forum issued an amended case summary order that provided Respondent’s authorized representative with a form to use to prepare the case summary.

13) On May 29, 2001, the Agency moved for a discovery order that required Respondent to produce five categories of documents. By order dated May 29, 2001, Respondent was given until June 5, 2001, to respond to the Agency’s motion for discovery order. Respondent filed no response to the Agency’s motion. On June 8, 2001, the forum issued an interim order that granted the Agency’s motion and required Respondent to produce all of the requested documents to the Agency no later than June 12, 2001.

14) On May 31, 2001, the Agency filed a case summary. On June 5, 2001, the Agency filed an addendum to its case summary, notifying the forum that one of its

witnesses would be testifying by telephone and naming an additional telephone witness who was “inadvertently left off of the witness list.”

15) On June 5, 2001, the Agency case presenter, Cynthia Domas, sent the forum a letter that stated in pertinent part:

“Enclosed is the Case Summary for Respondent in the above matter. The document was left on my desk on May 31, 2001. I was out of the office that day and did not return until just before 8 p.m. After seeing the document, I wrote a letter to Mr. Morris explaining that the document had not been correctly filed. A copy of that letter is attached.

“Today I received a phone call from Kim Morris. She indicated that she brought the document into the Salem office in an effort to be sure that it was timely filed. However, she did not have the documentation with her that stated where the document should be filed. I explained to Ms. Morris that in the future Respondent must file all documents with the Hearings Unit as stated in the Notice of Hearing. I further indicated the Respondent was required to provide the Agency with copies of any documents that Respondent filed with the Hearings Unit.”

16) On June 5, 2001, the Hearings Unit received Respondent’s case summary.

17) By letter dated June 11, 2001, Respondent requested that the Agency “show good cause for telephone testimony, or that [Tamara Roth and Anna Blythe] not testify in this matter.” At the hearing, the ALJ permitted telephone testimony from two Agency witnesses pursuant to OAR 839-050-0250(11).

18) On June 12, 2001, Respondent submitted a response to the discovery order issued on June 8, 2001.

19) At the start of hearing, Respondent’s authorized representative, Michael T. Morris, stated that he did not receive a “couple of notices” or a copy of the administrative contested case hearing rules that were included in the Notice of Hearing. The ALJ provided Morris with additional copies of the Notice of Contested Case Rights and Procedures and the forum’s contested case hearings rules, OAR 839-050-0000 to 839-050-0440, and granted Morris time to peruse them prior to hearing. Respondent’s

representative had no questions about the Notice of Contested Case Rights and Procedures.

20) At the start of hearing, Respondent and the Agency verbally stipulated that the wage claimants were on the premises of Santiam Auto car lot located at 3650 Portland Road, Salem, Oregon, between April 16 and April 27, 2000.

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

22) Respondent's authorized representative, Michael T. Morris, was advised during the hearing that any statements he made that were not sworn and subject to the Agency's cross-examination would not be considered as evidence in the record. Morris declined the opportunity to give testimony during the hearing.

23) The proposed order was issued and mailed on April 4, 2002, to all persons indicated on the face of the mailing certificate attached to the proposed order. The participants were notified in the proposed order that they were entitled to file exceptions to the proposed order within ten days of its issuance. To be accepted as timely filed, exceptions, if any, needed to be filed with the Hearings Unit and postmarked no later than April 15, 2002.

OAR 839-050-0380(4) provides:

"Participants must file any exceptions within ten days of the date of issuance of the Proposed Order. Exceptions must be filed with the administrative law judge through the hearings unit. Pursuant to OAR 839-050-0050, participants may request an extension of time to file exceptions."

Under OAR 839-050-0050(2),

"[w]here a participant requires additional time to submit any document, a written request for such extension must be filed with and received by the hearings unit no later than the date set for filing of the document in question, except that the administrative law judge has discretion to permit

a participant to make a verbal motion for an extension of time. Where the administrative law judge allows a participant to make a verbal motion for extension of time, the administrative law judge shall promptly notify the other participants of the motion and give them an opportunity to respond, either verbally or in writing. * * *.”

Respondent did not request an extension of time to file exceptions to the proposed order, either verbally or in writing. The Hearings Unit received Respondent’s exceptions to the proposed order on April 18, 2002, contained in an envelope postmarked April 17, 2002.

