

In the Matter of
CREATIVE CARPENTERS
CORPORATION
Case No. 18-06
Final Order of Commissioner Dan Gardner
Issued October 5, 2007

SYNOPSIS

Respondent employed Claimant to perform construction work at the agreed rate of \$20 per hour. From January 14 through 25, 2005, Claimant worked 63.5 hours. At the agreed rate of \$20 per hour, Claimant earned \$1,270 and was paid \$800. Respondent was ordered to pay the remaining amount of \$470 in unpaid, due and owing wages. Respondent's failure to pay was willful and he was ordered to pay \$4,800 in penalty wages. Respondent did not owe Claimant overtime wages and was found not liable for civil penalties under ORS 653.055. ORS 652.140; ORS 652.150; ORS 653.055.

The above-entitled case came on regularly for hearing before Linda A. Lohr, 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 August 28, 2007, in the W. W. Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Jeffrey Burgess, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Kurt King ("Claimant") was present throughout the hearing and was not represented by counsel. Creative Carpenters Corporation ("Respondent") failed to appear for hearing through counsel or an authorized representative.

The Agency called as witnesses: Margaret Trotman, BOLI Wage and Hour Division compliance specialist; Jerry Walton, Construction Contractors Board compliance officer; and Claimant.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-5;
- b) Agency exhibits A-1 through A-26 (filed with the Agency's case summary) and A-27 (offered at 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 February 21, 2005, Claimant filed a wage claim with the Agency alleging Respondent had employed him from January 14 through January 25, 2005, and failed to pay all of his wages for hours he worked during that period.

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

3) On July 18, 2005, the Agency issued Order of Determination No. 05-0517. In the Order, the Agency alleged Respondent had employed Claimant during the period January 14 through January 25, 2005, failed to pay him for all hours worked in that period, including overtime hours pursuant to OAR 839-020-0030, and was liable to him for \$1,302.50 in unpaid wages, plus interest. The Agency also alleged Respondent's failure to pay all of Claimant's wages when due was willful and Respondent was liable to him for \$4,800 as penalty wages, plus interest. In addition to the penalty wages, the Agency alleged Respondent paid Claimant less than the wages to which he was entitled under ORS 653.010 to 653.261 and was therefore liable to him for \$4,800 as civil penalties, pursuant to ORS 653.055(1)(b), plus interest. The Order 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. A true copy of the Order of Determination was served on Respondent at 10647 SE Lexington Street, Portland, Oregon, on August 17, 2005.

4) On September 7, 2005, the Agency issued a Notice of Intent to Issue Final Order by Default. In the notice, the Agency observed that Respondent had not filed an answer and request for hearing within the time specified in the Order of Determination. The notice stated that "if [an answer and request for hearing] is not received by September 19, 2005, the Agency will issue a Final Order by Default in this matter."

5) On September 12, 2005, Respondent filed an answer and request for hearing. In its answer, Respondent, through its authorized representative Warren Matti, admitted Claimant performed work for Respondent at the rate of \$20 per hour, denied Claimant was an "employee," and alleged Claimant was an independent contractor acting in his capacity as a licensed and bonded construction contractor.

6) On July 27, 2007, the Agency submitted a request for hearing. On July 30, 2007, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9 a.m. on August 28, 2007. With the Notice of Hearing, the forum included copies of the Order of Determination, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440. The hearing notice was mailed to Respondent and Respondent's registered agent at 10647 SE Lexington Street, Portland, Oregon, the address provided by Respondent in its answer to the Order of Determination. In the hearing notice, Respondent was advised: "If you cannot participate in the scheduled hearing at the time set, you must notify the Hearings Unit IMMEDIATELY and request a postponement." The Hearings Unit did not receive any notification from Respondent's authorized

representative or any other Respondent representative indicating Respondent could not or would not appear at the scheduled hearing.

7) On August 1, 2007, the ALJ ordered the Agency and Respondent each to submit a case summary that included: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and, for the Agency only, a brief statement of the elements of the claim and any wage and penalty calculations. The ALJ ordered the participants to submit their case summaries by August 17, 2007, and notified them of the possible sanctions for failure to comply with the case summary order.

