

In the Matter of
FORESTRY ACTION COMMITTEE
OF THE ILLINOIS BASIN INTEREST GROUP
Case No. 25-07
Final Order of Commissioner Brad Avakian
Issued October 31, 2008

SYNOPSIS

Respondent employed Claimant as a forestry technician at the rate of \$12 per hour. Claimant was not an independent contractor as Respondent claimed, but was an employee entitled to the agreed upon rate for all hours worked and one and one half times the agreed upon rate for those hours that exceeded 40 in a regular workweek. Respondent kept no records of the hours Claimant worked and the forum awarded her \$2,274 in unpaid wages based on her credible testimony concerning her pay rate and the amount and extent of work she performed. Respondent's failure to pay was willful and the forum ordered Respondent to pay \$2,880 in penalty wages in addition to the unpaid wages. ORS 652.140; ORS 652.150; ORS 653.010; ORS 653.261.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on August 12, 2008, in Room 4 of the Employment Department/Worksource Oregon, located at 119 N. Oakdale Avenue, Medford, Oregon.

Alan McCullough, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "Agency"). Hazel Danene Reagan ("Claimant") was present throughout the hearing and was not represented by counsel. Forestry Action Committee of the Illinois Basin Interest Group ("Respondent") appeared through Susan Chapp, Respondent's executive director and authorized representative.

The Agency called as witnesses: Susan Chapp, Respondent's executive director; Claimant; and Margaret Pargeter, BOLI Wage and Hour Division Compliance Specialist.

Respondent called as witnesses: Kristine Miller, Respondent's former employee; Robin Wilson, Respondent's office manager; and Susan Chapp.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-20;
- b) Agency exhibits A-1 through A-22, A-24 (filed with the Agency's case summary), A-25, and A-26 (submitted during 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 October 13, 2005, Claimant filed a wage claim with the Agency alleging that Respondent had employed her from December 15, 2004, through May 20, 2005, that she earned \$2,200 between April 18 and May 18, 2005, and that Respondent failed to pay her the wages she earned for the hours she worked during that period.

2) When she filed her wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent.

3) On March 9, 2006, the Agency issued Order of Determination No. 05-3203. In the Order, the Agency alleged Respondent had employed Claimant during the period April 18 through May 18, 2005, failed to pay her for all hours worked in that period, and was liable to her for \$2,200 in unpaid wages, plus interest. The Agency also alleged Respondent's failure to pay all of the wages when due was willful and Respondent was liable to Claimant for \$3,300 as penalty wages, plus interest. The Order gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) Respondent was served with the Order of Determination and thereafter, through counsel, timely filed an answer and requested a hearing. In its answer,

Respondent denied the claimed rate of pay, the accuracy of the claimed work hours, and the amount claimed as unpaid wages. Respondent further denied that it willfully failed to pay Claimant because 1) "it was not financially able to do so," 2) "it had a valid reason to believe that the contested wages claimed by [Claimant] were not in fact, owed," and 3) "the amount of wages listed in the Order of Determination were not owed, or at least were not owed in the amount demanded." Respondent specifically contested the number of hours Claimant worked and the amount of pay per hour. As an affirmative defense, Respondent alleged Claimant was an independent contractor and not an employee as the Agency alleged.

5) On March 4, 2008, the Agency submitted a request for hearing. In the request, the Agency noted that on March 3, 2008, Respondent's counsel advised the Agency case presenter that he no longer represented Respondent. On March 13, 2008, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:00 a.m. on June 17, 2008. With the Notice of Hearing, the forum included copies of the Order of Determination, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

6) On March 20, 2008, the ALJ issued an order requiring Respondent to obtain counsel or file a letter authorizing a corporate officer or employee to represent Respondent at the hearing.

7) On March 27, 2008, Respondent's executive director timely filed a letter designating board member Robert Pelletier as Respondent's authorized representative.

8) On April 2, 2008, the ALJ ordered the Agency and Respondent each to submit a case summary that included: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and, for the

Agency only, a brief statement of the elements of the claim and any wage and penalty calculations. The ALJ ordered the participants to submit their case summaries by June 6, 2008, and notified them of the possible sanctions for failure to comply with the case summary order.

9) On April 23, 2008, the Agency moved to postpone the hearing based on the Agency case presenter's involvement in a family member's wedding scheduled close to the hearing date. Based on the Agency's representation that Respondent had no objection to a postponement, the ALJ granted the Agency's motion and the hearing was reset to commence on August 12, 2008.

