

In the Matter of
ROBERT J. THOMAS
dba More and More Construction

Case No. 11-09

Final Order of Commissioner Brad Avakian

Issued June 4, 2009

SYNOPSIS

The Agency paid out \$2,037.50 in unpaid wages to two wage claimants from the Wage Security Fund and sought reimbursement of that amount from Respondent, plus a twenty-five percent penalty of \$509.38, \$6,000.00 in penalty wages, and a \$3,000.00 civil penalty for one claimant who was not paid overtime wages. The forum ordered Respondent to repay \$2,037.50 to the Wage Security Fund, a twenty-five percent penalty of \$509.38, \$6,000.00 in penalty wages, and a \$3,000.00 civil penalty. ORS 652.150; 652.414, ORS 653.055; ORS 653.261; 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 Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on Tuesday, April 28, 2009, at the offices of the Oregon Employment Dept, located at 119 N. Oakdale Avenue, Medford, OR 97501.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Patrick Plaza, an employee of the Agency. Claimants Travis Englehart and Gary Nunez were present and were not represented by counsel. Respondent did not appear at hearing and was held in default.

The Agency called as witnesses: Claimants Englehart and Nunez; Jess Campbell; and Wage and Hour Division compliance specialist Katy Bayless.

The forum received into evidence:

a) Administrative exhibits X-1 through X-5 (submitted or generated prior to hearing); and

b) Agency exhibits A-1 through A-32 (submitted prior to hearing) and A-33 (submitted at hearing).

Having fully considered the entire record in this matter, I, Brad Avakian, 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 January 15, 2008, Claimant Travis Englehart (“Englehart”) filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him. At the time he filed his wage claim, Englehart assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent.

2) On January 15, 2008, Claimant Gary Nunez (“Nunez”) filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him. At the time he filed his wage claim, Nunez assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent.

3) Claimants filed their wage claims within the statute of limitations.

4) On April 23, 2008, the Agency issued Order of Determination No. 08-1203 based upon the wage claims filed by Claimants Englehart and Nunez. The Order of Determination alleged:

(a) Claimant Englehart was employed in Oregon by Respondent from November 29 to December 12, 2007; that he was entitled to the agreed pay rate of \$12.50 per hour; that he performed work, labor, and services; that he was paid nothing for 80 hours regular work and 2 hours of

overtime work, for which he earned \$18.75 per hour; and that he is owed \$1,037.50 in unpaid wages, plus interest.

(b) Claimant Nunez was employed in Oregon by Respondent from December 3 to December 17, 2007; that he was entitled to the agreed pay rate of \$12.50 per hour; that he performed work, labor, and services; that he was paid nothing for 80 hours regular work; and that he is owed \$1,000.00 in unpaid wages, plus interest.

(c) Respondent willfully failed to pay those wages, more than 30 days had elapsed since the wages became due and owing, and Respondent owes Claimants each \$3,000.00 in penalty wages, plus interest.

(d) Respondent paid Englehart less than the wages to which he was entitled under ORS 653.010 to 653.261 and is liable to Englehart for civil penalties, pursuant to the provisions of ORS 653.055(1)(b), in the amount of \$3,000.00, plus interest.

(e) BOLI has paid Englehart and Nunez \$2,037.50 from the Wage Security Fund ("WSF") and is entitled to recover from Respondent that amount as wages paid from the WSF, plus a penalty of 25% of the sum paid from the WSF, equaling \$509.38, plus interest.

The Order of Determination 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 June 16, 2008, Respondent filed an answer and request for hearing in which he denied he owed any wages to Claimants and stated that "I Robert Thomas am the or [sic] was the owner of More and More Construction." Respondent also alleged that Claimants had been fired on November 14, 2007, and that Claimants were "stepson and son-in-law to Jess Campbell who took \$196,270.00 plus stole all my tools and put me into bankruptcy."

6) On November 14, 2008, the Agency filed a "BOLI Request for Hearing" with the forum.

7) On November 17, 2008, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimants stating the time and place of the hearing as April 28, 2009, at the office of the Oregon Employment Dept, 119 N. Oakdale Avenue, Medford, 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 document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445.

8) At the time set for hearing, Respondent had not appeared and had not previously announced that he would not appear. Pursuant to OAR 839-050-0330(2), the ALJ waited 30 minutes before commencing the hearing. When Respondent did not appear or contact the hearings unit by telephone during that time, the ALJ declared Respondent in default at 9:30 a.m. and commenced the hearing.

