

In the Matter of

**DEBBIE FRAMPTON and BRAD FRAMPTON,
dba FRAMPTON QUARTER HORSES,**

Case No. 34-99

September 17, 1999

SYNOPSIS

Respondents employed Claimant as a horse stall cleaner at the \$75.00 per week, regardless of the number of hours she worked. Claimant was not an independent contractor, as claimed by Respondents, but an employee who was entitled to minimum wage for all the hours she worked. Respondents kept no record of the hours and dates worked by Claimant, and the forum awarded Claimant \$2,173.67 in unpaid wages based on credible testimony presented by the Agency concerning the amount and extent of work she performed. Respondents' failure to pay the wages was willful, and Respondents failed to prove their affirmative defense of financial inability to pay Claimant's wages at the time they accrued. The Commissioner ordered Respondents to pay \$1440 in penalty wages in addition to the unpaid wages. ORS 652.140(2); 652.150.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 30, 1999, in a conference room in the State Office Building, 165 East Seventh, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI") was represented by David K. Gerstenfeld, an employee of the Agency. The wage claimant, Mandy Lynaye Holm, was present throughout the hearing and was not represented by counsel. Respondents were not represented by counsel.

The Agency called as witnesses: Mandy Lynaye Holm, the Claimant; Jason Holm, Claimant's brother; Codie Wright, Claimant's friend; and Newell Enos, Agency Compliance Specialist.

Respondents called as witnesses: Fred and Bonnie Stoney, Deborah Frampton's father and mother; and Respondents Bradley and Deborah Frampton.

Administrative exhibits X-1 to X-24, Agency exhibits A-1 to A-8, and Respondents' exhibits R-1 to R-12 were offered and received into evidence. The record closed on June 30, 1999.

Having fully considered the entire record in this matter, I, Jack Roberts, 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 August 28, 1998, Claimant filed a wage claim with the Agency. She alleged that Respondents employed her and failed to pay wages earned and due to her.

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

3) Claimant filed her wage claim within the statute of limitations.

4) On February 2, 1999, the Agency served on Respondent Deborah Frampton Order of Determination 98-2739 based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondents owed a total of \$626.00 in unpaid wages based on Claimant having worked 21 weeks for Respondents from December 1, 1997, through April 25, 1998, at the wage rate of \$75.00 per week, and only having been paid \$949.00, plus \$1,800.00 in civil penalty wages and interest, and required that, within 20 days, Respondent either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

5) On February 6, 1999, Respondents filed an answer and requested a hearing in this matter. In their answer, they contended that Claimant was an independent contractor who agreed to work for them for \$75.00 a week, and that Claimant received

her pay in the form of “clothing apparel, as well as, cash.” Respondents admitted owing Claimant \$526.00 and raised the affirmative defense that they were financially unable to pay the balance of the unpaid wages alleged in the Order of Determination.

6) On March 22, 1999, the Agency filed a “Request For Hearing” with the Hearings Unit and also served the same document on Respondents.

7) On March 24, 1999, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and the Claimant stating the time and place of the hearing as June 30, 1999, at 9:00 a.m., in Eugene, Oregon. Together with the Notice of Hearing, the forum sent a document entitled “Summary of Contested Case Rights and Procedures” containing the information required by ORS 183.413, and a copy of the forum’s contested case hearings rules, OAR 839-050-000 to 839-050-0440.

8) On April 2, 1999, the Agency moved to amend the Order of Determination to allege that Claimant earned the statutory minimum wage of \$5.50/hr. for 115 hours worked (\$632.50) from December 1 through 31, 1997; that Claimant earned the statutory minimum wage rate of \$6.00/hr. for 440 hours worked (\$2,640.00) from January 1 through April 25, 1998; that Claimant was paid a total of \$1,043.83; that the remaining unpaid wages are \$2,228.67; and that Claimant’s rate per day during the period of employment pursuant to ORS 652.150 was \$48.00 and there is now due and owing to Claimant the sum of \$1,440 as penalty wages.

9) On April 9, 1999, Respondents objected to the Agency’s motion to amend the Order of Determination on the basis that Claimant was an independent contractor who contracted to do a job for a set amount.