10) On July 14, 2008, Respondent notified the Hearings Unit that its authorized representative had been changed from Robert Pelletier to Respondent's executive director Susan Chapp.

11) On July 22, 2008, the Agency moved to amend the Order of Determination by interlineation to lower the amount of wages and penalty sought and to include a reference to overtime wages. Respondent did not file a response within the time allowed under the ALJ's interim order, and the Agency's motion was granted. The amended Order of Determination alleged that Respondent owed Claimant \$2,039.28 in unpaid wages and \$2,880 in penalty wages, and alleged a violation of overtime provisions.

12) The Agency and Respondent timely submitted case summaries.

13) On August 1, 2008, the Agency filed an addendum to its case summary.

14) On August 6, 2008, the Agency, with the ALJ's permission, filed a second addendum to its case summary by facsimile transmission, and mailed the original to the Hearings Unit for inclusion in the hearing record.

15) On August 7, 2008, the ALJ issued an addendum to the order granting the Agency's motion to amend. The addendum pointed out that although Respondent did not object to the Agency's amendment, the allegations were deemed denied for the purpose of hearing and Respondent was not required to file an amended answer.

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

17) The ALJ issued a proposed order on October 16, 2008, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At times material, Respondent was a domestic nonprofit corporation consisting of a volunteer citizen's committee that received funding through grant agreements from multiple sources to perform various projects, such as tree planting and weed control.

2) In August 2003, Respondent, through its executive director, Susan Chapp, signed a grant agreement with the Oregon Watershed Enhancement Board ("OWEB") to perform work on the Illinois Valley Riparian Tree Planting Project. OWEB granted Respondent funds of up to \$79,765.00 for the two year project. The project's budget included \$2,520 per month for a 10-month tree planting project coordinator position and \$2,520 per month for a 12-month forestry technician position. The project completion and grant expiration date was June 30, 2005. To receive funds under the grant, Respondent was required to track its expenditure and submit records to OWEB showing what work was done on each project. To help meet that requirement, workers were asked to maintain a daily work log and turn it in to Respondent before receiving a

paycheck. Chapp was the project manager for the entire project and signed the paychecks.

3) On December 15, 2004, Chapp hired Claimant as the tree planting project coordinator to finish up the OWEB tree planting project's second year. Claimant was hired to complete the previous coordinator's work after the coordinator left the position. Claimant had no experience in the field, but Chapp believed that Claimant's background in education was an asset to the position and she personally recruited Claimant who quit her jobs at a café and as a substitute school bus driver to work for Respondent.

4) Chapp agreed to pay Claimant \$2,200 per month and to pay her twice monthly.

5) Claimant's duties included office work and community outreach. Her work hours were from 8 a.m. to 4 p.m. Occasionally, she was required to attend and participate in community meetings after her scheduled work hours. Respondent provided Claimant a cubicle with a desk, file cabinet, telephone, and computer. Respondent gave Claimant business cards to use and paid her mileage for using her car while performing outreach work. As project coordinator, Claimant performed data entry, prepared educational materials and used them for community outreach to schools, public landowners and the local community, made telephone calls, attended weekly board meetings, recruited volunteers to plant trees, sought volunteers and donations for an outreach potluck, published advertisements in newspapers, and posted fliers. Chapp was Claimant's immediate supervisor and any educational materials or advertisements that Claimant prepared were subject to Chapp's pre-approval. Claimant received her assignments during Monday morning meetings or through daily discussions with Chapp.

6) As part of the grant agreement, Chapp asked Claimant to maintain a daily work log and prepare a final report at the end of her tenure as the tree planting project coordinator. Claimant maintained a log from December 15, 2004, through April 15, 2005. On or about April 15, 2005, Claimant prepared and completed a final report and gave it to Chapp. Between December 2004 and April 2005, Respondent paid Claimant \$7,700 in wages and \$54.72 in mileage expenses. When her job ended April 15, 2005, Respondent still owed Claimant wages totaling \$1,280 for her tree planting project coordinator work.

7) On or about April 18, 2005, Chapp asked Claimant to stay on and finish up the forestry technician position for 25 hours per week and fill the Onion Camp weed control coordinator position for 15 hours per week. Chapp offered Claimant \$12 per hour to perform both jobs and Claimant agreed to stay and work for that amount. Claimant replaced Mike Mitchell who had received \$2,200 per month as the forestry technician.

