

Oregon  
State  
Bar

CLE  
Seminars

# The Pitfalls of Employee Classification: Is That Independent Contractor Really an Employee?



*Cosponsored by the  
Labor & Employment Section*

**Wednesday, July 18, 2018  
Noon–1:15 p.m.**

**1.25 General CLE credits**

**THE PITFALLS OF EMPLOYEE CLASSIFICATION: IS THAT  
INDEPENDENT CONTRACTOR REALLY AN EMPLOYEE?**

**OREGON STATE BAR LABOR & EMPLOYMENT SECTION EXECUTIVE COMMITTEE**

Aruna A. Masih, Chair  
Clarence M. Belnavis, Chair-Elect  
Lisa A. Amato, Past Chair  
Stephen L. Brischetto, Treasurer  
Kyle T. Abraham, Secretary  
J. Ashlee Albies  
Janine C. Blatt  
Amanda T. Gamblin  
Shirin Amir Khosravi  
Jose A. Klein  
Sally Ann LaJoie  
Haley Rosenthal  
Shelley D. Russell  
Elizabeth A. Semler  
Jennifer Sung  
Dennis E. Westlind  
Scott N. Hunt, Advisory Member

The materials and forms in this manual are published by the Oregon State Bar exclusively for the use of attorneys. Neither the Oregon State Bar nor the contributors make either express or implied warranties in regard to the use of the materials and/or forms. Each attorney must depend on his or her own knowledge of the law and expertise in the use or modification of these materials.

Copyright © 2018

OREGON STATE BAR  
16037 SW Upper Boones Ferry Road  
P.O. Box 231935  
Tigard, OR 97281-1935

TABLE OF CONTENTS

Schedule . . . . . v

Faculty . . . . . v

Presentation Slides. . . . . 1

Advisory Opinion of the Commissioner of the Bureau of Labor and Industries Regarding the  
Employment Status of Uber Drivers. . . . . 7

*In the Matter of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263 (2014)* . . . . .11

*In the Matter of Susan C. Steves, 32 BOLI 43 (2012)* . . . . .23

*In the Matter of Mark A. Frizzell, 31 BOLI 178 (2011)* . . . . .37

*In the Matter of Horizon Technologies, LLC, 31 BOLI 229 (2011)* . . . . .69



## SCHEDULE

### 11:30 Registration

### Noon The Pitfalls of Employee Classification: Is That Independent Contractor Really an Employee?

- ◆ A Bureau of Labor and Industries administrative law judge and two attorneys share the employee and employer perspectives
- ◆ Review recent and notable cases and agency opinions that explain the multi-factored “economic realities” test
- ◆ Considerations for building or defending a misclassification case or how to set up a legal working relationship from the start

Kari Furnanz, *Bureau of Labor & Industries, Portland*

Damien Munsinger, *Klein Munsinger LLC, Portland*

Corinna Spencer-Scheurich, *Northwest Workers’ Justice Project, Portland*

### 1:15 Adjourn

## FACULTY

**Kari Furnanz**, *Bureau of Labor & Industries, Portland*. Ms. Furnanz is an administrative law judge for BOLI’s Administrative Prosecution Unit.

**Damien Munsinger**, *Klein Munsinger LLC, Portland*. Mr. Munsinger has represented and advised individuals, universities, small and large companies, and public entities on a wide range of issues including employment discrimination, wrongful termination, disability, and Title IX compliance, adjudication, and litigation. He is a member of the Northwest Association of Title IX Administrators; the Oregon Women Lawyers Queen’s Bench Special Events Subcommittee; the Oregon Asian Pacific American Bar Association; the Oregon State Bar Legal Heritage Committee, Labor and Employment Section, Litigation Section, and Sustainable Futures Section; the Federal Bar Association, and the American Bar Association. He regularly speaks on a wide range of employment-related topics and has taught at the Lewis & Clark Graduate School of Education and Counseling and at Willamette University College of Law.

**Corinna Spencer-Scheurich**, *Northwest Workers’ Justice Project, Portland*. Ms. Spencer-Scheurich is the Deputy Director of the Northwest Workers’ Justice Project (NWJP). For the last six years, she has litigated in both state and federal court exclusively on behalf of low-wage workers in Oregon. Before joining NWJP, Ms. Spencer-Scheurich was the South Texas Regional Director of the Texas Civil Rights Project, where she practiced employment, disability, and civil rights law on behalf of low-income families living on the Texas-Mexico border.



# ***THE PITFALLS OF EMPLOYEE CLASSIFICATION:***

## ***IS THAT INDEPENDENT CONTRACTOR REALLY AN EMPLOYEE?***

***OREGON STATE BAR  
LABOR AND EMPLOYMENT SECTION  
JULY 18, 2018***

## ***PRESENTED BY:***

***KARI FURNANZ  
OREGON BUREAU OF LABOR & INDUSTRIES***

***CORINNA SPENCER-SCHEURICH,  
NW WORKERS JUSTICE PROJECT***

***DAMIEN MUNSINGER  
KLEIN MUNSINGER LLC***

# ***INDEPENDENT CONTRACTORS***

## **Economic realities test**

- Oregon wage and hour.

## **Right to control test**

- Oregon civil rights, employment.

## **ORS 670.600**

- Department of Revenue, Employment Department, Construction Contractors Board, and Landscape Construction Board.

# ***ECONOMIC REALITIES TEST***

## ***WAGE & HOUR***

- 1. The extent to which the work performed by the worker is an integral part of the alleged employer's business.**
- 2. The degree of control exercised by the alleged employer.**
- 3. The permanency of the relationship.**

## ***ECONOMIC REALITIES TEST***

### ***WAGE & HOUR***

4. The skill and initiative required to perform the work.
5. The degree to which the worker's opportunity for profit and loss is determined by the alleged employer.
6. The extent of the relative investments of the worker and alleged employer.

## ***ECONOMIC REALITIES TEST***

### ***REMEMBER...***

- No single factor is determinative.
- Labels don't mean anything.
- Totality of the circumstances.

## ***RIGHT TO CONTROL TEST***

### ***CIVIL RIGHTS***

1. Direct evidence of the right to control, or the exercise of control.
2. Method of payment.
3. Furnishing of equipment.
4. Right to fire.

## ***ORS 670.600***

### ***CERTAIN STATE AGENCIES***

- Department of Revenue, Employment Department, Construction Contractors Board, and Landscape Construction Board.
- All statutory elements must be satisfied.

# ***THE PITFALLS OF EMPLOYEE CLASSIFICATION:***

***IS THAT INDEPENDENT  
CONTRACTOR REALLY AN  
EMPLOYEE?***

***THANK YOU!  
QUESTIONS?***





## **BUREAU OF LABOR AND INDUSTRIES**

### **ADVISORY OPINION OF THE COMMISSIONER OF THE BUREAU OF LABOR AND INDUSTRIES OF THE STATE OF OREGON**

Regarding:

October 14, 2015

**THE EMPLOYMENT STATUS OF  
UBER DRIVERS**

---

### **ADVISORY OPINION**

#### **Introduction**

In recent months, BOLI has received requests for guidance on the employment status of Uber drivers. To date, no case relevant to this question has been filed with BOLI. Any such case would be decided on the specific facts and legal arguments presented. Although the analysis would not be binding in that proceeding, we intend this Advisory Opinion to be instructive to all interested parties—most notably Uber, its drivers and other transportation network companies—on what conclusions can be drawn from current, available information.

Under existing labor laws, the rights of workers are dependent upon their proper classification as employees. Employees are afforded workplace protections such as receiving at least minimum wage for all hours worked (unless exempt), timely payment of wages, safe working conditions, remedies for discriminatory practices and, unemployment and workers' compensation benefits. Independent contractors, although they may have greater independence and flexibility than employees, are entitled only to compensation and other advantages as provided by agreement.

In Oregon and many other states, workers are increasingly performing work in circumstances that appear to be outside of traditional employment arrangements. This trend has raised concerns that employees are being improperly classified as independent contractors, volunteers or interns. When an employer misclassifies a worker, it is not only the worker who is adversely affected. The employer also skirts its responsibility to pay employer taxes, creating an uneven playing field for employers who do follow the rules.

Recent administrative and court cases in California address the employment status of Uber drivers. In addition, a recent opinion from the United States Department of Labor (Administrative Interpretation No. 2015-1, July 15, 2015) analyzes the misclassification of workers generally. These are instructive to this Advisory Opinion.

## Analysis

Like federal law, Oregon's wage and hour regulations broadly define "employ" as "to suffer or permit to work." ORS 653.010(2). A business "suffers or permits" a person to work if, as a matter of economic reality, the person is dependent on the business. When determining whether a person has performed work as an employee, BOLI applies the "economic realities" test used by courts to determine employee status under the federal Fair Labor Standards Act. *See, Cejas Commercial Interiors, Inc. vs. Torres-Lizama*, 260 Or App 87 (2013). The economic realities test considers the degree to which a worker is economically dependent upon the employer. Workers who are economically dependent are suffered or permitted to work and, therefore, are classified as employees. Independent contractors, in comparison, are workers who exercise economic independence in the operation of their own businesses.

The economic realities test is comprised of the following factors:

1. **The degree of control exercised by the alleged employer;**
2. **The extent of the relative investments of the worker and the alleged employer;**
3. **The degree to which the worker's opportunity for profit and loss is determined by the alleged employer;**
4. **The skill and initiative required in performing the job;**
5. **The permanency of the relationship; and,**
6. **The extent to which the work performed by the worker is an integral part of the alleged employer's business.**

No factor by itself is decisive and not all must be met to determine employment. Rather, we consider the factors in their totality and in relation to one another to determine whether a worker is economically dependent on the alleged employer.

The facts examined here are taken from the California administrative and court cases. Uber's practices in Oregon are substantially the same as those in California. When applying the economic realities test to the relationship between Uber and its drivers, we draw the following conclusions:

1. **Degree of control**

The employer's control is considered in light of the ultimate determination whether the worker is economically dependent on the employer or, performing work under their own business. To be working under their own business, the worker must control such a meaningful part of the business that it stands as a separate economic entity.

While Uber drivers use their own vehicle and may accept or reject ride requests, effectively setting their own work schedules, Uber exercises a significant degree of control over the driver's actual work. Uber unilaterally dictates the fare to be charged, a percentage of which is paid to the driver. Uber monitors the performance of drivers and may discipline or terminate those who do not perform to Uber's standards. Uber may restrict a driver's access to its smartphone application if the driver fails to

complete a requisite number of trips within a defined period. Uber instructs drivers as to their conduct, personal appearance and methods for carrying out services. Uber prescribes qualifications for its drivers, selects them through a screening process that includes a background, motor vehicle records check, and vehicle inspection.

These facts do not show such worker control that the worker could be considered a separate economic entity from Uber. Rather, they show a much greater degree of control by Uber. This indicates an employment relationship.

## 2. **Relative investments**

The nature and extent of the relative investments from the employer and the worker help determine whether the worker has an independent business. An independent contractor usually makes investments that support the business beyond any one particular job. Investments may enable the business to expand, change its costs or otherwise change the manner and extent of how it provides goods or services. If the worker's investment is relatively minor compared to the employer's, then the worker may be economically dependent on the employer.

An Uber driver's investment is largely restricted to the use of a personal vehicle. This includes fuel, maintenance and insurance costs. Sometimes, driver investment includes a deposit for the iPhone Uber provides for access to its application. Uber provides, however, the entire apparatus that makes the service possible. This includes, but is not limited to, the software application itself, marketing, finance and accounting systems, and management of operations. The driver's investment is negligible compared to that of Uber's multi-billion dollar infrastructure. This indicates an employment relationship.

## 3. **Worker's profit and loss**

A worker with their own business may experience either a profit or loss, often dependent upon their managerial skills to administer the business. An employee's ability to earn more is dependent upon their ability to work and the employer making work hours available, not the managerial skills of the worker.

An Uber driver does not exercise managerial functions that affect the opportunity for profit or loss. Uber sets the fare without input from drivers. The driver's ability to earn additional income is related only to the number of rides they provide through Uber. In fact, Uber prohibits workers from answering rider questions about booking future rides outside the Uber application or in any other way soliciting future rides from Uber riders. All these factors indicate an employment relationship.

## 4. **Skill and initiative**

A worker's business skills, judgment and initiative, rather than their technical skills, indicate whether they are economically independent from the business. If the work requires technical skills but is not reliant on such business skills to perform the work, then the worker is likely an employee.

Drivers do not exercise managerial and business like skills or initiative that would indicate they are operating independent businesses. Rather, they are dependent entirely upon Uber's application in order to perform any work. This indicates an employment relationship.

5. **Permanency of the relationship**

Employees are generally hired on a permanent or indefinite basis. Independent contractors generally work project to project.

Uber does not engage drivers to perform services for a fixed period of time, project or contract basis. As long as the drivers satisfy Uber's standards they may work indefinitely. The relationship may, therefore, be expected to last for a long period of time. This indicates an employment relationship.

6. **Work as an integral part of business**

If a worker performs services integral to the business, it is likely the worker is an employee. Courts have found this factor particularly compelling. Work can be integral even if it is just one component of the business. Work can also be integral if it involves the same tasks performed by thousands of other workers providing work for the business.

Uber provides transportation services to its customers, services it cannot provide without its drivers. As such, the driver's work is not only integral but, a necessary part of Uber's business. This indicates an employment relationship.

These six factors from the economic realities test illustrate how Uber drivers are not operating their own separate businesses with the degree of autonomy one expects with an independent contractor. To the contrary, the rigorous hiring process, the highly controlled directions as to how work is to be performed and at what price, the expectation of long term employment, the insignificant investment of the driver when compared to the massive infrastructure provided by Uber and the integral nature of the driver's work to the business are all characteristic of an employment relationship.

It should be noted that Oregon's minimum wage laws exempt "taxicab operators." The term "taxicab operator" is based on a traditional and older model describing the delivery of transportation services and may not apply to Uber drivers. Even if the exemption did apply, however, Uber drivers would still be covered by other important workplace protections such as the right to be paid in full and on time and, the right to work free from discrimination and harassment.

**Conclusion**

Uber suffers or permits drivers to work for the company's benefit. Further, drivers are economically dependent on Uber pursuant to the "economic realities" test. Under Oregon law, and relative to the factors discussed in this opinion, Uber drivers are employees.



Brad Avakian, Commissioner

Oregon Bureau of Labor and Industries

## 33 BOLI ORDERS

---

**In the Matter of  
C.S.R.T., LLC, and ROBERT P. SABO  
Case No. 38-14  
Final Order of Commissioner Brad Avakian  
Issued August 28, 2014**

---

### SYNOPSIS

Respondent C.S.R.T., LLC (“CSRT”) employed Claimant from November 15, 2012, through May 15, 2013, at the agreed rate of \$20 per hour. Claimant earned a total of \$10,400.00 and was paid nothing for her work. Respondents CSRT and Robert P. Sabo were ordered to pay Claimant \$10,400.00 in unpaid, due and owing wages. CSRT and Sabo, as a successor in interest to CSRT, willfully failed to pay these wages and were ordered to pay Claimant \$4,800.00 in ORS 652.150 penalty wages.

---

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 June 4, 2014, in the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries (“BOLI” or “the Agency”) was represented by administrative prosecutor Adriana Ortega, an employee of the Agency. Wage claimant Cristina Cortez (“Claimant”) was present throughout the hearing and was not represented by counsel. No one appeared at the hearing on behalf of Respondents CSRT or Robert Sabo (“Sabo”) and CSRT was held in default.

The Agency called the following witnesses: Claimant; BOLI Wage and Hour Compliance Specialist Margaret Pargeter; Jennifer Doyle and Charles Montgomery, Claimant’s coworkers; and Elizabeth Cox, CSRT’s bookkeeper.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-9; and
- b) Agency exhibits A-1 through A-47.

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following

## 33 BOLI ORDERS

Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact,<sup>1</sup> Conclusions of Law, Opinion, and Order.

### FINDINGS OF FACT – PROCEDURAL

1) On May 28, 2013, Claimant filled out and signed a wage claim and assignment of wages with the Agency. Claimant actually filed her wage claim and assignment of wages on June 6 or June 20, 2013.<sup>2</sup> On her wage claim form, she wrote “6051 SE Malden Street, Portland 97206” as Respondent’s address. (Testimony of Claimant, Ex. A1)

2) On October 15, 2013, the Agency issued Order of Determination (“OOD”) No. 13-1116 based on the wage claim filed by Claimant and the Agency’s investigation. The OOD was personally served on Robert Sabo, CSRT’s registered agent, at 6051 SE Malden St., Portland, Oregon. In pertinent part, the OOD alleged that:

- Claimant was employed by and performed work for CSRT from November 15, 2012, through May 15, 2013, at the agreed rate of \$1,500.00 per month.
- Claimant earned a total of \$9,000.00 and was paid nothing for her work and is owed \$9,000.00 in unpaid, due and owing wages.
- CSRT willfully failed to pay these wages and owes Claimant \$4,154.40 in ORS 652.150 penalty wages.

(Ex. X1)

3) On December 16, 2013, Robert Sabo filed an answer and request for hearing on behalf of CSRT in which he identified himself as CSRT’s “CEO” and authorized representative. The answer and request for hearing was printed on CSRT’s letterhead, with an address of “PO Box 86350, Portland, OR 97286.” Sabo denied that any wages or penalty wages were owed “because CSRT LLC has no employees.” (Ex. X1)

4) On April 9, 2014, BOLI’s Contested Case Coordinator issued a Notice of Hearing to CSRT, the Agency, and Claimant setting the time and place of hearing for 9:30 a.m. on May 20, 2014, at BOLI’s Portland office. Together with the Notice of Hearing, the forum sent a copy of the OOD, 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 839-050-0000 to 839-050-0445. (Ex. X2)

5) On April 7, 2014, the Agency issued an Amended OOD that added the following allegations to its original OOD.

---

<sup>1</sup> The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the Findings of Fact – The Merits.

<sup>2</sup> The Agency date-stamped Claimant’s wage claim form twice, once on June 6 and once on June 20, 2013.

### 33 BOLI ORDERS

- CSRT issued dishonored checks to Claimant on November 2, 2012, in the amount of \$900.18 and on December 31, 2012, in the amount of \$2,250.00.
- Pursuant to ORS 652.195 and OAR 839-001-0300, CSRT is liable to Claimant in the amount of \$2,730.54 for the first returned check and \$6,750.00 for the second returned check.

The Amended OOD stated that the Agency would consider CSRT's original request for hearing as valid for the Amended OOD unless CSRT notified that Agency otherwise. (Ex. X6)

6) On April 30, 2014, the Agency issued a Second Amended OOD in which the case caption was amended to read "C.S.R.T. LLC, an Oregon domestic limited liability company, and Robert P. Sabo, individually" instead of "C.S.R.T. LLC, an Oregon domestic limited liability company."<sup>3</sup> The Agency mailed its Second Amended OOD to CSRT and Sabo by regular and certified mail at 6051 SE Malden St., Portland, OR 97206" and PO Box 86350, Portland, OR 97286. Both certified mailings were returned on May 27, 2014, marked "UNCLAIMED." (Ex. X5)

7) The Agency designated the Agency file as the record in its OOD, the Amended OOD, and the Second Amended OOD. (Exs. X1, X5, X6)

8) At the time set for hearing, neither Respondent CSRT nor Respondent Sabo had made an appearance. The ALJ went on the record and stated that Respondents would be held in default if they did not make an appearance within 30 minutes. By 10 a.m., neither Respondent CSRT nor Respondent Sabo had appeared, and the ALJ commenced the hearing by declaring CSRT in default<sup>4</sup> and explaining the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing. (Statement of ALJ)

9) The ALJ issued a proposed order on June 25, 2014, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On July 7, 2014, the Agency filed exceptions. Those exceptions, which challenged the ALJ's conclusion that Sabo was not properly served and, as such, cannot be held personally liable for the unpaid wages and penalty wages, are addressed in the Opinion section of this Final Order in the discussion of Respondent Sabo's liability.

### RULING ON AGENCY MOTION

After the ALJ's opening statements and after the ALJ declared CSRT to be in default, the Agency's administrative prosecutor asked the ALJ to apply the provisions of OAR 839-005-0330(1) & (2) by accepting the pleadings and the Agency's case

---

<sup>3</sup> There were no other changes from the Amended OOD.

<sup>4</sup> The ALJ did not declare Respondent Sabo in default.

### 33 BOLI ORDERS

summary as the record of the case and issuing a Final Order on Default. In pertinent part, that rule reads as follows:

“(1) Default may occur when:

“\* \* \* \* \*

“(b) A party withdraws a request for hearing;

“(c) The Forum has scheduled a hearing and a party notifies the Agency or the administrative law judge that the party will not appear at the specified time and place; or

“(d) Notice regarding the time and place of the hearing was sent to the party and the party fails to appear at the scheduled hearing.

“(2) Under the circumstances described in (1)(b)–(d) of this rule, the administrative law judge will take evidence to establish a prima facie case in support of the charging document. If the Agency designated the Agency file as the record in its charging document and no further testimony or evidence is necessary to establish a prima facie case, the Agency file, including all materials submitted by a party, shall constitute the record. No hearing shall be conducted and the administrative law judge shall issue a final order by default. \* \* \*”

This is the first case in which the Agency has asked the forum to apply this rule. After the ALJ explained the problems he saw in interpreting the rule, the Agency elected to withdraw its request and proceeded to call witnesses listed in its case summary and offer the Agency exhibits filed with its case summary.

#### FINDINGS OF FACT – THE MERITS

1) At all times material herein, CSRT was an Oregon limited liability company that engaged the personal services of one or more employees. (Testimony of Claimant, Doyle, Montgomery, Pargeter; Exs. X1, X5, X6)

2) CSRT registered as a domestic limited liability company with the Oregon Secretary of State Corporation Division on September 30, 2011, with a renewal date of September 30, 2013. Sabo is listed as CSRT’s registered agent and an LLC member in the Corporation Division’s registry. On the same registry, Sabo’s address is listed as “711 Monroe Street, #1, Oregon City, OR 97045” and his mailing address as “PO Box 86350, Portland, OR 97286.” (Testimony of Pargeter; Ex. A30)

3) In October 2012, Sabo hired Claimant to work as a website graphic designer for CSRT. Sabo and Claimant agreed that Claimant would work 20 hours per week and be paid \$20 per hour, with \$100 a month deducted for taxes. They also agreed that Claimant would work from her home. (Testimony of Claimant; Ex. A1)

4) Claimant completed a W-4 form and began work on October 1, 2012. After that, she worked 20 hours a week for CSRT throughout her employment. Her last day of work was May 15, 2013. Claimant quit CSRT’s employment on that day because she had not been paid since November 2012. (Testimony of Claimant; Ex. A28)

### 33 BOLI ORDERS

5) CSRT's regular paydays were the 15<sup>th</sup> and last day of each month. (Testimony of Claimant)

6) Initially, CSRT paid Claimant for her work, but Claimant was not paid anything for any work she performed after November 14, 2012. (Testimony of Claimant; Ex. A27)

7) Sabo assigned work to Claimant and monitored her work throughout her employment via a computer program he installed on her computer called "Shockey Monkey." Claimant had to "clock in" in each morning on this program and sign out when she ended her work each day. All the work Claimant performed for CSRT required the creation of a work ticket on the computer. Sabo also installed Outlook Express and virus protection on Claimant's computer. There is no evidence that Claimant worked for anyone else during her employment with CSRT. (Testimony of Claimant; Exs. A2 through A27)

8) On November 2, 2012, CSRT issued a paycheck to Claimant in the amount of \$910.18 for "Payroll Oct. #2." On December 31, 2012, CSRT issued a check to Claimant in the amount of \$2,250.00 for "Nov & Dec Pay." Sabo signed both checks. Both checks were returned by Claimant's bank as "NSF."<sup>5</sup> (Testimony of Claimant; Ex. A29)

9) Claimant worked a total of 520 hours for CSRT between November 15, 2012, and May 15, 2013, earning \$10,400 (520 x \$20 per hour = \$10,400). As of the date of hearing, Claimant had not been paid for any of that work. (Testimony of Claimant, Pargeter; Ex. A37)

10) During the wage claim period, Claimant made several futile requests to Sabo for her pay. (Testimony of Claimant)

11) Agency compliance specialist Margaret Pargeter was assigned to investigate Claimant's wage claim. On June 27, 2013, Pargeter mailed a letter to Sabo that stated:

"The wage claim of Cristina Cortez has been assigned to me for resolution. \* \* \*

"Cristina Cortez alleges working 6 months at the rate of \$1600 per month during the period of November 15, 2012, through May 15, 2013, earning \$9,600, of which she was paid nothing, leaving a balance due and owing of \$9,600.00.

