

In the Matter of

CARL ODOMS dba Island City Auto Body

Case No. 12-06

Final Order of Commissioner Dan Gardner

Issued June 12, 2006

SYNOPSIS

The Agency paid out \$5,579.13 in unpaid wages to four wage claimants in a Wage Security Fund payout and sought reimbursement of that amount from Respondent, plus a \$1,394.78 penalty and \$8400 in penalty wages. The forum ordered Respondent to repay \$5,399.13 to the Wage Security Fund, a twenty-five percent penalty of \$1,349.78, and \$8400 in penalty wages. ORS 652.150; 652.414; OAR 839-001-0510, OAR 839-001-0515.

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 May 2, 2006, at the Senior Center, Dwight Hopkins Memorial Room, 1504 Albany Street, La Grande, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Cynthia L. Domas, case presenter, an employee of the Agency. Respondent Carl Odoms did not appear at the hearing and was held in default.

The Agency called the following witnesses: Jahnae Nelson, Christopher Bashon, and Troy Tucker, wage claimants; and Newell Enos (telephonic), Wage & Hour Division compliance specialist.

The forum received into evidence:

a) Administrative exhibits X-1 through X-10 (submitted or generated prior to hearing); and

b) Agency exhibits A-1 through A-20ⁱ (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 or about January 31, 2005, Claimant Nelson (“Nelson”) filed a wage claim with the Agency alleging that Respondent Carl Odoms had employed her and failed to pay her all earned, due, and owing wages.

2) At the time Nelson filed her wage claim, she assigned to the Commissioner of the Bureau of Labor and Industries, in trust for herself, all wages due from Respondent. On June 6, 2005, Nelson signed BOLI’s “Wage Security Fund” assignment of wages Form WH-10B.

3) In or around May 2005, Claimant Bashon (“Bashon”) filed a wage claim with the Agency alleging that Respondent Carl Odoms and Scott Davis had employed him and failed to pay him all earned, due, and owing wages.

4) At the time Bashon filed his wage claim, he assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent. On June 13, 2005, Bashon signed BOLI’s “Wage Security Fund” assignment of wages Form WH-10B.

5) On June 1, 2005, Claimant Donell Michael (“Michael”) filed a wage claim with the Agency alleging that Respondent Carl Odoms had employed him and failed to pay him all earned, due, and owing wages.

6) On May 27, 2005, Michael assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent by signing and dating BOLI’s “Wage Security Fund” assignment of wages Form WH-10B.

7) On June 2, 2005, Claimant Tucker (“Tucker”) filed a wage claim with the Agency alleging that Respondent Carl Odoms had employed him and failed to pay him all earned, due, and owing wages.

8) On June 1, 2005, Tucker assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent. On May 27, 2005, Tucker signed BOLI’s “Wage Security Fund” assignment of wages Form WH-10B.

9) On July 28, 2005, the Agency issued Order of Determination No. 05-1900 in which it alleged that Claimants were employed by Respondent for different periods of time between December 1, 2004, and May 8, 2005; that Claimants worked straight time and overtime hours for Respondent for which they were not compensated;ⁱⁱ that Respondent owed Claimants a total of \$5,579.13 in unpaid wages; that Respondent willfully failed to pay the wages and owed Claimants \$8,400 in penalty wages, plus interest; that the Bureau had paid Claimants \$5,579.13 from the Wage Security Fund (“WSF”); and that the Commissioner was entitled to recover a penalty of \$1,394.78 (25 percent of the sum paid from the WSF), plus interest.

10) On August 10, 2005, Respondent filed an answer and request for hearing.

11) On January 26, 2006, the Hearings Unit issued a Notice of Hearing to Respondent and the Agency stating the time and place of the hearing as May 2, 2006, at 9 a.m., at the Senior Center, Dwight Hopkins Memorial Room, 1504 Albany Street, La Grande, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled “Summary of Contested Case Rights and Procedures” containing the information required by ORS 183.413, a Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum’s contested case hearings rules, OAR 839-050-000 to 839-050-0440.

12) On February 22, 2006, the Agency filed a motion to amend the Order of Determination by interlineation as follows:

“Pursuant to ORS 652.414 the Bureau has also determined that the Wage Claimants referred to in Exhibit A and incorporated by reference herein, are entitled to and have received payment from the Wage Security Fund (Fund) in the amounts set forth in Exhibit A, the total amount which is \$5,579.13 plus interest as set out in Exhibit A. The Commissioner of the Bureau of Labor and Industries is entitled by ORS 652.414(3) to recover and seeks recovery from the employer amounts paid from the Fund, together with a penalty of 25 percent of the sums paid from the Fund or \$200, whichever is greater. In this matter the penalty amount is \$1,394.78, as set forth in Exhibit C and incorporated by reference herein, along with interest at the legal rate of payment from the dates such amounts were paid from the Fund until the date the penalty amount is paid. The Bureau is not seeking to have the employer pay the wages to the Wage Claimants as the Wage Claimants have been paid from the Fund.”