10) On April 16, 1999, the Agency filed a motion for a discovery order seeking documents related to the number of hours Claimant worked, the amount she was paid, evidence indicating she was an independent contractor, and documentation of

Respondents' financial inability to pay Claimant's wages at the time they became due. The Agency's motion was accompanied by a letter setting out the Agency's unsuccessful attempts to obtain the documents by informal means.

11) On April 23, 1999, Respondents responded to the Agency's motion for a discovery order, stating that some of the requested documents did not exist, and that they would bring the others to the hearing, to the best of their ability.

12) On May 4, 1999, the forum granted the Agency's motion to amend the Order of Determination, noting that Respondents' objection that Claimant was an independent contractor constituted a defense to the wage claim, but not a reason for disallowing the motion. Respondents were given the option of filing an amended answer, in lieu of the forum deeming Respondents as having denied the new allegations contained in the Agency's amendment.

13) On May 4, 1999, the forum granted the Agency's motion for a discovery order as to all documents sought, noting that Respondents were required to provide the documents to the Agency by May 17, and that simply providing the documents at the hearing would not suffice.

14) On May 4, 1999, the ALJ issued a case summary order requiring the Agency and Respondents each to submit a list of witnesses to be called, copies of documents or other physical evidence to be introduced, a statement of any agreed or stipulated facts, and, by the Agency only, any damage calculations. The ALJ ordered the participants to submit case summaries by June 18, 1999, and notified them of the possible sanctions for failure to comply with the case summary order.

15) On May 14, 1999, the ALJ modified the case summary order, additionally ordering the Agency to provide a statement of the elements of the claim and Respondents to provide a statement of the defense to the claim.

16) The Agency filed its case summary, with attached exhibits, on June 17, 1999.

17) Respondents filed their case summary, with attached exhibits, on or about June 17, 1999.

18) On June 22, 1999, the Agency filed a request that Respondents make two witnesses available for cross-examination. These witnesses had prepared documents that were included as exhibits with Respondents' case summary.

19) On June 23, 1999, the ALJ issued a letter to Respondents and the Agency that spelled out the Agency's request for cross-examination of witnesses, indicated the possible consequences of Respondents' failure to make the witnesses available, and instructed Respondents as to how they might go about making the witnesses available to the Agency.

20) At the start of the hearing, Respondents said they had reviewed the "Notice of Contested Case Rights and Procedures" and had no questions about it.

21) Pursuant to ORS 183.415(7), the ALJ explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

22) At the start of the hearing, the ALJ, on his own motion, excluded witnesses pursuant to OAR 839-050-0150(3).

23) On July 22, 1999, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order. The Forum received no exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondents Bradley and Deborah Frampton, a married couple, did business in Oregon as Frampton Quarter Horses, and employed one or more persons to work at that business.

2) At all times material herein, Respondents' business consisted of buying, selling, and training horses.

3) Respondents kept their horses in a barn ("the barn") containing 22-23 horse stalls located on Highway 99, north of Eugene. The barn was owned by the Eugene Airport, which leased the barn to Steve Christianson, who in turn rented stalls to Respondents and others.

4) Prior to being employed by Respondents, Claimant had gone to the barn with Codie Wright to ride horses with Wright. Wright boarded her horse at the barn.

5) In the last week of November 1997, Respondents asked Claimant to clean their horse stalls for one week while Respondents were out of town. Claimant accepted Respondents' offer and was paid \$100 for her work.

6) Respondent Brad Frampton then asked Claimant, who was a 15-year-old high school student at the time,¹ if she would like to clean Respondents' horse stalls at the barn on a regular basis. Claimant accepted Frampton's offer. Claimant entered into an oral agreement with Frampton to clean horse stalls for Respondents in exchange for payment of \$75.00 per week. Frampton and Claimant agreed that Claimant would clean the stalls on Monday through Friday each week, starting each day after school let out.

7) Frampton and Claimant did not discuss the length of time Claimant would be employed when Claimant was hired or at any time during her employment with Respondents.

8) The general practice in the horse industry is for stall cleaners to be paid a flat rate for performing a set amount of work.

