

In the Matter of

LAURA M. JAAP and NETTICE M. HONN

Case No. 32-08

Final Order of Commissioner Brad Avakian

Issued April 8, 2009

SYNOPSIS

Respondent Laura Jaap employed three wage claimants in January and February 2007 to perform repairs on Respondent Honn's house at the respective agreed rates of \$25, \$12, and \$12 per hour. Claimants respectively earned \$4,400, \$2,112, and \$1,056 in gross wages and were only paid \$1,000, \$980, and \$288 before quitting. The forum found that Respondent Jaap was Claimants' sole employer and dismissed the Order of Determination as to Respondent Honn. Respondent Jaap was ordered to pay the Claimants a total of \$5,300 as unpaid, due, and owing wages. Respondent Jaap's failure to pay the wages was willful, and she was ordered to pay Claimants a total of \$11,760 in penalty wages. ORS 652.140(2), ORS 652.150.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 24 and 25, 2009, at the Eugene office of the Bureau of Labor and Industries, located at 1400 Executive Parkway, Suite 200, Eugene, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Jeffrey C. Burgess, an employee of the Agency. Wage claimants David Northern, Thomas Northern, and John Swinger were present throughout the hearing and were not represented by counsel. Respondents Laura Jaap and Nettice Honn appeared at the hearing by telephone and were present throughout the hearing.

The Agency called the following witnesses: Claimants David and Thomas Northern; Claimant John Swinger; Newell Enos, BOLI Wage and Hour Division compliance specialist; and Robert McArthur, Wage and Hour Division screener.

Respondents called themselves as telephonic witnesses.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-14 (submitted or generated prior to hearing); and
- b) Agency exhibits A-1 through A-28 (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 August 17, 2007, Claimant David Northern (“D. Northern”) filed a wage claim with the Agency alleging that “Laura Zapp”ⁱ had employed him from January 9 through February 6, 2007, and failed to pay wages earned and due to him. He did not sign and date the original wage claim, but did so at hearing and the forum received his signed and dated wage claim as a substitute for Exhibit A-1 that was filed with the Agency’s case summary.

2) On March 7, 2007, Claimant Thomas Northern (“T. Northern”) filed a wage claim with the Agency alleging that “Laura Zapp” had employed him from January 9 through February 6, 2007,ⁱⁱ and failed to pay wages earned and due to him.

3) On March 7, 2007, Claimant John Swinger (“Swinger”) filed a wage claim with the Agency alleging that “Laura Zapp” had employed him from January 9, 2007, through February 6, 2007, and failed to pay him wages earned and due to him.

4) At the time they filed their wage claims, Claimants D. Northern, T. Northern, and Swinger assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimants, all wages due from Respondents.

5) Claimants brought their wage claims within the statute of limitations.

6) On October 1, 2007, the Agency issued Order of Determination No. 07-0683 based upon the wage claims filed by Claimants and the Agency's investigation. The Order of Determination alleged that Respondents Laura M. Jaap and Nettice Honn had employed Claimants in January and February 2007 and owed a total of \$5,300 in unpaid wages and \$11,600 in penalty wages, plus interest on both sums, and required that, within 20 days, Respondents 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.

7) Respondents were served with the Order of Determination and filed an answer and request for hearing on October 15, 2007.

8) On January 6, 2009, the Agency filed a "BOLI Request for Hearing" with the forum regarding its Order of Determination.

9) On January 9, 2009, the Hearings Unit issued a Notice of Hearing to Respondents, the Agency, and Claimants setting the time and place of a hearing as 9 a.m., February 24, 2009, at BOLI's Eugene office. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

10) On January 15, 2009, the Agency moved for a prehearing conference to discuss Respondents' statement to the Agency that they had moved out of state and wished to have a telephone hearing.

11) On January 16, 2009, Respondent Jaap filed a motion to allow both Respondents and their witnesses to appear by telephone.

12) On January 21, 2009, the ALJ ordered the Agency and Respondents each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and a brief statement of the elements of the claim, a statement of any agreed or stipulated facts, and any wage and penalty calculations (for the Agency only). The ALJ ordered the participants to submit case summaries by February 13, 2009, and notified them of the possible sanctions for failure to comply with the case summary order.

13) On January 28, 2009, the ALJ conducted a recorded prehearing conference with both Respondents and Burgess for the purpose of considering Respondents' motion for a telephone hearing. At the conclusion of the hearing, the ALJ **GRANTED** Respondents' motion, subject to conditions set out in an order entitled "Ruling on Respondents' Motion for Telephone Hearing; Summary of Prehearing Conference" that the ALJ issued the next day.

14) At the start of the hearing, the ALJ orally advised the Agency and Respondents of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

15) During the hearing, Respondents were both given an opportunity to cross examine the Agency's witnesses, but Honn declined to do so.

16) The ALJ issued a proposed order on March 18, 2009, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) In January and February 2007, Respondent Honn ("Honn") owned a house ("Honn's house) located at 390 N. 6th St., Harrisburg, Oregon. Honn had purchased the house in September 2005 as an investment property. She then sold it on

contract, but subsequently repossessed it after the buyers defaulted. While living at the house, the buyers tore out some of the walls.