The forum finds that Respondent’s exceptions to the proposed order were not timely filed and therefore are not considered in this Order.

24) Respondent included in its exceptions requests to disqualify the administrative law judge and dismiss the case, or, in the alternative, reopen the record “so that Respondent can rebutt [sic] the proposed order and enter additional evidence in order to get a fair hearing.” Respondent’s requests (hereinafter “motions”) are addressed below.

RULINGS ON RESPONDENT’S POST-HEARING MOTIONS

MOTION TO DISQUALIFY ALJ

Respondent asserts that the ALJ “was prejudiced against Respondent at the hearing and * * * biased for the claimants without fair cause.” OAR 839-050-0160 provides, in pertinent part:

“1) * * * Any party to any contested case may claim that the person designated as administrative law judge is prejudiced against any party or counsel or the interest of any party or counsel appearing in such case. Such prejudice shall be established by a motion supported by an affidavit establishing that the designated administrative law judge is prejudiced against the party or counsel, or against the interest of the party or counsel, such that the party or counsel cannot, or believes that he or she cannot, have a fair and impartial hearing before the administrative law judge, and that it is made in good faith and not for the purpose of delay. Grounds upon which a motion may be made, or upon which the administrative law judge may determine that disqualification is necessary, include but are not limited to a family relationship with the complainant or claimant or with any

party or counsel, or a financial interest in the property or business of any of those individuals. The fact that the administrative law judge is an employee of the Oregon Bureau of Labor and Industries is not a ground for disqualification of the administrative law judge.

“(2) The motion and affidavit must be filed together within 14 days after service of the notice of hearing. No motion to disqualify an administrative law judge may be made after the administrative law judge has ruled upon any motion, other than a motion to extend time in the case, or after the hearing has commenced, whichever is earlier.”

Under the hearing rules, Respondent’s bare allegation of prejudice is not timely raised and is therefore denied.

MOTION TO DISMISS

Respondent requests the case “be completely dismissed because of the ALJ prejudice and lack of any real and sufficient evidence on the part of the claimants and false evidence/testimony given in the claimants’ case.” Respondent’s opportunity to comment on the evidence in the record expired on April 15, 2002. Respondent’s motion is therefore denied as untimely.

MOTION TO REOPEN CONTESTED CASE RECORD

Respondent requests that the record be reopened pursuant to OAR 839-050-0410 to allow Respondent the opportunity to “rebut” the proposed order and “enter additional evidence.” Respondent had ample opportunity to present testimonial and documentary evidence at the hearing and Respondent’s opportunity to refute the proposed order has expired. OAR 839-050-0410 provides, in pertinent part:

“the administrative law judge shall reopen the record where he or she determines additional evidence is necessary to fully and fairly adjudicate the case. In making this determination, the administrative law judge shall consider whether the evidence suggested for consideration could have been gathered prior to the hearing.”

Respondent made no showing that it has received new evidence that was previously unavailable. Having been presented with no additional evidence at all to consider, the

forum finds there is no reason to reopen the record in this matter. Respondent's motion to reopen the contested case record is denied.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Triple A Construction LLC was an Oregon limited liability company that performed construction work in Oregon, and employed one or more individuals in Oregon.

2) At all times material herein, Michael T. Morris was Respondent's owner and manager.

3) Sometime in early April 2000, Morris went to Claimant Toquero's home and asked if Toquero and Claimant Smith were interested in working on a remodeling job he had lined up. Both had worked for Morris previously on a "per job basis" and agreed to work on the remodel job for \$9.00 per hour.

4) Claimants started work on the remodel on April 16, 2000, at Santiam Auto located in Salem, Oregon. The remodel consisted of removing the roof from a one story building and adding a second story. Claimants were hired to tear off the roof and rafters, put in a floor, and do the framework for the second story. Except for occasionally going to pick up materials, Morris was on the job site with Claimants most days.

5) Morris had previously employed Claimants to do framing work sometime in 1998, for which he paid them \$8.00 per hour. At that time, Respondent required Claimants to sign drug and alcohol and attendance policies and to fill out time sheets. On the Santiam Auto remodel, Respondent did not require Claimants to sign company policies or fill out time sheets.

6) While working on the Santiam Auto car lot remodel, Morris told Claimants when to come to work and what to do each day. Morris supplied the necessary tools

and equipment to do the job, including nail guns, hammers, saws, tape measures, and power tools.