9) Claimant started work for Respondents on December 1, 1997, and continued to work for Respondents through April 24, 1998. Claimant did not work for any other employer while employed by Respondents.

10) Claimant voluntarily quit Respondents' employment on April 25, 1998.

11) While employed by Respondents, Claimant generally worked Monday through Friday, beginning at 3:30 p.m. The time Claimant stopped work each day varied between 7:00 p.m. and 9:00 p.m. Claimant also performed some work on some Saturdays and Sundays. In addition to cleaning stalls, Claimant also periodically assisted Respondents in washing and "lunging" their horses.

12) Claimant worked an average of 25 hours per week while employed by Respondents. In total, Claimant worked 115 hours in December 1997, and 410 hours between January 1, 1998, and April 24, 1998.

13) Beginning in January, 1998, Claimant began completing and submitting weekly invoices to Respondents showing how much she had earned that week (calculated at \$75.00 per week), the total amount Respondents owed her in unpaid wages, and the amount of cash she had received from Respondents that week, as well as the value of any goods Respondents had purchased for her that week.

14) When Claimant began work for Respondents, she had to clean nine horse stalls a day. Subsequently, the number of stalls she cleaned per day ranged from nine to 14.

15) Claimant cleaned Respondents' horse stalls by "stripping" or "picking" them.

16) "Stripping" a stall involved removing everything on the floor of each stall except for any remaining clean wood shavings and replacing all dirty shavings with clean shavings. Claimant stripped each stall twice a week, including every Monday. It

took Claimant from 15-45 minutes to strip each stall, depending on the condition of the stall.

17) "Picking" a stall involved removing horse manure and shavings that had been soiled by horse manure or urination from a stall that had mostly clean shavings in it. Claimant picked each stall on days when she did not strip the stalls. Claimant used Respondents' pitchfork and wheelbarrow to clean Respondents' horse stalls. It took Claimant from 5-20 minutes to pick each stall, depending on the condition of the stall.

18) Claimant had no special training to learn to clean Respondents' horse stalls. She had never cleaned horse stalls before starting work for Respondents.

19) Claimant invested no money in Respondents' business. She had no opportunity to earn a profit or suffer a loss.

20) While working for Respondents at the barn, Claimant spent 15-30 minutes each day talking with Wright, her brother Jason, and Respondents. Claimant occasionally was driven to a local store by Deborah Frampton, Wright, or her brother Jason to get a pop or go shopping.

21) Respondents did not maintain any record of the dates and hours that Claimant worked, and Claimant did not maintain a contemporaneous record of the dates and hours she worked.

22) When Claimant filed her wage claim on August 28, 1998, she completed a BOLI WH-127² for the months of December 1997 through April 24, 1998. Claimant indicated she had worked 5 hours per day, Monday through Friday, during that period of time. At the time Claimant completed this calendar, she believed she was only entitled to unpaid wages based on the flat rate of \$75.00 per week, regardless of the number of hours she actually worked each week.

23) Based on the statutory minimum wage,³ Claimant earned \$632.50 in December 1997 and \$2,460.00 between January 1, 1998, and April 24, 1998, for a total of \$3,092.50 earned while employed by Respondents.

24) During her employment with Respondents, Claimant received a total of \$100 in cash and \$418.83 in goods and services as compensation for her work.

25) After Claimant left their employ, Respondents paid Claimant \$300 cash on November 27, 1998, and \$100 cash on January 21, 1999. Both payments were intended to compensate Claimant for work performed between December 1, 1997, and April 24, 1998.

26) On February 6, 1999, Respondents acknowledged owing Claimant \$526 based on the work she performed for Respondents performed between December 1, 1997, and April 25, 1998.

27) At the time of the hearing, Respondents still owed Claimant \$2,173.67 in unpaid wages.

28) Claimant's hourly rate of pay at the time she left Respondents' employ was \$6.00 per hour.⁴

29) All the witnesses were credible and in general agreement on issues of material fact.

30) From January 1998 to the present, the horse market has gone steadily downhill, while the cost of maintaining a horse has increased at a pace with the cost of living in general.

31) Brad Frampton was also working for "OrPac" [phonetic] when Claimant began working for Respondents, but was paid in hay rather than money.