"Please take one of the following actions by July 29, 2013:

"1. Submit a check payable to Cristina Cortez in the gross amount of \$9,600.00, along with itemized statement of lawful deductions (if any).

"2. Submit to me evidence the claimant did not work the hours claimed, or that she has been paid.

---

<sup>5</sup> The returned checks were stamped "RETURN REASON – NOT SUFFICIENT FUNDS."

### 33 BOLI ORDERS

"3. Submit evidence my computations are incorrect."

(Testimony of Pargeter; Ex. A32)

12) Claimant's penalty wages are calculated as follows: \$20 per hour x 8 hours = \$160.00 x 30 days = \$4,800.00. (Calculation of ALJ)

13) All the witnesses were credible. (Entire Record)

#### CONCLUSIONS OF LAW

1) At all times material herein, Respondent CSRT was an Oregon employer that employed Claimant and was subject to the provisions of ORS 652.110 to 652.332.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondents herein. ORS 652.310 to 652.405.

3) CSRT and Sabo violated ORS 652.140(2) by failing to pay all wages earned and unpaid to Claimant not later than five days, excluding Saturdays, Sundays and holidays, after Claimant left CSRT's employment.

4) CSRT and Sabo owe \$10,400.00 in unpaid, due, and owing wages to Claimant. ORS 652.140(2).

5) CSRT and Sabo willfully failed to pay Claimant all wages due and owing and owe \$4,800.00 in penalty wages to Claimant. ORS 652.150.

6) Although the Commissioner has jurisdiction over the Agency's allegations that CSRT and Sabo violated ORS 652.195 and OAR 839-001-0300 by issuing two dishonored checks to Claimant, those charges are dismissed because OAR 839-050-0440(4) precludes the Agency from amending its original OOD to add those allegations.

7) Under the facts and circumstances of this record, and according to the applicable law, BOLI's Commissioner has the authority to order CSRT and Sabo to pay Claimant her earned, unpaid, due and owing wages and penalty wages. ORS 652.332.

#### OPINION

#### INTRODUCTION

In a wage claim default case, the Agency needs only to establish a prima facie case supporting the allegations of its OOD in order to prevail. *In the Matter of Letty Lee Seshier*, 31 BOLI 255, 261 (2011). In this case, the elements of the Agency's prima facie case are: 1) CSRT employed Claimant; 2) The pay rate upon which CSRT and Claimant agreed, if other than the minimum wage; 3) The amount and extent of work Claimant performed for CSRT; and 4) Claimant performed work for which she was not properly compensated. See, e.g., *In the Matter of Dan Thomas Construction, Inc.*, 32 BOLI 174, 180 (2013).

## 33 BOLI ORDERS

### CLAIMANT WAS EMPLOYED BY RESPONDENT

In its answer, CSRT denied owing wages to Claimant “because CSRT has no employees.” Assuming, arguendo, that CSRT has raised an independent contractor defense by this answer,<sup>6</sup> CSRT has the burden of proving that defense by a preponderance of the evidence in order to prevail.<sup>7</sup>

This forum applies an “economic reality” test to distinguish an employee from an independent contractor under Oregon’s minimum wage and wage collection laws. The degree of economic dependency in any given case is determined by analyzing the facts presented in light of the following five factors, with no one factor being dispositive: (1) The degree of control exercised by the alleged employer; (2) The extent of the relative investments of the worker and alleged employer; (3) The degree to which the worker’s opportunity for profit and loss is determined by the alleged employer; (4) The skill and initiative required in performing the job; and (5) The permanency of the relationship. See, e.g., *In the Matter of Horizon Technologies, LLC*, 31 BOLI 229, 245 (2011).

Aside from its answer, CSRT provided no evidence whatsoever to support its defense. In contrast, the Agency proved the following facts through the credible testimony of Agency witnesses and the Agency’s exhibits:

- Sabo assigned and directed Claimant’s work for CSRT;
- Claimant used a computerized time clock set up by Sabo to sign in and out of work each day;
- Claimant invested no money in CSRT’s business and the software she required to perform her job was provided and installed by Sabo, acting as CSRT’s agent;
- CSRT was the only entity for whom Claimant performed work during the wage claim period;
- Claimant was paid by the hour and had no opportunity to earn a profit or suffer a loss;
- CSRT gave Claimant a W-2 form for 2012;
- Claimant performed computer graphic design projects for CSRT with minimal supervision from Sabo;
- There was no fixed time period for Claimant’s employment.

These facts are indicia of an employment relationship, not an independent contractor relationship, and the forum concludes that Claimant was CSRT’s employee.

---

<sup>6</sup> Cf. *In the Matter of Horizon Technologies, LLC*, 31 BOLI 229, 241 (2011) (respondent raised the affirmative defense of independent contractor when respondent did not use the specific term “independent contractor” in its answer but affirmatively alleged that claimant was an “Independent Business Owner selling our GPS devices” and that claimant “bought an independent business distributorship” and “was his own business owner”).

<sup>7</sup> See, e.g., *In the Matter of Laura M. Jaap*, 30 BOLI 110, 121-22 (2009).

## 33 BOLI ORDERS

### THE PAY RATE TO WHICH RESPONDENT AND CLAIMANT AGREED

Through Claimant's credible testimony, the Agency proved that Claimant's agreed rate of pay was \$20 per hour.

### AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT

Claimant testified that she worked 20 hours a week for CSRT between November 15, 2012, and May 15, 2013. Her testimony was corroborated by the handwritten calendar of hours worked that she completed for the Agency at the time she filed her wage claim and by computer records she provided to the Agency that document specific dates and times she worked for CSRT. Based on this evidence, the forum concludes that Claimant worked a total of 520 hours for CSRT (20 hours x 26 weeks = 520 hours).

### CLAIMANT PERFORMED WORK FOR WHICH SHE WAS NOT PROPERLY COMPENSATED

Claimant was paid nothing for her 520 hours of work and is owed \$10,400.00 in gross, unpaid wages (520 hours x \$20 = \$10,400.00), an amount greater than the \$9,000.00 in unpaid wages sought in the OOD. This forum has previously held that the Commissioner has the authority to award unpaid wages exceeding those sought in the OOD when, as in this case, they are awarded as compensation for statutory wage violations alleged in the charging document.<sup>8</sup> The forum follows its precedent in this case and awards Claimant \$10,400.00 in unpaid wages.

### CLAIMANT IS OWED ORS 652.150 PENALTY WAGES

The forum may award penalty wages when a respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission "willfully" if he or she 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).

The Agency proved that Claimant and CSRT, through its member Sabo, agreed on a wage rate of \$20 per hour and that CSRT, through Sabo, was aware that Claimant worked 20 hours a week throughout her employment with CSRT and that Claimant has not been paid for any of her work performed after November 15, 2012. There is no evidence that CSRT, through its member Sabo, acted other than voluntarily and as a free agent in not paying Claimant for six months' work. The forum therefore concludes that CSRT and Sabo acted willfully in failing to pay Claimant her wages and is liable for ORS 652.150 penalty wages.

---

<sup>8</sup> See, e.g., *In the Matter of Letty Lee Seshier*, 31 BOLI 255, 263 (2011).

### 33 BOLI ORDERS

ORS 652.150(1) and (2) provide, in pertinent part:

“(1) Except as provided in subsections (2) and (3) of this section, if an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 \* \* \*, then, as a penalty for the nonpayment, the wages or compensation of the 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.

“(2) If the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 100 percent of the employee’s unpaid wages or compensation unless the employer fails to pay the full amount of the employee’s unpaid wages or compensation within 12 days after receiving the written notice. If the employee or a person on behalf of the employee fails to send the written notice, the penalty may not exceed 100 percent of the employee’s unpaid wages or compensation. \* \* \*”

The Agency provided documentary and testimonial evidence that, on June 27, 2013, its investigative staff made the written demand contemplated by ORS 652.150(2) for Claimant’s wages. The Agency’s OOD, issued on October 15, 2013, repeated this demand. Because CSRT and Sabo failed to pay Claimant her unpaid wages after receiving the notices, the forum computes penalty wages at the maximum rate set out in ORS 652.150(1) (\$20 hourly rate x eight hours per day x 30 days = \$4,800.00 penalty wages).

Although \$4,800.00 is a greater amount than the \$4,154.40 in penalty wages sought in the OOD, this forum has previously held that the Commissioner has the authority to award penalty wages exceeding those sought in the OOD when, as in this case, they are awarded as compensation for statutory wage violations alleged in the charging document.<sup>9</sup> The forum follows its precedent in this case and awards Claimant \$4,800.00 in penalty wages.

#### **LIABILITY OF ROBERT SABO**

On April 30, 2014, the Agency issued its Second Amended OOD. The only difference between the Amended OOD and the Second Amended OOD was the change in the caption from “C.S.R.T. LLC, an Oregon domestic limited liability company, Employer” to “C.S.R.T. LLC, an Oregon domestic limited liability company, and Robert P. Sabo, individually, Employer.” The certificate of service accompanying the Second Amended OOD states it was mailed by regular and certified mail to Sabo at 6051 Malden St., Portland, Oregon 97286, the same address at which Sabo was personally served with the original OOD naming CSRT as the sole Respondent.

In the Proposed Order, the ALJ dismissed the Second Amended OOD as to Sabo because of the Agency’s failure to complete service of that document on Sabo. In

---

<sup>9</sup> See, e.g., *In the Matter of Petworks LLC*, 30 BOLI 35, 44 (2008).

### 33 BOLI ORDERS

its Exceptions, the Agency argues that service was completed under ORS 839-050-0030 because the Second Amended OOD was mailed by certified mail to Sabo at an address that the Agency, under ORS 839-050-0030(4), was entitled to presume was correct. In support of this argument, the Agency enclosed an affidavit by BOLI's contested case coordinator stating that the Second Amended OOD, in addition to being mailed to Sabo at his Malden St. address, was also mailed to CSRT, ORS at PO Box 86350, Portland, Oregon 97286, CRST's correct address, and that this information was inadvertently omitted from the certificate of service accompanying the Second Amended OOD because of a clerical error. The Agency included documentation of this additional mailing. ORS 839-050-0030, the administrative rule on which the Agency relies, provides, in pertinent part:

"(1) *Except as otherwise provided in ORS 652.332(1)* the charging document will be served on the party or the party's representative by personal service or by registered or certified mail. Service of a charging document is complete upon the earlier of:

"(a) Receipt by the party or the party's representative; or

"(b) Mailing when sent by registered or certified mail to the correct address of the party or the party's representative.

"(2) All other documents may be served on the party or the party's representative by personal service or by mailing to the last known address in the Agency file for the case to be heard. Service of a document other than the charging document is complete upon personal service or mailing, whichever occurs earlier.

"(3) Any participant to a contested case proceeding filing a document with the Forum will serve a copy of such document upon all other participants or their representatives.

"(4) Each party must notify the Forum and the Administrative Prosecution Unit of the party's change of address. Such notice must be in writing and served on the Forum and the Administrative Prosecution Unit within 10 days of the party's change of address. Unless the Forum and the Administrative Prosecution Unit have been so notified, they will presume that the party's address on file with the Agency is correct."

(Emphasis added). ORS 652.332(1) establishes an "administrative proceeding for wage claim collection" and covers all cases in which wage claims have been filed with BOLI. Relative to service of an OOD, ORS 652.332(1) requires that service of an OOD "shall be made in the same manner as service of summons **or** by certified mail, return receipt requested." (Emphasis added). Accordingly, sending an OOD by registered or certified mail to the correct address of the party, as provided in OAR 839-050-0030(1)(b), as the Agency did in this case, is sufficient to accomplish service of an

### 33 BOLI ORDERS

OOD. The Agency's exception is accepted and the forum finds that Sabo was properly served.

The Agency argues that Sabo be held liable as a successor in interest to CSRT. According to records of the Oregon Secretary of State, CSRT became an inactive corporation on November 29, 2013. (Ex. A47). To decide if an employer is a "successor," "the test is whether it conducts essentially the same business that the predecessor did." *Blachana v. Bureau of Labor and Industries*, 354 OR 676, 686 (2014), citing to *In re Anita's Flowers & Boutique*, 6 BOLI 258, 267-68 (1987). Sabo is a successor if he conducted essentially the same business as CSRT did before it became inactive on November 29, 2013. "The elements to look for include: the name or identity of the business; its location; the lapse of time between the previous operation and the new operation; the same or substantially the same workforce employed; the same product is manufactured or the same service is offered; and, the same machinery, equipment, or methods of production are used. Not every element needs to be present to find an employer to be a successor; the facts must be considered together to reach a decision." *Id.*

In the present case, even though CSRT claims to have dissolved on November 29, 2013, Sabo continued to represent himself as CEO and representative of CSRT as soon as December 16, 2013 when he requested a hearing in this matter on CSRT letterhead using the same address and phone number as CSRT used prior to its dissolution. (Ex. A43) In this request it is notable that Sabo both refers to his representative status in the present tense as well as the defense that the company "has" no employees. (Ex. A43).

Further, Margaret Pargeter, the Agency's Compliance Specialist, testified credibly at hearing that CSRT maintained an active website after its dissolution and that the Agency's wage security fund could not be used to pay complainant her lost wages because CSRT was still in operation. (Pargeter testimony, see also Ex. A47-7). The website said that "Since 2006, C.S.R.T. specializes in providing cloud computer and cloud network support...." (Ex. A47-7) These are not only the same services provided by CSRT prior to its dissolution but the company has expressly portrayed itself as having continuously provided these services since 2006. Pargeter also called CSRT on April 9, 2014 and the phone was answered "CSRT, how can I help you." (Ex. A47-1). CSRT has, therefore, continued to use the same name, same contact information, provide the same services and employ the same CEO after its dissolution as it did before. Sabo continued to refer to himself as CSRT's CEO and representative in the month following the apparent dissolution. The agency has met its burden that Sabo is a successor in interest.

### ORS 652.195 CIVIL PENALTY

The Agency amended its original OOD to allege that, based on CSRT's issuance of dishonored checks to Claimant on November 2 and December 31, 2012, Claimant is entitled to a civil penalty in the amount of \$9,500.54 under ORS 652.195 and OAR 839-

### 33 BOLI ORDERS

001-0300. The forum dismisses this claim without reaching the merits for the reason explained below.

OAR 839-050-0440 provides, in pertinent part:

“(1) Contested case proceedings based on Orders of Determination under ORS 652.332, Notices of Intent to assess civil penalties under 652.710 or 653.256, or consolidated proceedings based on both types of charging documents are governed by the procedures set forth in OAR chapter 839, division 50, except to the extent those procedures are modified by this rule.

“\* \* \* \* \*

“(4) No amendments will be allowed in contested case proceedings based on Orders of Determination under ORS 652.332, Notices of Intent to assess civil penalties under ORS 652.710 or 653.256, or consolidated proceedings based on both types of charging documents, except that the agency may amend an Order of Determination or Notice of Intent once to correct names of respondents or to add respondents.”

This contested case proceeding was initiated by the Agency’s issuance of an Order of Determination based on ORS 652.332. Under section (4), the Agency was foreclosed from amending its OOD except “to correct names of respondents or to add respondents.” The Agency exceeded its authority in amending its OOD to seek civil penalties under ORS 652.195 and OAR 839-001-0300. Since the Agency had no authority to amend its OOD to seek ORS 652.195 and OAR 839-001-0300 civil penalties, the forum has no authority to impose such penalties and dismisses the Agency’s claim.

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.140(2), ORS 652.150, and ORS 652.332, and as payment of the unpaid wages and penalty wages, the Commissioner of the Bureau of Labor and Industries hereby orders Respondents **C.S.R.T., LLC and Robert P. Sabo** to deliver to the Administrative Prosecution Unit of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Claimant **Cristina Cortez** in the amount of **FIFTEEN THOUSAND TWO HUNDRED DOLLARS (\$15,200.00)**, less appropriate lawful deductions, representing **\$10,400.00** in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from June 1, 2013, until paid; and **\$4,800.00** in ORS 652.150 penalty wages, plus interest at the legal rate on that sum from July 1, 2013, until paid.

## 32 BOLI ORDERS

---

**In the Matter of**

**SUSAN C. STEVES**

**Case No. 75-11**

**Final Order of Commissioner Brad Avakian**

**Issued April 30, 2012**

---

### **SYNOPSIS**

Respondent employed Claimant as her assistant from March 5, 2009, through May 26, 2010, during which time Claimant worked 1,143 hours. In the absence of an agreed wage rate, Claimant was entitled to be paid Oregon's statutory minimum wage of \$8.40 per hour for all hours worked. Claimant earned \$9,601.20 and was only paid \$2,000, leaving \$7,601.20 in unpaid due and owing wages. Respondent's failure to pay Claimant was willful and Respondent was ordered to pay \$2,016.00 in penalty wages. Respondent was ordered to pay an additional \$2,016.00 as a civil penalty based on her failure to pay the minimum wage for all hours worked. ORS 652.140(2), ORS 652.150; ORS 653.055.

---

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 February 23-24, 2012, at the DeArmond Room of Deschutes County's offices, located at 1300 N.W. Wall Street, Bend, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Chet Nakada, an employee of the Agency. Wage claimant Kristene Crawford ("Claimant") was present throughout the hearing and was not represented by

## 32 BOLI ORDERS

counsel. Respondent Susan C. Steves represented herself and was present throughout the hearing.

The Agency called the following witnesses: Claimant; BOLI Wage and Hour Division compliance specialist Bernadette Yap-Sam (telephonic); and Cheryl Bruns (telephonic), a former client of Respondent.

Respondent called herself as a witness.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-9 (submitted or generated prior to hearing); and X-11 through X-13 (ALJ interim orders issued after the hearing). Exhibit X-10, consisting of Respondent's case summary submitted at the time set for hearing, was not received into evidence.
- b) Agency exhibits A-1 through A-11 (submitted prior to hearing), A-12, A-13, and A-15 (submitted at hearing);
- c) Respondents' exhibits R-1 and R-2 (submitted at hearing); and
- d) Exhibits ALJ-1 and ALJ-2, consisting of documents requested by the ALJ after the 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 or about October 13, 2000, Claimant filed a wage claim with the Agency alleging that Respondent had employed her and failed to pay wages earned and due to her. At the same time, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent. Earlier, Claimant filed a wage claim form with the Agency that she signed on August 25, 2010.

2) On February 15, 2011, the Agency issued Order of Determination No. 10-2591 based on the wage claim filed by Claimant and the Agency's investigation. In pertinent part, the Order alleged that:

- Respondents employed Claimant from March 5, 2009, through May 26, 2010 (the "wage claim period"), and was required to pay Claimant no less than \$8.40 per hour for each hour worked;
- Claimant worked 1,114.49 hours;
- Respondent only paid Claimant \$2,000.00, leaving a balance due and owing of \$7,361.72 in unpaid wages, plus interest thereon at the legal rate per annum from July 1, 2010, until paid;

## 32 BOLI ORDERS

- Respondent willfully failed to pay these wages and owes Claimant \$2,016.00 in penalty wages, with interest thereon at the legal rate per annum from August 1, 2010, until paid.
- Respondent owes Claimant \$2,016.00 in civil penalties based on Respondent's failure to pay Claimant at the minimum wage for all hours worked.

3) On May 31, 2010, Respondent filed an answer and request for hearing in which she denied employing Claimant for 1,114.49 hours during the wage claim period, further denied that Claimant was ever her employee, and alleged that Claimant volunteered in her office because Respondent represented Claimant's boyfriend in a contested custody modification proceeding without charging him.

4) On August 12, 2011, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimant setting the time and place of hearing for 9:00 a.m. on February 23, 2012, at the Offices of Deschutes County, located in Bend, Oregon. The Notice of Hearing included a copy of the Notice of Intent to Assess Civil Penalties, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, a multi-language notice explaining the significance of the Notice of Hearing, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445.

5) On November 28, 2011, the ALJ ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and a brief statement of the elements of the claim, a statement of any agreed or stipulated facts, and any wage and penalty calculations (for the Agency only). The ALJ ordered the participants to submit case summaries by February 10, 2012, and notified them of the possible sanctions for failure to comply with the case summary order.

6) The Agency filed a case summary on February 10, 2012.

7) On February 16, 2012, Dirk D. Sharp, attorney at law, faxed a notice of representation to the forum stating that Respondent had retained him to represent her. At the same time, Sharp filed a motion for postponement based on the following grounds:

1. "Additional investigation is necessary on behalf of Respondent.
2. "Witnesses need to be informed of the hearing.
3. "Witnesses need to be interviewed.
4. "MS. Steves has undergone emergency oral surgery in the last week and is scheduled for additional treatment next week.
5. "Due to the above medical treatments MS. Steves experiences severe pain upon speaking.

## 32 BOLI ORDERS

6. The foregoing would impede and prevent adequate representation of MS. Steves.”

On Friday, February 17, the ALJ telephoned Sharp and told him that he would need to provide a letter from Respondent's dentist confirming Respondent's medical status before the ALJ would rule on Respondent's motion for postponement. The ALJ also informed Sharp that, once Sharp provided a note from the dentist, he would call the Agency case presenter to see if the Agency had any objection to a postponement. Later that day, Sharp telephoned the ALJ, said that the dentist's office was not open, and asked that the ALJ grant the postponement without a note from Respondent's dentist. About 10 minutes later, the ALJ conducted a prehearing conference with Sharp and the Agency case presenter to discuss Respondent's motion for postponement. The Agency case presenter objected to a postponement on the grounds that the Agency was prepared for hearing. Sharp reiterated that Respondent might not be unable to participate in the hearing, depending on her medical condition the following week. The ALJ denied Respondent's motion for postponement based on the absence of any medical evidence other than Sharp's statement to support it, but said that he would reconsider Respondent's motion if Respondent filed a statement from her dentist that established Respondent was medically unable to participate in the hearing. At 9:25 a.m. on February 21, the ALJ telephoned Sharp to inform him that the Hearings Unit had received nothing from the dentist's office. In response, Sharp said he would no longer be representing Respondent at the hearing and was withdrawing as her counsel. Sharp added that Respondent would attend the hearing. Sharp faxed a letter of withdrawal of representation to the ALJ later that day.

- 8) At the start of hearing, the ALJ verbally informed the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

- 9) Respondent did not file a case summary prior to the time set for hearing, but brought her case summary to the hearing. The Agency objected to Respondent's case summary on the grounds that it was untimely filed. In response to the ALJ's query, Respondent stated that she did not file a case summary earlier because the ALJ's interim order requiring case summaries had been misfiled at her office. The ALJ sustained the Agency's objection on the grounds that Respondent failed to offer a satisfactory reason for having failed to timely file her case summary and that excluding it would not violate that ALJ's duty to conduct a full and fair inquiry under ORS 183.415(10).

- 10) On her case summary, Respondent listed Dirk Sharp as a witness. Based on the Agency's objection and Respondent's failure to timely file a case summary, the ALJ did not allow Sharp to testify but did allow Respondent to make an oral offer of proof regarding what Sharp's testimony would have been, had he been allowed to testify.