8) Claimant's work hours were from 8 a.m. to 4 p.m., Monday through Thursday, and from 9 a.m. to 4 p.m. on Fridays. Claimant worked in the office, but spent much of her time in the field monitoring tree growth. Chapp instructed Claimant to go through the tree planting files and determine which trees and property had not been monitored by the previous forestry technician. Chapp gave Claimant instructions about the monitoring process and gave her a GPS monitoring device and calibration tool to locate the trees and measure their growth. At Chapp's request, Claimant kept a record of her work hours so her hours would not exceed the number allotted each week for each position. Chapp told her to flex her time, if necessary, to avoid exceeding the allotted hours.

9) Between April and May 2005, Claimant had trouble obtaining her final paycheck from Respondent for her previous work as the tree planting project coordinator. During that time, Chapp asked Claimant to manipulate the tree monitoring data and Claimant declined. For those reasons, Claimant decided to quit working for Respondent. Claimant's last work day was May 18, 2005. Shortly after she quit, Claimant turned in the GPS tracking device and calibration tool, along with a note reminding Chapp that Respondent had not yet paid her in full for her tree planting project coordinator work.

10) After Claimant quit, Chapp asked Kristine Miller to finish up where Claimant left off. Chapp used the remaining grant money budgeted for the forestry technician position to pay Miller. Miller worked 40 hours per week and received a check on June 10, 2005, for \$1,393.48 that included \$123.48 for expenses, and one on June 24, 2005, for \$1,270.

11) Sometime in June 2005, Claimant received a check from Respondent, dated June 10, 2005, for \$1,280, the amount Respondent owed Claimant for her work as tree planting project coordinator. Before paying Claimant, Chapp asked office manager Robin Wilson to generate a work log "for the funders." Although Wilson objected to creating the document, she understood the documentation was necessary before OWEB would furnish the money to pay Claimant. Wilson created a document that she knew was a false report.

12) From April 18 through May 18, 2005, Claimant worked 187 hours, including 5 overtime hours. Based on the agreed \$12 per hour wage rate, Claimant earned \$2,274 (\$12 per hour x 182 hours, plus the overtime rate of \$18 per hour x 5 hours).

13) On June 30, 2005, Claimant left a telephone message reminding Chapp that she was still owed wages for her forestry technician and weed control coordinator work. When Chapp failed to respond, Claimant hand delivered a letter dated July 22, 2005, to one of Respondent's board members, Bill Reid, in which Claimant requested that Respondent pay her for her work as forestry technician and weed control coordinator. When she received no response from Reid, she sent him another letter dated August 1, 2005, reiterating her request for wages and stating, in pertinent part:

“By law, I am supposed to be paid 5 days after my last day of work. I have been more than patient, and if I must resort to filing a complaint with the Bureau of Labor, I will also notify the funders for these two positions. As of this date, I have heard no word from the Director, or Board, concerning my pay. Please call and let me know when you receive this letter whether or not I need to file the paperwork I have already completed.”

Claimant did not receive a response from Reid and did not receive her wages.

14) On or about August 23, 2005, Chapp sent Claimant a letter stating in pertinent part:

“On June 31st [sic], there was a brief phone message from you saying you had just realized it was the last day you could get paid from the Tree Planting Project and that you were coming in later. We made certain there was someone in the office all that day until 6 p.m. You did not come in. I assumed you had decided you were not owed any more money.

“At some later point, you gave a letter dated July 22nd to FAC board member Bill Reid. You then delivered another letter dated August 1st. Both letters indicated that you believed you still had money coming to you. This is an inaccurate assumption on your part.

“Your contract as Tree Planting Project Coordinator states that the last payment is contingent upon completion of stated duties. You did not complete those duties. Your draft final report had to be mostly rewritten by others. The volunteer data base was only half done. Someone else had to complete it. We paid you, not because you were due the money, but because we chose to land on the side of overpay rather than underpay.

“In your attempt to complete the Forestry Technician work, the monitorings you performed were incomplete, with many blanks on the monitoring forms, so that the monitorings all had to be done again. You took some monitoring photos and put them in the computer but did not identify or

label them, so they are useless. The final Forestry Technician pay is contingent on completion of duties. You did not complete the duties and you did not perform the work you did in a satisfactory manner.