13) On March 15, 2006, the ALJ granted the Agency’s motion to amend the Order of Determination.

14) When the ALJ commenced the hearing at 9:00 a.m. on May 2, 2006, Respondent had not yet appeared at the hearing and had not contacted the Agency case presenter, the ALJ, or the Hearings Unit to state that he would not be making an appearance. The ALJ waited until 9:30 a.m. to commence the hearing, then declared Respondent in default and commenced the hearing.

15) At hearing, the Agency moved to amend the Order of Determination to allege that Nelson was employed by Respondent from November 15 to December 20, 2004, instead of December 1 to December 17, 2004, as alleged in the original Order of Determination. The ALJ granted the Agency’s motion.

16) The ALJ issued a proposed order on May 25, 2006, 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) Between December 1, 2004, and May 8, 2005, Respondent Carl Odoms owned and operated an auto body shop in Island City, Oregon, under the assumed business name of Island City Auto Body, and engaged the personal services of one or more employees, including Claimants Nelson, Bashon, Tucker, and Michael.

2) Nelson worked for Respondent from November 15 to December 20, 2004 at the agreed rate of \$9.00 per hour. She did filing, computer work, accounts payable and receivable, and answered phones. At Respondent's request, she maintained a contemporaneous record of the hours that she worked. She worked 68.5 straight time hours between December 6 and December 17, 2004, for Respondent, earning \$616.50 in gross wages (68.5 x \$9), and was not paid anything for those hours. She worked another six hours on December 20, 2004, earning another \$54 in gross wages, then voluntarily quit after work that day because she had not been paid and Respondent did not pay her when she asked for her wages.

3) Bashon worked for Respondent from January 5 through April 11, 2005, at the agreed rate of \$9.00 per hour. He washed, prepped, and painted cars. On March 4, 2005, he received an NSF paycheck from Respondent for the work he performed in the second half of February 2005. After that, he maintained a contemporaneous record of his work hours until he left Respondent's employment. Bashon worked 253 straight time hours from February 16 to April 11, 2005, earning \$2277 in gross wages (253 hours x \$9). The only pay he received for that work were two draws of \$100 and \$200, respectively. He quit Respondent's employment on April 11, 2005, because he had not been paid and Respondent did not pay him when he asked for his wages. When he quit, Respondent owed him \$1977 in unpaid, due and owing gross wages.

4) Tucker worked for Respondent from February 1 through May 8, 2005, at the agreed rate of \$9.00 per hour. He sanded, prepped, taped, and did body work on

cars. While working for Respondent, he maintained a contemporaneous record of his work hours that Respondent reviewed and approved. Between April 1 and May 8, 2005, he worked 176.5 straight time hours, earning \$1,768.50 (176.5 x \$9) and 50.75 overtime hours, earning \$685.13 (50.75 hours x \$13.50), for a total of \$2,453.63. The only pay he received for that work was \$680. He quit Respondent's employment on May 8, 2005, because he had not been paid and Respondent did not pay him when he asked for his wages. When he quit, Respondent owed him \$1,777.63 in unpaid, due and owing gross wages.

5) Michael worked for Respondent from April 11 through May 8, 2005, at the agreed rate of \$8.00 per hour. He sanded, prepped, and taped cars and worked with Tucker. Between April 11 and May 8, 2005, he worked 138 straight time hours and 31.5 overtime hours, earning \$1,482 (138 hours x \$8 = \$1,104; 31.5 hours x \$12 = \$378; \$1,104 + \$378 = \$1,482). The only pay he received for that work was \$450. His last day of work was May 8, 2005. When he left Respondent's employment, Respondent owed him \$1,777.63 in unpaid, due and owing gross wages. Respondent did not pay him when he asked for his wages.

6) Respondent was still in business on May 11, 2005, but was evicted from his shop after that and was no longer doing business as of June 2005.

7) Newell Enos, an Agency compliance specialist, investigated the wage claims of Claimants Nelson, Bashon, Tucker, and Michael. Based on his interviews with the Claimants, the time records they provided, his interview with Respondent, and Respondent's failure to provide any time records, Enos determined that Claimants had valid wage claims for the following amounts:

Jahnae Nelson: \$796.50

Christopher Bashon: \$1,977.00

Troy Tucker: \$1,773.63

Donell Michael: \$1,032.00

8) Based on his interview with Respondent, Enos determined that Respondent closed his business in June 2005, that Respondent was in jail in June 2005, and that Respondent lacked sufficient assets to pay the wage claims in a timely matter.