- 11) On February 28, 2012, the ALJ re-opened the record on his own motion to obtain a copy of Claimant's original 2009-2010 nail salon appointment books for

## 32 BOLI ORDERS

inspection. Claimant sent her original books directly to the ALJ, who received it on March 5, 2012. After inspecting the books, the ALJ copied two pages that appeared to contain inconsistencies with the Claimant's 2009-2010 calendars received at hearing as Exhibits A-8 and A-9, and marked and received them into the record as Exhibits ALJ-1 and ALJ-2. Copies were provided to both participants and the original books mailed back to the Claimant, with instructions to Claimant to retain them until such time as this case is completely resolved and all appeal rights have expired. The record closed on March 29, 2012.

12) The ALJ issued a proposed order on April 11, 2012, 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 during the wage claim period, Respondent was an Oregon attorney with an office in Bend, Oregon, that she shared with Dirk Sharp, another attorney, and operated a for-profit business. As part of her general practice, she did pro bono<sup>1</sup> work for military veterans.

2) At all times during the wage claim period, Claimant worked as a nail technician at Image Salon in Bend, Oregon, where she leased her own work station and worked as an independent contractor. Claimant did not work at the nail salon on Mondays and Wednesdays.

3) Respondent and Claimant met at Images Salon, where Respondent went every couple of weeks to have her nails done, and they became friends. Claimant learned that Respondent was an attorney and did pro bono work for military veterans. Claimant's live-in boyfriend, David Sutterfield, is a military veteran who needed legal assistance in his child custody case. Claimant told Respondent about Sutterfield's situation and Respondent agreed to take Sutterfield's case on a pro bono basis.

4) In 2009, Respondent performed a substantial amount of pro bono legal work on Sutterfield's behalf, including several all day court appearances. Her first consultation with Sutterfield was on February 20, 2009. Claimant assisted Respondent in some of her work on Sutterfield's behalf.

5) On one of Respondent's visits to Claimant's nail salon, Respondent told Claimant that she had been having trouble collecting debts from some of her clients. Claimant told Respondent that she had a background in collections and could assist Respondent.

6) On March 5, 2009, Claimant began performing work for Respondent at Respondent's office. Claimant continued to perform work for Respondent until May 26,

---

<sup>1</sup> Respondent testified that "pro bono" means "providing legal services for free -- no charge."

## 32 BOLI ORDERS

2010, working primarily on Mondays and Wednesdays, but also working some other days, including weekends and evenings. During this time, Claimant acted as Respondent's personal assistant. Besides collections, Claimant also performed reception work, filed documents for Respondent in her office, and delivered documents to the court and to other attorneys.

7) Respondent told Claimant to keep track of all the hours she worked on a calendar so that Respondent would be able to pay her for the time Claimant had worked, plus a bonus for her collections. Respondent and Claimant did not agree on a specific wage rate.

8) During her employment with Respondent, Claimant maintained a contemporaneous record of the hours she worked each day on a calendar, noting that times she started and stopped work each day.

9) Respondent did not keep a record of the hours that Claimant worked.

10) In 2009, Respondent had not filed tax returns for the prior four years. When Claimant learned this, she told Respondent that she had done her own taxes and could do Respondent's. With Respondent's acquiescence, Claimant organized Respondent's financial records for the previous four years and prepared tax returns for those years, a job she started doing on September 29, 2009. On March 1, 2010, Respondent signed a "POWER OF ATTORNEY FOR REPRESENTATION" form that authorized Claimant to "receive [Respondent's] confidential tax information and/or represent [Respondent] before the Oregon Department Revenue for all tax matters." Claimant subsequently spoke with Department of Revenue representatives a number of times on Respondent's behalf.

11) Between March 5, 2009, and May 26, 2010, Respondent and Claimant exchanged approximately 604 phone calls that Claimant made or received on her cell phone. A number of those calls were made on days that Claimant did not claim to have worked on her calendar of hours submitted to the Agency.

12) Claimant worked a total of 1,143 hours for Respondent, broken down as follows:

<u>Month &amp; Year</u>	<u>Hours Worked</u>
March 2009	66.5
April 2009	56.75 <sup>2</sup>
May 2009	53.75
June 2009	76.75

---

<sup>2</sup> The forum has not included hours Claimant noted on her calendar for April 8 and April 17 because her notes indicated she performed work related to "Jeff," an individual whom Respondent credibly testified was never her client.

## 32 BOLI ORDERS

July 2009	60.00
August 2009	76.00
September 2009	103.5
October 2009	54.5
November 2009	85.5
December 2009	75.25
January 2010	86.5
February 2010	87.5
March 2010	106.5
April 2010	100.75
May 2010	53.25

13) Respondent paid Claimant approximately \$2,000.00 in cash for her work.

14) On one occasion between August 2009 and May 26, 2010, Respondent introduced Claimant to Cheryl Bruns, one of her clients, with the following words: "This is my assistant Kristy." When Bruns called Respondent's office, Claimant usually answered the phone. One day Respondent called Bruns and told Bruns that Claimant "was no longer working for her and that [Respondent] was going to have a new assistant."

15) Claimant quit on May 26, 2010, because Respondent would not pay her.

16) In July 2010, Respondent contacted the Bend Police Department and reported that Claimant had a \$250 check in her possession made out Respondent's name. Respondent told an officer from the Bend Police Department that she "used to have an assistant in her legal office named Kristene Crawford. \* \* \* Crawford began asking for advances of pay, and it got to the point that Steves told Crawford she could no longer give [sic] advances."

17) Oregon's statutory minimum wage in 2009 and 2010 was \$8.40 per hour.

18) Claimant filed two wage claim forms with BOLI's Wage and Hour Division, in response to Yap-Sam's request to Claimant to provide additional information that was not provided on her first wage claim form.

19) On November 22, 2010, the Agency mailed a document entitled "Notice of Wage Claim" to Respondent that stated:

"You are hereby notified that KRISTENE MARIE CRAWFORD has filed a wage claim with the Bureau of Labor and Industries alleging:

## 32 BOLI ORDERS

“Unpaid wages of \$9,391.90 at the rate of \$8.40 per hour from March 4, 2009 to May 26, 2010.

”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.

“IF YOU DISPUTE THE CLAIM, complete the enclosed ‘Employer Response’ form and return it together with the documentation which supports your position, as well as payment of any amount which you concede is owed the claimant to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.

“If your response to the claim is not received on or before December 7, 2010, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees.”

20) Respondent has not paid any money to Claimant since Claimant’s last day of work and owes Claimant \$7,601.20 in unpaid, due and owing wages.

21) Penalty wages are computed as follows for Claimant, in accordance with ORS 652.150: \$8.40 per hour x 8 hours x 30 days = \$2,016.00.

22) ORS 653.055 civil penalties are computed as follows for Claimant: in accordance with ORS 652.150 and ORS 653.055: \$8.40 per hour x 8 hours x 30 days = \$2,016.00.

### CREDIBILITY FINDINGS

23) Bernadette Yap-Sam and Cheryl Bruns were credible witnesses and the forum has credited their testimony in its entirety.

24) Claimant was a credible witness as to the number of hours she worked and the duties she performed. The forum has believed her testimony on those issues whenever it conflicted with Respondent’s testimony.

25) Respondent’s testimony concerning the number of hours worked by Claimant and as to Claimant’s “volunteer” status was not credible.

### ULTIMATE FINDINGS OF FACT

1) At all times during the wage claim period, Respondent was an Oregon attorney who maintained an office in Bend, Oregon, and employed Claimant.

2) Claimant worked as Respondent’s assistant between March 5, 2009, and May 26, 2010. She filed documents, did collections and reception work, delivered documents to the court and to other attorneys, and prepared and filed Respondent’s back returns. She quit on May 26, 2010.

## **32 BOLI ORDERS**

3) Claimant worked a total of 1,143 hours for Respondent, earning \$9,601.20, and has only been paid \$2,000.00. Respondent owes Claimant \$7,601.20 in unpaid, due and owing wages.

4) Penalty wages are computed as follows for Claimant, in accordance with ORS 652.150: \$8.40 per hour x 8 hours x 30 days = \$2,016.00.

5) ORS 653.055 civil penalties are computed as follows for Claimant: in accordance with ORS 652.150 and ORS 653.055: \$8.40 per hour x 8 hours x 30 days = \$2,016.00.

### **CONCLUSIONS OF LAW**

1) At all times material herein, Respondent was an Oregon employer who suffered or permitted Claimant to work in Oregon and Claimant was Respondent's employee, subject to the provisions of ORS 652.110 to 652.200, ORS 652.310 to 652.405, and ORS 653.010 to 653.055.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 652.310 to 652.405.

3) Respondent violated ORS 652.140(2) by failing to pay to Claimant all wages earned and unpaid not later than five days after May 26, 2010, excluding Saturdays, Sundays and holidays. Respondent owes Claimant \$7,601.20 in unpaid, due, and owing wages.

4) Respondent willfully failed to pay Claimant all wages due and owing and owes \$2,016.00 in penalty wages to Claimant. ORS 652.150.

5) Respondent paid Claimant less than the wages to which he was entitled under ORS 653.010 to 653.261 by failing to pay her Oregon's statutory minimum wage for all hours worked and is liable to pay \$2,016.00 in civil penalties to Claimant. ORS 653.055(1)(b).

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 Susan C. Steves to pay Claimant her earned, unpaid, due and payable wages, ORS 652.150 penalty wages, and ORS 653.055 civil penalties, plus interest, on all sums until paid. ORS 652.332.

### **OPINION**

#### **CLAIMANT'S WAGE CLAIM**

To establish Claimant's wage claim, the Agency must prove the following elements by a preponderance of the evidence: 1) Respondent employed Claimant; 2) The pay rate upon which Respondent and Claimant agreed, if other than the minimum wage; 3) The amount and extent of work Claimant performed for Respondent; and 4)

## 32 BOLI ORDERS

Claimant performed work for which she was not properly compensated. *In the Matter of Letty Lee Seshier*, 31 BOLI 255, 261 (2011).

### RESPONDENT EMPLOYED CLAIMANT

Respondent claims she that never employed Claimant and Claimant volunteered all her work for Respondent to repay Respondent for pro bono work that Respondent performed for Claimant's boyfriend, a military veteran. Respondent testified that she valued this work at \$35,000+, based on Respondent's standard fee of \$195 an hour. Respondent also alleges that Claimant cannot, as a matter of law, be her employee because there was no agreed rate of pay. The forum rejects both defenses for reasons stated below.

First, as Respondent testified, pro bono work means work performed without the expectation of compensation. Respondent's claim that she performed \$35,000+ of pro bono work for Claimant's boyfriend and accepted 15 months of volunteer work by Claimant based on Claimant's gratitude for that work is a non-sequitur.

Second, there is credible evidence in the record that Respondent told two persons – Cheryl Bruns and a Bend police officer -- that Claimant was her assistant.

Third, Oregon law imposes specific conditions on the circumstances in an employment setting in which a person can be considered a volunteer. ORS 653.010(2) provides:

“‘Employ’ includes to suffer or permit to work but does not include voluntary or donated services performed for no compensation or without expectation or contemplation of compensation as the adequate consideration for the services performed for a public employer referred to in subsection (3) of this section, or a religious, charitable, educational, public service or similar nonprofit corporation, organization or institution for community service, religious or humanitarian reasons or for services performed by general or public assistance recipients as part of any work training program administered under the state or federal assistance laws.”

Respondent is a private attorney operating a for-profit business who fits in none of these categories. Consequently, Claimant could not work for her as a volunteer as a matter of law.<sup>3</sup>

---

<sup>3</sup> See also *In the Matter of Graciela Vargas*, 16 BOLI 246, 259 (1998)(the forum held that claimant did not perform work for respondent as a volunteer when claimant did not provide respondent with voluntary or donated services performed for no compensation or without expectation or contemplation of compensation and respondent ran a for-profit restaurant; was not a public employer or religious, charitable, educational, public service or similar nonprofit corporation, organization or institution for community service; and acknowledged actually paying claimant for some work); *In the Matter of Arabian Riding and Recreation Corp.*, 16 BOLI 79, 92 (1997)(minors were employees, not volunteers, when there was no evidence or attempt to show that respondent was a public employer or a religious, charitable, or educational institution as described or was involved in a federal or state public assistance program).

## 32 BOLI ORDERS

Fourth, Claimant credibly testified that Respondent paid her approximately \$2,000.00 in cash during the wage claim period. Respondent's claim that she gave this amount of money to Claimant whenever she needed money because they were "friends" requires a stretch of the imagination the forum is unwilling to make.

Fifth, although Respondent and Claimant may have been friends before the wage claim was filed, the approximate 604 phone calls between Respondent and Claimant during the wage claim period support an inference that the relationship between Respondent and Claimant was something other than just a friendship.

Finally, although ORS 653.010 does not include an express definition of "employee," by contextual implication and for purposes of chapter 653, a person is an "employee" of another if that other "employs," *i.e.*, "suffer[s] or permit[s]" the person to work. *In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration*, 25 BOLI 12, 38 (2003), *affirmed without opinion, Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004). When an employer suffers or permits a person to work, as in this case, the fact that the person is not paid or there is no agreement to pay the worker a fixed rate does not take her out of the definition of "employee" when a minimum wage law requires she be paid the minimum wage. *In the Matter of LaVerne Springer*, 15 BOLI 47, 67 (1996).

Based on all of the above, the forum concludes that the Agency has met its burden of proving that Respondent employed Claimant.

### **CLAIMANT WAS ENTITLED TO BE PAID OREGON'S MINIMUM WAGE**

Testimony by both Respondent and Claimant concerning the specific circumstances under which Claimant began working for Respondent and their pay arrangement was sparse and murky. However, it is undisputed that there was no agreement that Claimant would be paid a specific wage. Claimant testified she expected to be paid a commission on the collections she successfully performed for Respondent, and Respondent points to this as evidence that Claimant was not entitled to an hourly rate. This argument fails. When there is no agreed upon rate of pay, an employer is required to pay at least the statutory minimum wage. *In the Matter of Jo-El, Inc.*, 22 BOLI 1, 7 (2001). Since Respondent and Claimant did not agree to a specific rate of pay, Claimant was entitled to be paid \$8.40 per hour, Oregon's statutory minimum wage in 2009 and 2010.

### **AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT**

When the employer produces no records of the hours that a wage claimant worked, the forum may rely on evidence produced by the agency from which "a just and reasonable inference may be drawn." *In the Matter of Letty Lee Seshier*, 31 BOLI 255, 262 (2011). *See also In the Matter of Mark A. Frizzell*, 31 BOLI 178, 204 (2011). A claimant's credible testimony may be sufficient evidence to show the amount of hours worked by the claimant. *Id.* In this case, Claimant's testimony, supported by her contemporaneously maintained calendar and cell phone records, is the only evidence of

## 32 BOLI ORDERS

the hours that Claimant worked, as Respondent testified that she did not keep records of Claimant's hours.<sup>4</sup> OAR 839-020-0040 sets out general parameters for how work hours are to be calculated. In pertinent part, it states:

“(2) Work requested or required is considered work time. Work not requested, but suffered or permitted is considered work time.

“(3) Work performed for the employer but away from the employer's premises or job site is considered work time. If the employer knows or has reason to believe that work is being performed, the time spent must be counted as hours worked.

“(4) It is the duty of the employer to exercise control and see that the work is not performed if it does not want the work to be performed. The mere promulgation of a policy against such work is not enough.”

Claimant credibly testified as to the hours she recorded in her 2009 and 2010 calendars as having worked for Respondent and testified as to her specific recollection of the duties she performed on a number of different days. Her testimony supports a conclusion that her recorded hours reflect work performed at Respondent's request of acquiescence. Although Respondent testified generally that Claimant did not work the hours she claimed, the only significant dispute over what Claimant did on a particular day concerned July 20, 2009, a date Claimant said she drove Respondent to Salem to the Supreme Court, and Respondent testified that Claimant drove Respondent to the Court of Appeals, then went on a shopping trip to Portland while Respondent presented her case to the Court. As Claimant only claimed one hour of work on that day, from 6-7 p.m., this disagreement is immaterial to the forum's determination concerning the number of hours Claimant worked.

In conclusion, the forum relies on Claimant's credible testimony and contemporaneous record of hours worked establish the number of hours she worked for Respondent. That total is 1,143 hours, as detailed in Finding of Fact # 12 -- The Merits.

### **CLAIMANT PERFORMED WORK FOR WHICH SHE WAS NOT PROPERLY COMPENSATED**

Claimant credibly testified that she was paid approximately \$2,000.00 in cash. Respondent kept no receipts or other record of the payments she made to Claimant, but acknowledged she gave Claimant cash upon request. Lacking any other evidence of the amount paid by Respondent to Claimant, the forum relies on Claimant's credible testimony to conclude that she was paid \$2,000.00 for her work. In contrast, she earned \$9,601.20, leaving a balance due and owing of \$7,601.20. Although this amount exceeds the amount of unpaid wages sought in the Order of Determination, the commissioner has the authority to award monetary damages, including penalty wages that exceed those sought in the Order of Determination when they are awarded as

---

<sup>4</sup> Specifically, Respondent testified that she did not keep records because she did not believe that Claimant was an employee.

## 32 BOLI ORDERS

compensation for statutory wage violations alleged in the charging document. See, e.g., *In the Matter of Letty Lee Seshier*, 31 BOLI 255, 263 (2011); *In the Matter of Petworks LLC*, 30 BOLI 35, 44 (2008). The commissioner exercises that authority in this case.

### CLAIMANT IS OWED PENALTY WAGES

An employer is liable for penalty wages when it willfully fails to pay any wages or compensation of any employee whose employment ceases. Willfulness does not imply or require blame, malice, 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. See, e.g., *In the Matter of Computer Products Unlimited, Inc.*, 31 BOLI 209, 225 (2011).

In this case, Respondent knew that Claimant was performing work on Respondent's behalf and chose not to pay her all wages due and owing on the basis of her belief that Claimant was a volunteer and not entitled to any wages. An employer acts "willfully" when it knows what it is doing, intends to do what it is doing, and is a free agent. *In the Matter of Pavel Bulubenchii*, 29 BOLI 222, 227 (2007). There is no evidence that Respondent intended to pay Claimant an amount other than the amount Claimant was actually paid or that Respondent was not acting as a free agent in choosing not to pay Claimant the rest of her wages. The forum further notes that Respondent's failure to apprehend the correct application of the law and her actions based on this incorrect application do not exempt her from a determination that she willfully failed to pay wages earned and due. See *In the Matter of Scott Miller*, 23 BOLI 243, 262 (2002).

ORS 652.150(1) and (2) provide, in pertinent part:

"(1) Except as provided in subsections (2) and (3) of this section, if an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 \* \* \*, then, as a penalty for the nonpayment, the wages or compensation of the 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.

"(2) If the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation unless the employer fails to pay the full amount of the employee's unpaid wages or compensation within 12 days after receiving the written notice. If the employee or a person on behalf of the employee fails to send the written notice, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation. \* \* \*"

The Agency provided documentary and testimonial evidence that its investigative staff made the written demand for Claimant's wages contemplated in ORS 652.150(2) after Claimant filed her wage claim. The Agency's Order of Determination, issued on

## 32 BOLI ORDERS

February 15, 2011, repeated the demand.<sup>5</sup> Respondent failed to pay the full amount of Claimant's unpaid wages within 12 days after receiving the written notice and has still not paid them. Consequently, the forum assesses penalty wages at the maximum rate set out in ORS 652.150(1) (hourly rate x eight hours per day x 30 days = penalty wages). Using this formula, penalty wages for Claimant equal \$2,016.00.

### CLAIMANT IS OWED CIVIL PENALTIES UNDER ORS 653.055

The Agency also seeks civil penalties of \$2,016.00 under ORS 653.055(1)(b). That statute provides that an employer who pays an employee less than the applicable minimum wage is liable to the employee for civil penalties that are computed in the same manner as penalty wages under ORS 652.150. *Cornier v. Paul Tulacz, DVM PC*, 176 Or App 245 (2001). A *per se* violation occurs when an employee's wage rate is the minimum wage, the employee is not paid all wages earned, due, and owing under ORS 652.140(1) or 652.140(2), and no statutory exception applies. *In the Matter of Allen Belcher*, 31 BOLI 1, 10 (2009). Claimant's wage rate was the minimum wage. She was not paid all wages earned, due, and owing after she quit, and there is no applicable statutory exception. Consequently, Claimant is entitled to an ORS 653.055 civil penalty in the amount of \$2,016.00.

### ORDER

NOW, THEREFORE, as authorized by ORS 652.140(1), ORS 652.150, ORS 653.055, and ORS 652.332, and as payment of the unpaid wages, penalty wages, and civil penalties, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Susan C. Steves** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

- (1) A certified check payable to the Bureau of Labor and Industries in trust for Claimant in the amount of ELEVEN THOUSAND SIX HUNDRED AND THIRTY THREE DOLLARS AND TWENTY CENTS (\$11,633.20), less appropriate lawful deductions, representing \$7,601.20 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from July 1, 2010, until paid; \$2,016.00 in penalty wages, plus interest at the legal rate on that sum from August 1, 2010, until paid; and a civil penalty of \$2,016.00, plus interest at the legal rate on that sum from August 1, 2010, until paid.

---

<sup>5</sup> See *In the Matter of Captain Hooks, LLC*, 27 BOLI 211, 224 (2006)(the Agency's Order of Determination constitutes a written notice of nonpayment of wages).

**In the Matter of  
MARK A. FRIZZELL and LAUNA  
G. FRIZZELL**

**Case No. 05-11**

**Final Order of Commissioner  
Brad Avakian**

**Issued June 13, 2011**

---

**SYNOPSIS**

Respondent Mark Frizzell, a commercial fisherman, employed Claimant in 2009 as a crew member to assist Respondent in the 2009-2010 crab harvest. Claimant worked a total of 137 hours preparing Respondent's crab gear for the crab harvest. He was fired shortly before crab season began. If Claimant had participated in the crab harvest, he would have been paid a percentage of the total harvest. Instead, the only pay he received was in the form of cash and check draws and cans that he could cash in for a deposit return, totaling \$497. Under these circumstances, the forum concluded that Claimant was entitled to be paid at the minimum wage rate for all of his work on Respondent's crab gear. Computed at Oregon's 2009 minimum wage of \$8.40 per hour, Claimant earned \$1,150.80, leaving \$653.80 in unpaid, due, and owing wages. Respondent's failure to pay the wages was willful and the forum awarded Claimant \$2,016.00 in penalty wages. The forum also awarded Claimant \$2,016.00 as a civil penalty based on Respondent's failure to pay Claimant the minimum wage for all hours worked.

The forum determined that Respondent Launa Frizzell did not employ Claimant and dismissed the charges against her. ORS 652.140(1), ORS 652.150, ORS 653.025, ORS 653.055, ORS 653.261.

---

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 March 8-9, 2011, at the Newport office of the Oregon Department of Human Services, located at 120 NE Avery Street, Newport, Oregon.

The Bureau of Labor and Industries (“BOLI” or “the Agency”) was represented by case presenter Chet Nakada, an employee of the Agency. Wage claimant John Laws (Claimant) was present throughout the hearing and was not represented by counsel. Respondents Mark and Launa Frizzell represented themselves and were present throughout the hearing.

The Agency called the following witnesses: Claimant; BOLI Wage and Hour Division compliance specialist Bernadette Yap-Sam (telephonic); Tamera Raney, Claimant’s girlfriend; and Mark and Launa Frizzell.

In addition to themselves, Respondents called the following witnesses: Shawn Callahan and Doug McCall, former crew mem-

bers; and Tyana Frizzell, Respondents’ daughter.