2) Due to the buyers' demolition, it was necessary to repair Honn's house before it could be sold or rented. Honn gave Jaap, her mother, the authority to determine what work would be done to the house.ⁱⁱⁱ

3) Jaap had no financial interest in Honn's house.

4) In late December 2006 or early January 2007, Jaap was dating Steven Davis, D. Northern's nephew. Davis told Jaap D. Northern did construction work, and Jaap asked Davis to contact D. Northern about repairing and remodeling Honn's house. Davis called D. Northern and asked him if he would do some repair and remodel work on Honn's house so it could be sold or rented.

5) D. Northern and Claimant T. Northern ("T. Northern") are brothers. D. Northern's wife is Swinger's aunt.

6) On January 5, 2007, the three Claimants met with Davis and Jaap at Honn's house. Honn was not present at the meeting. Davis and Jaap showed Claimants the repair work and remodeling they wanted done. The work included demolition and reconstruction of several rooms, including a bathroom and two bedrooms in a former garage, the replacement of electrical receptacles, lights, switches, and plug-ins, and demolishing a concrete floor and building a new false floor. D. Northern told Jaap that he needed help to do the work, and told her what T. Northern and Swinger could do. Claimants agreed to do the work and Jaap hired them. Jaap and the Claimants made individual agreements that D. Northern would be paid \$25 per hour and T. Northern and Swinger would be paid \$12 per hour. Jaap agreed to pay them by the week.

7) None of the three Claimants submitted a written bid and there was no written employment contract between Claimants and Respondents. None of the three Claimants filled out any employment-related paperwork, such as W-4s, I-9s.

8) At that time, D. Northern had been doing construction work for 40 years. He had previously been licensed as a contractor in Idaho and had been a partner in a construction company located in Grants Pass, for which he worked as a salesman. He had not worked as a contractor in Oregon or Idaho for the previous five years and was not an Oregon licensed contractor.

9) D. Northern and Swinger first reported to work on January 9, 2007. Davis and Jaap explained the scope of the work and took them around Honn's house and explained the work Jaap wanted done.

10) T. Northern's first day of work was January 10, 2007.

11) While working on Honn's house, D. Northern's primary work was the carpentry required in the project.

12) While working on Honn's house, Swinger helped perform the demolition necessary on the job, including using the jackhammer to remove the concrete floor from the former garage, framing, and drywall.

13) While working on Honn's house, T. Northern performed the electrical work required on the job, as well as doing some clean up work. He had learned to do basic electrical work around his house and had replaced plugs for a "co-op" that was his former employer.

14) D. Northern and Swinger performed work at Honn's house in January and February 2007. T. Northern only worked in January 2007. Claimants each worked eight hours every day that they worked at Honn's house.

15) D. Northern kept a contemporaneous written record of the hours the Claimants worked each day by noting them in his personal calendar. D. Northern and Swinger worked the same days, including every day that T. Northern worked.

16) After Claimants had worked a week at Honn's house, they submitted their record of hours worked to Jaap for the dates of January 9-13. D. Northern and Swinger reported 40 hours worked and T. Northern reported 24 hours worked. Jaap went to the bank and returned with a large manila envelope with three smaller envelopes in it, which she gave to D. Northern. The smaller envelopes each had a different Claimant's name written on them. D. Northern's envelope contained \$1,000 in cash; T. Northern's envelope contained \$288 in cash; and Swinger's envelope contained \$480 in cash.

17) Jaap was present at the work site at least three days a week while Claimants performed work at Honn's house except for January 16-23, 2007, when Jaap was commuting to, participating in, or returning from a dog sled race in Joseph, Oregon. When Jaap was at Honn's house, she stayed for one to four hours, doing some repair work herself and giving directions to Claimants regarding what work should be performed. When Jaap was in Joseph, Davis was at the house and gave Claimants direction. Handwritten instructions for the work to be performed by the Claimants at Honn's house, including a floor plan with dimensions and a list of the electrical work to be performed, were left for Claimants on a counter at Honn's house.

18) Jaap provided and paid for all the materials for the job, although Claimants had to pick those materials up at two different building supply stores. Honn met the Claimants and paid for the building supplies with her debit card at Jerry's, one of the stores, and Jaap repaid her for the expense.

19) D. Northern provided most of the hand and power tools used on the job, including a table saw, chop saw, worm drive skill saw, drills, hammers, tapes, squares,

knives, and nail aprons. Davis provided the jackhammer. Jaap provided saw blades, nails, a wheelbarrow, sledgehammer, and crowbar.

20) Honn's only involvement with the work on her house was that she owned the house and met the claimants on one occasion at Jerry's to pay for building materials because Jaap was out of town.

21) On January 24, 2007, Jaap paid Swinger another \$500 in cash after Swinger requested a draw so that he could go to Medford and pick up his car that had been stolen and wrecked.