8) On August 1, 2007, the ALJ issued a notice pertaining to fax filings and timelines.

9) On August 15, 2007, the Agency timely filed a case summary. Respondent did not file a case summary.

10) Respondent did not appear at the time and place set for hearing and no one appeared on its behalf or advised the ALJ of any reason for the failure to appear. The ALJ ruled that Respondent was in default, having been properly served with the Notice of Hearing and having failed to appear at the hearing.

11) The ALJ advised the Agency of the issues to be addressed in order to establish a prima facie case for the record.

12) At the start of hearing, the Agency moved to amend the Order of Determination to correct a typographical error. The Agency's motion was granted and the Order was amended to change the date in paragraph III from "March 1, 2004" to "March 1, 2005."

13) The ALJ issued a proposed order on September 10, 2007, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At times material, Respondent was an Oregon corporation conducting business in Oregon as a licensed residential construction contractor. Respondent was licensed with the Construction Contractors Board (“CCB”) as “Exempt (Cannot Have Employees Has No Workers’ Comp Coverage).”

2) In January 2005, Respondent's corporate president Warren Matti hired Claimant to do some carpentry and framing on a residential building site. Although Claimant was a licensed construction contractor at the time, he was experiencing some personal and professional setbacks and needed work. Claimant and Matti had renewed their previous acquaintance through a Christian fellowship program and during one of the meetings Claimant asked Matti for a job. Matti agreed to hire Claimant at the rate of \$20 per hour.

3) Claimant's first day of work was on Friday, January 14, 2005. Claimant's work days began at 8 a.m. and ended at 5 or 5:30 p.m. Matti established Claimant's work hours, including a one hour lunch period each day. Claimant brought some of his framing tools, but Respondent or the general contractor supplied other necessary tools and materials Claimant used on the job. Matti supervised Claimant's work and, on at least one occasion, instructed Claimant on how he wanted the job done. Claimant was hired for an indefinite period and was not performing work for anyone else while working for Respondent.

4) Respondent paid Claimant \$800 after his first full week of work. The pay did not include wages for Claimant's first work day on January 14. After he was paid,

Claimant worked two additional days. Claimant's employment ended on January 25, 2005, following a disagreement with Matti.

5) Claimant's last work day was January 25, 2005. That evening, he gave Matti a time sheet that showed his daily work hours and documented the \$800 he received from Matti as wages. Between January 14 and January 25, 2005, Claimant recorded the following work hours on his time sheet:

Friday, January 14 – 8.5 hours
Monday, January 17 – 8 hours
Tuesday, January 18 – 8 hours
Wednesday, January 19 – 8.25 hours
Thursday, January 20 – 5.75 hours
Friday, January 21 – 8.75 hours
Saturday, January 22 – 4.5 hours
Monday, January 24 – 8.25 hours
Tuesday, January 25 – 3.5 hours

From January 14 through January 25, 2005, Claimant worked 63.5 hours. Claimant earned \$1,270 and was paid \$800. At the time Claimant's employment terminated, Respondent owed him \$470.

6) On January 26, 2005, Claimant filed a complaint with the CCB alleging that Respondent's corporate president Matti had hired and agreed to pay him \$20 per hour, treated him as an employee, and told him that Respondent had workers' compensation coverage. He also alleged that Respondent fired him after a disagreement, refused to respond to his requests for a final paycheck, and after Claimant's threat "to take action" told him to "go ahead and take action." After investigating Claimant's complaint, the CCB found that "[o]n or about January 14, 2005 to January 25, 2005, [Respondent] had an employee while licensed as an exempt contractor," in violation of ORS 701.035(3). Based on its finding, the CCB issued a

notice of intent to assess a \$1,000 civil penalty and suspend Respondent's license. In lieu of a hearing on the notice, Respondent entered into a settlement agreement and admitted that it had an employee while licensed as an exempt contractor during the time specified in the CCB notice of intent. The CCB issued a final order "in the amount of \$1,000 and license suspension of which \$500 and imposition of the license suspension shall be suspended conditioned on the Respondent's completion of the terms of [the] agreement." Respondent agreed "not to perform any work that violates any provision of [ORS chapter 701], within a three-year period from issuance of the Final Order," and "to change CCB license number 120904 from 'exempt' to 'non-exempt.'" Respondent also agreed to pay the remaining \$500 of the civil penalty before April 5, 2005.