The forum received into evidence:

a) Administrative exhibits X-1 through X-20 (submitted or generated prior to hearing); and

b) Agency exhibits A-1 through A-10 (submitted prior to hearing), A-11 (submitted at hearing), and A-12 (submitted after hearing);

c) Respondents’ exhibits R-1, R-5, R-10A, R-10B, R-10C, R-13, R-16 through R-19, R-21, R-22, R-24, R-25, R-26, R-27, and R-28 (submitted prior to hearing). R-10A, R-10B, R-10C were originally all numbered as R-10 but were renumbered and paginated at hearing to make the record clear. Respondents’ exhibits R-2 through R-4, R-6, R-7, R-30, and R-31 (submitted prior to hearing) were offered but not received. Respondents’ exhibits R-29 and R-30, which were photos taken on Respondents’ cell phones of which no copy had been made, were not received. The ALJ gave Respondents the opportunity to make an offer of proof for each exhibit that was offered but not received.

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 December 18, 2009, Claimant filed a wage claim with the Agency alleging that Mark Frizzell (“M. Frizzell”) had employed him and failed to pay wages earned and due to him. At the same time, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent.

2) On May 19, 2010, the Agency issued Order of Determination No. 09-3761 based on the wage claim filed by Claimant and the Agency’s investigation. In pertinent part, the Order alleged that:

- Respondents employed Claimant from September 21 through November 24, 2009, and were required to pay Claimant no less than \$8.40 per hour for each hour worked;
- Claimant worked a total of 292 hours, earning \$2,452.80;
- Respondents have only paid Claimant \$240.00, leaving a balance due and owing of \$2,212.80 in unpaid wages, plus interest thereon at the legal rate per annum from December 1, 2009, until paid;
- Respondents willfully failed to pay these wages and owe Claimant \$2,016.00 in penalty wages, with interest thereon at the legal rate per annum from January 1, 2010, until paid.

- Respondents owe Claimant \$2,016.00 in civil penalties based on Respondents’ failure to pay Claim at the minimum wage for all hours worked.

3) On May 31, 2010, Respondents each filed an answer and request for hearing in which they each alleged:

- Claimant worked on an agreed upon percentage basis, not for an hourly wage;
- Claimant did not work the hours claimed in the Order of Determination;
- Claimant was self-employed like all commercial fishermen and was paid “on a percentage of the catch only”;
- Respondents do not owe Claimant any wages;
- Because Respondents do not owe Claimant wages, Respondents do not owe Claimant any penalty wages.

4) On August 25, 2010, the Hearings Unit issued a Notice of Hearing to Respondents, the Agency, and Claimant setting the time and place of hearing for 9:00 a.m. on March 8, 2011, at the Newport offices of the Oregon Department of Human Services.

5) On August 31, 2010, the ALJ ordered the Agency and Respondents each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and a brief statement of

the elements of the claim, a statement of any agreed or stipulated facts, and any wage and penalty calculations (for the Agency only). The ALJ ordered the participants to submit case summaries by February 25, 2011, and notified them of the possible sanctions for failure to comply with the case summary order.

6) Respondents filed virtually identical case summaries on February 16, 2011.

7) On February 14, 2011, Respondents filed a request for discovery in which they stated the following:

“[We] hereby request and subpoena all original documents showing [Claimant’s] hourly wages (State Law Wage not the percentage) he received while working on commercial fishing boats during the entire year in question (2009). I do not want a calendar or a letter fabricated after the fact, I want to see the actual original check stubs and receipts to prove this.

“Mr. Law was paid a higher percentage like all fishermen to cover all gear work that is performed. Commercial Fisherman [sic] do not get paid an hourly wage since they are already being compensated through the percentage. All boat owners would pay a lesser percentage if they paid an hourly wage on top of a percentage of the catch. They are considered self-employed

or independent contractor [sic] and received a 1099.

“That is why I am asking for the documents that show him actually being paid a state required hourly wage, not his percentage broke [sic] down in days and hours worked to average an hourly.”

In response, the ALJ issued an order requiring Respondents to state whether they wanted a discovery order or subpoena issued, should their motion for discovery be granted.

8) On February 17, 2011, the ALJ conducted and recorded a telephonic prehearing conference with Mr. Nakada, M. Frizzell, and Launa Frizzell (“L. Frizzell”). During the conference, the ALJ explained the difference between issuing a subpoena and a discovery order. During the conference, M. Frizzell stated that he cannot read. He also stated that L. Frizzell, his wife, can read and would read all documents related to the case to him. That same day, Respondents filed a letter stating that they would like a discovery order, not a subpoena.

9) In response to Respondents’ motion for a discovery order, the Agency timely filed a response in which it stated that it “has no documents Respondents are asking for in its request for a discovery order.” The Agency did not make a relevancy objection to the requested discovery. On February 22, 2011, the ALJ issued an interim order granting Respon-

dents' motion that stated, in pertinent part:

"Respondents' defenses both include allegation that commercial fishermen, including Claimant, are paid on a percentage basis only, not hourly wage, and are considered self-employed. Based on Respondents' pleading, I find that the discovery requested by Respondents is reasonably likely to produce information generally relevant to Respondents' defense. Accordingly, Respondents' motion is **GRANTED.**"

10) Respondents' case summary included a request that the forum dismiss the case. The forum treated Respondents' request as a motion to dismiss. On February 25, 2011, the ALJ issued an interim order denying Respondents' request. In pertinent part, the interim order stated:

"\* \* \* Respondents asked the forum 'to dismiss this case and waive all penalty [sic] and fees that have been assessed against us' on the grounds that Respondents' Exhibit R-10 makes it 'obvious' that Claimant's 'Calendar of events, days worked and hours worked were fabricated after-the-fact and not kept in a contemporaneous manner as claimed by claimants [sic] on 5-17-2010 in their statement to BOLI.

"Until the Agency files its case summary, I have no way of knowing, aside from reading the allegations in the Order of

Determination, which specific dates and times the agency contends that Claimant \* \* \* worked. I note Respondents' exhibits appear to concede that Claimant did work some hours, albeit less than the amount claimed in the Order of the Determination. Even then, the potential existence of a partial discrepancy is not grounds for dismissing the case, as it is possible that a claim may be valid in some respects and not others."

11) On February 25, 2011, the Agency filed its case summary. Agency filed an addendum to its case summary on February 28, 2011.

12) On February 28, 2011, the Agency sent a letter to the ALJ stating that it was arranging to have security present at the hearing because of security concerns that were outlined in the letter.

13) An officer from the City of Newport Police Department was present throughout the hearing.

14) During the second day of hearing, Respondent Mark Frizzell made the following requests:

- That he be given the opportunity to retain an attorney;
- That the case be removed to federal court;
- For a court trial with a jury.

The ALJ denied each request.

15) On March 16, 2011, the ALJ re-opened the record on his own motion to obtain a copy of Claimant's original 2008-2009 planner for inspection. At hearing, copies of that planner showing entries for September 21 through November 29, 2009, had been offered and received into evidence. At hearing, the Agency had proffered the original planner for inspection, but the ALJ declined the Agency's offer at that time. Claimant sent his original planner directly to the ALJ, who received it on March 22, 2011, and marked and received it into the record as Exhibit A-12.

16) The ALJ issued a proposed order on April 20, 2011, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On April 26, 2011, the Agency filed exceptions. Those exceptions are discussed at the end of the Opinion section of this Final Order.

#### **FINDINGS OF FACT – THE MERITS**

1) At all times material herein, Mark Frizzell ("M. Frizzell") was a commercial fisherman who owned the fishing vessel *Intrepid* and used it to catch crab and fish in the Pacific Ocean off the coasts of Oregon and Washington. M. Frizzell lived in Newport, Oregon, and docked the *Intrepid* in Newport when it was not on a fishing trip. M. Frizzell hired everyone who worked on the *Intrepid* or performed work to prepare it for fishing trips.

2) At all times material herein, Launa Frizzell ("L. Frizzell") was married to M. Frizzell. She acted as M. Frizzell's bookkeeper, wrote out checks, and processed accounts receivable for M. Frizzell.

3) Traditionally, deck hands and the skipper who are hired to work on commercial fishing vessels are paid an agreed rate that consists of a percentage of the gross value of the total catch each fishing trip. In exchange for that percentage, they are expected to prepare the vessel and fishing gear required for each trip, work on the boat while it is fishing, and clean the vessel after the trip. They are expected to pay for their own groceries. Traditionally, they receive an IRS 1099 at the end of the year.

4) M. Frizzell hired Claimant, an experienced commercial fisherman, in the summer of 2009 to skipper the *Intrepid* while it was fishing for tuna and to work as a deck hand during the crab harvest. For tuna trips, M. Frizzell agreed to pay him 13 percent of the catch and later raised it to 16 percent. M. Frizzell agreed to pay Claimant 12 percent of the crab catch. Claimant and M. Frizzell did not execute a written employment contract.

5) Beginning in August 2009, Claimant skippered the *Intrepid* on commercial tuna fishing trips for M. Frizzell until September 17, 2009. Claimant was paid in full for those trips.

6) After the fishing trip that ended on September 17, 2009,

Claimant, Doug McCall, and Shawn (“Red”) Callahan cleaned up the “tuna mess,” then sanded and painted the *Intrepid*.

7) After fishing for tuna, it takes a day or more to clean up the *Intrepid* and perform routine mechanical maintenance so that it can be prepared for crab season.

8) From September 17 to October 1, 2009, Claimant performed the following work related to cleaning up the “tuna mess” or preparing the *Intrepid* for crab season:

September 21: 7.5 hours cleaning up tuna mess

September 22: 7.5 hours crab-related work

September 23: 7.5 hours crab-related work

September 24: 7.5 hours crab-related work

9) Between October 3 and October 11, 2009, Claimant skippered the *Intrepid* on its last commercial tuna fishing trip of the 2009 season. Claimant was paid in full for that trip. At the end of the trip, he owed M. Frizzell \$240 for groceries. Claimant’s share of the catch was only \$397.76. Because Claimant had medical bills to pay and he and M. Frizzell anticipated that Claimant would be working through crab season, M. Frizzell told Claimant he would not deduct the \$240 from Claimant’s check, but would instead deduct from Claimant’s first crab check.

10) Preparation of the *Intrepid* for crab season involved repairing M. Frizzell’s crab pots,

drilling holes in “baiters,” attaching bridles, and painting buoys. This work was done either on the *Intrepid*, in the crab yard where M. Frizzell kept his crab pots, or at Frizzell’s house. During the 2009 crab season, M. Frizzell had 300 crab pots, each weighing approximately 120 pounds, including baiter, 900 buoys, bridle, and the weighted ropes used to lower and raise the pots from the ocean floor.

11) McCall was let go by M. Frizzell on October 16, 2009. At that time, 87 of M. Frizzell’s 300 crab pots had been repaired.

12) During the wage claim period, Claimant worked a number of days with Callahan doing work related to crab gear.

13) Callahan did not have a valid Oregon driver’s license during the wage claim period. He drove to work for the first “2-3 days” that he worked for Respondent, and then decided it was a bad idea to drive without a license. Thereafter, Claimant picked Callahan in the morning and gave Callahan a ride to work. On those days, it was common that Claimant would telephone Callahan when he arrived at Callahan’s driveway in the morning or Callahan would telephone Claimant to tell them he was ready to be picked up.

14) During the wage claim period, M. Frizzell hired Justin \_\_\_\_\_ to paint the buoys used on the *Intrepid* and paid him a piece rate wage.

15) Claimant worked the following schedule for Respondent from October 12 through November 23, 2009:

October 12: 4 hours cleaning up tuna mess

October 13: 4 hours cleaning up tuna mess, 1 hour crab-related work

October 14: 5 hours crab-related work

October 19: 7.5 hours crab-related work

October 21: 7.5 hours crab-related work

October 22: 7.5 hours crab-related work

October 26: 5 hours crab-related work

October 27: 5 hours crab-related work

October 28: 5 hours crab-related work

October 29: 5 hours crab-related work

October 30: 6 hours crab-related work

October 31: 5 hours crab-related work

November 1: 5 hours crab-related work

November 4: 5 hours crab-related work

November 5: 5 hours crab-related work

November 7: 6 hours crab-related work

November 8: 6 hours crab-related work

November 9: 6 hours crab-related work

November 20: 5 hours crab-related work

November 21: 5 hours crab-related work

November 22: 5 hours crab-related work

November 23: 7 hours crab-related work

16) In total, Claimant performed 137 hours of crab-related work for M. Frizzell from September 22 through November 23, 2009.

17) M. Frizzell fired Claimant at the end of the work day on November 23, 2009.

18) Despite being fired, Claimant showed up for work on November 24, 2009, and worked

for at least an hour. There was no evidence presented that M. Frizzell was contemporaneously aware that Claimant was working on November 24 or that he had authorized Claimant to work that day.

19) In November 2009, Claimant received \$257 in draws as an advance against the percentage of the catch he expected to earn from the *Intrepid's* crab harvest. The draws were paid in the form of checks for \$200 and \$20, \$20 in cash, and \$17 worth of cans with a return deposit that Claimant was able to return for cash.

20) On October 1, 2009, sunset occurred at 6:58 p.m. in Newport; by October 31 sunset had moved back to 6:08 p.m. On November 1, 2009, sunset occurred at 5:06 p.m.<sup>1</sup> in Newport; by November 24 sunset had moved back to 4:41 p.m.

21) The 2009 crab season in Oregon began on December 1, 2009, and lasted five months. M. Frizzell and Callahan fished for crab in the *Intrepid*. Claimant was not paid a percentage of the *Intrepid's* crab harvest or any money other than the \$497 in draws he received in October and November 2009.

22) Claimant received all of his draws from L. Frizzell. Six of them, including four related to the tuna catch, and two related to

---

<sup>1</sup> The forum takes judicial notice of the fact that Daylight Savings Time ended on November 1, 2009.

crab work, were given to Claimant in the form of checks. M. and L. Frizzell's names, address, and phone number is printed on each check, and they are signed by L. Frizzell. The Frizzells did not keep receipts for cash draws that they paid out.

23) Including the \$240.00 tuna draw, Claimant had received \$497.00 in outstanding draws at the time he was fired. Calculated at Oregon's 2009 statutory minimum wage of \$8.40 per hour, Claimant earned \$1,150.80 in gross wages (137 hours x \$8.40 per hour = \$1,150.80), leaving \$653.80 in unpaid, due and owing wages as of Claimant's last day of work.

24) Respondents did not keep a record of the hours worked by Claimant during the wage claim period.

25) Claimant did not work for anyone else but M. Frizzell during the wage claim period.

26) Claimant invested no money in the *Intrepid* or M. Frizzell's fishing business. Other than his raingear and boots, he provided no equipment or tools. M. Frizzell was his boss, told him what work to do, and provided him with the pair of pliers he needed to do his work.

27) Respondents gave Claimant an IRS Form 1099-MISC for 2009 that stated Claimant had received \$3,866.31 in "Fishing boat proceeds" from "Mark A. Frizzell."

28) Oregon's statutory minimum wage into 2009 was \$8.40 per hour.

29) On December 30, 2009, the Agency mailed a document entitled "Notice of Wage Claim" to Mark Frizzell that stated:

"You are hereby notified that JOHN LAWS has filed a wage claim with the Bureau of Labor and Industries alleging:

"Unpaid statutory minimum wages of \$2,355.60 at the rate of \$8.40 per hour from September 21, 2009 to November 24, 2009.

"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.

"IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation which supports your position, as well as payment of any amount which you concede is owed the claimant to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.

"If your response to the claim is not received on or before January 14, 2010, the Bureau may initiate action to collect these wages in addition to

penalty wages, plus costs and attorney fees.”

30) Respondents have not paid any money to Claimant since Claimant’s last day of work.

31) Penalty wages are computed as follows for Claimant, in accordance with ORS 652.150: \$8.40 per hour x 8 hours x 30 days = \$2,016.

32) ORS 653.055 civil penalties are computed as follows for Claimant: in accordance with ORS 652.150 and ORS 653.055: \$8.40 per hour x 8 hours x 30 days = \$2,016.

33) The Agency offered Claimant’s September, October, and November 2009 Verizon cell phone bills into evidence and they were all received as Exhibit A-10. The bills show the purported origination and destination of each call, the calling and receiving numbers, and the time of day each call was made. Because of an unresolved controversy about whether the stated origination and destination of each call are the actual geographic locations the calls were made to or from, the forum gives no weight to the stated origination and destination of the calls listed on the bills. However, the forum has relied on numbers and times of calls between Claimant and Callahan to help determine days that Claimant did or did not work.

### **CREDIBILITY FINDINGS**

34) Doug McCall and Bernadette Yap-Sam were credible

witnesses and the forum has credited their entire testimony.

35) Tyana Frizzell is the daughter of M. and L. Frizzell. She testified that in September, October, and November 2009 she lived with her parents and arrived home from work at noon. She also testified that she never saw Claimant paint buoys or lash up crab pots, that he never worked at the Frizzell house after 4 p.m., and that it gets dark after 4 p.m. in October. The 4 p.m. statement was identical to the testimony of M. Frizzell and L. Frizzell and was offered to prove that Claimant could not have worked after 4 p.m. because it was dark. Due to her familial bias and her testimony about the 4 p.m. hour of darkness in October that contradicts credible documentary evidence to the contrary, the forum has only credited her testimony that was corroborated by other credible evidence.

36) Shawn Callahan’s testimony was riddled with internal inconsistencies. Although not currently employed by M. Frizzell, Callahan demonstrated a bias towards Respondents by repeatedly volunteering additional information that he perceived would be favorable to them in response to the Frizzell’s direct examination. His testimony on direct examination was remarkably specific as to dates that he worked, considering that he appeared to be testifying solely from memory. In contrast, when cross examined about the same dates, he stated in a five-minute time span: “It’s hard to

remember that far back”; “It’s hard to remember all of these”; “It’s hard to remember dates”; and “It’s just kind of hard to remember because I know we took a lot of days also off for deer and elk season.” In addition, his testimony on direct examination about Exhibit R-17, and his handwritten statement describing the dates and hours he and Claimant worked contradicted many of his prior statements on direct examination about the same dates.

In contrast to the more credible testimony of McCall, who testified that only 87 crab pots had been repaired by October 16 and that he worked on crab gear in October, Callahan testified that 167 crab pots had been repaired by September 9. He testified, as did M. Frizzell, that M. Frizzell would not let anyone work alone on crab pots due to safety issues but contradicted that testimony by claiming he worked alone on crab gear on October 26, October 30, and November 10. Callahan also testified that he rode to work with Claimant because his driver’s license had been suspended. This raises the additional question of how Callahan could have worked alone when he did not testify to any other means of getting to work except by writing with Claimant.

Callahan testified that he and Claimant never started work at 8 a.m., the time they were scheduled to start, that Claimant often picked him up at 9:30 a.m., that they never did any work for the first 1½ hours they were at the

boat, and that they had 1-1½ hour lunches at McDonald’s three or four times a week, and that they never worked after 3:30 p.m. If the forum believes this testimony, it must conclude that Claimant and Callahan could not have worked more than 3½-4 hours in a typical day. In contrast, Callahan’s written record of hours, which he also testified was accurate, shows that he worked “4-5” or “5-6” hours with Claimant on 11 different days. Considering this contradiction and other testimony by Callahan that he and Claimant only worked on crab gear during four separate weeks<sup>2</sup> that respectively totaled two, three, four, and five days in duration, the forum views this as another demonstration of Callahan’s bias. This bias was further shown by undisputed evidence that Callahan was one of M. Frizzell’s hunting partners in the fall of 2009.

In conclusion, the forum has only credited Callahan’s testimony when it was corroborated by other credible evidence.

37) Mark Frizzell testified that most of the crab gear work was done while Claimant was fishing for tuna in the *Intrepid*. In an earlier signed, written statement, he stated that “when John Law started crab gear on October 26, 2009[,] the gear was almost done[.] [T]hey had 130 crab pots to do out of 300 crab pots.” This was in marked contrast to McCall’s credible testimony that

---

<sup>2</sup> The forum bases this calculation on a Monday-Sunday work week.

213 crab pots remained to be done when he was let go on October 16, 2009. Like his daughter, M. Frizzell also testified that it gets dark around “4:30-5 p.m.” in October to prove that no outdoor crab work could be done after that time due to the absence of light to work in. Again, this contradicts credible evidence provided by the Agency showing that on sunset occurred at between 6:58 p.m. and 6:08 p.m. in Newport in October 2009. M. Frizzell’s written statement also states that when Claimant did work, M. Frizzell “always give him money for food [and] gas or my wife made them lunch.” This contradicts Callahan’s testimony that he and Claimant usually ate at McDonald’s. M. Frizzell also testified that he hired Claimant in the “sixth or seventh” month in 2009, which contradicts his written statement that he hired Claimant on August 22, 2009. Finally, the forum credits M. Frizzell’s disagreement with the hours Claimant claims to have worked. However, it discredits his testimony that Claimant was paid in draws for all the crab preparation work he performed based on M. Frizzell’s failure to keep any records of the hours Claimant worked and because of the unreliability of L. Frizzell’s record of crew member draws in November 2009. In conclusion, the forum has only credited M. Frizzell’s testimony concerning the amount Claimant was paid and the hours he worked when it was supported by other credible testimony. The forum also treats M. Frizzell’s written statement that Claimant

worked five hours whenever he worked as an admission against interest to support the conclusion that Claimant worked a minimum of five hours each day that Callahan testified that he and Claimant worked together.

38) Launa Frizzell’s testimony about her role in M. Frizzell’s fishing operation was credible. She did not witness Claimant’s work and did not testify as to the hours he worked. Her testimony concerning the draws that she paid out to Claimant was not credible because she provided no written receipts and because it shows cash draws paid out to Claimant on dates he did not work<sup>3</sup> and to Callahan on two dates he testified he was either setting up for elk hunting or elk hunting.<sup>4</sup>

39) Tamera Raney, Claimant’s live-in partner for the last six years, was called as a witness by the Agency to provide evidence of the hours and dates worked by Claimant and to authenticate copies of pages from the 2008-2009 planner she and Claimant shared that were offered and received as part of Exhibit A-1. She testified that she accurately wrote down Claimant’s hours worked on a daily, contemporaneous basis in the daily planner they shared based on information given to her by Claimant and that the copies in Exhibit A-1 were accurate copies.

---

<sup>3</sup> November 2, November 12, and November 16.

<sup>4</sup> November 12 and November 16.

Ranes's credibility hinges primarily on this testimony.

After the hearing, the ALJ requested that the Agency submit the original planner and the Agency responded by having Claimant send it directly to the ALJ. After inspecting the original planner, the forum concludes that, while many of the dates and some of the hours in the planner are correct, the entries showing Claimant's dates and hours worked were not made contemporaneously and are not completely accurate. The forum bases this conclusion on the following observations: (1) The first entry in the planner is on January 23, 2009, and the only dates in the planner that show hours worked per day by Claimant are the days corresponding to his wage claim, whereas there are entries before and after Claimant's employment with Respondent that refer to work on other boats; (2) Why would Claimant keep a contemporaneous record of his hours when he was expecting to be paid based on a percentage of the catch and had no way of anticipating he would be fired before the crab season started when he did not keep a similar record with his other fishing employment that paid him on a percentage of the catch basis? (3) Several of the entries in the original planner do not match the exhibits, leaving the ALJ to conclude that Claimant or Raney either deliberately excluded some entries when making copies for the hearing or changed them after the hearing; (4) The entries in the planner related to

Claimant's dates and hours worked for Respondent are all written the same style and appear to be written with the same pen, whereas other entries on those days related to paying bills through November 10, 2009, are written with a different pen in a different colored ink. Based on these observations, the forum has only credited Raney's testimony concerning the dates and hours worked by Claimant when it was corroborated by other credible evidence.

40) Claimant's testimony was only partly credible because of his demeanor, of internal inconsistencies, the issues with his planner described in the previous Finding of Fact – The Merits, contradictions with credible documentary evidence, and his lack of specificity as to actual work he performed on any given day.