"I offered you the position of Volunteer Weed Coordinator for Onion Camp because of your help in getting people to a weed meeting. However, there is no product from the job. There is no volunteer list and/or contact information put together by you. There is no documentation of any work you may or may not have done in this capacity.

"Due to your lack of performance and satisfactory product in all three job titles, as detailed in the job descriptions and contracts, the Forestry Action Committee does not owe you further pay. Indeed, due to your lack of performance, we were not required to give the final coordinator check at all.

"I hope this letter clarifies any lingering questions on your part."

15) Claimant filed a wage claim on October 13, 2005.

16) On November 14, 2005, the Agency mailed a "NOTICE OF WAGE

CLAIM" to Respondent that stated in pertinent part:

"You are hereby notified that HAZEL D. REAGAN has filed a wage claim with the Bureau of Labor and Industries alleging:

"Unpaid wages of \$2,200 at the rate of \$12 per hour from April 18, 2005, to May 18, 2005.

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

"IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation that 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 November 29, 2005, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

17) On November 29, 2005, Respondent submitted a response through counsel disputing Claimant's wage claim, stating in pertinent part:

“Ms. Reagan voluntarily walked away from her work for Forestry Action Committee, she completely failed to perform a large amount of the work for which she had been hired, she breached the terms of her contract with Forestry Action Committee, she refused to communicate with the organization after leaving it, and in spite of all that, the organization has already paid her much more than she actually earned through her work for the organization. Accordingly, Forestry Action Committee must dispute her claim for wages.”

Along with its response, Respondent submitted a completed Wage Claim Investigation/Employer Response form. On the form, Respondent stated Claimant was “hired as a contractor by the volunteer executive director S. Chapp,” that the agreed upon rate of pay at hire was “\$2,200/month upon completion of specific tasks,” and that the agreed upon rate at termination was the “same.” In the response, Respondent stated that it did not keep a record of Claimant’s work hours, explaining that Claimant was “hired & paid by the task.” Chapp provided Respondent’s counsel with all of the information contained in Respondent’s response and the completed Wage Claim Investigation/Employer Response form.

18) In its answer to the Order of Determination, Respondent stated that for the period April 18 through May 18, 2005, Claimant worked 143 hours. Regarding Claimant’s agreed upon rate of pay, Respondent stated, in pertinent part:

“[T]here was no agreement at all with Ms. Reagan regarding an hourly rate of pay. Claimant was hired to perform specific tasks as an independent contractor, pursuant to the attached contract. The pay was to be based on her performance and completion of those tasks. She did not perform or complete the required tasks, and then she quit without telling anyone, by just leaving one day and not returning and without telling anyone that she was quitting.

“In actual fact, Ms. Reagan was an unsatisfactory employee, who did a poor job of performing the tasks she was hired to do. As a result of her poor job performance, if she had been paid by the hour, Forestry Action Committee would not have paid Ms. Reagan at the rate of \$10.00 per hour, which is the top of the pay range for comparable work. That high rate is only available to people that work for a longer time and show that their job performance exceeds expectations. That does not describe Ms. Reagan or the quality of work she performed for Forestry Action Committee.

“ * * * * *

“In summary, if Forestry Action Committee is required to pay anything further to Ms. Reagan, then it objects to payment at any rate higher than \$8.00 per hour, which is what she would have been earning if she were being paid by the hour, based on her poor job performance, and based on the fact that the highest rate of pay for comparable work with this organization was \$10.00 per hour.”

There were no signatures on the “attached contract.” Chapp provided Respondent’s counsel with all of the information contained in the answer.

19) In a letter dated August 23, 2006, that was sent to Respondent along with a copy to Claimant, the Internal Revenue Service (“IRS”) held that Claimant was Respondent’s employee in 2004 and 2005 and not an independent contractor under the federal guidelines. The letter was in response to “a Form SS-8 that was submitted to request a determination of employment status for Federal employment tax purposes.” According to the letter, the IRS had solicited information from Respondent and Claimant, but had not received any information from Respondent. The letter states that the IRS determination was based on the application of law to the information presented or discovered during the course of the IRS investigation. Although the determination pertained only to Claimant’s work relationship, the IRS emphasized that the ruling “may be applicable to any other individuals engaged by the Forestry Action Committee under similar circumstances” and encouraged Respondent to comply with the determination by filing or amending its employment tax returns.