32) Between January and May 1998, Respondents maintained at least two joint personal accounts at Key Bank, one entitled "Horse Acct."

33) Between January and May 1998, Respondents wrote a number of checks on the two joint personal accounts referred to in Finding of Fact – The Merits #32 that resulted in overcharges being assessed against Respondents because their accounts lacked sufficient funds to cover the checks.

34) Between January and May 1998, Respondents continued to operate their horse business. In that time period, Respondents purchased food for their horses, made payments on retail charge accounts related to their horse business, and paid other bills, such as utility bills and mortgage payments.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondents Bradley and Deborah Frampton, a married couple, did business in Oregon as Frampton Quarter Horses, and employed one or more persons to work at that business.

2) Respondents employed Claimant from December 1, 1997 through April 24, 1998. During that time, Respondents suffered or permitted Claimant to render personal services to them.

3) Respondents and Claimant agreed that Claimant would be paid \$75.00 per week for all work performed, regardless of the number of hours it took Claimant to perform the work.

4) Claimant worked an average of 25 hours per week while employed by Respondents. In total, Claimant worked 115 hours in December 1997, and 410 hours between January 1, 1998, and April 24, 1998.

5) The state minimum wage during 1997 was \$5.50 per hour. In 1998 it was \$6.00 per hour.

6) Based on the statutory minimum wage, Claimant earned \$632.50 in December 1997 and \$2,460.00 between January 1, 1998, and April 24, 1998, for a total of \$3,092.50 earned while employed by Respondents.

7) During and subsequent to her employment with Respondents, Claimant received a total of \$500 in cash and \$418.83 in goods and services as compensation for her work, leaving \$2,173.67 in unpaid wages.

8) Respondents willfully failed to pay Claimant \$2,173.67 in earned, due, and payable wages within five days, excluding Saturdays, Sundays, and holidays, after she quit, and more than 30 days have elapsed from the date Claimant's wages were due.

CONCLUSIONS OF LAW

1) During all times material herein, Respondents were employers and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405. During all times material herein, Respondents employed Claimant.

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

3) At times material, ORS 652.140(2) provided:

“When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever even occurs first.”

Respondents violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid within five days, excluding Saturdays, Sundays, and holidays, after Claimant quit Respondents' employment.

4) At times material, ORS 653.025 required, in pertinent part:

“ * * * for each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages computed at a rate lower than:

“(1) For calendar year 1997, \$5.50.

“(2) For calendar year 1998, \$6.00.”

While employed by Respondents, Claimant was entitled to be paid the statutory minimum wage. Calculated at statutory minimum wage rate, Claimant earned a total of \$3,092.50. Claimant was only paid \$918.83 in cash and goods. Respondents violated ORS 653.025 by failing to pay Claimant minimum wage for the hours in Respondents' employ.

5) ORS 652.150 provides:

“if an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued.”

OAR 839-001-0480 provides:

“When an employer shows that it was financially unable to pay the wages at the time the wages accrued, the employer shall not be subject to the penalty provided for in OAR 839-001-0460. If an employer continues to operate a business or chooses to pay certain debts and obligations in preference to an employee's wages, there is no financial inability.”

Respondents are liable for civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(2).

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

OPINION

INTRODUCTION

The Agency alleged in its Order of Determination, as amended at hearing, that Claimant was employed by Brad and Debbie Frampton as a horse stall cleaner from November 1, 1997, through April 24, 1998, that she worked a total of 525 hours and was only paid \$918.83, and that she is entitled to \$2,228.67 in unpaid wages and \$1,440 as penalty wages. Respondents alleged that Claimant was an independent contractor, and that they were financially unable to pay Claimant the wages alleged in the Order of Determination.

EMPLOYEE OR INDEPENDENT CONTRACTOR?

This forum utilizes an “economic reality” test to determine whether a claimant is an employee or independent contractor under Oregon’s minimum wage and wage collection laws. *In the Matter of Francis Bristow*, 16 BOLI 28, 37 (1997); *In the Matter of Geoffroy Enterprises*, 15 BOLI 148, 164 (1996). The focal point of the test is “whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which she renders her services.” *Id.* The forum considers five factors to gauge the degree of the worker’s economic dependency, with no single factor being determinative. These factors are:

- “(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;
- “(5) The permanency of the relationship.” *Bristow*, 16 BOLI at 37, *citing Geoffroy Enterprises*, 15 BOLI at 164.