First, Claimant's demeanor. On direct examination, Claimant was relaxed and responded confidently and directly to questions. On cross examination, as soon as M. Frizzell and L. Frizzell began grilling him about his hours worked and confronted him with some contradictory evidence, his demeanor underwent a dramatic transformation. Almost immediately, he became noticeably disturbed and flustered and his confident testimony on direct examination became uncertain and hesitant.

Second, internal inconsistencies in Claimant's testimony. Despite undisputed evidence, including Claimant's own testimony,

that Respondent only has 300 crab pots and a permit for 300 crab pots, Claimant testified that he worked on 500 crab pots for M. Frizzell and offered no explanation for this discrepancy.<sup>5</sup> On direct and redirect examination, Claimant testified that he worked on “chew bags.” Earlier, he told the Agency investigator that he had worked on chew bags. On cross-examination he testified that he did not recall working on chew bags.

Third, a conflict with credible documentary evidence. Claimant testified he was fired on November 24, the day Respondent loaded crab gear. However, an uncontroverted receipt from the Port of Newport provided by Respondent shows that Respondent loaded crab gear on November 23 between 9:30 a.m. and 1:00 p.m.

Finally, Claimant testified that he had little independent recollection as to what work he did for M. Frizzell on any specific day during the wage claim period. Instead, he testified that the nearly 300 total work hours noted by Raney in their shared planner was an accurate record of the dates and hours he worked on crab gear for M.

---

<sup>5</sup> His relevant testimony on this subject on direct examination was:

Q: “To prepare for the 2009 crabbing season, how many pots did you work on?”

A: “If you look at it that way, about 500 pots because I was told when we got down to the yard that there was about 80 to 100 pots all ready to go.”

Frizzell. Based on the entire record, the forum has determined that this record is only partly accurate and that Claimant either purposely omitted several entries in copying it to be part of Exhibit A-1 or added them after the hearing before submitting the original planner to the ALJ. Either way, this casts a shadow on Claimant’s credibility.

In conclusion, the forum has credited Claimant’s testimony regarding the amount of draws he received in its entirety, but only credited his testimony as to the dates and hours he worked on crab gear based on the methodology set in out the section of the Opinion entitled “Amount and Extent of Hours Worked.”

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

1) At all times material herein, M. Frizzell was a commercial fisherman who owned the fishing vessel *Intrepid* and used it to catch crab and fish in the Pacific Ocean off the coasts of Oregon and Washington. M. Frizzell lived in Newport, Oregon, and docked the *Intrepid* in Newport when it was not on a fishing trip. At all times material herein, M. Frizzell was an Oregon employer who suffered or permitted one or more employees to work, including Claimant.

2) At all times material herein, L. Frizzell was married to M. Frizzell. She acted as M. Frizzell’s bookkeeper, wrote out checks, and processed accounts receivable for M. Frizzell.

3) M. Frizzell hired Claimant in the summer of 2009 to skipper the *Intrepid* while it was fishing for tuna and to work as a deck hand during the crab harvest. M. Frizzell agreed to pay Claimant 12 percent of the crab catch.

4) From September 22 to November 23, 2009, Claimant worked 137 hours on crab-related jobs for M. Frizzell. Calculated at Oregon's 2009 statutory minimum wage of \$8.40 per hour, Claimant earned \$1,150.80 in gross wages.

5) Claimant was paid no wages for his crab-related work but received \$497 in draws in October and November 2009 from M. Frizzell with the intent that they would be deducted from his crab harvest checks.

6) M. Frizzell fired Claimant on November 23, 2009.

7) After being fired, Claimant showed up for work on November 24, 2009, and worked for at least an hour without M. Frizzell's knowledge or authorization.

8) The 2009 crab season in Oregon began on December 1, 2009, and lasted five months. M. Frizzell and Callahan fished for crab in the *Intrepid*. Claimant was not paid a percentage of the *Intrepid's* crab harvest or any money other than the \$497 in draws he received in October and November 2009, leaving \$653.80 in unpaid, due and owing wages as of Claimant's last day of work.

9) On December 30, 2009, the Agency mailed a document entitled "Notice of Wage Claim" to M.

Frizzell that notified Frizzell of Claimant's wage claim and asked that Frizzell submit a check for either the amount of wages sought in the wage claim or the amount that Frizzell conceded was due.

10) Respondents have not paid any money to Claimant since Claimant's last day of work.

11) Penalty wages are computed as follows for Claimant, in accordance with ORS 652.150: \$8.40 per hour x 8 hours x 30 days = \$2,016.

12) ORS 653.055 civil penalties are computed as follows for Claimant: in accordance with ORS 652.150 and ORS 653.055: \$8.40 per hour x 8 hours x 30 days = \$2,016.

### CONCLUSIONS OF LAW

1) At all times material herein, Respondent M. Frizzell was an Oregon employer who suffered or permitted Claimant to work in Oregon and Claimant was Respondent's employee, subject to the provisions of ORS 652.110 to 652.200, ORS 652.310 to 652.405, and ORS 653.010 to 653.055.

2) At all times material herein, Respondent L. Frizzell was not an Oregon employer and Claimant was not her employee. The Agency's Order of Determination is hereby dismissed as to Respondent L. Frizzell.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 652.310 to 652.405.

4) Respondent M. Frizzell violated ORS 652.140(1) by failing to pay to Claimant all wages earned and unpaid not later than the end of Respondent's work day on November 24, 2009. Respondent M. Frizzell owes Claimant \$653.80 in unpaid, due, and owing wages related to work Claimant performed on crab gear.

5) Respondent M. Frizzell willfully failed to pay Claimant all wages due and owing related to work Claimant performed on crab gear and owes \$2,016 in penalty wages to Claimant. ORS 652.150.

6) Respondent M. Frizzell paid Claimant less than the wages to which he was entitled under ORS 653.010 to 653.261 by failing to pay him Oregon's statutory minimum wage for all hours worked related to work Claimant performed on crab gear and is liable to pay \$2,016 in civil penalties to Claimant. ORS 653.055(1)(b).

7) 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 Mark Frizzell to pay Claimant his earned, unpaid, due and payable wages, penalty wages, and civil penalties, plus interest, on all sums until paid. ORS 652.332.

## OPINION

### CLAIMANT'S WAGE CLAIM

To establish Claimant's wage claim, the Agency must prove the following elements by a prepon-

derance of the evidence: 1) Respondents employed Claimant; 2) The pay rate upon which Respondents and Claimant agreed, if other than 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 Respondents. *In the Matter of Creative Carpenters Corporation*, 29 BOLI 271, 277 (2007).

### CLAIMANT WAS EMPLOYED BY RESPONDENT M. FRIZZELL

In this case, the Agency named both M. Frizzell and L. Frizzell as Respondents. In their respective answers, both Frizzells allege that Claimant was self-employed and that they did not owe Claimant any wages because he did not earn any wages. The forum treats these pleadings as a denial that Respondents employed Claimant and an affirmative assertion that Claimant was an independent contractor. The Agency has the burden of proving that one or both Respondents were Claimant's employer. *See In the Matter of 82<sup>nd</sup> Street Mall, Inc.*, 30 BOLI 140, 142 (2009) (the agency must prove the elements of its prima facie case, which includes respondent's employment of a wage claimant, in order to prevail). Respondents bear the burden of proving that Claimant was an independent contractor. *In the Matter of Gary Lee Lucas*, 26 BOLI 198, 210 (2005).

Based on the pleadings, the forum must conduct a two-step analysis before concluding

whether the Agency has established, by a preponderance of the evidence, the first element of its prima facie case. The first step is to determine whether one or both Respondents are potentially liable if the forum finds that Claimant was not an independent contractor. The second step is to determine whether Respondents have proved, by a preponderance of the evidence, that Claimant was an independent contractor.

**A. Are one or both Respondents potentially liable as employers?**

To answer this question, the forum looks at the ownership and operation of the Frizzell fishing business. There is no evidence that the business was a limited liability company or corporation or another form of business entity created by statute. The business was not registered with the Corporation Division and there was no assumed business name. This leaves only two possibilities -- either the business was an individual proprietorship owned by either M. Frizzell or L. Frizzell or the Frizzells were partners.

The business in question involves the fishing and crab harvesting operation conducted aboard the vessel *Intrepid* while at sea and the necessary work performed prior to and subsequent to the actual fishing and crab harvesting. Undisputed evidence established that M. Frizzell owns the *Intrepid*, hires crew members and other persons to do piece work in preparation for the crab season and negotiates pay rates

with them, determines the work performed by the persons he hires, and supervises them. Undisputed evidence further established that L. Frizzell's only connections with the business were: (1) She was M. Frizzell's bookkeeper; (2) She was married to M. Frizzell; and (3) She signed the checks for the business's accounts payable and her name was printed on the checks immediately below M. Frizzell's name.

M. Frizzell's ownership of the *Intrepid* and supervision of its operations establishes that he was an owner of the business and is potentially liable as an employer. L. Frizzell's potential liability, if any, must arise from a partnership interest.

A partnership is never presumed and the agency bears the burden of proof to show that co-named respondents were partners. *In the Matter of John Steensland*, 29 BOLI 235, 263 (2007). Under ORS 67.055(1), "the association of two or more persons to carry on as co-owners a business for profit creates a partnership, whether or not the persons intend to create a partnership." ORS 67.055(4) provides:

"In determining whether a partnership is created, the following rules apply:

"(a) Factors indicating that persons have created a partnership include:

"(A) Their receipt of or right to receive a share of profits of the business;

“(B) Their expression of an intent to be partners in the business;

“(C) Their participation or right to participate in control of the business;

“(D) Their sharing or agreeing to share losses of the business or liability for claims by third parties against the business; and

“(E) Their contributing or agreeing to contribute money or property to the business.

“\* \* \* \* \*

“(c) The sharing of gross returns does not by itself create a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.”

See *In the Matter of Captain Hooks, LLP*, 27 BOLI 211, 225 (2007). The only evidence in the record support the conclusion that a partnership existed is the undisputed facts that Respondents are married and both of their names appear on the checks used to pay Claimant. This is insufficient to establish a partnership and the forum concludes that the business was an individual proprietorship owned and operated by M. Frizzell hereafter “Respondent”).<sup>6</sup>

<sup>6</sup> See *In the Matter of Bubbajohn Howard Washington*, 21 BOLI 91, 100 (2000) (when there was no evidence presented that a co-respondent participated in the decision to hire claimant; that she directed claimant’s

## **B. Claimant was not an independent contractor.**

The forum’s determination of whether or not Claimant was an independent contractor focuses only on the specific work at issue in this wage claim. The Agency concedes that Claimant was paid in full based on Claimant’s agreement with Respondent for tuna fishing. The work at issue is the work that Claimant performed to prepare the *Intrepid* and Respondent’s crab gear for the 2009-2010 crab harvest that did not involve any participation in the actual crab harvest. Claimant’s

---

work in any way; that she shared in any profits or liability from respondent’s business; or that she controlled the operation of the business, other than taking money from customers, the forum concluded that the co-respondent was not a partner). Compare *In the Matter of Richard Ilg*, 11 BOLI 230, 233, 237, 239 (1993) (two respondents, a father and son, were partners when (1) they filed for an assumed business name together as parties in interest; (2) they operated as a partnership; (3) both had signatory authority on the business bank accounts; and (4) both assigned and supervised the work of the claimants); *In the Matter of Flavors Northwest*, 11 BOLI 215, 224, 228-29 (1993) (two respondents, a husband and wife, were partners when they were co-registrants of an assumed business name; the public viewed the wife as a co-owner; the claimants viewed her as a co-owner and operator of the business with her husband; and she had an active role in obtaining applications and other documents, keeping records, and preparing payrolls for the business).

tuna work was a different kind of work performed under a different agreement for a different percentage of the catch.

This forum applies an “economic reality” test to distinguish an employee from an independent contractor under Oregon’s minimum wage and wage collection laws. *In the Matter of Forestry Action Committee*, 30 BOLI 63, 75-76 (2008). The degree of economic dependency in any given case is determined by analyzing the facts presented in light of the following five factors, with no one factor being dispositive:

- (1) The degree of control exercised by the alleged employer;
- (2) The extent of the relative investments of the worker and alleged employer;
- (3) The degree to which the worker’s opportunity for profit and loss is determined by the alleged employer;
- (4) The skill and initiative required in performing the job; and
- (5) The permanency of the relationship.

*Id.*

The facts relevant to the determination of whether Respondent was Claimant’s employer can be categorized as follows:

### **1. The degree of control exercised by Respondent.**

Although there is a dispute over the number of hours that Claimant actually worked, Respondent testified that he was the

boss and told Claimant what to do. Claimant credibly testified that Respondent set his work hours. Respondent testified that he had the right to set Claimant’s hours and to tell Claimant when he could not work<sup>7</sup> as well as when he should work. This evidence indicates an employment relationship.

### **2. The extent of the relative investments of Claimant and Respondent.**

Respondent owned the *Intrepid* and there was no evidence that Claimant made any financial investment in Respondent’s business. His only job-related expense was the gas he bought for his truck so he could drive to work from his home in Toledo.<sup>8</sup>

Respondent provided all the tools used by Claimant in his work. All of Claimant’s work related to crab gear was done at Respondent’s house, on the *Intrepid* while it was docked, or at the Port of Newport “crab yard” where Respondent stored his crab pots. This evidence indicates an employment relationship.

### **3. The degree to which the Claimant’s opportunity for profit and loss was determined by Respondent.**

Because Claimant had no investment in Respondent’s

---

<sup>7</sup> Specifically, Respondent testified that he told Claimant not to work while Respondent was elk hunting.

<sup>8</sup> The forum regards the expense of commuting to work as a normal cost in most employment relationships.

business, he could not suffer a monetary loss. He had no opportunity to earn more money during the crab season by working harder or more skillfully because he was not paid by a percentage of the catch due to his premature termination. Although he was hired at an agreed rate of pay -- 12 percent of the catch for the crab harvest -- his actual pay bore no relationship to this agreed rate and the only money received during the crab season was \$257 in draws, including the cans he returned for deposit. This indicates an employment relationship.

#### **4. The skill and initiative required in performing the job.**

Claimant was an experienced commercial fisherman. However, the only work he performed for Respondent was sanding and painting the *Intrepid*, repairing crab pots, drilling baiters, and painting buoys. The only tool Claimant used to repair crab pots was a pair of pliers. Painting buoys required the use of a paint brush and drilling holes in baiters required the use of a drill. There was no evidence that these tasks required any special training or skills. This indicates an employment relationship.

#### **5. The permanency of the relationship.**

The expected duration of Claimant's employment with Respondent was until the end of the crab season, which lasted from December 1, 2009, until the end of April 2010. Claimant's work related to Respondent's crab

harvest, which even Respondent agrees began no later than October 26, 2009, would have extended for six months had he not been fired. An anticipated end date to employment, in and of itself, does not indicate either an independent contractor or an employment relationship, as the forum focuses on the anticipated duration of the employment. Based on prior final orders, the forum concludes that the anticipated six-month duration of Claimant's employment indicates an employment relationship.<sup>9</sup>

---

<sup>9</sup> See *In the Matter of Forestry Action Committee*, 30 BOLI 63, 76 (2008) (Impermanence of a particular job alone, when claimant's tenure with respondent was limited to six months by the terms of respondent's contract with a funding agency, did not create an independent contractor relationship); *In the Matter of Triple A Construction, LLC*, 23 BOLI 79, 93 (2002) (When claimants were laborers hired for a short term remodeling project to perform a variety of tasks that did not require them to possess a high degree of initiative, judgment, foresight, or any special skills, the forum held that the impermanence of a particular job alone does not create an independent contractor relationship). Compare *In the Matter of Laura M. Jaap*, 30 BOLI 110, 124-25 (2009), *appeal pending* (When claimants were hired to perform specific repair and remodeling work on respondent's daughter's house, with the option of performing limited repair work on respondent's house when the work on the daughter's house was complete; the work on the daughter's house was nearly completed in a few days less than one month; and the scope of work at respondent's house was even

Based on this analysis of the five factors involved in the “economic reality” test, the forum concludes that Claimant was Respondent’s employee, not an independent contractor. However, the analysis does not stop here because of an additional twist to Respondent’s affirmative defense that is unique to the commercial fishing industry and is independent of the five factors in the economic reality test. Summarized, Respondent argues Claimant is an independent contractor because industry tradition and IRS rules define Claimant’s relationship with Respondent as self-employment<sup>10</sup> and Claimant agreed to be self-employed. Therefore, since Claimant was an independent contractor who did not participate in the crab harvest, the only activity that could have generated income for him under

---

more limited, the forum concluded that the facts were indicative of an independent contractor relationship between respondent and claimants, even though there was no evidence that claimants worked for anyone else while they worked at respondent’s daughter’s house); *In the Matter of Gary Lee Lucas*, 26 BOLI 198, 212 (2005) (On a construction job, when claimants testified that respondent told them only that there might be other projects in the future, the forum concluded that was insufficient evidence from which to conclude that respondent hired them for an indefinite period of time).

<sup>10</sup> Throughout the contested case hearing process, Respondent used the terms “self-employed” and “self-employment” to refer to Claimant’s alleged independent contractor status.

his agreement with Respondent, Claimant was not entitled to any compensation. Additional facts that are relevant to this defense include the following:

- Although Claimant worked on other fishing boats before and after his work for Respondent, there is no evidence that he engaged in any other gainful employment while he worked for Respondent.
- Respondent and Claimant did not enter into a written employment contract.
- Claimant was expected to pay for his own groceries while harvesting crab at sea on the *Intrepid*.
- Crew members on commercial fishing boats are traditionally considered to be self-employed when they receive no cash pay other than the share of the boat’s catch.
- Respondent gave Claimant an IRS Form 1099-MISC for 2009.
- Oregon State University publishes a bulletin stating that the IRS considers crewmen on fishing boats to be self-employed if they are an officer or crew member normally has a crew of fewer than 10 people, they received no cash pay other than a share of the boat’s catch, and their share depends on the amount of the catch.

The forum first addresses Respondent’s contention that Claimant agreed to be “self-employed.” It is undisputed that there was no written employment agreement between Claimant and

Respondent and that crew members on commercial fishing boats are traditionally considered to be self-employed when they receive no cash pay other than the share of the boat's catch. Claimant testified that he believed he fell into this category of crew member.<sup>11</sup> As to the actual agreement between Respondent and Claimant, the only explicit agreement was that Claimant would be paid a specific percentage of the crab harvest. The conditions upon which that rate of pay was contingent, e.g. preparing the crab gear and harvesting the crab from the *Intrepid* -- were apparently assumed by Claimant and Respondent based on industry tradition, as there was no testimony that those conditions were discussed. An agreement for a percentage of the catch is a possible element of self-employment. It can just easily be viewed as an agreed rate of pay between an employer and employee. The only issue it conclusively resolves is that Claimant and Respondent agreed on a method of compensation other than statutory minimum wage. By itself, the percentage of the catch agreement between Claimant and Respondent does not establish an independent contractor relationship. The forum further notes that even if Claimant and Respondent had entered into a specific agreement denoting

---

<sup>11</sup> *But c.f. In the Matter of Ann L. Swanger*, 19 BOLI 42, 55 (1999) (Intent is not a controlling factor in determining whether an employment relationship exists).

Claimant as an independent contractor, this fact alone would not require the forum to conclude that Claimant was an independent contractor during the wage claim period.<sup>12</sup>

The forum next looks at whether industry tradition or IRS rules make Claimant an independent contractor as a matter of law or otherwise exempt Respondent from paying Claimant the minimum wage. There is no provision in Oregon law that defines crew members on commercial fishing boats as independent contractors. Likewise, there is no exception in Oregon law for industry tradition that exempts owners of commercial fishing boats from paying the statutory minimum wage to crew members on their boats.<sup>13</sup> Even assuming that the

---

<sup>12</sup> See, e.g., *Forestry Action Committee* at 75 (Even if respondent had produced a contract with claimant's signature, an "independent contractor agreement" is not controlling when determining whether a worker is an independent contractor, as the forum looks at the totality of the circumstances to determine the actual working relationship. Similarly, it does not matter if a worker agrees, orally or in writing, to work as an independent contractor, as intent does not control whether an employment relationship exists.)

<sup>13</sup> *C.f. In the Matter of Debbie Framp-ton*, 19 BOLI 27, 38 (1999) (general practice in the horse industry of paying employees a flat rate for cleaning horse stalls is not a defense to a wage claim when that practice results in the employee being paid less than the minimum wage).

Oregon State University's ("OSU") representation of IRS rules for crew members is accurate,<sup>14</sup> IRS rules do not preempt the Commissioner's authority to determine whether a wage claimant is an independent contractor. Even if they did, the IRS's purported rules would arguably not apply here because (1) Claimant received cash draws from Respondent that bore no percentage relationship to the share of the catch, and (2) Claimant did not receive an actual share of the catch.

The Agency argues that a crew member on a commercial fishing boat is guaranteed the minimum wage in the same manner as a commissioned salesperson is guaranteed minimum wage if the commission on sales is less than the minimum wage. The forum need not decide that general point. Rather, the forum only needs to decide whether Claimant, a person hired as a crew member on a commercial fishing boat who agreed to be paid a percentage of the catch, who performed work preparing for the catch but was fired before having an opportunity to participate in the catch, and who received draws but no share of the catch, is or is

not an independent contractor and is or is not entitled to minimum wage for the work he did in preparation for the catch.

### **Conclusion**

Based on the application of the economic reality test, the forum concludes Claimant was an employee who Respondent suffered or permitted to work and that Respondent was required to pay him Oregon's 2009 minimum wage for all hours worked preparing for Respondent's crab harvest. Industry tradition and IRS rules do not override this conclusion.

### **THE PAY RATE TO WHICH RESPONDENT AND CLAIMANT AGREED, IF OTHER THAN MINIMUM WAGE**

Claimant testified that Respondent agreed to pay him 14 percent of the crab catch; Respondent testified that the agreement was 12 percent. The exact percentage that Claimant and Respondent agreed to is immaterial because the Agency is not seeking to recover unpaid wages based on an agreed rate, but on the 2009 Oregon statutory minimum wage of \$8.40 per hour. When there is an agreed rate of pay between an employer and employee but there is no way of determining that rate because of a failure of proof, the minimum wage becomes the applicable wage rate by default.<sup>15</sup> By anal-

---

<sup>14</sup> Respondent only offered OSU's publication purporting to summarize IRS rules into evidence, not the actual rules. Based on the forum's conclusion that those rules do not control the outcome in this case, the forum declines to engage in the legal research necessary to determine if the OSU summary is an accurate reprint of those rules.

---

<sup>15</sup> See *In the Matter of TCS Global*, 24 BOLI 246, 258 (2003) (In the absence of evidence that claimant was entitled to the same pay rate - \$10.00 per

ogy, when there is an undisputed agreed rate of pay between an employer and employee consisting of a set percentage of a future unknown amount (proceeds from Respondent's crab harvest) contingent upon the employee's participation in a work activity (Claimant being aboard the *Intrepid* while it harvested crab) but that contingency is unsatisfied, the minimum wage becomes the applicable wage rate by default. Accordingly, the forum concludes that Claimant was entitled to be paid Oregon's 2009 statutory minimum wage of \$8.40 per hour.

---

hour - that respondent agreed to pay him for his flagging and pilot car work, the forum concluded that claimant was entitled to receive the applicable minimum wage rate for each hour he worked as a dispatcher). See also *In the Matter of Elisha, Inc.*, 25 BOLI 125, 150 (2004), *affirmed without opinion, Elisha, Inc. v. Bureau of Labor and Industries*, 198 Or App 285, 108 P3d 1219 (2005) (When the forum found there was no evidence showing that the wage claimants agreed to a "package deal" that included a 2.5 percent commission for all of the guests they checked in, plus free use of an apartment adjoining the motel office, paid utilities, including cable television and local telephone calls, and free use of respondent's laundry facilities, the forum concluded that the wages owed to the wage claimants should be computed at the minimum wage rate, including overtime).