7) At the time of hearing, Claimants had never attended a trade school or taken any classes in construction. Nether Claimant had a CCB license and Respondent did not ask them to produce such a license.

8) On or about April 21, 2000, while working on the second story, Claimant Toquero slipped on a rafter and fell part way through the ceiling of the first story. He told Morris that his only injury was to his pride. He did not seek medical treatment after the fall while he was working for Respondent.

9) From about April 24 through 27, 2000, subcontractor, John Weaver, poured concrete for Respondent on the Santiam Auto car lot remodel. Weaver and his employee, Fred Toquero, observed Claimants and Morris working on the job site each of those days. During that time, there was a disagreement between Claimants and Morris about whether Claimants were to install skylights. Morris instructed Claimants to install them and Claimants maintained that installing skylights was not part of the original deal between them. On April 27, 2000, Claimants left the job site after working three and one-half hours. Morris told Weaver he was not going to pay Claimants for their work because they did not complete the job.

10) On or about May 1, 2000, Claimant Toquero filed a complaint with the Oregon Occupational Safety and Health Division ("OR-OSHA") alleging Respondent required Claimants to work on a second story addition without fall protection. After an inspection on June 1, 2000, OR-OSHA notified Claimant Toquero of its finding that it was "unable to substantiate a violation concerning the complaint on the truss and sheathing work. The company was cited for another fall protection issue."

11) Sometime in April 2000, Steven Campbell observed Claimants working on the Santiam Auto remodel. Around the time Claimants quit working for Respondent, Campbell stopped to ask Morris if he had any work available. Morris put Campbell to work finishing the job Claimants started. Morris told Campbell he would be paid \$7.00 per hour and instructed him to show up at 9 a.m. each day. Morris opened the gate for Campbell each day. Campbell's work day usually ended at 5 p.m., sometimes 7 p.m. Respondent determined the number of hours Campbell worked and provided all of the tools Campbell used on the job. While employed, Campbell was present during an OR-OSHA inspection concerning fall protection issues. Campbell had been working on the second floor of the remodel while there were no barriers on the windows. After the inspection, Respondent told Campbell to sign up with "Brown and Dutton," a temporary service, for "insurance purposes." After he signed up, Campbell's pay rate did not change and he was paid directly by the service instead of Respondent. Campbell worked for Respondent until the remodel was completed about two months later.

12) When they filed their wage claims, Claimants recorded the days and hours they worked between April 16 and April 27, 2000, on calendars provided by the Agency. The specific days and number of hours noted on each calendar were identical. When he filled out the Agency's form calendar, Claimant Toquero used a personal calendar that contained his handwritten entries between April 16 and April 27, 2000. Each entry showed a time period worked with the total number of hours recorded each day, e.g., on Sunday, April 16, he recorded:

"12-9

"9 hours

"Start job/car lot remodel."

On five of the days, April 18, April 20 through April 22, and April 26, the total number of hours do not correspond with the time period recorded, e.g., on Tuesday, April 18, he recorded:

“7-8:30

“13 hours”

Most of the entries designate a 7 or 8 a.m. start time and a 9 or 9:30 p.m. end time.

13) Claimants’ testimony was generally credible and Respondent did not rebut their claims pertaining to the hours they worked or their pay rate in any way. Absent evidence to the contrary, the forum accepts Claimants’ testimony regarding the hours they worked and the amount Respondent agreed to pay them when they were hired.

14) Based on the hours they reported to the Agency, Claimants each worked, on the Santiam Auto remodel, 9 hours on April 16; 12.5 hours on April 17; 13 hours (39 hours total) April 18 – 20; 12.5 hours on April 21; 13 hours on April 22; 5 hours on April 23; 13 hours (39 hours total) April 24 – 26; and, 3.5 hours on April 27, for a total of 133.5 hours. Of the hours worked, 53.5 hours were in excess of 40 hours per week.

15) Claimants voluntarily quit working for Respondent after they left work on April 27, 2000.

16) At the time Claimants left their employment, they were each owed \$1,442.25 in unpaid wages (80 hours x \$9.00 per hour; 53.5 hours x \$13.50 per hour).