9) At the outset of the hearing, the ALJ explained the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing.

10) The ALJ issued a proposed order on May 19, 2009, 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, Robert J. Thomas ("Respondent") was an employer in the state of Oregon doing business under the assumed business name of More & More Construction and a contractor licensed with the Oregon Construction Contractor's Board.

2) Respondent hired Claimants Englehart and Nunez in July 2007 to work on houses that Respondent was building. Nunez was hired to do roofing and labor. Englehart was hired to do carpentry work. Respondent agreed to pay Claimants \$12.50 per hour and \$18.75 hour for any overtime work.

3) Claimants were not asked to fill out an employment application, but filled out W-4 forms for Respondent around the time they were first hired.

4) Claimants were supervised by Jess Campbell. Campbell is Englehart's stepfather and Campbell's daughter is Nunez's girlfriend. Campbell went to work for Thomas as a supervisor, with the promise that he could become a partner.

5) While working for Respondent, Claimants regularly worked Monday through Friday. They filled out weekly timecards showing the hours they worked and turned them into Respondent each Wednesday after work. For the first few months of their employment, Respondent paid them every Friday by check, including a pay stub that showed statutory deductions.

6) As their employment continued, Respondent began to pay Claimants one or more days late and paying them in cash or by personal check. On these occasions, Respondent did not give Claimants pay stubs.

7) In November and December 2007, Claimants worked on a \$700,000 "spec" house in Shady Cove, Oregon that was located on property adjacent to home in which Respondent and his wife lived.

8) Between November 29 and December 12, 2007, Englehart worked the following dates and hours for Respondent:

November 29: 8 hours

November 30: 8 hours

December 3-7: 8 hours each day (total = 40 hours)

December 8: 2 hours

December 10-12: 8 hours each day (total = 24 hours)

In all, Englehart worked 82 hours, including two hours of overtime on December 8, a Saturday, in his last two weeks of work. Englehart's last day of work for Respondent was December 12. Respondent discharged Englehart.

9) Respondent did not pay Englehart for any of the 82 hours he worked between November 29 and December 12, 2007.

10) Between December 3 and December 14, 2007, Nunez worked the following dates and hours for Respondent:

December 3-7: 8 hours each day (total = 40 hours)

December 10-14: 8 hours each day (total = 40 hours)

In all, Nunez worked 80 hours in his last two weeks of work. Nunez's last day of work for Respondent was December 14. Respondent discharged Nunez.

11) Respondent did not pay Nunez for any of the 80 hours he worked between December 3 and December 14, 2007.

12) When Englehart and Nunez were not paid after their first week of work in December, Nunez visited Respondent's wife at Respondent's house to ask about pay. At the time, Respondent was working with another crew on a house in Eugene. Respondent's wife told him that they should finish the house and that Respondent would be back.

13) On January 28, 2008, the Agency sent a Notice of Wage Claim to Respondent at his address on file with the Corporations Division. The letter stated that Claimants had filed wage claims alleging they were owed unpaid wages in the respective amounts of \$1,037.50 (Englehart) and \$600.00 (Nunez).

14) On February 11, 2008, the Agency received a written response from Respondent in which he stated, among other things, that both Claimants started work for him on "7-5-07," that they were "discharged due to lack of work," that Respondent's workweek was Monday to Friday, and that he agreed to pay Claimants \$12.50 per hour and \$18.75 per hour for overtime.

15) Katy Bayless, an Agency compliance specialist, investigated Claimants' wage claims. Based on her interviews with Claimants, the time records they provided, Respondent's failure to provide any time records, and Respondent's admissions that he employed Claimants and agreed to pay them \$12.50 per hour, Bayless made a

determination that Englehart was owed \$1,037.50 in unpaid, due and owing wages (80 hours x \$12.50/hour = \$1,000; 2 hours x \$18.75 = \$37.50; \$1,000.00 + \$37.50 = \$1,037.50) and that Nunez was owed \$1,000.00 in unpaid, due and owing wages (80 hours x \$12.50/hour = \$1,000.00).

16) On April 1, 2008, Bayless interviewed Campbell, who verified that he had supervised Claimants, that they had worked for Respondent in December, and that they were never paid for that work. Campbell also told her that Respondent had gone out of business and had his license suspended, and that he had no knowledge of anyone else taking over Respondent's business.