## CLAIMANT PERFORMED WORK FOR WHICH HE WAS NOT PROPERLY COMPENSATED

### A. Amount Claimant was paid.

To determine whether Claimant performed work for which he was not properly compensated, the forum must calculate how much Claimant was actually paid and compare that sum with the amount he earned. Claimant's pay falls into three categories – the draws he received while working on crab gear, the money he received from returning cans that Respondent gave him, and his "tuna draw."<sup>16</sup>

First, the crab draws. Claimant contends that he only received \$240 in cash or check draws while he worked on crab gear, whereas Respondent contends that Claimant was paid \$475. Respondent's argument is based on L. Frizzell's November 2009 calendar of draws for *Intrepid* crew members and Callahan's testimony. The forum finds Claimant more credible than Respondent for several reasons. First, Launa Frizzell testified that her November 2009 calendar of draws for *Intrepid* crew members was accurate. Second, Callahan testified that he and Claimant received draws at the same time in November for the same amounts and that they each received \$475. If this is true, then L. Frizzell's calendar cannot be accurate, because it only shows \$170 in draws received by Callahan. The

---

<sup>16</sup> See Finding of Fact #9 – The Merits.

calendar also shows that Claimant received draws on two days that Respondent claims Claimant did not work and that Callahan got two of his three draws on days Callahan and Respondent claim that Callahan did not work. It shows that Claimant got draws on seven different days, and that Callahan only received draws on two of those days, two of which – November 12 and 16 -- Callahan testified that he and Claimant did not work together. Finally, it shows that Callahan and Claimant received the same amount of draw on only one day, November 20. In addition, Respondent produced no receipts for the alleged cash draws. Based on these contradictions and Respondent's failure to produce records, the forum credits Claimant's testimony that he only received \$240 in cash or checks for crab draws.

Second, the amount of money Claimant received by returning cans given to him by Respondent and getting a refund on the deposit for those cans. Claimant testified he received \$17; Respondent testified there was "probably" \$35 worth of cans. Respondent produced no records to support the \$35 figure. The forum finds Claimant's testimony to be more credible than Respondent's and concludes that the value of the cans was \$17.

Third, the forum must consider whether the undisputed \$240 "tuna draw" should be considered as an offset in calculating how much Claimant was paid. Claimant and Respondent agree that

the "tuna draw" represented groceries purchased by Respondent for Claimant's benefit during the tuna season and that crew members, including Claimant, were expected to pay for their own groceries. They disagree on whether it should be considered an offset against any money Claimant earned during the crab season. Claimant testified that Respondent "forgave" the debt at the end of the tuna season, whereas Respondent maintains that he told Claimant that he would take the \$240 out of Claimant's first crab check. The forum believes Respondent's version for two reasons – it is consistent with industry practice and Claimant's expectation, and because Respondent anticipated giving Claimant a crab check from which he could have deducted the \$240. Consequently, the forum considers the \$240 "tuna draw" as an offset against any wages due from Respondent to Claimant.<sup>17</sup>

---

<sup>17</sup> See, e.g., *In the Matter of Mario Pedroza*, 13 BOLI 220, 225, 231 (1994) (An employer was entitled to a setoff against wages owed to claimant for an overpayment of accrued vacation benefits); *In the Matter of Kenny Anderson*, 12 BOLI 275, 282 (1994) (When respondent gave claimant gasoline on two occasions and claimant agreed to allow a setoff for the fair market value of the gas from his wages due, the forum reduced the amount of wages due by that setoff); *In the Matter of Sheila Wood*, 5 BOLI 240, 251 (1986) (When a claimant received goods and services pursuant to a wage agreement and claimant admitted she received said goods and

In conclusion, the forum finds that Respondent paid \$497 to Claimant relative to his wage claim.

**B. Hours worked by Claimant.**

If the forum accepts Respondent's version of the events, it must conclude that Claimant worked a bare minimum of 75 hours. This is based on Respondent's testimony that Claimant began crab work on October 26, 2009, Respondent's written statement that "[w]hen he [Claimant] did work they only work[ed] 5 hours a day" on days that they (Claimant and Callahan) worked, and Callahan's oral and written testimony about the dates Claimant worked. It assumes Claimant worked five hours on each of the following 15 dates: October 26, 27, 28, 29, 31, and November 1, 4, 5, 7, 8, 9, 20, 21, 22, and 23, 2009. Calculated at minimum wage based on Respondent's version of events, Claimant earned \$630 in gross wages for working 75 hours (75 hours x \$8.40 = \$630). Based on Respondent's version of the advance, Claimant was not paid for almost 16 hours of work (\$630 - \$497 = \$133 ÷ \$8.40 = 15.8). However, the forum does not accept Respondent's version of hours worked by Claimant. Instead, the forum has concluded that Claimant worked 137 hours

---

services as compensation for work performed, the forum held that said compensation constituted a lawful setoff against the wages due to claimant).

on crab-related jobs for Respondent, earning \$1,150.80 in gross wages (137 hours x \$8.40 = \$1,150.80). The forum has not credited Claimant for any hours worked on November 24, 2009, the day after he was fired. To be liable as an employer for hours worked by an individual that are unpaid, the employer must "suffer or permit" that individual to work. ORS 653.010(2). While the plain meaning of "to permit" requires a more positive action than "to suffer," both terms imply much less positive action than required by the common law test for determining an employment relationship. To "permit" something to happen does not require an affirmative act, but only a decision to allow it to happen. To "suffer" something to happen is even broader and means to tolerate or fail to prevent it from happening. Thus, a business may be liable under the provisions of ORS chapter 653 if it knows or has reason to know a worker was performing work in that business and could have prevented it from occurring or continuing. *In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration*, 25 BOLI 12, 38-39 (2003), *affirmed without opinion, Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004). In this case, there is no evidence that Respondent knew or had reason to know that Claimant was performing work after he was fired and could have prevented it from occurring or continuing. Consequently, Respondent is not required to pay Claimant for any

hours Claimant worked on November 24, 2009, and the forum need not resolve the issue of how many hours Claimant worked that day.<sup>18</sup>

### **C. Conclusion.**

Whether the forum accepts Respondent's or Claimant's version of events, both lead to the conclusion that Claimant was not paid for all hours worked.

### **AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT**

Claimant, Respondent, and Callahan were the only witnesses who had any direct knowledge of the hours Claimant worked. All were less than credible. There are two written records – the record Raney created in the planner she and Claimant used and Callahan's 2010 written statement noting the hours he and Claimant worked. Neither can be credited in its entirety because the credibility problems noted in the Findings of Fact – The Merits. There is also Respondent's written statement that Claimant and Callahan

worked five hours when they worked together. Finally, Respondent kept no record of Claimant's hours, claiming he had no responsibility to do so because Claimant was not an employee.

When the employer produces no records, the forum may rely on evidence produced by the agency from which "a just and reasonable inference may be drawn." *In the Matter of Kilmore Enterprises*, 26 BOLI 111, 122 (2004). A claimant's credible testimony may be sufficient evidence to show the amount of hours worked by the claimant and amount owed. *Id.* at 123. Here, Claimant's testimony was only partly credible. However, taken as a whole, there is sufficient credible evidence in the record for the forum to formulate a methodology from which "a just and reasonable inference may be drawn" as to the hours worked by Claimant. That methodology consists of the following:

- If Claimant testified that he worked on a given day, but Callahan disagreed, and Claimant or Callahan telephoned one another before 8:00 a.m., the forum has credited Claimant as working that day.<sup>19</sup>

---

<sup>18</sup> Compare *In the Matter of William Presley*, 25 BOLI 56, 69 (2004), *affirmed Presley v. Bureau of Labor and Industries*, 200 Or App 113, 112 P3d 485 (2005) (When respondent was aware of the work claimant performed and there was no evidence respondent ever told claimant to leave respondent's car lot or not to perform a particular job, the forum found that respondent "suffered or permitted" claimant to work and thereby "employed" claimant).

---

<sup>19</sup> There was credible evidence that the only telephone calls between Claimant and Callahan at this time of day were related to Claimant giving Callahan a ride to work and there was no evidence that Callahan had any way to get to work unless Claimant picked him up.

- If Callahan and Claimant agreed that Claimant worked on a given day after October 26, Claimant was either credited with five hours<sup>20</sup> or Callahan's maximum estimate of hours worked, whichever is greater, unless Callahan's testimony contradicted Callahan's written statement, in which case the forum has credited Claimant's estimate of hours worked.
- If Claimant stated in his planner that he did not work on a given day but Respondent or Callahan testified that Claimant did work on that day, Claimant was credited with five hours worked or Callahan's maximum estimate of hours worked, whichever is greater.
- If Claimant testified that he worked on a given day and Callahan disagreed, Claimant was not credited with any hours worked if there were no telephone calls between Callahan and Claimant that day.
- Based on McCall's testimony that it takes a day or more to clean up the *Intrepid* after a tuna fishing trip, the forum has subtracted 16 hours from Claimant's claim of hours worked because Claimant was paid for those hours from his tuna draws related to tuna fishing trips.
- On three dates – September 21, September 22, and September 23 -- when Callahan's testimony on direct and cross examination was contradictory regarding the number of hours that Claimant worked, the forum has credited Claimant's version of the number of hours he worked.
- The forum subtracted .5 hours for Claimant's lunch on October 19, 21 and 22.

The application of this methodology results in the record of hours worked that is set out in Findings of Fact ## 8 & 15 -- The Merits. In total, Claimant worked 137 hours, earning \$1,150.80. He was paid only \$497.00 and is owed \$653.80 in gross unpaid, due, and owing wages.

### **CLAIMANT IS OWED PENALTY WAGES**

The forum may award penalty wages when a respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission "willfully" if he or she 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).

The Agency established by a preponderance of the evidence that Claimant was an employee who was entitled to be paid Oregon's statutory minimum wage of \$8.40 per hour, that Respondent

---

<sup>20</sup> This is based on Respondent's written statement that Claimant started work on October 26 and worked five hours on days that Claimant worked.

set Claimant's work hours and was aware of them, that Respondent fired Claimant and did not pay him for all hours worked, and that the Agency made a written demand for Claimant's unpaid wages and Respondent made no payment in response. It is an employer's duty to keep an accurate record of the hours worked by its employees. ORS 653.045; *In the Matter of Norma Amazola*, 18 BOLI 209, 218 (1999). The fact that Respondent kept no record of Claimant's hours worked does not allow him to evade his responsibility for penalty wages, nor does his failed defense that Claimant was an independent contractor.<sup>21</sup> There is no evidence that Respondent acted other than voluntarily and as a free agent in underpaying Claimant and the forum concludes that Respondent acted willfully in failing to pay Claimant his wages and is liable for penalty wages under ORS 652.150.

ORS 652.150(1) and (2) provide, in pertinent part:

"(1) Except as provided in subsections (2) and (3) of this section, if an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 \* \* \* ,

---

<sup>21</sup> See, e.g., *In the Matter of Bukovina Express, Inc.*, 27 BOLI 184, 203 (2006) (a respondent's ignorance or misunderstanding of the law does not exempt that respondent from a determination that it willfully failed to pay wages earned and owed.)

then, as a penalty for the non-payment, the wages or compensation of the 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. However:

"(a) In no case shall the penalty wages or compensation continued for more than 30 days from the due date; \* \* \*

"(2) If the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation unless the employer fails to pay the full amount of the employee's unpaid wages or compensation within 12 days after receiving the written notice. If the employee or a person on behalf of the employee fails to send the written notice, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation. \* \* \*

The Agency provided documentary and testimonial evidence that its investigative staff made the written demand contemplated by ORS 652.150(2) for Claimant's wages on December 30, 2009. The Agency's Order of Determination, issued on May 19, 2010, repeated this demand.<sup>22</sup> Respon-

---

<sup>22</sup> See *In the Matter of Petworks LLC*, 30 BOLI 35, 47 (2008) (Agency's Order of Determination constitutes a written notice of nonpayment of wages under ORS 652.150).

dent failed to pay the full amount of Claimant's unpaid wages within 12 days after receiving the written notices and has still not paid them. Consequently, the forum assesses penalty wages at the maximum rate set out in ORS 652.150(1) (hourly rate x eight hours per day x 30 days = penalty wages). Using this equation, penalty wages for Claimant equal \$2,016.00 (\$8.40 per hour x eight hours x 30 days).

### **CLAIMANT IS OWED CIVIL PENALTIES UNDER ORS 653.055**

The Agency also seeks civil penalties of \$2,016 under ORS 653.055(1)(b). That statute provides that an employer who pays an employee less than the applicable minimum wage is liable to the employee for civil penalties that are computed in the same manner as penalty wages under ORS 652.150. *Cornier v. Paul Tulacz, DVM PC*, 176 Or App 245 (2001). A *per se* violation occurs when an employee's wage rate is the minimum wage, the employee is not paid all wages earned, due, and owing under ORS 652.140(1) or 652.140(2), and no statutory exception applies. *In the Matter of Allen Belcher*, 31 BOLI 1, 10 (2009). Claimant's wage rate was the minimum wage. He was not paid all wages earned, due, and owing after he was fired, and there is no applicable statutory exception. Consequently, Claimant is entitled to an ORS 653.055 civil penalty in the amount of \$2,016.

### **RESPONDENT'S EXCEPTIONS**

Respondent's exceptions to the Proposed Order are summarized below:

1. Respondent gave Claimant \$235.00 in draws that were not credited to Respondent by the ALJ in the Proposed Order.

2. The ALJ credited Claimant with 28.5 hours work related to crab gear that were tuna-related.

3. The ALJ ordered Respondent to pay "26.555%" of the amount sought by the Agency in the Order of Determination and it is not right that Respondent should have to pay penalty wages and civil penalties when Claimant "falsely claimed all these hours against us and we were forced to defend ourselves."

4. It was unnecessary to have a police officer at the hearing. The only reason a police officer was requested was to damage Respondent's credibility.

5. The Proposed Order stated that Claimant was not represented by counsel, whereas Mr. Nakada, the Agency case presenter, was present at hearing and all the questions asked on Claimant's behalf were asked by Mr. Nakada.

The forum rejects Exceptions 1 and 2 because they reflect conclusions that are not supported by a preponderance of evidence. In contrast, the forum's Findings of Fact related to Respondent's exceptions -- ## 8 and 23 -- are supported by a preponderance of credible evidence in the record.

Exception 3 asks that the penalty wages and civil penalties be dismissed because Claimant did not prevail on the entirety of his claim, based in large part on his credibility issues. The forum denies Respondent's exception. An award of penalty wages and ORS 653.055 civil penalties is not contingent on a claimant prevailing on the entirety of his or her claim. Under Oregon law, Claimant is entitled to penalty wages so long as Respondent willfully failed to pay him all wages earned, due, and owing, and an ORS 653.055 civil penalty so long as he worked any hours for Respondent for which he was not paid the minimum wage.

Exception 4 objects to the presence of a police officer at the hearing. An officer was present at all times during the hearing for security purposes, but that fact was not considered in any way in the forum's evaluation of the credibility of Mark or Launa Frizzell or any of their witnesses.

Exception 5 objects to a statement in the Proposed Order that Claimant was not represented by counsel, inasmuch as Mr. Nakada, the Agency case presenter, presented Claimant's case and Claimant only appeared as a witness. The term "counsel," as used in this forum, means "an attorney who is in good standing with the Oregon State Bar \* \* \*." OAR 839-050—0020(10). As Mr. Nakada is not attorney, the language in the Proposed Order properly reflected that fact.

### ORDER

NOW, THEREFORE, as authorized by ORS 652.140(1), ORS 652.150, ORS 653.055, and ORS 652.332, and as payment of the unpaid wages, penalty wages, and civil penalties, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **MARK A. FRIZZELL** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

- (1) A certified check payable to the Bureau of Labor and Industries in trust for Claimant in the amount of FOUR THOUSAND SIX HUNDRED AND EIGHTY FIVE DOLLARS AND EIGHTY CENTS (\$4,685.80), less appropriate lawful deductions, representing \$653.80 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from December 1, 2009, until paid; \$2,016.00 in penalty wages, plus interest at the legal rate on that sum from January 1, 2010, until paid; and a civil penalty of \$2,016.00, plus interest at the legal rate on that sum from January 1, 2010, until paid.



ORS 652.414, ORS 653.261,  
OAR 839-020-0030.

**In the Matter of  
HORIZON TECHNOLOGIES,  
LLC**

**Case No. 67-10**

**Final Order of Commissioner  
Brad Avakian**

**Issued June 24, 2011**

---

**SYNOPSIS**

Claimant worked from August 2007 through December 2008 performing home-based internet sales of Respondent's product, and was only paid \$33 when Respondent went out of business. The Agency sought to recover \$21,725.92 in unpaid wages on behalf of Claimant. The Agency also sought to recover funds that were paid to Claimant from the Wage Security Fund, plus a 25 percent penalty on those funds. Based on evidence presented by the Agency that showed Claimant was not employed by Respondent, the forum concluded that the Agency did not establish a prima facie case and dismissed the Agency's Order of Determination. ORS 652.140(2), ORS 652.150, ORS 653.025, ORS 653.055,

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 January 25, 2011, at the office of the Oregon Employment Department at 846 SE Pine Street, Roseburg, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Chet Nakada, an employee of the Agency. Wage claimant Larry Kilburn ("Claimant") was present throughout the hearing and was not represented by counsel. Respondent Horizon Technologies, LLC did not make an appearance at the hearing and was held in default.

The Agency called the following witnesses: Claimant Kilburn; BOLI Wage and Hour Division compliance specialist Margaret Pargeter (telephonic); Heather Garcia, Claimant's daughter; and Raul Garcia, Claimant's son-in-law (telephonic).

The forum received into evidence:

a) Administrative exhibits X-1 through X-8 (submitted prior to hearing) and X-9 (submitted at hearing at the ALJ's request);

b) Agency exhibits A-1 through A-12 (submitted prior to 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 March 19, 2009, Claimant filed a wage claim with the Agency alleging that Horizon Technologies, LLC had employed him from August 20, 2007, to December 31, 2008, and failed to pay wages earned and due to him. At the same time, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent. On August 27, 2009, Claimant signed and dated a BOLI form entitled “Wage Security Fund Assignment of Wages.”

2) On August 25, 2009, the Agency issued Order of Determination number 09-0942 based on the wage claim filed by Claimant and the Agency’s investigation. The Order named Horizon Technologies, L.L.C. as Claimant’s employer and alleged, in pertinent part:

- Respondent employed Claimant from August 20, 2007, to December 31, 2008.

- Claimant worked a total of 2,746.75 hours, of which 744 were hours worked at the rate of \$7.80 per hour, 1,994 were hours worked at the rate of \$7.95 per hour, 4.25 were hours worked over 40 in a workweek at a rate of \$11.70 per hour, and 4.5 were hours worked over 40 in a work week at the rate of \$11.93 per hour;
- During the wage claim period, Claimant earned a total of \$21,758.92, of which only \$3,300.00 has been paid, leaving \$18,458.91 in unpaid, due and owing wages;
- Respondent willfully failed to pay these wages and owes Claimant \$1,908.00 in penalty wages;
- Respondent paid Claimant less than the wages to which he was entitled under ORS 653.025 and OAR 839-020-0010 and ORS 653.261(1) and OAR 839-020-0030 and is liable to the Claimant for civil penalties under ORS 653.055(1)(b) in the amount of \$1,908.00.

3) On October 2, 2009, Respondent filed an answer and request for hearing through its authorized representative, Michael Angel. In its answer, Respondent denied that it ever employed Claimant and affirmatively alleged that Claimant was an “Independent Business Owner selling our GPS devices.”

4) On January 12, 2010, the Agency issued Amended Order of Determination No. 09-0942 in which it amended the original Order of Determination to allege that Claimant had only been paid \$33.00, leaving \$21,725.92 in unpaid, due and owing wages; and to allege that \$2,416.80 of the unpaid wages was eligible for payment from the Wage Security Fund (“WSF”), that BOLI paid this amount to the Claimant, and that BOLI’s Commissioner is entitled by ORS 652.414(3) to recover this amount, plus a penalty of 25%, or \$604.20.

5) On January 19, 2010,<sup>1</sup> Respondent filed an answer and request for hearing through its authorized representative, Michael Angel. In its answer, Respondent denied that it ever employed Claimant and affirmatively alleged that Claimant bought an independent business distributorship and was his own business owner.

6) On November 8, 2010, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimant setting the time and place of hearing for 10:00 a.m. on January 25, 2011,

at the Roseburg office of the Oregon Employment Department.

7) Respondent did not make an appearance at the hearing and did not notify the Agency or the ALJ that it would not appear at the time and place set for hearing. The ALJ waited until 10:30 a.m., then declared Respondent in default and commenced the hearing.

8) The ALJ issued a proposed order on March 9, 2011, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On April 18, 2011, the Agency filed exceptions. Those exceptions are discussed at length in the Opinion section of this Final Order.

#### **FINDINGS OF FACT – THE MERITS**

1) At all times material herein, Respondent Horizon Technologies, L.L.C. was an Arizona limited liability company whose registered agent and manager was Michael Angel. Respondent conducted its business out of Arizona and has never been registered to do business in Oregon.

2) Respondent sold a product called “Millennium Plus” (“MP”) that integrated Global Positioning System (“GPS”) and cellular technology and enabled clients to communicate with a vehicle at any time of the day or night, nearly anywhere in the world, using a computer with Internet access and a browser. MP included a GPS and a choice of service plans that allowed clients to choose from dif-

---

<sup>1</sup> Respondent’s answer and request for hearing is dated January 19, 2009, but the forum concludes for two reasons that Respondent misdated it — (1) BOLI date stamped it as received on January 25, 2010; and (2) The answer and request was filed in response to BOLI’s Amended Order of Determination, which was issued on January 12, 2010.

ferent specific monitoring “actions” that Respondent would perform each month per client vehicle.<sup>2</sup>

3) Claimant, who had recently been laid off from his job, learned of Respondent’s business through “direct mail” that he received from Respondent that described Respondent’s business and a business opportunity reselling its product. Claimant, who was very experienced in motor vehicle repair and motor vehicle computers, researched Respondent’s company and its product and concluded it had “great possibilities,” with a definite potential of making a good income.<sup>3</sup>

4) Claimant contacted Respondent, talked with one of Respondent’s representatives, and decided he wanted to sell MP for Respondent, viewing it as a way to earn the money he needed to start his own towing and repair business. Respondent required Claimant to make an initial investment of \$1,500 to purchase a “welcome package.” Claimant made this payment by credit card over the phone. Claimant under-

---

<sup>2</sup> For example, an “action” included such things as locating a vehicle, determining if a vehicle being driven was speeding, or disabling the vehicle’s starter. Without a service plan, Respondent’s GPS was essentially useless, the functional equivalent of a cell phone without a service provider.

<sup>3</sup> In Claimant’s own words, he believed Respondent’s product would be the best product to hit [the market] since cell phones” and hoped to get in the “ground floor” of the business.

stood that he would be paid on a commission basis and was told his commission would be the amount he sold the MP’s GPS units for that was “over and above” the minimum pricing schedule that Respondent set for its MP GPS units. Although Respondent recommended certain resale prices based on the volume of units sold in a transaction, Claimant was free to sell the MP GPS unit at any price above Respondent’s minimum pricing schedule. When clients ordered an MP GPS, they also selected and ordered a service plan. The service plans had fixed prices that Claimant could not negotiate, and he did not receive a commission on their sale.

5) Once Claimant paid for the “welcome” package, Respondent sent Claimant a “Reseller’s Handbook” and designated a company representative, described in the “Reseller’s Handbook” as “a coach to guide you through your business venture,”<sup>4</sup> whom Claimant was supposed to contact on a regular basis. During the wage claim period, Claimant communicated at least once a week by email and telephone with a “coach” who was located in Arizona.