20) Following the IRS audit, Respondent paid all back taxes and reclassified some of its workers. Later, in a response to the Agency’s discovery request, Respondent stated “[w]e now understand the difference between an employee and a contractor, but we did not understand the legal distinction when [Claimant] was hired.”

21) On May 1, 2005, Respondent’s bank account had a beginning balance of \$13,787.27. The deposits for May totaled \$12,475 and the withdrawals totaled

\$15,727.57. The ending balance on May 31, 2005, was \$10,534.70. In May 2005, Chapp signed checks on Respondent's behalf for newspaper advertisements, phone bills, employee salaries, weed crew wages, and reimbursements for Chapp and her son. During that month, Chapp also signed a \$3,497.50 check to the National Forest Foundation for the mushroom project.

22) Claimant was a credible witness. Her testimony was straightforward and consistent with her prior statements to the Agency and other credible evidence in the record. Claimant's testimony was not impeached in any way and is credited in its entirety.

23) Susan Chapp's testimony conflicted with prior statements she made to the Agency during the wage claim investigation, contradicted other credible testimony, and was internally inconsistent. For example, she firmly denied paying anyone performing work comparable to Claimant's the equivalent of \$12 per hour, but later retracted her testimony when confronted with Respondent's records showing that employees in comparable positions were paid the equivalent of \$12 or more per hour, and in some cases, as much as \$16 per hour. Her testimony that Respondent's "bottom" pay rate was \$10 per hour and that Respondent never paid anyone \$8 per hour conflicted with her earlier testimony and prior statement to the Agency that employees in positions comparable to Claimant's were paid only \$8 per hour and if they performed well and competently, could receive an increase to \$10 per hour, which was "the top of the range for comparable work."

Prior to hearing, Chapp told the Agency that the person hired to replace Claimant "was paid \$10 per hour, the same as we would have paid [Claimant] if she had been working as an employee." During the hearing, when confronted with documentary evidence showing Claimant's replacement was paid the equivalent of \$16 per hour to

finish up the forestry technician job, Chapp acknowledged her prior statement was “inaccurate,” but insisted that Claimant’s replacement received less than \$10 per hour because she had to work over 50 hours per week to meet the grant obligation. However, Kristine Miller credibly testified that she was hired to finish the forestry technician job for the remaining grant money and that she worked a 40-hour workweek. Miller’s testimony that Respondent paid her \$2,540 to finish the job, equating to \$16 per hour for a 40-hour workweek, was corroborated by credible documentary evidence showing she was paid that amount.

Furthermore, Chapp’s acknowledgement that Claimant was asked to stay on and finish up the forestry technician position after her first job with Respondent concluded, belied her statements and testimony that Claimant’s work performance was unsatisfactory and that she was overpaid for her work as tree planting project coordinator. Absent any evidence Claimant was ever disciplined or rebuked for poor work performance and given Respondent’s subsequent efforts to keep Claimant on the payroll, Chapp’s unsubstantiated assertions are decidedly disingenuous.

Chapp’s credibility was further undermined by her admission that she asked Robin Wilson to create a false record in order to comply with grant requirements. While Chapp’s motives appeared driven by a sincere commitment to Respondent’s community projects, they do not justify distorting facts to protect Respondent’s interests. Her demonstrated bias and conflicting positions about Claimant’s pay rate and work performance rendered her testimony unreliable overall. Consequently, it was credited only when it was an admission, statement against interest, or corroborated by credible evidence in the record.

24) Robin Wilson’s testimony was not credible. Her admission that she created a false record at Chapp’s behest in order to comply with grant requirements

illustrates a willingness to fabricate if it serves Respondent's interests. Bias may be inferred by her acknowledgement that she and her family members were Respondent's longtime employees and that Respondent was her sole source of income. Her misguided loyalty also was evident when, several times during cross-examination, Wilson, visibly nervous, turned to Chapp for answers to particular questions. Overall, her testimony was not convincing and was credited only when it was an admission, statement against interest, or corroborated by credible evidence in the record.

25) Kristine Miller and Margaret Pargeter were credible witnesses.

ULTIMATE FINDINGS OF FACT

1) At times material, Respondent was a nonprofit corporation that employed one or more persons to perform work in Oregon.