9) As a result of his investigation, Enos recommended that all four Claimants be paid their unpaid, due and owing wages from the WSF.

10) On June 22, 2005, BOLI caused the WSF to issue checks in the amount of \$1,548.83 to Bashon, \$577.86 to Michael, \$663.74 to Nelson, and \$1,591.77 to Tucker, representing gross wages, less statutory deductions. In July 2005, BOLI determined that Tucker had been underpaid by \$50 and, on July 27, 2005, BOLI caused the WSF to issue a second check to Tucker for \$50.

11) 25 percent of \$5,579.13 is \$1,394.78.

12) The actual total of unpaid wages due to the four Claimants was \$5,399.13, and 25 percent of that sum is \$1,349.78.

13) On February 7, 2005, the Agency sent a letter to Respondent stating that Jahnae Nelson had filed a wage claim with BOLI alleging “[U]npaid wages of \$607.50 at the rate of \$9.00 per hour from December 6, 2004 to December 20, 2004” and demanding that Respondent immediately send a check if the claim was correct. Respondent paid no additional wages to Nelson.

14) On May 3, 2005, the Agency sent a letter to Respondent stating that Christopher Bashon had filed a wage claim with BOLI alleging “[U]npaid regular wages of \$2,108.50 and unpaid statutory overtime wages of \$67.50 at the rate of \$9.00 per hour from February 16, 2005 to April 11, 2005 for a total claim of \$2,176.00” and demanding that Respondent immediately send a check if the claim was correct. Respondent paid no additional wages to Bashon.

15) On June 3, 2005, the Agency sent a letter to Respondent stating that Donell Michael and Troy Tucker had filed a wage claims with BOLI alleging “unpaid regular wages of \$584.00 at the rate of \$8.00 per hour and unpaid overtime of \$252.00 at the rate of \$12.00 per hour from April 16, 2005 to May 8, 2005 for a total claim of \$836.00” for Michael and “unpaid regular wages of \$1,195.00 at the rate of \$9.00 per hour and unpaid overtime of \$560.25 at the rate of \$13.50 per hour from April 1, 2005 to May 8, 2005 for a total claim of \$1,755.25” for Tucker. The letter demanded that Respondent immediately send checks if the claims were correct. Respondent paid no additional wages to Michael or Tucker.

16) Pursuant to ORS 652.150, penalty wages are calculated as follows:

Nelson, Bashon, and Tucker: $\$9 \times 8 \text{ hours} = \$72 \times 30 \text{ days} = \$2,160$

Michael: $\$8 \times 8 \text{ hours} = \$64 \times 30 \text{ days} = \$1,920$

17) Claimants Nelson, Bashon, and Tucker, and Agency Compliance Specialist Enos were credible witnesses.

ULTIMATE FINDINGS OF FACT

1) Between November 15, 2004, and May 8, 2005, Respondent Carl Odoms was a person who operated an auto body shop in Island City, Oregon and engaged the personal services of one or more persons, including Claimants Nelson, Bashon, Tucker, and Michael.

2) Nelson worked for Respondent from November 15 to December 20, 2004, at the agreed rate of \$9.00 per hour. She worked 68.5 straight time hours between December 6 and December 17, 2004, for Respondent, earning \$616.50 in gross wages, was not paid anything for those hours. She worked another six hours on December 20, 2004, earning another \$54 in gross wages, and was owed a total of \$670.50 in unpaid wages when she left Respondent’s employment, none of which has been paid by Respondent.

3) Bashon worked for Respondent from January 5 through April 11, 2005, at the agreed rate of \$9.00 per hour. He worked 253 straight time hours from February 16 to April 11, 2005, earning \$2,277 in gross wages, and was only paid \$300 for that work. When he left Respondent's employment, Respondent owed him \$1,977 in unpaid wages, none of which has been paid by Respondent.

4) Tucker worked for Respondent from February 1 through May 8, 2005, at the agreed rate of \$9.00 per hour. Between April 1 and May 8, 2005, he worked 176.5 straight time and 50.75 overtime hours, earning a total of \$2,453.63, and was paid only \$680 for that work. When he left Respondent's employment, Respondent owed him \$1,777.63 in unpaid wages, none of which has been paid by Respondent.