17) After talking with Campbell on April 1, Bayless determined that Claimants were eligible for payment of their wages from the Wage Security Fund ("WSF"). That same day, she mailed a letter to Respondent that stated:

"NOTICE OF WAGE CLAIMS

"GARY S NUNEZ, ET AL have filed claims for wages with the Bureau of Labor and Industries, and assignments thereof have been made to the Commissioner of the Bureau of Labor and Industries for the purpose of collection, as provided by law. The details of the claims are as follows:

"SEE ATTACHED

"Available information indicates that your business operations have ceased and that you may have insufficient assets to pay these claims. For this reason, the Bureau is considering paying the claims from the Wage Security Fund. The Wage Security Fund provides for the payment of wage claims when the employer ceases business and has no assets.

"So that we can determine whether GARY S NUNEZ, ET AL are eligible to receive payments from the Wage Security Fund, your assistance is requested. Please complete the Employer's Questionnaire enclosed and return it to our office by April 14, 2008.

"If the Bureau determines that an employee is eligible for payment from the Wage Security Fund and does in fact make a payment to the employee from the Fund, the law allows the Bureau to perfect a security interest in the personal property of the employer. The law also allows the Bureau to recover any such amounts from employers as well as a penalty, attorney fees, costs and disbursements.

22) ORS 653.055 civil penalties for Englehart based on Respondent's failure to pay two hours of overtime, calculated pursuant to ORS 652.150, equal \$3,000.00 (\$12.50 per hour x 8 hours x 30 days = \$3,000.00).

23) As of the date of hearing, Respondent had not paid Claimants any of the \$2,037.50 in gross wages due and owing to them or repaid the WSF.

24) Bayless, Englehart, Nunez, and Campbell were credible witnesses.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent was an employer in the state of Oregon doing business under the assumed business name of More & More Construction and engaged the personal service of one or more employees.

2) Respondent employed Claimants Englehart and Nunez in July 2007 to work on houses that Respondent was building. Respondent agreed to pay them \$12.50 per hour, plus overtime. Respondent's regular workweek began on Monday.

3) Between November 29 and December 12, 2007, Englehart worked 82 hours for Respondent, including two hours of overtime, earning \$1,037.50 in gross wages. As of the date of hearing, Respondent had not paid Englehart any of these wages.

4) Between December 3 and December 14, 2007, Nunez worked 80 straight time hours for Respondent, earning \$1,000.00 in gross wages. As of the date of hearing, Respondent had not paid Nunez any of these wages.

5) On January 28, 2008, and again on April 1, 2008, the Agency sent letters to Respondent notifying him that Englehart and Nunez had filed wage claims and demanding payment of \$1,037.50 in gross, unpaid wages for Englehart and \$1,000.00 in gross, unpaid wages for Nunez.

6) The Agency investigated Englehart's and Nunez's wage claims and made a determination that they were owed \$1,037.50 and \$1,000.00, respectively, in unpaid,

due and owing wages for work performed within 60 days of their last day of work. The Agency further determined that Respondent lacked sufficient assets to pay the wage claims and that the wage claims could not otherwise be fully and promptly paid.

7) On May 1, 2008, BOLI issued checks to Englehart and Nunez for gross wages of \$1,037.50 and \$1,000.00, respectively, less statutory deductions.

8) Respondent willfully failed to pay wages to Englehart and Nunez and more than 30 days have expired since their wages were due. Penalty wages, computed in accordance with ORS 652.150, equal \$3,000.00 each (\$12.50 per hour x 8 hours x 30 days = \$3,000.00)

9) ORS 653.055 civil penalties for Englehart based on Respondent's failure to pay two hours of overtime, calculated pursuant to ORS 652.150, equal \$3,000.00 (\$12.50 per hour x 8 hours x 30 days = \$3,000.00).

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 Englehart and Nunez 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(1) by failing to pay Englehart and Nelson all wages earned and unpaid not later than the end of the first business day after their discharge.

4) Respondent's failure to pay Englehart and Nunez all wages due and owing was willful. Respondent owes Englehart and Nunez \$3,000 each in penalty wages. ORS 652.150; OAR 839-001-0470.

5) Under ORS 653.055, Respondent is liable for a civil penalty to Englehart in the amount of \$3,000.00 for failing to pay Englehart overtime wages to which he was entitled pursuant to ORS 653.261 and OAR 839-020-0030. ORS 653.055(1)(b).