2) Respondent employed Claimant as a forestry technician and weed control coordinator from April 18 through May 18, 2005.

3) Respondent agreed to pay Claimant \$12 per hour.

4) Between April 18 and May 18, 2005, Claimant worked 187 hours, 5 of which were hours that exceeded 40 hours in a given work week.

5) Claimant's last day of work was May 18, 2005.

6) From April 18 through May 18, 2005, Claimant earned \$2,274. Respondent did not pay Claimant any part of the wages earned and owes Claimant \$2,274 in due and unpaid wages.

7) On Claimant's behalf, BOLI sent Respondent written notice of nonpayment of wages on November 14, 2005, before issuing an Order of Determination on May 9, 2006.

8) Respondent willfully failed to pay Claimant \$2,274 in earned, due and payable wages. Respondent has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.

9) Penalty wages for Claimant, computed pursuant to ORS 652.150, equal \$2,880.

CONCLUSIONS OF LAW

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

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

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

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

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

OPINION

The Agency was required to prove: 1) Respondent employed Claimant; 2) any pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) Claimant performed work for which she was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. *In the Matter of Sue Dana*, 28 BOLI 22, 29 (2006). Respondent had the burden of proving its affirmative defenses that Claimant was an independent contractor during the wage claim period and that, in the alternative, Respondent was financially unable to pay any wages owed when Claimant quit working for Respondent. See *In the Matter of Gary Lee Lucas*, 26

BOLI 198, 210 (2005)(the defense of independent contractor is an affirmative one and a respondent bears the burden proof); *see also In the Matter of Captain Hooks, LLP*, 27 BOLI 211, 223 (2006)(claiming financial inability to pay wages at the time wages accrued is an affirmative defense). Respondent further contends that even if Claimant was an employee, she was not entitled to \$12 per hour, and her work performance “in all three job titles” was not satisfactory; therefore, Respondent owed her no further pay.

UNPAID WAGES

A. Employment Relationship

ORS 652.310(1) defines “employer” as:

“[A]ny person who in this state, directly or through an agent, engages personal services of one or more employees * * *.”

ORS 652.310(2) defines “employee” as:

“[A]ny individual who otherwise than as copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled.”

Respondent’s allegation that Claimant signed a contract and agreed to work as an independent contractor is not supported by credible evidence. 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. Rather, the forum looks at the totality of the circumstances to determine the actual working relationship. *In the Matter of The Alphabet House*, 24 BOLI 262, 278 (2003). Respondent’s argument that their mutual understanding factors into the totality of the circumstances has no merit. It matters not that a worker agrees, orally or in writing, to work as an independent contractor.¹ Intent does not control whether an employment relationship exists. *In the Matter of Ann L. Swanger*, 19 BOLI 42, 55 (1999).

The test for distinguishing an employee from an independent contractor requires full inquiry into the true “economic reality” of the employment relationship based on a particularized inquiry into the facts of each case. *In the Matter of Kilmore Enterprises*, 26 BOLI 111, 120 (2004). The forum considers five factors when determining the degree of economic dependency in any given case and no one factor is 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.*

Respondent does not dispute that after Claimant completed her tree planting project coordinator work, she continued to work for Respondent under the OWEB agreement, from April 18 until May 18, 2005. Although Respondent claimed Claimant was an independent contractor during that time, a preponderance of credible evidence established that Respondent’s executive director, Susan Chapp, continued to direct and control Claimant’s work throughout that period. Chapp established Claimant’s pay rate and work hours, told her where and how to perform her job duties, and provided her with the equipment and tools necessary to carry out those duties. Chapp directed Claimant to record her work hours on a calendar to keep from exceeding the hours allotted for the forestry technician and weed coordinator jobs and expected her to maintain a work log documenting her tree monitoring activities. Generally, a worker who is required to comply with another person’s instructions about when, where and how to perform services is an employee. Also, the fact that a worker is furnished with necessary tools and equipment to perform required job duties tends to support the existence of an employment relationship.

Claimant had no previous forestry experience and there is no evidence she conducted her own business or possessed special skills that she agreed to provide to Respondent for a prescribed amount of money. In fact, credible evidence established that she left employment elsewhere to work exclusively for Respondent. Although her tenure with Respondent was limited by the terms of the OWEB agreement, impermanence of a particular job alone does not create an independent contractor relationship. *In the Matter of Triple A Construction LLC*, 23 BOLI 79, 93 (2002). The totality of the circumstances show Claimant was economically dependent on Respondent, her services were a necessary part of Respondent's business, and those services were performed in a manner consistent with an employer-employee relationship.