7) Claimant filed a wage claim and thereafter, on March 7, 2005, BOLI sent Respondent a Notice of Wage Claim ("Notice") that stated, in pertinent part:

"You are hereby notified that KURT T. KING has filed a wage claim with the Bureau of Labor and Industries alleging:

"Unpaid wages of \$470.00 at the rate of \$20.00 per hour from January 14, 2005 to January 25, 2005.

"IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address."

The Notice was mailed to Creative Carpenters Corporation at 10647 SE Lexington, Portland, Oregon 97266.

8) After reviewing Claimant's time sheet and the calendar documenting his hours worked, BOLI computed Claimant's earnings to include 3.25 overtime hours he accrued from Monday, January 17 through Saturday, January 22, 2005. By letter dated June 3, 2005, Respondent was notified that:

"To resolve this matter now, you must submit payment of \$502.50 to the Bureau's Portland office address no later than June 16, 2005. Alternatively, you must submit the following records to support any position that these wages are not due:

“1. Any and all records and documents including, but not limited to timecards, which show the hours worked each day by claimant by day [sic] from January 14, 2005 through January 25, 2005.

“2. Any and all records documenting wages paid for work performed from January 14, 2005 through January 25, 2005, including, but not limited to pay stubs (itemized deductions), copies of cancelled checks, and signed records of draws taken and any other record of payment.

“3. Any other documentation of information which you feel pertains to this investigation.”

Although Respondent's president subsequently admitted during a telephone interview that he hired Claimant at the \$20 per hour rate, Respondent otherwise did not respond to the June 3 letter and did not provide documents or submit payment for the unpaid wages.

9) Claimant was a credible witness. His testimony was straightforward and unembellished. The forum credited Claimant's testimony in its entirety.

10) Trotman and Walton were credible witnesses.

ULTIMATE FINDINGS OF FACT

1) At times material, Respondent conducted business in Oregon and employed one or more persons in the operation of that business.

2) Respondent employed Claimant from January 14 through January 25, 2005.

3) Respondent agreed to pay Claimant \$20 per hour.

4) Between January 14 and January 25, 2005, Claimant worked 63.5 hours.

5) Claimant's last day of work was January 25, 2005.

6) From January 14 through January 25, 2005, Claimant earned \$1,270.

Respondent paid Claimant \$800 and owes Claimant the remaining amount of \$470 in due and unpaid wages.

7) On Claimant's behalf, BOLI sent Respondent written notice of nonpayment of wages on March 7, 2005, before issuing an Order of Determination on July 18, 2005.

8) Respondent willfully failed to pay Claimant the \$470 in earned, due and payable wages. Respondent has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.

9) Penalty wages for Claimant, computed pursuant to ORS 652.150, equal \$4,800.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and ORS 653.010 to 261.

2) The actions, inaction, statements, and motivations of Warren Matti, Respondent's president, are properly imputed to Respondent.

3) 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.

4) Respondent violated ORS 652.140 by failing to pay Claimant all wages earned and unpaid after Claimant's employment terminated.

5) Respondent is liable for penalty wages under ORS 652.150 for willfully failing to pay all wages or compensation earned and due to Claimant when his employment terminated, as provided in ORS 652.140.

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

OPINION

Respondent failed to appear at hearing and was found in default pursuant to OAR 839-050-0330. Consequently, the Agency was required to establish a prima facie case on the record to support the allegations in the Order of Determination. *In the Matter of MAM Properties, LLC*, 28 BOLI 172, 187 (2007). Unsworn and unsubstantiated assertions contained in Respondent's answer may be considered when making factual findings, but are overcome whenever they are contradicted by credible evidence in the record. *Id.*

WAGE CLAIM

The Agency's prima facie case must include credible evidence showing: 1) Respondent employed Claimant during the period claimed; 2) the pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) Claimant performed work for which he was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. *Id.* at 18.