In this case, the preponderance of credible evidence on the whole record establishes the following:

A. The degree of control exercised by the alleged employer.

Claimant's reporting time was one of mutual convenience, in that it coincided with the time she got out of school and had a ride to the barn. She was expected to clean the stalls with the tools provided by Respondents, but there was no evidence she was closely supervised while doing her cleaning. Although Claimant was expected to clean all of Respondents' horse stalls each day, she was also able to spend time visiting with her brother, Jason Holm, and his girlfriend, Codie Wright, as well as with Respondents. She only performed work that Respondents directed her to perform.

B. The extent of the relative investment of the worker and the alleged employer.

Claimant had no investment, while Respondents owned the horses and equipment and leased the facilities.

C. The degree to which the worker's opportunity for profit and loss is determined by the alleged employer.

Because she made no investment other than her time, Claimant had no opportunity whatsoever to earn a profit or suffer a loss.

D. The skill and initiative required in performing the job.

The only skills required of Claimant were the ability to use a pitchfork and wheelbarrow. The initiative required was the same that anyone employed as a manual laborer would need to use in order to keep his or her job.

E. The permanency of the relationship.

There is no evidence in the record to indicate that Claimant or Respondents, at any time prior to Claimant's termination, considered Claimant's employment to be limited to a specific duration of time.

F. Conclusion.

Four of the five factors used to determine whether an individual performing work is an employee or an independent contractor clearly indicate an employer-employee relationship. The fifth, the degree of control exercised by the alleged employer, contains indicia of both.

Respondents argue that Claimant's practice of submitting invoices showing the money due to her and Respondents' intent that Claimant perform work as an independent contractor demonstrate that Claimant was an independent contractor. The "economic reality" test used by this forum focuses on substance, not form. Mere use of a form entitled "INVOICE" that an independent contractor might use is not an indicator of independent contractor status and the forum gives no weight to it. Likewise, an employer's intent and how he or she labels a worker, or for that matter, how a worker labels herself, does not determine whether the worker is an employee or an independent contractor. *Bristow*, 16 BOLI at 40.

Considering each factor of the economic reality test, I conclude that Claimant was economically dependent upon Respondents' business and that she was an employee of Respondents.

WERE THERE ANY UNPAID WAGES DUE CLAIMANT AT THE TIME OF HER TERMINATION?

To establish a prima facie case for wage claims, the Agency must establish the following: (1) Respondents employed Claimant; (2) Claimant's agreed upon rate of pay, if it was other than minimum wage; (3) Claimant performed work for which she was not properly compensated; and (4) the amount and extent of work performed by Claimant. *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 260 (1999). The claimant has the burden of proving that she performed work for which she was not properly

compensated. *In the Matter of Graciela Vargas*, 16 BOLI 246, 253-54, *citing Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

The forum has already grappled with the issue of whether Claimant was an employee or an independent contractor and determined that Claimant was an employee.

Respondents and the Agency agree that Respondents and Claimant entered into an agreement whereby Claimant would be paid \$75.00 per week for cleaning horse stalls, regardless of the hours it took. The net result of this agreement, based on Claimant's average of 25 hours worked per week, was a \$3.00 per hour wage rate. Respondents defend this result based on Claimant's assent to it and the general practice in the horse industry of paying individuals a flat rate for jobs. However, an employer's agreement with an employee whereby the employer is not required to comply with the minimum wage law is not a defense to a wage collection proceeding in this forum. ORS 653.055(2); *Bristow*, 16 BOLI at 41. Neither is general industry practice, where that practice violates the minimum wage laws of this state. Consequently, this forum calculates the unpaid wages due and owing to Claimant at the statutory minimum wage, not the agreed upon rate of \$75.00 per week.