17) Kimberly Morris testified credibly despite her bias as Michael T. Morris’ wife. She acknowledged that, although Claimants had been on the payroll during years past, Respondent did not consider Claimants “employees” in April 2000. She did not deny that Claimants performed work for Respondent between April 16 and April 27, 2000, or that they were not paid for any work they performed. The forum believed her statement that Claimants were not given any company policies to sign in 2000.

18) Steven Campbell's testimony was credible in all respects. He readily acknowledged that he knew David Toquero, but did not demonstrate any bias toward Claimants or Respondent. His testimony was forthright and the forum credits his testimony in its entirety.

19) Leroy Kammerer's testimony that the gates at Santiam Auto open every day at 10 a.m. and close every evening at 7 p.m., and that he and his partner have the only keys to the gates, was not altogether believable. First, it was contradicted by Campbell's credible testimony that Morris opened the gates to let Campbell in every day at 9 a.m. Moreover, Claimant Toquero also testified that Morris was the one who opened the gates in the morning at 9 a.m. to let Claimants in every day. Kammerer also acknowledged that, as owner of Santiam Auto, he was aware of Claimants' presence during the car lot remodel, which is contrary to his statement to the Agency during its investigation that he had no knowledge of either Claimant. His testimony was further offset by Kimberly Morris' credible testimony that Kammerer currently employs Michael T. Morris at Santiam Auto. The forum disregarded Kammerer's testimony unless it was corroborated by other credible testimony.

20) The testimony of Tamara Roth, Newell Enos, Fred Toquero and John Weaver was credible.

21) Respondent's owner and authorized representative, Michael T. Morris, did not testify at the hearing.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent conducted a business in the state of Oregon and engaged the personal services of one or more employees in the operation of that business.

2) The actions, inaction, knowledge and motivations of Michael T. Morris, Respondent's owner and manager, are properly imputed to Respondent.

- 3) Respondent employed Claimants between April 16 and April 27, 2000.
- 4) Respondent and Claimants agreed Claimants would be paid \$9.00 per hour.
- 5) Claimants quit their employment on April 27, 2000, without notice to Respondent.
- 6) Claimants each worked 133.5 hours between April 16 and April 27, 2000, 53.5 of which were in excess of 40 hours per week. For all of these hours, each Claimant earned a total of \$1,442.25. Respondent paid Claimants nothing and therefore owed Claimants \$2,884.50 in earned and unpaid compensation on the day their employment terminated.
- 7) Respondent owes Claimant Toquero \$1,442.25 for wages earned and Claimant Smith \$1,442.25 for wages earned.
- 8) Respondent willfully failed to pay Claimants the \$2,884.50 in earned, due and payable wages no later than May 2, 2000, the fifth business day after Claimants quit their employment without notice to Respondent. Respondent has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.
- 9) Civil penalty wages, computed pursuant to ORS 652.150, equal \$2,160 for each Claimant, for a total of \$4,320.

CONCLUSIONS OF LAW

- 1) ORS 653.010 provides, in pertinent part:
 - “(3) ‘Employ’ includes to suffer or permit to work; * * * .
 - “(4) ‘Employer’ means any person who employs another person * * * .”
- ORS 652.310 provides, in pertinent part:
- “(1) ‘Employer’ means any person who in this state, directly or through an agent, engages personal services of one or more employees * * * .
 - “(2) ‘Employee’ means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or

agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled.”

During all times material herein, Respondent was an employer and Claimants were Respondent’s employees subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.414, and 653.010 to 653.261.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein.

3) ORS 653.261(1) provides:

“The Commissioner of the Bureau of Labor and Industries may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to, minimum meal periods and rest periods, and maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of such employees when computed without benefit of commissions, overrides, spiffs, and similar benefits.”

OAR 839-020-0030(1) provides that except in circumstances not relevant here:

“ * * * 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 when computed without benefits of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.281(1).”

Respondent failed to pay Claimants at the overtime rate, in violation of OAR 839-020-0030(1).

4) ORS 652.140(2) provides:

“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.”

Respondent violated ORS 652.140(2) by failing to pay Claimants all wages earned and unpaid within five days, excluding Saturdays, Sundays and holidays, after Claimants quit their employment on April 27, 2000, without at least 48 hours' notice to Respondent.

5) 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.”

Respondent is liable for \$4,320 in civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimants when due as provided in ORS 652.140(2).

6) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimants their earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

In order to prevail in this matter, the Agency was required to prove: 1) that Respondent employed Claimants; 2) Respondent agreed to pay Claimants \$9.00 per hour; 3) that 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 Barbara Coleman*, 19 BOLI 230, 263, 264 (2000). In its answer, Respondent disputed all of these elements and characterized Claimants as independent contractors who “represented themselves to have the proper authority and appropriate licensing

and documentation as required by the Construction Contractors Board (“CCB”) and the State of Oregon.” The Agency established, however, by a preponderance of the evidence, that Respondent employed Claimants and willfully failed to pay them all wages earned when due.

RESPONDENT EMPLOYED CLAIMANTS

There is no dispute that Claimants rendered services for Respondent on a remodeling project that took place on the premises of Santiam Auto between April 16 and April 27, 2000. In order to determine whether they were employees or independent contractors under Oregon’s minimum wage and wage collection laws, the forum relies on an “economic reality” test. See *In the Matter of Ann L. Swanger*, 19 BOLI 42, 53 (1999); *In the Matter of Frances Bristow*, 16 BOLI 28, 37 (1997). The test, derived from one used by the federal courts when applying the Fair Labor Standards Act, helps to determine “whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which [he or she] renders [his or her] services.” *In the Matter of Geoffrey Enterprises, Inc.*, 15 BOLI 148, 164 (1996) (relying on *Circle C Investments, Inc.*, 998 F2d 324 (5th Cir 1993)). Having considered the following test criteria, the forum finds that the record establishes Claimants were economically dependent upon Respondent’s business.

A. The degree of control the alleged employer has over a worker.

There is sufficient evidence to find that Respondent had total control over when and how long Claimants worked and how they were to accomplish the tasks they were assigned. Despite evidence that Respondent hired Claimants on a per job basis, Claimants had no control over how they approached each assigned project. The forum finds they were hired as day laborers to perform work in accordance with Respondent’s instructions and, as such, were working at the direction of Respondent.

B. The extent of the relative investments of the worker and alleged employer.

Claimants invested only their time in the remodeling project. Respondent supplied all of the tools and equipment used for the remodel. Claimants may have brought their own hammer or tape measure to use on the job site, but evidence shows and the forum finds that Claimants were dependent on the equipment Respondent provided to get the job done and could not have performed the remodeling work without the tools and equipment provided by Respondent.

C. The degree to which the worker's opportunity for profit and loss is determined by the alleged employer.

In this case, Respondent determined and exclusively controlled the amount of Claimants' hourly rate and the forum can conclude from that fact that Claimants were "wage earners toiling for a living, [rather] than independent entrepreneurs seeking a return on their risky capital investments." See *Reich v. Circle C. Investments, Inc.*, 998 F2d 324, at 328 (5th Cir 1993), citing *Brock v. Mr. W. Fireworks, Inc.*, 814 F2d 1042 at 1051 (5th Cir), cert. denied, 484 US 924 (1987). Respondent produced no evidence that Claimants were independent contractors who were risking a loss of money if the project fell through or was not completed.

D. The skill and initiative required in performing the job.

Claimants had the skills necessary to wield hammers and saws and had previous experience working for Respondent on similar jobs. Neither had attended any trade schools or taken any classes in construction. Neither had a CCB license nor is there any evidence in the record that Respondent required them to have such a license. The forum concludes that Claimants possessed no special skills or talents that would have made them likely to be independent contractors while working for Respondent.

E. The permanency of the relationship.

Independent contractors are generally engaged to perform a specific project for a limited period. In this case, Claimants were hired for a short term remodeling project that did not require them to possess a high degree of initiative, judgment, or foresight to perform a specific task. Instead, they were hired as laborers for a limited period to do a variety of tasks that did not require any special skills. The impermanence of a particular job alone does not create an independent contractor relationship.

The forum is obliged to look at the totality of the circumstances when determining whether a worker is an independent contractor. In this case, the evidence as a whole reveals the actual relationship between Claimants and Respondent and the forum finds the Claimants were Respondent's employees for the duration of the Santiam Auto remodeling job.

AGREED UPON RATE

There is no evidence that contradicts Claimants' testimony that Respondent agreed to pay Claimants \$9.00 per hour for their services. Respondent's principal was present at the hearing and had ample opportunity to dispute Claimants' contention and did not. The forum therefore accepts the testimony that Respondent and Claimants agreed to the \$9.00 per hour rate.

