

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

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,ⁱ 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 different specific monitoring “actions” that Respondent would perform each month per client vehicle.ⁱⁱ

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.ⁱⁱⁱ

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 understood 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,"^{iv} 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 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 workweek:

- 3.75 hours during a workweek beginning September 3, 2007, and ending September 9, 2007;
- .5 hours during a workweek beginning September 24, 2007, and ending September 30, 2007;
- .5 hours during a workweek 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 reimbursement 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 82nd 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,^v prior Final Orders generally contain a summary statement in their Opinion concluding that the respondent employed the claimant.^{vi} 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.^{vii} 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.^{viii}

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 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 independent 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.^{ix} 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,^x 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.^{xi} In the majority of those 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,^{xii} 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 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.^{xiii} 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 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.^{xiv} 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 Geoffroy Enterprises, Inc.*, 15 BOLI 148, 164 (1996) (adopting FLSA test used by 5th Circuit Court of Appeals in *Circle C Investments, Inc.*, 998 F2d 324, 327 (5th Cir 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,^{xv} 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 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.^{xvi}

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 forum 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 equipment 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,^{xvii} an agreed rate of pay^{xviii} or piece rate^{xix} 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 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^{xx} 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. 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.^{xxi} 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 requiring 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 perform the work for which the claimants were hired.^{xxii}

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 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.^{xxiii} 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.”^{xxiv}

The Handbook also 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 Agency did not prove the first element of its prima facie case. Therefore, Claimant cannot prevail on his wage claim.^{xxv} The forum rejects the Agency’s exception 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.^{xxvi}

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.

ⁱ 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.

ⁱⁱ 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.

ⁱⁱⁱ 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.

^{iv} See Finding of Fact #7—The Merits.

^v 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).

^{vi} 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”);

^{vii} 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).

^{viii} 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”).

^{ix} See footnote 8, *supra*.

^x See the forum’s discussion of *In the Matter of Okechi Village & Health Center, Inc.*, 27 BOLI 156 (2006), *infra*.

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

^{xii} See footnote 8, *supra*.

^{xiii} 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”).

^{xiv} See *Boucherv. Shaw*, 572 F3d 1087, 1091 (9th Cir. 2009) (citing *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28 (1961)).

^{xv} See Finding of Fact #4 – The Merits.

^{xvi} 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 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).

^{xvii} 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).

^{xviii} See, e.g. *Laura Jaap* at 110; *Forestry Action Committee* at 77.

^{xix} 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).

^{xx} The forum has no way of knowing the amount of commission that Claimant should have been paid. See Finding of Fact #21 – The Merits.

^{xxi} See footnote 3, *supra*.

^{xxii} 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).

^{xxiii} 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*.

^{xxiv} 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 Owner (IBO) and Reseller of our products."

^{xxv} 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 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).

^{xxvi} 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).