The third element of the Agency's prima facie case, whether Claimant performed work for which she was not properly compensated, is undisputed. Based on this agreed upon rate of pay of \$75.00 per week, Respondents admit that they still owe Claimant \$526 for cleaning horse stalls during the period of time encompassed by her wage claim.⁵

The final element of the Agency's prima facie case requires proof of the amount and extent of work performed by Claimant. The Agency's burden of proof can be met by producing sufficient evidence from which "a just and reasonable inference may be

drawn.” *In the Matter of Graciela Vargas*, 16 BOLI 246, 254 (1998). Where an employer produces no records of hours or dates worked by the claimant, the commissioner may rely on evidence produced by the agency, including credible testimony by the claimant, “to show the amount and extent of the employee’s work as a matter of just and reasonable inference,” and “may then award damages to the employee, even though the result be only approximate.” *In the Matter of Diran Barber*, 16 BOLI 190, 196-97 (1997), *citing Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946). The rationale for this policy is “not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work” when such inability is based on “an employer’s failure to keep proper records, in conformity with his statutory duty * * *.” *Graciela Vargas*, at 253, *citing Anderson*.

Here, Respondents produced no record of hours or dates worked by the Claimant. In fact, the only evidence of any kind produced by Respondents on this issue was some inconclusive testimony regarding how long it takes experienced and inexperienced stall cleaners to clean a horse stall. Claimant also kept no contemporaneous records, but estimated that she worked an average of five hours per day, five days a week, throughout her employment with Respondents, numbers that are reflected on her WH-127. As there are no accurate records to rely on, the forum examines the Agency’s evidence to determine if it shows “the amount and extent of the employee’s work as a matter of just and reasonable inference.” *Id.*

Claimant’s credible testimony, corroborated by her brother and his girlfriend, Codie Wright, established Claimant’s arrival at work at 3:30 p.m., Monday through Friday, from December 1, 1997, through April 24, 1998. Claimant, who had no prior experience cleaning horse stalls, testified that it took her from 5-20 minutes to “pick” a

stall and 15-45 minutes to “strip” a stall. Wright, who also cleaned Respondents’ horse stalls at one time, validated Claimant’s estimates by her testimony that it took her up to 20 minutes to “pick” a stall and 45-60 minutes to “strip” a stall. When these figures are extrapolated by multiplying them by a range of nine to 14 stalls cleaned per day, the following minimum and maximum periods of time result:

Task	Time to clean stalls	9 Stalls	14 Stalls
Pick stalls (3X/week)	5 mins.	45 mins.	70 mins.
Pick stalls (3X/week)	20 mins.	180 mins.	280 mins.
Strip stalls (2X/week)	15 mins.	135 mins.	210 mins.
Strip stalls (2X/week)	45 mins.	405 mins.	630 mins.

Since no two stalls are identically soiled on a given day, it is a reasonable assumption that the amount of time utilized by Claimant in cleaning horse stalls ranged somewhere between 45 and 280 minutes for picking stalls each day, three times a week, and 135 and 630 minutes for stripping stalls each day, twice a week. This correlates to an absolute minimum of 6.75 hours and an absolute maximum of 35 hours Claimant spent per week cleaning stalls. There was no evidence to suggest that Claimant ever worked less than two hours in a day or more than seven. Claimant herself testified she worked a range of three to seven hours each day, a figure consistent with eyewitness testimony, the figures shown in the table above, and the fact that she sometimes performed other work than cleaning stables and did some work on weekends. Finally, Claimant’s statement that she averaged five hours work per day was made at a time when she had nothing to gain by inflating her hours.⁶ Based on this evidence, the forum concludes that the Agency has satisfied its burden of showing the amount and extent of

the employee's work as a matter of just and reasonable inference, and that Claimant worked an average of 25 hours per week.

PENALTY WAGES

An award of penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *In the Matter of Troy R. Johnson*, 17 BOLI 285, 292 (1999), *citing Sabin v. Willamette Western Corp.*, 276 Oregon 1083, 557 P2d 1344 (1976). Respondents, as employers, had a duty to know the amount of wages due its employees. *In the Matter of R.L. Chapman Ent. Ltd.*, 17 BOLI 277, 285 (1999). Respondents believed they owed Claimant \$926 in unpaid wages at the time of Claimant's termination.⁷ Respondents acted voluntarily and as free agents. The forum concludes that Respondents acted willfully. Respondents' implied argument that they did not know they were Claimant's employer⁸ does not rebut this conclusion.