WORK PERFORMED

Claimants testified and Respondent does not dispute that Claimants performed work for which they were not paid. Respondent's only argument is that they were not employees, but independent contractors. The forum rejects that argument and finds that Claimants performed work for Respondent as its employees and were not paid for their work.

AMOUNT AND EXTENT OF WORK PERFORMED

ORS 653.045 requires Respondent to keep and maintain proper records of wages, hours and other conditions and practices of employment. Where the forum concludes an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. Where, as in this case, the employer produces no records, the Commissioner may rely on evidence produced by the Agency from which "a just and reasonable inference may be drawn." *In the Matter of Majestic Construction*, 19 BOLI 59, 58 (1999). A claimant's credible testimony may be sufficient evidence. *In the Matter of Graciela Vargas*, 16 BOLI 246 (1998).

Here, Respondent kept no record of the days or hours Claimants worked. Claimant Toquero kept a contemporaneous record of the hours both Claimants worked between April 16 and April 27, 2000. Despite the opportunity to do so, Respondent produced no evidence to "negative the reasonableness of the inference to be drawn from the [Claimants'] evidence." *Id.* at 255, *quoting Mt. Clemens Pottery Co.*, 328 US at 687-88. The forum concludes, therefore, that Claimants performed work for which they were improperly compensated and the forum may rely on the evidence Claimants produced showing the hours they worked as a matter of just and reasonable inference. Claimants' testimony establishes that they each worked a total of 133.5 hours for Respondent, 53.5 of which were hours worked in excess of 40 per week. For all of these hours, Claimants each earned a total of \$1,442.25, based on the agreed upon rate of \$9.00 per hour. Respondent paid none of the wages earned and due. Respondent owes each Claimant \$1,442.25, for a total of \$2,884.50 in unpaid wages.

CIVIL PENALTIES

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, as an employer, had a duty to know the amount of wages due to his employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238 (1983).

Respondent did not dispute that Claimants performed work for him. Respondent denied, however, that he “employed” Claimants. The facts and law prove otherwise. Respondent’s failure to apprehend the correct application of the law and Respondent’s actions based on this incorrect application do not exempt Respondent from a determination that he willfully failed to pay wages earned and due. *In the Matter of Locating, Inc.*, 14 BOLI 97 (1994), *aff’d without opinion, Locating, Inc. v. Deforest*, 139 Or App 600, 911 P2d 1289 (1996); *In the Matter of Mario Pedroza*, 13 BOLI 220 (1994). Respondent does not deny that Claimants were not paid for services performed and the evidence shows Respondent intentionally withheld wages because of a perception that the work Claimants were performing was not completed. Based on those facts, the forum infers Respondent voluntarily and as a free agent failed to pay Claimants all of the wages earned between April 16 and April 27, 2000. Respondent acted willfully and is liable for penalty wages under ORS 652.150.

Penalty wages, therefore, are assessed and calculated in accordance with ORS 652.150 in the amount of \$4,320. This figure is computed by multiplying \$9.00 per hour by 8 hours per day multiplied by 30 days for each Claimant. See ORS 652.150 and OAR 839-001-0470.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, Respondent **Triple A Construction, LLC** is 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:

- 1) A certified check payable to the Bureau of Labor and Industries, in trust for David L. Toquero, in the amount of THREE THOUSAND SIX HUNDRED AND TWO DOLLARS AND TWENTY FIVE CENTS (\$3,602.25), less appropriate lawful deductions, representing \$1,442.25 in gross earned, unpaid, due and payable wages and \$2,160 in penalty wages, plus interest at the legal rate on the sum of \$1,442.25 from May 2, 2000, until paid and interest at the legal rate on the sum of \$2,160 from June 2, 2000, until paid.
- 2) A certified check payable to the Bureau of Labor and Industries, in trust for Gary L. Smith, in the amount of THREE THOUSAND SIX HUNDRED AND TWO DOLLARS AND TWENTY FIVE CENTS (\$3,602.25), less appropriate lawful deductions, representing \$1,442.25 in gross earned, unpaid, due and payable wages and \$2,160 in penalty wages, plus interest at the legal rate on the sum of \$1,442.25 from May 2, 2000, until paid and interest at the legal rate on the sum of \$2,160 from June 2, 2000, until paid.