Prior to hearing, Respondent told the Agency that it "now understand[s] the difference between an employee and a contractor, but * * * did not understand the legal distinction when [Claimant] was hired." Based on that understanding, Respondent paid back taxes that it owed to the state and reclassified its workers as employees. However, Respondent's argument that its misunderstanding mitigates the failure to pay Claimant's wages has no merit. Respondent at all times had a duty to know the laws that regulate employment in this state. *In the Matter of Okechi Village and Health Center*, 27 BOLI 156, 169 (2006). Respondent's failure to understand the correct application of the law is not a defense. *In the Matter of Gary Lee Lucas*, 26 BOLI 198, 216 (2006). Claimant was Respondent's employee and the only remaining issues are the agreed upon wage rate, whether Claimant is owed any wages, and, if so, how much.

B. Agreed Upon Rate

Claimant credibly testified that Chapp asked her to finish up the forestry technician position and work as the weed control coordinator for \$12 per hour and that she agreed to perform those duties for that amount. Chapp's prior statements to the Agency and her testimony that "workers working in comparable jobs start at \$8 per hour" and that Respondent had "never agreed to pay Claimant at such a high rate" because it "does not and has never paid any other comparable workers at such a high rate" were deemed not credible.

First, Chapp contradicted her own testimony when she later testified that Respondent had never paid anyone less than \$10 per hour. Second, credible evidence showed that the person who previously filled the forestry technician position was paid \$2,200 per month and the person who replaced Claimant after she left was paid \$2,540 per month, which, when computed based on a 40 hour work week, amounts to more than \$12 per hour in both cases. Third, Respondent, through Chapp, stated during the wage claim investigation that Claimant's pay rate was the same when her employment terminated as it was when it started - \$2,200 per month - which, when computed based on the hours Claimant worked between April 18 and May 18, 2005, including overtime hours, amounts to approximately \$12 per hour. Claimant's testimony that she was promised \$12 per hour was not impeached in any way and the forum finds Respondent agreed to pay Claimant that amount when it hired her for the forestry technician and weed control coordinator positions.

C. Uncompensated Work

In its answer, Respondent admitted Claimant worked at least 143 hours for which she was not compensated. Respondent's assertion that Claimant was not owed anything because she did not perform well and left before completing the work she was

hired to perform is disingenuous and not a defense. If Respondent believed Claimant was not performing as expected, its recourse was to take disciplinary action or terminate her for poor work performance, if appropriate. Instead, credible evidence shows that after her purportedly unsatisfactory work performance as tree planting project coordinator, Claimant was asked to continue on as a forestry technician and weed control coordinator. Respondent's complaint that Claimant's work performance was unsatisfactory "in all three job titles" has no merit. Even if the complaint was legitimate, Respondent cannot seek redress by refusing payment, after the fact, for hours Claimant actually worked. *In the Matter of Dan's Ukiah Service*, 8 BOLI 96, 106 (1989). Respondent's admission establishes unequivocally that Claimant performed work for which she was not properly compensated.

D. Amount and Extent of Work Performed

If the forum concludes that a claimant was employed and improperly compensated, as it did in this case, it becomes the burden of the respondent to come forward with the precise amount of work performed or evidence that negates the reasonableness of the inference to be drawn from the claimant's evidence. *In the Matter of Graciela Vargas*, 16 BOLI 246, 253-54 (1998).

Here, Respondent acknowledged it kept no record of the days or hours Claimant worked. Claimant credibly testified that she recorded the dates and hours she worked on a calendar she maintained at Respondent's behest. She produced a calendar that shows she worked 187 hours between April 18 and May 18, 2005, including 5 overtime hours, and includes notes of some of the activities she performed during that period. Despite the opportunity to do so, Respondent produced no evidence that controverts Claimant's credible evidence. The forum, therefore, may rely on Claimant's credible evidence showing the hours she worked. Claimant's credible testimony and

contemporaneous documentation established she worked 187 hours for Respondent, including five overtime hours, and earned a total of \$2,274, based on the agreed upon rate of \$12 per hour (\$12 per hour x 182 hours, plus the overtime rate of \$18 per hour x 5 hours). Respondent admitted that it did not pay Claimant any wages for any of the hours she worked during the wage claim period and therefore owes Claimant \$2,274 in unpaid wages.