6) The Agency paid out a total of \$2,037.50 from the WSF to Englehart and Nunez and is entitled to recoup \$2,037.50, plus a 25 percent penalty of \$509.38 from Respondent. ORS 652.414(1), ORS 652.414(3).

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 reimburse the Wage Security Fund, to pay a 25 percent penalty on the amount paid out by the Wage Security Fund, to pay Claimants Englehart and Nunez their penalty wages, and to pay Claimant Englehart a civil penalty, 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, when (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 established that rebuttable presumption through credible evidence documentary evidence and witness testimony showing:

(1) It determined that the Claimants' wage claims were valid for \$2,037.50 in wages earned within 60 days before the last day Claimants were employed, that Respondent had ceased doing business, and that Claimants' wage claims could not otherwise be fully and promptly paid;

(2) It based its determination on an investigation that included interviews of all material witnesses and an inspection of available, relevant documents; and

(3) It paid out \$2,037.50 from the WSF, an amount equal to Claimants' unpaid, due, and owing wages, and seeks to recover that money.

No evidence was presented to rebut this presumption, and the forum concludes that Respondent is liable to repay the WSF the \$2,037.50 paid out to Claimants.

WAGE SECURITY FUND PENALTY

Pursuant to ORS 652.414(3), the Commissioner is entitled to recover a 25 percent penalty on \$2,037.50, the amount of wages paid out, or \$200, whichever is greater. In this case, a 25 percent penalty of \$509.38 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 both Claimants were not paid for the hours they worked during their last two weeks of employment. During those hours of work, Nunez was the lead roofer and Englehart performed carpentry on a \$700,000 "spec" house located on a lot adjacent to Respondent's own home. At that time, Respondent was working with another crew on a house in Eugene. After the first week, Nunez went to Respondent's home and asked Respondent's wife about pay. She told him to finish the house and that Respondent would be back. Claimants then continued to work on the house before

they were discharged. The forum infers from these facts that Respondent knew Claimants were working during the wage claim period. Although Respondent knew Claimants were working, Respondent paid them nothing at all for two weeks of work. There was no evidence that, in failing to pay Claimants, Respondent acted other than voluntarily or as a free agent. Consequently, the forum concludes that Respondent's failure to pay Claimants their unpaid, due and owing wages was willful.

The forum notes that an employer's financial inability to pay wages at the time they accrue is an affirmative defense to liability for penalty wages. However, Respondent waived this defense by failing to plead it in his answer and request for hearing. OAR 839-050-0130(2); *In the Matter of Captain Hooks, LLP*, 27 BOLI 211, 223 (2006). Penalty wages are therefore assessed for both Claimants and calculated pursuant to ORS 652.150 (8 hours x \$12.50 per hour x 30 days = \$3,000.00).

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(1). The Agency alleged Respondent failed to pay Englehart overtime for the two hours of overtime he worked on December 8. 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(1). See OAR 839-020-0030(1). The Agency proved that Englehart worked those two hours of overtime, and that Respondent paid him nothing, not even straight time, for those two hours of work. Respondent is therefore liable to Claimant for \$3,000.00 in civil penalties as provided in ORS 652.150 (\$12.50 x 8 hours per day x 30 days = \$3,000.00). ORS 653.055(1)(b).

ORDER

NOW, THEREFORE, as authorized by ORS 652.150, 652.414, and ORS 653.055, 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 **Robert J. Thomas** 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 FIVE HUNDRED FORTY-SIX DOLLARS AND EIGHTY-EIGHT CENTS (\$2,546.88), representing \$1,037.50 paid to Travis Englehart from the Wage Security Fund, \$1,000.00 paid to Gary Nunez from the Wage Security Fund, and a 25 percent penalty of \$509.38 on the sum of \$2,037.50, plus interest at the legal rate on the sum of \$2,546.88 from February 1, 2008, until paid; and

(2) A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Travis Englehart, in the amount of SIX THOUSAND DOLLARS (\$6,000.00), representing \$3,000.00 in penalty wages and a \$3,000.00 civil penalty, plus interest at the legal rate on the sum of \$6,000.00 from February 1, 2008, until paid; and

(3) A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Gary Nunez, in the amount of THREE THOUSAND DOLLARS (\$3,000.00), representing \$3,000.00 in penalty wages, plus interest at the legal rate on the sum of \$3,000.00 from February 1, 2008, until paid.

ⁱ The check to the Oregon Department of Justice was a garnishment for a child support payment.