5) Michael worked for Respondent from April 11 through May 8, 2005, at the agreed rate of \$8.00 per hour. In that time, he worked 138 straight time and 31.5 overtime hours, earning a total of \$1,482, and was paid only \$450 for his work. When he left Respondent's employment, Respondent owed him \$1,032 in unpaid wages, none of which has been paid by Respondent.

6) An Agency compliance specialist investigated the wage claims of Nelson, Bashon, Tucker, and Michael and made a determination that all four Claimants had a valid wage claims for the amounts shown in Finding of Fact 7 – The Merits, that Respondent had ceased doing business, and that Respondent lacked sufficient assets to fully and promptly pay the wage claim at the cessation of business.

7) BOLI caused the WSF to issue checks in the amount of \$1,548.83 to Claimant Bashon, \$577.86 to Claimant Michael, \$663.74 to Claimant Nelson, and \$1,591.77 and \$50.00 to Claimant Tucker, representing their gross, unpaid claimed wages, less statutory deductions.

8) The actual total of gross unpaid wages due to the four Claimants was \$5,399.13, and 25 percent of that sum is \$1,349.78.

9) Respondent willfully failed to pay wages to Nelson, Bashon, Tucker, and Michael.

10) On February 7, 2005, the Agency sent a letter to Respondent alleging unpaid wages of \$607.50 to Nelson. On May 3, 2005, the Agency sent a letter to Respondent alleging unpaid wages of \$2,176.00 to Bashon. On June 3, 2005, the Agency sent a letter to Respondent alleging unpaid wages of \$836.00 and \$1,755.25, respectively, to Michael and Tucker. All four letters demanded that Respondent immediately send checks if the claims were correct.

11) On July 28, 2005, the Agency issued Order of Determination No. 05-1900 in which it alleged, among other things, that Nelson, Bashon, Tucker, and Michael were employed by Respondent and were owed unpaid wages in the respective amounts of \$796.50, \$1,977.00, \$1,773.63, and \$1,032. Respondent received this Order.

12) Nelson, Bashon, and Tucker are each owed \$2,160 in penalty wages. Michael is owed \$1,920 in penalty wages.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer subject to the provisions of ORS 653.261 and 652.110 to 652.414, and Nelson, Bashon, Tucker, and Michael were Respondent's employees.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 653.261 and ORS 652.310 to 652.414.

3) Respondent violated ORS 652.140(2) by failing to pay Nelson, Bashon, Tucker, and Michael all wages earned and unpaid not later than five days, excluding Saturdays, Sundays and holidays, after termination of their employment.

4) Respondent's failure to pay Nelson, Bashon, Tucker, and Michael all wages due and owing was willful. Respondent owes Nelson, Bashon, and Tucker \$2,160 each in penalty wages. Respondent owes Michael \$1,920 in penalty wages. ORS 652.150; OAR 839-001-0470.

5) The Agency paid out a total of \$5,579.13 from the WSF to Nelson, Bashon, Tucker, and Michael and is entitled to recoup \$5,399.13, plus a 25 percent penalty of \$1,349.78 from Respondent. ORS 652.414(1), ORS 652.414(3).

6) 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 reimburse the Wage Security Fund, to pay a 25 percent penalty on the amount paid out by the Wage Security Fund, and to pay Claimants their penalty wages, plus interest on all sums until paid. ORS 652.332, ORS 653.256.

OPINION

WAGE SECURITY FUND RECOVERY

In cases involving payouts from the WSF, where (1) there is credible evidence that a determination on the validity of the claim was made; (2) there is credible evidence as to the means by which that determination was made; and (3) the Agency has paid out money from the Fund and seeks to recover that money, there is a rebuttable presumption that the Agency's determination is valid for the sums actually paid out. *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 260 (1999). In this case, the Agency presented credible evidence, through documentary evidence and witness testimony, that established: (1) it made a determination on the validity of the claims of Claimants; (2) it based its determination on the information available at the time; and (3) it paid out money from the WSF and seeks to recover that money. However, the presumption regarding the validity of the amount paid out to Claimant Nelson was rebutted by

Nelson's own testimony. The WSF payout of \$796.50 to Nelson was based on the Agency's allegation that she was not paid for 88.5 hours that she worked from December 1 to December 17, 2004. In contrast, Nelson testified at hearing that her wage claim period covered the 74.5 hours she worked during the period from December 6 to December 20, 2004, earning \$670.50 in gross wages. This amount is further reduced by the \$54 in gross wages Nelson earned on December 20 because the Agency's Order of Determination only sought recovery for wages Nelson earned through "12-17-04."ⁱⁱⁱ

Respondent's liability to the WSF is limited to the amount disbursed that equals the amount Respondent owed Claimants when he left Respondent's employ, as alleged in the Agency's Order of Determination. Consequently, Respondent is liable to the WSF for \$5,399.13 for unpaid wages paid out to Nelson, Bashon, Tucker, and Michael.