PENALTY WAGES

The forum may award penalty wages when it determines that a respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. A respondent commits an act or omission "willfully" if the respondent acts or fails to act intentionally, as a free agent, and with knowledge of what is being done or not done. *In the Matter of Sue Dana*, 28 BOLI 22, 30 (2006).

Respondent's admission that Claimant worked at least 143 hours for which she was not compensated and that she was not paid because her performance in "all three job titles" was not satisfactory and Respondent owed "no further pay," demonstrates the knowledge and intent necessary to establish that Respondent's failure to pay was willful. Respondent's claim that its failure to pay was based on a good faith belief, albeit erroneous, that Claimant was a contractor and not entitled to any pay if she did not perform as expected is not a defense. Respondent's ignorance or misunderstanding of the law does not exempt it from a determination that it willfully failed to pay wages earned and due. *In the Matter of Toni Kuchar*, 23 BOLI 265, 275 (2002).

Respondent argued alternatively that it was financially unable to pay Claimant because the remaining grant money was used to pay Claimant's replacement and by the time she "later demanded payment, the organization had already spent the money that was originally available for that work, and it did not have any funds with which to

pay when she later made her demand.” An employer bears the burden of proving the affirmative defense of financial inability to pay wages at the time they accrue. *In the Matter of Captain Hooks, LLP*, 27 BOLI 211, 230 (2006).

Respondent does not contend the grant money was not available when Claimant's wages accrued. Instead, Respondent admits it had the money at the time, but chose to hire someone else to “finish the necessary work that [Claimant] had been responsible for, within the deadlines required by the grant contract, and to pay [Claimant's] replacement the remaining grant funds of \$2,200.” Moreover, credible evidence shows Respondent was still operating its business and paid other workers and business expenses when Claimant's wages accrued. Financial inability to pay wages at the time wages accrued does not exist when an employer continues to operate its business and chooses to pay certain debts and obligations rather than an employee's wages. *In the Matter of Elisha, Inc.*, 25 BOLI 125, 159 (2004). *See also In the Matter of Ashlanders Senior Foster Care, Inc.*, 14 BOLI 54, 81 (1995)(when respondent's business continued after claimant quit and respondent paid its other employees and other obligations at that time and thereafter, respondent failed to prove its defense); *In the Matter of Mary Stewart-Davis*, 13 BOLI 188, 201 (1994)(when respondent's business continued to operate after claimant quit and other employees and suppliers were paid, the allocation of available funds was respondent's choice and respondent failed to show its inability to pay claimant); and *In the Matter of Flavors Northwest*, 11 BOLI 215, 228 (1993)(a temporary shortage of cash does not constitute financial inability to pay when an employer continues to operate a business and chooses to pay certain obligations in preference to an employee's wages).

In this case, Respondent has multiple excuses for its failure to pay Claimant's wages, but none add up to a financial inability to pay wages when accrued.

Respondent's apparent mismanagement of grant funds is not a valid defense. Based on credible evidence demonstrating Respondent's knowledge that Claimant worked during the wage claim period and its admission that she was not paid for those hours because of its misguided belief that Claimant was not entitled to wages, and by acting as a free agent when it refused to pay Claimant the wages she earned even after it was informed that Claimant was an employee and not an independent contractor, Respondent acted willfully and is liable for penalty wages pursuant to ORS 652.150. Penalty wages are assessed and calculated in accordance with ORS 652.150 in the amount of \$2,880. This figure is computed by multiplying \$12 per hour by 8 hours per day multiplied by 30 days. See ORS 652.150 and OAR 839-001-0470(1)(c).

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, **Forestry Action Committee of the Illinois Basin Interest Group** is hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Hazel Danene Reagan, in the amount of FIVE THOUSAND ONE HUNDRED AND FIFTY FOUR DOLLARS (\$5,154), representing \$2,274 in gross earned, unpaid, due and payable wages, less appropriate lawful deductions, and \$2,880 in penalty wages, plus interest at the legal rate on the sum of \$2,274 from June 1, 2005, until paid and interest at the legal rate on the sum of \$2,880 from July 1, 2005, until paid.

ⁱ There is no credible evidence that Claimant agreed to work as an independent contractor.