6) Claimant and Respondent did not enter into a signed written agreement and Claimant signed no documents concerning their business relationship. Claimant

---

<sup>4</sup> See Finding of Fact #7—The Merits.

did not complete an employment application, a W-4, or an I-9.

7) The “welcome package” that Respondent provided to Claimant consisted of the following:

- A 74-page “Reseller’s Handbook” that included, among other things, a detailed description of MP, “Terms and Conditions for Business and Consumer Membership,” marketing information and materials, pricing information, and the amount of commission Claimant would receive for each sale;
- Sample fliers and glossy “trifolds” to be used for advertising purposes;
- Sample business cards; and
- A GPS unit for Claimant’s car.

8) A section of the “Reseller’s Handbook” was entitled “Terms and Conditions for Business and Consumer Membership.” Among other things, it provided:

“\* \* \* You understand that you are an Independent Business Owner (IBO) and Reseller of our products.”

“\* \* \* \* \*

“COMPENSATION. You shall be compensated for any products that you are authorized to market on our behalf and for which we receive a valid order, payment of the product and which is not returned to us.

Compensation will be according to the Commission Payment Schedule contained later in this Agreement. \* \* \*

“PRICING. Under this Agreement, you agree to market any and all products according to the Volume Pricing Schedule. You may negotiate prices with any person or any business entity however, you may not market the products lower [sic] than the price that you pay to us. You may not negotiate prices for services such as monitoring plans. We recommend that you follow the guidelines provided in the Volume Pricing Schedule.”

“\* \* \* \* \*

“ADVERTISING. You may conduct business and product advertising in any manner acceptable by law and approved by us. Failure to have us approve advertising prior to its use in any literature, signage, business cards, or other medium may be cause for immediate termination of this Agreement. \* \* \*

“\* \* \* \* \*

“TERMS OF AGREEMENT. This Agreement shall commence on the earliest of the following dates; the date on which construction is begun on your Web site, or the date you sign and return the Authorization form, or the date of your DEFAULT ACCEPTANCE and shall remain in force for a term of one year and will be automatically extended for

additional one year terms unless, written notice of non-renewal is issued by either party thirty days (30) prior to the expiration date of any annual contract term. \* \* \*

“TERMINATION OF AGREEMENT. Termination of this agreement may occur if you fail to maintain your membership in the IBO/Reseller Program, or for failure to remit your Web hosting fee, or failure to pay any other outstanding unpaid balance due us for more than thirty days. We may terminate this agreement for your non-payment or any other event of default of this Agreement. \* \* \*

9) To market MP, Respondent suggested that Claimant start his own website and have Respondent host it on Respondent’s servers for a fee of \$25 per month. After receiving the “Reseller’s Handbook,” Claimant did construct his own website as he prepared to market MP, naming it “*Findvehicle.net*.” Throughout the wage claim period, he paid Respondent \$25 a month to host his website. All orders that were generated through Claimant’s website and any payments made for orders generated to Claimant’s website were processed by Respondent. Claimant understood that Respondent would notify him of all sales generated through his website and send him a commission from the sale.

10) Claimant marketed MP for Respondent from August 20,

2007, through December 31, 2008 (the “wage claim period”). He performed all of his work at his home.

11) When Claimant began marketing MP for Respondent, he spent approximately \$1,200 to purchase a new computer and printer that he used to market MP during the wage claim period.

12) During the wage claim period, Claimant paid approximately \$1,000 per month advertising MP for Respondent, most of it to Google for internet marketing. Claimant initiated and paid for his own advertising, but was required to get approval for the content of that advertising from Respondent’s representative or risk termination of his business relationship with Respondent. Claimant also ordered and paid for 2,000 glossy trifold advertising brochures that were created and printed by Respondent.

13) Claimant ordered and paid for 1,000 business cards that he used while marketing MP for Respondent.

14) Claimant used his personal cell phone to market MP for Respondent and paid his own cell phone bills.

15) Respondent did not reimburse Claimant for any of his business expenses and Claimant did not expect to be reimbursed.

16) Other than his own business expenses, Claimant made no other investment in Respondent’s business.

17) During the wage claim period, Claimant told his daughter

and son-in-law that there was a possibility he could employ them to further his business, and that there might be a commission involved if they ever sold product for him.

18) Claimant set his own work hours during the wage claim period and worked an average of eight hours a day, five days a week.

19) Claimant had no other gainful employment during the wage claim period and lived off his savings during that time.

20) During the wage claim period, Claimant worked a total of 2,746.8 hours that were devoted to marketing MP for Respondent, including the following hours worked over 40 in a given work-week:

- 3.75 hours during a work-week beginning September 3, 2007, and ending September 9, 2007;
- .5 hours during a work-week beginning September 24, 2007, and ending September 30, 2007;
- .5 hours during a work-week beginning May 26, 2008, and ending June 1, 2008
- 4 hours during a workweek beginning August 11, 2008, and ending August 17, 2008.

21) Claimant frequently asked his “coach” for payment of

the commissions he believed he had earned. Claimant had no access to the records of his sales and has no record of the commissions he earned because Respondent did not provide those records.

22) During the wage claim period, Respondent sent Claimant one check for \$33 without disclosing the reason for the check. Claimant received no other payments from Respondent.

23) Claimant stopped trying to market MP for Respondent after December 31, 2008, when he became unable to contact Respondent by telephone. Respondent’s website “went down” shortly afterwards and Respondent is no longer in business.

24) Claimant worked without being paid for such a long time because he had “so much money invested in it that I couldn’t tell myself to stop until something happened.”

25) Oregon’s statutory minimum wage in 2007 was \$7.80 per hour; in 2008 it was \$7.95 per hour.

26) Claimant’s total work hours set out in Finding of Fact #20 – The Merits, when multiplied by the applicable minimum wage and associated overtime wage rates, yields the sum of \$21,750.91.

27) On March 27, 2009, the Agency mailed a document entitled “Notice of Wage Claim” to Respondent that stated:

“You are hereby notified that “LARRY WAYNE KILBURN has filed a wage claim with the Bureau of Labor and Industries alleging:

“Unpaid wages and overtime of \$21,720.00 at the rate of \$8.00 per hour from August 20, 2007 to December 31, 2008.

”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.

“IF YOU DISPUTE THE CLAIM, complete the enclosed ‘Employer Response’ form and return it together with the documentation which supports your position, as well as payment of any amount which you concede is owed the claimant to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.

“If your response to the claim is not received on or before April 10, 2009, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees.”

28) Margaret Pargeter, Wage and Hour Division Compliance Specialist, was assigned to investigate Claimant’s wage claim. She conducted an investigation and made a determination that Claimant’s claim was valid based

on the evidence provided to her. She also determined that Respondent had gone out of business at the end of 2008, that Respondent lacked sufficient assets to pay a wage claim, and that Claimant’s wage claim could not otherwise be fully and promptly paid. She then calculated that Claimant was eligible for a WSF payment of \$2,607.60 in gross wages and caused a check in the net amount of \$2,408.12 to be issued to Claimant from the WSF.

29) All the witnesses were credible.

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

1) At all times material herein, Respondent Horizon Technologies LLC was an Arizona limited liability company whose registered agent and manager was Michael Angel. Respondent’s business involved selling and servicing a product called “Millennium Plus” (“MP”) that integrated GPS and cellular technology and was used with motor vehicles. MP consisted of a GPS and a service plan.

2) Claimant, who is very experienced in motor vehicle repair and computers, received a mailing from Respondent that described Respondent’s business and a business opportunity reselling MP, its product. Claimant contacted Respondent after researching Respondent’s company and MP and decided he wanted to market Respondent’s MP product.

3) Claimant was required to make an initial investment of \$1,500 to purchase a “welcome

package” from Respondent that included a “Reseller’s Handbook,” sample advertising materials, and a GPS unit for Claimant’s car. The “Reseller’s Handbook” contained a clause stating that its “Terms and Conditions” went into effect as soon as Claimant began construction on his website. After receiving the “Reseller’s Handbook,” Claimant constructed a website and paid Respondent \$25 a month to host it.

4) Claimant marketed MP for Respondent from August 20, 2007, through December 31, 2008. During this time, he spent \$15,000 to \$20,000 for equipment, supplies, and advertising to market MP for Respondent from his home. Respondent did not pay for any of Claimant’s business expenses.

5) Although Claimant was required to sell Respondent’s GPS units for a minimum set price, he was free to sell the units for any amount over that price. Respondent told him that his commission would be the amount he sold the product for that was over and above Respondent’s minimum set price. He was not allowed to negotiate prices for Respondent’s service plans and did not receive a commission for service plan sales.

6) Claimant stayed in contact with Respondent via a weekly email or telephone call that he made to his business “coach” in Arizona whom he considered to be his supervisor.

7) Respondent retained the authority to approve the content of Claimant’s advertising; Claimant’s failure to obtain that approval could be cause for termination of the business relationship. Otherwise, Claimant unilaterally determined the means and methods he used to market Respondent’s product.

8) Respondent did not reimburse Claimant for any of his business expenses and Claimant did not expect to be reimbursed. On one occasion, Respondent sent Claimant a check for \$33 but did not disclose the reason for the check. Claimant received no other payments from Respondent.

9) Claimant set his own work schedule and worked an average of eight hours a day, five days a week during the wage claim period and worked a total of 2,746.8 hours, including 8.75 overtime hours. He performed all his work from his home.

10) Respondent went out of business at the end of 2008.

11) BOLI’s Wage and Hour Division investigated Claimant’s wage claim and determined that Claimant’s claim was valid based on the evidence provided, that Respondent had gone out of business at the end of 2008, that Respondent lacked sufficient assets to pay a wage claim, and that Claimant’s wage claim could not otherwise be fully and promptly paid. The Wage and Hour Division also calculated that Claimant was eligible for a WSF payment of \$2,607.60 in gross wages and

caused a check in the net amount of \$2,408.12 to be issued to Claimant from the WSF.

### CONCLUSIONS OF LAW

1) At all times material herein, Respondent did not employ Claimant. ORS 652.310, 653.010.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 652.330, 652.332.

3) Because Respondent did not employ Claimant and Claimant was not Respondent's employee, Claimant did not earn any wages and Respondent did not violate ORS 652.140(2) by failing to pay wages to Claimant in a timely manner.

4) Respondent did not willfully fail to pay Claimant all wages due and owing and does not owe penalty wages to Claimant. ORS 652.150.

5) Respondent did not fail to pay Claimant overtime wages and is not liable for civil penalties under ORS 653.055(1)(b).

6) Respondent is not liable to repay the WSF the wages paid out to Claimant by the WSF or an associated penalty. ORS 652.414.

7) 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 dismiss the wage claims filed by Claimant Kilburn and the Agency's claim for reim-

bursement of the WSF. ORS 652.332, ORS 652.414.

### OPINION

#### THE AGENCY'S EXCEPTIONS

The Agency's exceptions can be summarized as follows:

1. Respondent's defense that Claimant was an "Independent Business Owner selling our GPS devices" should not be construed as raising the affirmative defense of independent contractor because the words "independent contractor" were not specifically mentioned.

2. It is Respondent's burden to prove the affirmative defense of independent contractor. Respondent defaulted by not appearing at hearing and presented no evidence in support of that defense, and it is not the Agency's burden to disprove that defense.

3. The Agency presented a prima facie case. Instead of focusing on that, the ALJ "jumped immediately into applying and analyzing the independent contractor elements to the facts." When the Agency presents a prima facie case in a default case, the forum need not consider Respondent's unsubstantiated independent contractor defense.

4. The ALJ improperly applied the rebuttable presumption standard used by the commissioner in WSF cases.

5. The Proposed Findings of Fact – The Merits do not support a conclusion that Claimant was an independent contractor.

The forum incorporates a discussion of each of these exceptions in the body of this Opinion. The forum also points out that the Agency did not contest the accuracy of the Proposed Findings of Fact – The Merits, except to argue that the forum should infer the extent of Respondent’s business investment relative to Claimant’s investment.

### **CLAIMANT’S WAGE CLAIM**

In a wage claim default case, the Agency needs only to establish a prima facie case supporting the allegations of its Order of Determination in order to prevail. *In the Matter of Village Café, Inc., 30 BOLI 80, 88 (2008)*. The Agency’s prima facie case consists of the following elements: 1) Respondent employed Claimant; 2) The pay rate upon which Respondent and Claimant agreed, if other than 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. *In the Matter of 82<sup>nd</sup> Street Mall, Inc., 30 BOLI 140, 142 (2009)*. In a default case, the forum may consider any unsworn and unsubstantiated assertions contained in a respondent’s answer, but those assertions are overcome whenever they are contradicted by other credible evidence in the record. *In the Matter of Sehat*

*Entertainment, Inc., 30 BOLI 170, 181 (2009)*.

## **RESPONDENT DID NOT EMPLOY CLAIMANT**

### **A. Introduction**

The Agency seeks unpaid straight time and overtime wages for Claimant under ORS 653.025 and 653.261, calculated at the state minimum wage in effect in 2007 and 2008. Accordingly, the forum applies the definitions contained in ORS 653.010(2) and (3) to determine if Respondent employed Claimant. In pertinent part, those definitions read:

“(2) ‘Employ’ includes to suffer or permit to work \* \* \*.

“(3) ‘Employer’ means any person who employs another person.”

Read together, these two provisions mean that Respondent was Claimant’s employer if it suffered or permitted Claimant to work.

Federal and state case law do not provide specific guidance for applying the broad definition of “employ.” *In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration, 25 BOLI 12, 38 (2003), affirmed without opinion, Ochoa v. Bureau of Labor and Industries, 196 Or App 639, 103 P3d 1212 (2004)*. The Agency’s administrative rules add no clarification, as they do not define “employ” and merely state that “Employer” has the same meaning as that in ORS 653.010(3). OAR 839-020-0004(16).

Prior BOLI Final Orders have relied on the facts in each case to determine whether or not a respondent “employed” a wage claimant as defined in ORS 653.010(2) and have never formulated a specific test to determine if someone has been “suffer[ed] or permit[ted] to work.” Unless the respondent has raised an independent contractor defense or the defense that someone else was the claimant’s employer,<sup>5</sup> prior Final Orders generally contain a summary statement in their Opinion concluding that the respondent employed the claimant.<sup>6</sup> In most cases, this is because claimant’s employment is admitted in the respondent’s answer and the respondent has requested a contested case hearing to contest the amount of wages claimed and accompanying penalty wages.<sup>7</sup> In cases in which a respondent has raised an independent contractor

defense, the forum’s consistent approach has been to evaluate the merits of the defense and, in the vast majority of case, reject the defense and then simply conclude that the respondent employed claimant.<sup>8</sup>

The only case in which the forum has found any in-depth discussion of the meaning of “suffer or permit to work” is in *Ochoa*, a non-wage claim case in which the Agency alleged wage and hour recordkeeping and farm labor contractor violations and the issue of employment only arose because Respondent contended its workers were independent contractors and it was therefore not liable for the record keeping violations related to records that employers are required to create and maintain. *Id.* at 16. After finding that federal and state law contained no guidance on the specific meaning of “employ” as defined in ORS 653.010(2), the forum adopted the analytical approach used by the authors of

---

<sup>5</sup> See, e.g. *In the Matter of Paul Andrew Flagg*, 25 BOLI 1, 9-10 (2003) (respondent, who employed claimant to do construction work on a private home, alleged that the homeowner was the actual employer who employed both respondent and claimant).

<sup>6</sup> See, e.g., *In the Matter of Sehat Entertainment, Inc.*, 30 BOLI 170, 181 (2009) (“Credible evidence controverted Respondents’ unsworn claim in their answer that they did not employ Claimant”);

<sup>7</sup> See, e.g. *In the Matter of Tailor Made Fencing & Decking, Inc.*, 30 BOLI 151, 152, 156 (2009); *In the Matter of J. Guadalupe Campuzano-Cazares*, 30 BOLI 48, 59 (2008).

---

<sup>8</sup> See, e.g., *In the Matter of Alphabet House*, 24 BOLI 262, 278 (2003) (“All these factors point the forum to the conclusion that Claimant was an employee, not an independent contractor”); *In the Matter of Triple A Construction, LLC*, 23 BOLI 79, 93 (2002) (“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”).

an article examining the history of the FLSA, holding that when the work is encompassed within the overall business of the alleged employer, and the business owner supplies the capital and the work is unskilled, a business has suffered or permitted the work to be performed. *Id.* at 40. The forum then determined that Respondent's workers -- who were employed by Respondent in his nursery and agreed to perform the unskilled labor of harvesting cones for Respondent to avoid a summer layoff, who were expected to return to the nursery after the cone harvest, and who invested no capital -- were suffered or permitted to work for Respondent. *Id.* *Ochoa* is not applicable to this case because the facts are so different.

**B. Should Respondent's Independent Contractor Defense Be Considered?**

In its exceptions, the Agency asserts that the forum should not consider Respondent's independent contractor defense for two reasons. First, because Respondent did not use the specific term "independent contractor" in its answer. Second, because it is Respondent's burden to prove the affirmative defense of independent contractor. Therefore, when Respondent defaulted by not appearing at hearing and presented no evidence in support of that defense, the Agency was only required to present a prima facie case and was not required to disprove an independent contractor

defense that Respondent did not support with any evidence.

**1. Respondent did not use the term "independent contractor" in its answer.**

In its answer and request for hearing, Respondent, which appeared *pro se* in filing its answer through an authorized representative, averred that Claimant was not owed any wages because he was an "Independent Business Owner selling our GPS devices." In response to the Agency's Amended Order of Determination, Respondent denied it ever employed Claimant and affirmatively alleged that Claimant "bought an independent business distributorship" and "was his own business owner." The Agency argues that the forum should not construe this language as raising the affirmative defense of independent contractor. The forum disagrees, taking guidance from ORCP 12, which states:

**"A. Liberal construction.** All pleadings shall be liberally construed with a view of substantial justice between the parties.

**"B. Disregard of error or defect not affecting substantial right.** The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party."

Applying this standard, the forum concludes that Respondent raised the affirmative defense of inde-

pendent contractor in its original answer and its response to the Agency's Amended Order of Determination by its use of the language quoted earlier in this paragraph.

2. Respondent should not prevail because of its default.

The Agency's second argument implies that, even if Respondent raised an independent contractor defense, Respondent could not prevail once it defaulted and presented no evidence to support that pleading. Although not entirely clear, the Agency's reasoning seems to be that since it is Respondent's burden to prove the affirmative defense of independent contractor by a preponderance of the evidence, Respondent cannot prevail if it presents no evidence. The Agency is correct in its assertion that it is Respondent's burden to prove its independent contractor defense by a preponderance of the evidence. *In the Matter of Gary Lee Lucas*, 26 BOLI 198, 210 (2005). It is also correct that the forum's responsibility in a default case is to determine whether the Agency has established a prima facie case supporting the allegations of the charging document. See, e.g., *In the Matter of Keith Testerman*, 20 BOLI 112, 126 (2000). However, it is incorrect in its argument that the forum must ignore any evidence in a default case not presented by Respondent that tends to prove Respondent's affirmative defense of independent contractor.

The first element of the Agency's prima facie case is to establish that Respondent employed Claimant. Respondent's independent contractor defense is directly related to the issue of whether or not Respondent employed Claimant, as reflected in numerous Final Orders in which the forum evaluated a respondent's independent contractor defense, rejected it, and summarily concluded without further analysis that the claimant was employed by the respondent.<sup>9</sup> Respondents have raised an independent contractor defense in their answers in 40 prior BOLI contested case proceedings that resulted in Final Orders. With one exception,<sup>10</sup> the forum evaluated the merits of that defense in determining whether or not the respondent(s) employed the claimant(s). Included in that number are all eight default cases in which the respondent raised an independent contractor defense in its answer but did not appear at hearing.<sup>11</sup> In the majority of those

---

<sup>9</sup> See footnote 8, *supra*.

<sup>10</sup> See the forum's discussion of *In the Matter of Okechi Village & Health Center, Inc.*, 27 BOLI 156 (2006), *infra*.

<sup>11</sup> See *In the Matter of Richard Panek*, 4 BOLI 218 (1984); *In the Matter of Kevin McGrew*, 8 BOLI 251 (1990); *In the Matter of Rainbow Auto Parts & Dismantlers*, 10 BOLI 66 (1991); *In the Matter of R.L. Chapman Ent. Ltd.*, 17 BOLI 277 (1999); *In the Matter of Leslie Elmer DeHart*, 18 BOLI 199 (1999); *In the Matter of Stan Lynch*, 23 BOLI 34 (2002); *In the Matter of*

cases, the respondent's independent contractor defense was the very first issue addressed by the forum in its evaluation of the Agency's prima facie case.

Ultimately, the Agency's argument rests on the premise that it proved its prima facie case. If that were so, the forum would still evaluate Respondent's independent contractor defense, but the result would necessarily be different,<sup>12</sup> as proving the first element of the Agency's prima facie case – that Respondent employed Claimant -- necessarily proves that Claimant was not an independent contractor. Likewise, evidence that establishes by a preponderance of the evidence that Claimant was an independent contractor necessarily proves that Respondent did not employ Claimant. Although the burdens of proof for these two propositions respectively rest on the Agency and Respondent, it is immaterial who presents the evidence on which the forum relies for its conclusion. If Respondent pleads the defense of independent contractor and there is evidence in the record that is probative of that defense, the forum has no alternative but to consider that evidence, and it has consistently done so in the past. Consequently, the forum must consider and evaluate Respondent's independent contractor defense in light of any

evidence in the record that has a tendency to prove or disprove that defense. In a default case, the respondent is not present to make any objections and the Agency has complete control over what evidence it chooses to present. When the Agency presents evidence that tends to defeat one or more elements of its prima facie case, the forum must consider that evidence.

The Agency also argues that the Final Order in the case of *In the Matter of Okechi Village & Health Center, Inc.*, 27 BOLI 156 (2006) supports its contention that the forum need not consider a defaulting respondent's independent contractor defense. In *Okechi*, the Agency sought unpaid straight time and overtime wages for two claimants. In its answer and request for hearing, the respondent admitted that it employed both claimants for all straight time hours, but claimed that "all hours worked by claimants in excess of forty hours per week were covered by the independent contractor agreement between claimants and [Respondent]." In its Opinion, the forum acknowledged that the respondent had raised the independent contractor defense quoted above, but did not apply an "economic reality" test to evaluate the strength of respondent's defense, stating that:

"Respondent's unsubstantiated assertions are overcome by Claimants' credible testimony that there was no such agreement and that their overtime hours were an extension of

---

*Procom Services, Inc.*, 24 BOLI 238 (2003); *In the Matter of Ryan Allen Hite*, 31 BOLI 10 (2009).

<sup>12</sup> See footnote 8, *supra*.

their caregiver duties for Respondent and remain unpaid to date.”

*Okechi* can be distinguished from this case in three important respects. First, the *Okechi* respondent conceded that it employed claimants for the straight time portion of their hours and it was undisputed that claimants performed the same work during their overtime hours. Second, claimants credibly testified that there was no independent contractor agreement and there was no evidence to the contrary, apart from respondent’s bare assertion in its answer.<sup>13</sup> Third, nothing in the Final Order indicates that there was any substantive evidence in the record, apart from respondent’s statement in its answer, supporting respondent’s independent contractor defense. In contrast, here Respondent denied it employed Claimant, the Agency produced a “Reseller’s Handbook” that defined the business relationship between

---

<sup>13</sup> As the forum has stated previously, even if there had been an independent contractor agreement, this fact alone would be insufficient to establish, as a matter of law, that claimants were independent contractors. See, e.g., *In the Matter of Forestry Action Committee*, 30 BOLI 63, 75 (2008). See also *Alphabet House* at 278 (“Although Claimant may have signed an ‘independent contractor’ agreement, this fact alone does not control the outcome of this case, as the forum looks at the totality of the circumstances in determining whether a wage claimant was an employee or an independent contractor”).