There is credible evidence showing Claimant performed work for which he was not properly compensated and the amount and extent of the work he performed for Respondent. The evidence was not refuted. Additionally, credible evidence shows and Respondent's answer confirms that Respondent agreed to pay Claimant \$20 per hour for work he performed in January 2005. The only issue is whether Respondent employed Claimant and therefore is liable for the unpaid wages owed to him.

Respondent's unsworn and unsubstantiated contention that Claimant was working as a licensed independent contractor between January 14 and January 25, 2005, is contradicted by Claimant's credible testimony that 1) he was hired at an hourly rate for an indefinite period to perform carpentry and framing work for Respondent; 2) he was told "what to do and when to do it"; and 3) most of the tools and all of the materials Claimant used to perform his job were provided by Respondent. Claimant's

testimony was bolstered by Respondent's admission to BOLI that it agreed to pay Claimant an hourly rate and its admission in a settlement agreement with CCB that “[o]n or about January 14, 2005, to January 25, 2005, [Respondent] had at least one employee.” There is no evidence in the record that supports Respondent's affirmative defense that Claimant was an independent contractor. Consequently, Respondent was an employer during times material herein and is liable for unpaid wages in the amount of \$470.

PENALTY WAGES - ORS 652.150

The forum may award penalty wages when it determines that a respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. A respondent commits an act or omission “willfully” if the respondent acts or fails to act intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

Respondent did not dispute Claimant's pay rate, hours worked, or that Claimant was owed wages. Claimant credibly testified that he presented a time sheet to Respondent's president that indicated Claimant worked 63.5 hours during the wage claim period. The time sheet also shows that Matti acknowledged paying Claimant \$800 for one 40 hour work week. Those facts demonstrate that Respondent voluntarily, intentionally, and as a free agent failed to pay Claimant all of the wages he earned between January 14 and January 25, 2005. Consequently, Respondent is liable to Claimant for penalty wages in the amount of \$4,800 (\$20 x 8 hours per day x 30 days). See ORS 652.150 and OAR 839-001-0470.

CIVIL PENALTIES - ORS 653.055

If an employer pays an employee “less than the wages to which an employee is entitled under ORS 653.010 to 653.261,” the forum may award civil penalties to the employee. ORS 653.055. The Agency alleged Respondent failed to compensate Claimant at one and one half times his regular rate of pay for each hour he worked over 40 hours in a given work week between January 14 and January 25, 2005. The Commissioner’s rules governing overtime requirements were promulgated pursuant to ORS 653.261 and are within the range of wage entitlements encompassed by ORS 653.055.

In this case, for purposes of computing Claimant’s overtime entitlement, there is no evidence that Respondent had an established work week. See OAR 839-020-0030(2)(a)(defining “work week” as “any seven (7) consecutive twenty four (24) hour period as determined by the employer”). Consequently, any overtime Claimant earned during the wage claim period must be computed in accordance with Agency policy which deems that in the absence of a work week determined by the employer, a claimant’s work week begins the first day the claimant commences work during the wage claim period at issue. *In the Matter of Burrito Boy, Inc.*, 16 BOLI 1, 13 (1997). Evidence shows Claimant began working for Respondent on Friday, January 14, 2005. Accordingly, his work week for purposes of computing overtime was Friday through Thursday.ⁱ When computed pursuant to Agency policy, Claimant’s work hours never exceeded 40 in a given work week during the wage claim period.ⁱⁱ As a result, Claimant is not owed overtime wages and Respondent is not liable for civil penalties under ORS 653.055.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, penalty wages, and civil penalties, Respondent **Creative Carpenters**

Corporation is hereby ordered 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:

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Kurt King, in the amount of FIVE THOUSAND TWO HUNDRED SEVENTY DOLLARS (\$5,270), less appropriate lawful deductions, representing \$470 in gross earned, unpaid, due and payable wages, and \$4,800 in penalty wages, plus interest at the legal rate on the sum of \$470 from February 1, 2005, until paid, and interest at the legal rate on the sum of \$4,800 from March 1, 2005, until paid.

ⁱ The Agency erroneously computed Claimant's overtime hours based on a Monday through Sunday work week.

ⁱⁱ See Finding of Fact – The Merits 5.