WAGE SECURITY FUND PENALTY

Pursuant to ORS 652.414(3), the Commissioner is entitled to recover a 25 percent penalty on the amount paid or \$200, whichever is greater. In this case, \$1,349.78 is greater and Respondent is liable to the Commissioner for that amount.

PENALTY WAGES

An award of penalty wages turns on the issue of willfulness. An employer is liable for penalty wages when it willfully fails to pay any wages or compensation of any employee whose employment ceases. *In the Matter of Procom Services, Inc.*, 24 BOLI 238, 245 (2003). 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).

The Agency proved that all four Claimants worked hours for which they were not paid. All four Claimants asked Respondent to pay them the wages they had earned and Respondent declined to pay them. There was no evidence that Respondent acted other than voluntarily or as a free agent in declining to pay Claimants their unpaid, due and owing wages. More than 12 days have elapsed since written notice of Claimants' wage claim was sent to Respondent by BOLI and received by Respondent, and more than 30 days have elapsed since Claimants' last workday. Penalty wages are therefore assessed for all four Claimants and calculated pursuant to ORS 652.150 -- 8 hours x \$9 per hour x 30 days = \$2,160 (Nelson, Bashon, Tucker), and 8 hours x \$8 per hour x 30 days = \$1,920 (Michael).

ORDER

NOW, THEREFORE, as authorized by ORS 652.150 and 652.414, and as payment of the amounts paid from the Wage Security Fund as a result of his violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Carl Odoms** 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 SIX THOUSAND SEVEN HUNDRED FORTY EIGHT DOLLARS AND NINETY ONE CENTS, representing \$616.50 of the \$796.50 paid to Jahnae Nelson from the Wage Security Fund, \$1,977.00 paid to Christopher Bashon from the Wage Security Fund, \$1,032.00 paid to Donell Michael from the Wage Security Fund, and \$1,773.63 paid to Troy Tucker from the Wage Security Fund, totaling \$5,399.13; and a 25 percent penalty of \$1,349.78 on the sum of \$5,399.13, plus interest at the legal rate on the sum of \$6,698.91 from June 22, 2005, until paid, plus interest at the legal rate on the sum of \$50.00 from July 27, 2005, until paid; and
- (2) A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Jahnae Nelson, in the amount of TWO THOUSAND ONE HUNDRED AND SIXTY DOLLARS (\$2,160), representing \$2,160 in

penalty wages, plus interest at the legal rate on the sum of \$2,160 from February 1, 2005, until paid;

(3) A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Christopher Bashon, in the amount of TWO THOUSAND ONE HUNDRED AND SIXTY DOLLARS (\$2,160), representing \$2,160 in penalty wages, plus interest at the legal rate on the sum of \$2,160 from June 1, 2005, until paid;

(4) A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Troy Tucker, in the amount of TWO THOUSAND ONE HUNDRED AND SIXTY DOLLARS (\$2,160), representing \$2,160 in penalty wages, plus interest at the legal rate on the sum of \$2,160 from July 1, 2005, until paid;

(5) A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Donell Michael, in the amount of ONE THOUSAND NINE HUNDRED AND TWENTY DOLLARS (\$1,920), representing \$1,920 in penalty wages, plus interest at the legal rate on the sum of \$1,920 from July 1, 2005, until paid.

ⁱ Exhibits A-6, A-7, and A-8 all contain two pages. Only page one of each exhibit was offered and received.

ⁱⁱ The Order of Determination alleged Bashon was owed \$1,977 based on 253 straight time hours worked from 2-16-05 to 4-11-05; Michael was owed \$1,032 based on 138 straight time hours and 31.5 overtime hours worked from 4-11-05 to 5-8-05; Nelson was owed \$796.50 based on 88.5 straight time hours worked from 12-1-04 to 12-17-04; and Tucker was owed \$1,773.63 based on 196.5 straight time hours and 50.75 overtime hours worked from 4-1-05 to 5-8-05.

ⁱⁱⁱ In a default case, the amounts stated in the Order of Determination limit the relief the forum can award. *In the Matter of Majestic Construction, Inc.*, 19 BOLI 59, 62 (1999). The forum cannot order Respondent to reimburse the WSF for the wages Claimant Nelson earned on December 20, 2004, because the Agency's Order of Determination did not allege that Nelson was owed any wages on December 20, 2004.