Claimant and Respondent and that went into effect when Claimant began construction of his website, and Claimant testified extensively concerning his capital investment and the other factors that have led the forum to conclude he was an independent contractor.

In conclusion, the forum rejects the Agency’s contention that it is inappropriate to consider Respondent’s independent contractor defense because of Respondent’s default and proceeds to evaluate that defense based on the evidence presented at hearing.

### **C. Application Of Respondent’s Independent Contractor Defense**

This forum applies an “economic reality” test to distinguish an employee from an independent contractor under Oregon’s minimum wage and wage collection laws, with the touchstone being the “economic reality” of the relationship.<sup>14</sup> Restated, the forum considers whether “the alleged employee, as a matter of economic reality, is economically dependent upon the business to which [the employee] renders [his] services.” *In the Matter of Geofroy Enterprises, Inc.*, 15 BOLI 148, 164 (1996) (adopting FLSA test used by 5<sup>th</sup> Circuit Court of Appeals in *Circle C Investments, Inc.*, 998 F2d 324, 327 (5<sup>th</sup> Cir

---

<sup>14</sup> See *Boucher v. Shaw*, 572 F3d 1087, 1091 (9<sup>th</sup> Cir. 2009) (citing *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28 (1961)).

1993)). The “economic reality” test has five elements:

- (1) The degree of control exercised by the alleged employer;
- (2) The extent of the relative investments of the worker and alleged employer;
- (3) The degree to which the worker’s opportunity for profit and loss is determined by the alleged employer;
- (4) The skill and initiative required in performing the job; and
- (5) The permanency of the relationship.

*Id.* See also *In the Matter of Orion Driftboat and Watercraft Company*, 26 BOLI 137, 146 (2005); *In the Matter of Kilmore Enterprises*, 26 BOLI 111, 120-21 (2004); *In the Matter of William Presley*, 25 BOLI 56 (2004), *affirmed*, *Presley v. Bureau of Labor and Industries*, 200 Or App 113, 117, 112 P3d 485 (2005) (in reviewing the commissioner’s final order in which respondent’s primary argument was that claimant was an independent contractor, the court, after noting that respondent did not object to the commissioner’s use of the “economic reality” test, applied the same five element test and did not question whether it was the appropriate test to apply).

Before evaluating the merits of Respondent’s independent contractor defense, the forum notes that employers have raised this defense many times and the forum has rejected it on all but one occasion. See *In the Matter of Kilmore Enterprises, Inc.*, 26 BOLI 111, 120-122 (2004) (claimant

found to have performed part of his work as an employee for respondent and subsequent work for the same respondent as an independent contractor). However, this is the first time the defense has been raised in the context of a business enterprise involving home-based internet sales. The forum emphasizes that the holding in this case turns on its particular facts and should not be construed as controlling in all wage claim cases involving home-based internet sales in which the affirmative defense of independent contractor is raised.

#### DEGREE OF CONTROL

Respondent set the minimum price for its product, reserved the right to approve the content of Claimant’s advertising, required Claimant to pay \$25 a month to maintain a website that Respondent hosted on its servers, and controlled the means by which Claimant’s clients paid for the product. Claimant’s clients also paid Respondent directly, with Respondent promising to then pay a commission to Claimant.

Claimant determined the hours that he worked, the amount of commission he was supposed to earn on sales of Respondent’s GPS units,<sup>15</sup> the means and methods by which he marketed Respondent’s product, the amount he spent on marketing, the location from which he worked, and the equipment he used to market

---

<sup>15</sup> See Finding of Fact #4 – The Merits.

Respondent's product. He maintained contact with Respondent through weekly emails or telephone calls to a "coach" in Arizona.

This evidence, by itself, does not affirmatively indicate either an employment or independent contractor relationship.<sup>16</sup>

---

<sup>16</sup> Compare *In the Matter of Laura M. Jaap*, 30 BOLI 110, 125 (2009) (When respondent was present to direct work and perform work herself at least three days a week except during one week when her agent directed work in her absence; claimants performed the work that respondent and her agent instructed them to perform; claimants credibly testified that respondent and her agent directed their work and there was no more specific evidence concerning the extent of supervision by respondent; the forum concluded that the degree of control exercised by respondent was indicative of an employer-employee relationship); *Forestry Action Committee* at 76 (claimant who was required to comply with another person's instructions about when, where and how to perform services was an employee); *In the Matter of Gary Lee Lucas*, 26 BOLI 198, 210 (2005) (When claimants and respondent worked almost identical schedules, one claimant rode to and from work with respondent, and respondent told claimants how he wanted the work performed, the degree of control exercised by respondent indicated that claimants were employees, not independent contractors); *In the Matter of Rodrigo Ayala Ochoa*, revised final order on reconsideration, 25 BOLI 12, 42-43 (2003), affirmed without opinion, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004) (Based on the totality of the

The Agency disagrees with this analysis and argues that this evidence shows Respondent exercised significant control over Claimant and requires the conclusion that this element affirmatively shows that Claimant was not an independent contractor. The fo-

---

circumstances regarding degree of control -- respondent controlled the presence of workers who harvested cones for its business on the work site, as well as the workers' payroll, and the daily working conditions, i.e., lodging and transportation, this indicated an employer-employee relationship); *In the Matter of Triple A Construction, LLC*, 23 BOLI 79, 92 (2002) (When respondent hired claimants on a per job basis, but claimants had no control over how they approached each assigned project, the forum found they were hired as day laborers to perform work in accordance with respondent's instructions and, as such, were working at the direction and under the total control of respondent, indicating an employee-employer relationship.) But cf. *In the Matter of Kilmore Enterprises*, 26 BOLI 111, 121 (2004) (When respondent did not supervise or control claimant's work schedule or pay rate on a commercial painting job, claimant acknowledged that he was on his "own time" when he worked on the paint job and that he chose to work full eight hour days rather than the shorter work schedule respondent dictated on residential projects; claimant admitted that he, not respondent, determined the rate he would "charge" to do the work; and the record as a whole that showed respondent asked for and accepted claimant's "bid" on the commercial painting job, claimant's degree of control was indicative of an independent contractor relationship).

rum affirms its earlier conclusion about the legal significance of these facts and rejects the Agency's exception.

### **EXTENT OF RELATIVE INVESTMENTS**

In contrast to prior wage claim cases in which an alleged employer asserted an independent contractor defense, this is the first wage claim case to come before the forum in which a claimant actually made a substantial financial investment related to the work performed. Claimant testified that he invested \$15,000 to \$20,000 in the business during the wage claim period. This investment was not to buy stock or any ownership interest in Respondent, but to provide Claimant the means by which to market Respondent's product and earn potential income for Claimant. Claimant's investments included a computer and printer, monthly web site expense, cell phone bill, advertising expense to purchase brochures from Respondent and advertise through Google, business cards, and a \$1,500 startup fee to purchase a "welcome package" and a membership in Respondent's "Reseller's" program. There is no evidence that Respondent paid for any service or product it provided to Claimant to assist him in marketing MP. Rather, Claimant paid for everything.

In its exceptions, the Agency argues that the forum's analysis is flawed:

"While it is true that Claimant used his own funds for equip-

ment and supplies to work, the costs borne by the Claimant were items customarily provided by an employer to its sales employees (business cards, advertising brochures, website maintenance) and were paid to the Respondent. Missing, because Respondent provided no information in the record and was not present or available to the Forum at the hearing, is a discussion of the relative investments of the Claimant and Respondent. Presumably, the Respondent had business expenditures related to the purchase of GPS units, the actual servicing of the service plans, the leasing of business space, the costs of utilities, the maintenance of its website, the printing of advertising materials, etc. In other words, the Respondent's investment in the business venture likely far exceeded that of the Claimant."

The Agency's exception asks the forum to speculate about the extent of Respondent's business expenditures and draw a legal conclusion in support of the Agency based on that speculation. The forum declines to engage in such speculation, given the absence of any substantive evidence whatsoever to support the assumptions the Agency asks to forum to make. Ironically, the Agency's argument that the "costs borne by the Claimant were items customarily provided by an employer to its sales employees (business cards, advertising brochures, website maintenance)"

lends support to the forum's conclusion that Claimant was not Respondent's employee.

The investments required of and made by Claimant in hope of making a profit indicate an independent contractor relationship.

### **DEGREE TO WHICH CLAIMANT'S OPPORTUNITY FOR PROFIT AND LOSS WAS DETERMINED BY RESPONDENT**

Aside from *Kilmore*, this is the first wage claim case to come before the forum involving an independent contractor defense in which a claimant has actually had an opportunity to make a profit or suffer a loss. All previous cases except *Kilmore* have involved a claimant or claimants who worked for minimum wage,<sup>17</sup> an agreed rate of pay<sup>18</sup> or piece rate<sup>19</sup> who had no opportunity to earn money other than an agreed rate of pay or piece rate, and who had no cash or equity invested in the

work that they performed, other than their own labor. In *Kilmore*, a claimant was initially employed by respondent and paid at the fixed hourly rate of \$12 per hour. Subsequently, the claimant obtained a contractor's license, stopped working for respondent at a fixed hourly wage, and performed work for respondent at a flat rate proposed by claimant during the time that claimant was starting his own contracting business. The Commissioner held that claimant was an independent contractor when he performed work at the flat rate he proposed. In pertinent part, the Commissioner stated:

"\* \* \* when Respondent accepted Claimant's bid to perform the job for \$1,500 on his own time, the opportunity for profit and loss shifted to Claimant who had to depend on his own initiative, judgment, and foresight to complete the job in a manner that would result in such a profit."

*Kilmore* at 120-122.

In this case, there was no agreed-upon rate of pay and Claimant's potential income was directly dependent upon his investment of time and money. Respondent's Reseller's Handbook spelled out Claimant's potential commission profit as the difference between the price at which Claimant sold Respondent's MP GPS units and Respondent's minimum product price. It also required Claimant to make an initial capital investment of \$1,500 and to pay all of his own marketing expenses, which ultimately

---

<sup>17</sup> See, e.g. *In the Matter of Adesina Adeniji*, 25 BOLI 162 (2004); *In the Matter of William Presley*, 25 BOLI 56 (2004), *affirmed*, *Presley v. Bureau of Labor and Industries*, 200 Or App 113, 112 P3d 485 (2005).

<sup>18</sup> See, e.g. *Laura Jaap* at 110; *Forestry Action Committee* at 77.

<sup>19</sup> Cf. *Rodrigo Ayala Ochoa* at 43-44 (in a farm labor contractor case in which a respondent contended that cone pickers who worked on a piece rate basis were independent contractors, not employees for whom respondent had to provide itemized pay statements, the forum determined that the pickers were employees).

amounted to as much as \$20,000. Although Respondent recommended specific prices depending on the number of GPS units sold to a customer, Claimant was free to sell Respondent's MP GPS units -- with the exception of servicing plans for which he received no commission -- at any price he chose, so long as it exceeded Respondent's minimum pricing schedule. Accordingly, had Respondent paid Claimant according to the "Terms and Conditions for Business and Consumer Membership," the only limit on the amount of money that Claimant could have made was the number of successful MP GPS sales he could generate and the prices he charged, less the money he invested in marketing MP. The difference between Claimant's investment and the amount of commission he earned and would have received, had Respondent paid him, reflected his profit or loss. Respondent's failure to pay him any commissions to which he was entitled<sup>20</sup> does not lead to the conclusion that Respondent controlled his opportunity for profit and loss.

The degree to which Claimant determined his own opportunity for profit and loss indicates an independent contractor relationship.

In its exceptions, the Agency contends that the forum's conclusion is mistaken for two reasons.

---

<sup>20</sup> The forum has no way of knowing the amount of commission that Claimant should have been paid. See Finding of Fact #21 – The Merits.

First, because Claimant's potential earnings, like those of "any commissioned sales employee's wages," were dependent on "the number or items sold and the price of the products sold." Additionally, "Claimant's commission was really an amount added to the sales price established by the Respondent – he had to sell the GPS units for more than the Respondent's minimum price – as opposed to a percentage of the total price." Second, based on the fact that Claimant was paid almost nothing, the Agency posits:

"that this renders moot the entire exercise of analyzing the 'opportunity' for profit and loss in this situation. And it also must be said that the 'economic realities' for Claimant are sadly clear and very unfortunate. The Respondent negated any opportunity for profit that might have existed in its scheme, as portrayed in its materials, by failing to pay Claimant anything at all. A 'potential' opportunity for profit cannot be recognized when the employer's own actions sabotaged it. Because of this difference in the theory of the arrangement and the de facto result, Respondent should not be allowed to benefit from this element of the independent contractor test."

The forum finds the Agency's first argument confusing and gives it no weight. The Agency's second argument sets out pathos as a reason for not applying this element of the economic reality test.

The forum rejects this argument. The forum is a forum of law, not a court of equity. Even if it wanted to do so, it is not free to ignore its own legal precedent in order to rectify a “sadly clear and very unfortunate situation” in a particular case.

### **SKILL AND INITIATIVE REQUIRED OF CLAIMANT IN PERFORMING THE WORK**

Respondent marketed a product that integrated GPS and cellular technology and enabled clients to communicate with a vehicle at any time of the day or night, nearly anywhere in the world, using a computer with Internet access and a browser, with the only limitation being the type of service plan purchased by the client. Claimant testified that he was attracted to Respondent’s business because of his extensive prior experience and skills involving computers and their use in motor vehicles and what he perceived to be a very high income potential.<sup>21</sup> While there was no evidence that a person lacking skills and experience in these areas could not have successfully marketed Respondent’s product, it is also apparent that Claimant believed his technical expertise gave him an edge. As for marketing skills, there was no evidence presented as to whether Claimant had any prior marketing education or experience.

Respondent did not regulate or limit Claimant’s initiative by requir-

ing him to work a set number of hours or set schedule, and there is no evidence that Respondent monitored Claimant’s work hours or working conditions in any way whatsoever. Respondent imposed no mandatory sales techniques and did not restrict Claimant’s sales efforts to a specified group of customers. Aside from reserving the right to approve the content, Respondent did not limit Claimant’s advertising in any way. The responsibility of generating and closing sales that would lead to commission income for Claimant was completely in his hands. While Respondent’s Reseller’s Handbook contained numerous suggestions about how Claimant might successfully market MP, Claimant had complete discretion regarding the amount of physical and intellectual energy, financial investment, and time he used to market MP. So long as he sold MP for more than Respondent’s minimum price, Claimant was free to charge whatever price he could negotiate with clients. In sum, his opportunity to earn income was completely dependent on his own initiative.

The forum concludes that the initiative required of and exercised by Claimant indicates an independent contractor relationship.

In contrast, prior cases in which the Commissioner has held that no independent contractor relationship existed between claimants and a respondent have all found that no particular degree of skill or initiative was required to

---

<sup>21</sup> See footnote 3, *supra*.

perform the work for which the claimants were hired.<sup>22</sup>

The Agency excepts to the forum's conclusion, asserting that the facts cited above require a conclusion that Claimant was not an independent contractor, focusing on Claimant's lack of prior marketing skills and virtually ignoring the initiative exercised by

---

<sup>22</sup> See *Gary Lee Lucas* at 211-12 (When the skill and initiative required of claimants was that of an ordinary framer and they worked alongside and took directions from respondent, did not bid on the job, did no design work associated with the job, and there was no evidence that they did any work independently, the forum found these facts indicated that claimants were employees, not independent contractors); *Ochoa* at 44 (When the amount of money workers earned somewhat depended upon the efficiency of their work, but the skill required was limited to their ability to bend over and pick up cones and the initiative required for picking cones was no more than that required of any other piecework, the forum found that cone picking did not reach the level of an enterprise for which success depends on the initiative, judgment or foresight of the typical independent contractor); *Triple A Construction, LLC* at 93 (When claimants had the skills necessary to wield hammers and saws and had previous experience working for respondent on similar jobs, but had not attended any trade schools or taken any classes in construction and did not have a CCB license, the forum concluded that claimants possessed no special skills or talents that would have made them likely to be independent contractors while working for respondent).

Claimant. The forum rejects the Agency's exception.

### PERMANENCY OF RELATIONSHIP

The "Terms and Conditions for Business and Consumer Membership" found in Respondent's "Reseller's Handbook" provide that when the stated terms were met, the "Agreement" was to remain in force for one year and would be automatically extended for additional one-year terms unless either party submitted written notice of non-renewal 30 days prior to the expiration date of any annual contract term.<sup>23</sup> Respondent retained the right to unilaterally terminate the "Agreement" for failure "to maintain membership in the IBO/Reseller Program, or for failure to remit Web hosting fee, or failure to pay any other outstanding unpaid balance due us for more than thirty days."<sup>24</sup> The Handbook also

---

<sup>23</sup> Again, the forum points out that an independent contractor agreement, whether written or verbal, does not control the employment relationship between a respondent and a claimant, as the forum looks at the totality of the circumstances to determine whether a wage claimant was an employee or independent contractor. See footnote 13, *supra*.

<sup>24</sup> In referencing the language of the "Terms and Conditions," the forum does not determine whether an agreement or contract existed between Claimant and Respondent. Rather, the language is referenced in order to set out the terms and conditions communicated by Respondent regarding the relationship with those designated as "Independent Business

states that the permanency of the relationship could be as brief as 30 days, or a period of years if Respondent and Claimant continued to renew.

The potential longevity of the relationship between Respondent and Claimant weighs in favor of employee status.

## CONCLUSION

As a practical matter, Claimant was economically dependent on his sales of Respondent's MP during the wage claim period, in that he had no other source of potential income and performed no other gainful employment. However, the forum's application of its "economic reality" test shows that three of the five elements of the "economic reality" test indicate that Claimant was an independent contractor, one element indicates neither, and only one -- permanency of the relationship -- indicates an employment relationship. In this context, the "economic reality" of this case is that Claimant's relationship with Respondent was that of an entrepreneur who invested his time and money in a business venture in hopes of making a substantial profit on his substantial investment through sales commissions - - not that of an employee who was entitled to a guaranteed minimum wage under ORS 653.025 and 653.035(2). Accordingly, the forum concludes that Respondent did not employ Claimant and the

---

Owner (IBO) and Reseller of our products."

Agency did not prove the first element of its prima facie case. Therefore, Claimant cannot prevail on his wage claim.<sup>25</sup> The

---

<sup>25</sup> *Compare Presley, 200 Or App 113, at 117-18* (Court held that claimant, whom respondent argued was an independent contractor, was an employee under the forum's "economic reality" test based on the following: respondent exercised control primarily by assigning duties and determining the hours during which his business was open; claimant had no financial investment in respondent's business; claimant exercised some control over his "profit" to the extent his remuneration was derived from commissions, but a good deal of his pay came in the form of wages; the bulk of his tasks -- ferrying, washing, detailing, and selling used cars -- required little if any skill and initiative; claimant was hired for an unspecified, indefinite term; and claimant exercised some small degree of self-determination in that he could take extended breaks for lunch and personal matters and attempt to sell his home and his father's vehicles); *Perri v. Certified Languages International, LLC*, 187 Or App 76, 82-83, 66 P3d 531 (2003) (Under both the common law "right to control" and FLSA "economic reality" tests, court concluded that defendant was not entitled to summary judgment concluding that plaintiff, a telephone operator who worked at home, was an independent contractor based on the following facts: defendant had the right to hire and fire plaintiff and set her rate and method of compensation; defendant exercised control over the manner in which plaintiff performed her work and selected the pool of interpreters whom plaintiff could assign to customers; defendant furnished telephone lines and interpreter lists to plaintiff, which

forum rejects the Agency's excep-

---

appeared to be the sum of physical resources required to do her work; defendant controlled plaintiff's work schedule; and defendant determined plaintiff's working conditions by limiting other activities that she could perform while working for defendant); *In the Matter of Procom Services, Inc.*, 24 BOLI 238, 244 (2003) (Claimant, who performed telemarketing sales for respondent, was an employee, not an independent contractor, when respondent directed claimant's work and supplied all of the equipment necessary to perform the work; claimant had no investment in respondent's business; claimant had no opportunity to earn a profit or suffer a loss, as respondent agreed to pay her a specific wage or commission and she had no investment other than her time; the job required no training and claimant was only allowed to call persons on her call list and was provided sales scripts that she was required to use; claimant was hired for an indefinite period of time; and no one else employed claimant during the relevant period); *In the Matter of Ann L. Swanger*, 19 BOLI 27, 36-37 (1999) (Claimant, who sold cars for respondents, was an employee, not an independent contractor when claimant had no means of attracting a higher volume of customers to respondents' car lot to increase his potential sales commissions; claimant had no investment in respondents' business; the skill and initiative required of claimant was no more than that required of other commission-paying jobs; claimant was selling cars on respondents' lot approximately 60% of the time that the lot was open; and there was no reliable evidence that claimant earned money by any other means except for a few cars he sold for another person).

tion that the facts summarized in its discussion of the five elements of the "economic reality" independent contractor test establish, as a matter of law, that Respondent employed Claimant.

### **WAGE SECURITY FUND REIMBURSEMENT**

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 WSF 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 Blachana, LLC*, 30 BOLI 197, 219 (2009), *appeal pending*. See also *Sehat Entertainment* at 182; *In the Matter of Robert J. Thomas*, 30 BOLI 160, 167 (2009). The Agency's compliance specialist credibly testified that she investigated the claim, concluded it was valid based on the evidence presented to her, and that her recommendation led to the WSF payout. These facts create the rebuttable presumption described above.

This presumption is rebutted by the forum's conclusion that the Agency did not prove the first element of its prima facie case – that Respondent employed Claimant. Since Claimant was not employed by Respondent, Respondent had no statutory obligation to pay him wages and owes Claimant no wages. The

WSF exists to compensate eligible “employees[s]” for “earned and unpaid wages” when “the employer against whom the claim was filed has ceased doing business and is without sufficient assets to pay the wage claim and the wage claim cannot otherwise be fully and promptly paid[.]” ORS 652.414(1). Claimant did not earn any wages because he was not employed by Respondent. Since there are no “earned and unpaid” wages, the forum cannot order Respondent to repay the WSF the wages paid out to Claimant or the 25 per cent penalty sought by the Agency.

In its exceptions, the Agency argues that the forum improperly applied the presumption. Specifically, the Agency contends:

“In this case the Forum determined that the Compliance Specialist testified credibly to the three necessary points of the rebuttable presumption standard. However, the Forum found that the Respondent’s unsworn and unsupported defense overcame the presumption. This casts troubling doubt on the strength and validity of the presumption in future cases, even those where no meaningful defense is offered.

“Here Respondent prevailed even though it did not produce any evidence or assertions of any kind other than a handful of unsworn words denying Claimant was Respondent’s employee, asserting Claimant was an ‘Independent Business

Owner’ and Claimant ‘bought an Independent Business Distributorship’ and requesting a hearing which Respondent did not attend.”

The forum rejects the Agency’s exception. The Agency’s statement that Respondent’s defense was “unsupported” is inaccurate. As pointed out earlier, Respondent’s defense was supported by a preponderance of the evidence – albeit evidence that was elicited and provided by the Agency.<sup>26</sup>

### ORDER

NOW, THEREFORE, as Respondent has been found not to owe Claimant Larry Kilburn wages, the Commissioner of the Bureau of Labor and Industries hereby orders that Amended Order of Determination #09-0942 seeking unpaid wages, ORS 652.150 penalty wages, and ORS 653.055(1)(b) civil penalties on behalf of Claimant Kilburn, along with recovery of funds paid from the Wage Security Fund to Kilburn and a 25 per cent penalty on those funds, be and is hereby dismissed.

---

<sup>26</sup> This is not the first default case in which the Agency established the WSF rebuttable presumption and then presented evidence to rebut it. See *In the Matter of Carl Odoms*, 27 BOLI 232, 240 (2006) (forum disallowed recovery of Agency’s total WSF payout when Agency witness testified that she did not work as many hours as the Agency used in calculating her WSF reimbursement payout).