Pursuant to ORS 652.150, Respondents can avoid liability for penalty wages by proving, by a preponderance of the evidence, their financial inability to pay Claimant's wages at the time they accrued. Under OAR 839-001-0480, there is no financial inability "[i]f an employer continues to operate a business or chooses to pay certain debts and obligations in preference to employee's wages * * *." Respondents offered numerous documents into evidence relating to their financial status in 1998 and 1999, as well as testimony relating the downturn in the horse market and their financial distress in 1998 and 1999. Only those reflecting Respondents' financial status from December 1997 through the end of May 1998, the period in which Claimant's wages accrued, are relevant to this inquiry.

Several conclusions can be drawn from these documents. First, Respondents wrote a number of checks, up to \$15,000 worth in the month of February 1998. Second, a number of these checks appear to have been written on Respondents' "horse account." Third, Respondents were still conducting their horse business through May 1998, as receipts show considerable amounts of hay purchased in that month. Fourth, a number of Respondents' checks bounced, subjecting Respondents to considerable overdraft fees. Fifth, Respondents had trouble meeting their personal financial obligations, but paid some outstanding bills.

Respondents may have been in dire financial straits in May of 1998, but the law is clear. So long as they continued to operate their business and pay certain debts and obligations in preference to Claimant's wages, the forum cannot draw the conclusion that Respondents had a financial inability to pay Claimant's wages. Respondents have not met their burden of proof in proving the contrary. Accordingly, the forum assesses penalty wages in the amount of \$1,440.00. This figure is computed by multiplying \$6.00 per hour x 8 hours per day x 30 days, pursuant to ORS 652.150 and OAR 839-001-0470.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages and civil penalty wages it owes as a result of its violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders **Deborah Frampton and Bradley Frampton** 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 Mandy Lynaye Holm in the amount of THREE THOUSAND SIX HUNDRED THIRTEEN DOLLARS AND SIXTY-SEVEN CENTS (\$3,613.67), less appropriate lawful deductions, representing \$2,173.67 in gross earned, unpaid, due, and payable wages and \$1,440.00 in penalty wages, plus interest at the legal rate on the sum of \$2,173.00 from

June 1, 1998, until paid and interest at the legal rate on the sum of \$1,440.00 from July 1, 1998, until paid.

¹ Claimant's birthdate is May 3, 1982.

² A BOLI WH-127 form has two blank monthly calendars on each page containing instructions that the wage claimant is to fill in the month, year, dates of each month, and hours worked each day, excluding meals.

³ See ORS 653.025.

⁴ Although Claimant and Respondents agreed that Claimant would be paid \$75 per week, regardless of the number of hours she worked, this agreement was contrary to the statutory mandate of ORS 653.025, which requires that an employee must be paid the statutory minimum wage for each hour they are gainfully employed. Claimant's average work hours of 25 hours per week, divided into \$75, yields an hourly pay rate of \$3.00, in contrast to the \$6.00 per hour statutory minimum wage in effect in 1998.

⁵ As noted in Finding of Fact – The Merits #26, \$400 in unpaid wages due and owing was paid to Claimant more than 30 days *after* May 1, 1998, the due date of all of Claimant's wages.

⁶ Claimant first made this estimate on her WH-127, which she filled out at the time she filed her wage claim seeking compensation for unpaid wages at the flat rate of \$75 per week.

⁷ This figure is derived from adding the \$526 Respondents believed was owing to Claimant at the time of the hearing to the \$400 that Respondents paid Claimant between her date of termination and the hearing.

⁸ Respondents' assertion Claimant was an independent contractor is necessarily an assertion that they were not Claimant's employer. See, e.g., *In the Matter of Country Auction*, 5 BOLI 256, 267 (1986)(Employer, in a wage claim case, asserted he could not be found to have willfully failed to pay a Claimant at the minimum wage rate because he was unaware that the law imposed a minimum wage rate requirement on him. The commissioner held this defense to be irrelevant because "the employer, like all employers, is charged with knowing the wage and hour laws governing his activities as an employer.")