22) At some point during the work on Honn's house, Jaap asked D. Northern to fix the ceiling on the second floor of the house she lived in at 290 7th Street, Harrisburg, and gave D. Northern the keys to her house. Claimants decided not to perform that work when Jaap could not pay them for the work on Honn's house.

23) Claimants D. Northern and Swinger continued to work until the only work left was hanging doors. They decided to quit when Jaap told them she had no money to pay them and had unsuccessfully tried to refinance so she could pay them. At that time, T. Northern had already quit.

24) There was no evidence that the Claimants were employed by anyone else or working on any other job while they worked on Honn's house.

25) There was no evidence that T. Northern or Swinger have ever been construction contractors.

26) By week, D. Northern worked the following days and hours at Honn's house:

January 9-13 (40 total hours)
January 15-19 (40 total hours)
January 22-26 (40 total hours)
January 29 – February 2 (40 total hours)
February 5-6 (16 hours)

In total, D. Northern worked 176 hours, earning \$4,400 in gross wages. He was only paid \$1,000, leaving \$3,400 due and owing.

27) By week, T. Northern worked the following days and hours at Honn's house:

January 10-11, 13 (24 total hours)
January 16-17, 19 (24 total hours)
January 22-23, 26 (24 total hours)
January 29 – 30 (16 total hours)

In total, T. Northern worked 88 hours, earning \$1,056 in gross wages. He was only paid \$288, leaving \$768 due and owing.

28) By week, Swinger worked the following days and hours at Honn's house:

January 9-13 (40 total hours)
January 15-19 (40 total hours)
January 22-26 (40 total hours)
January 29 – February 2 (40 total hours)
February 5-6 (16 hours)

In total, Swinger worked 176 hours, earning \$2,112 in gross wages. He was only paid \$980, leaving \$1,132 due and owing.

29) On March 19, 2007, Jaap called Robert McArthur, WHD Screener, and told him, among other things, that Claimants "did work for her."

30) On August 17, 2007, BOLI's Wage & Hour Division mailed separate letters entitled "Notice of Wage Claim" that were identical in content to Respondents Jaap and Honn. In part, the letters read:

"You are hereby notified that DAVID DEAN NORTHERN, ET AL, have filed wage claims with the Bureau of Labor and Industries alleging:

"David D. Northern claims unpaid wages of \$3,400.00 at the rate of \$25.00 per hour from January 9, 2007 to February 6, 2007.

"Thomas A. Northern claims unpaid wages of \$768.00 at the rate of \$12.00 per hour from January 10, 2007 to January 30, 2007.

"John B. Swinger claims unpaid wages of \$1,132.00 at the rate of \$12.00 per hour from January 9, 2007 to February 6, 2007.

“IF THE CLAIMS ARE CORRECT, you are required to IMMEDIATELY make negotiable checks or money orders payable to the claimants for the amount of wages claimed, less deductions required by law, and send the payments to the Bureau of Labor and Industries at the above address.”

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

31) On September 12, 2007, Enos sent separate letters, by regular and certified mail, to Jaap and Honn in which he stated his determination with regard to the Claimants’ wage claims. The certified letters were returned unclaimed from the post office, but the letters sent by regular mail were not returned. In pertinent part, the letters read as follows:

“After review of the information provided, it is my determination that you owe the three wage claimants unpaid wages as listed below. Computations are attached:

<u>NAME</u>	<u>UNPAID WAGES</u>	<u>PENALTIES</u>
David D. Northern	\$3,400.00	\$6,000.00
Thomas A. Northern	\$ 768.00	\$2,880.00
John B. Swinger	\$1,132.00	\$2,880.00

“Please respond on or before **September 26, 2007**. If no response is received by that date, the Bureau will initiate administrative action to collect these wages. In addition the Bureau may seek to collect penalty wages of up to 30 days’ wages plus costs and attorney fees. Please be advised that penalty wages totaling \$11,750.00 have accrued as of this date.”

32) Penalty wages for D. Northern under ORS 652.150 are computed as follows: \$25 per hour x 8 hours x 30 days = \$6,000.

33) Penalty wages for T. Northern under ORS 652.150 are computed as follows: \$12 per hour x 8 hours x 30 days = \$2,880.

34) Penalty wages for Swinger under ORS 652.150 are computed as follows: \$12 per hour x 8 hours x 30 days = \$2,880.

35) Thomas Northern answered questions on direct and cross examination calmly, concisely, and without hesitation. His memory was clear and his answers were responsive. He testified entirely from his recollection, not referring to any notes except when he was asked to refer to a specific exhibit. His testimony was internally consistent and consistent with documentary evidence provided by the Agency. His testimony was consistent with the testimony of Swinger, whom the forum has found to be a credible witness, and he was not impeached by Respondents. The forum has credited his testimony in its entirety.

36) Like T. Northern, John Swinger answered questions on direct and cross examination calmly, directly, and without hesitation. He had an excellent memory of the events relevant to the wage claims and testified in detail about the condition of the work site and work he performed without having to refer to any notes. His testimony was internally consistent and consistent with documentary evidence provided by the Agency. He was not impeached by Respondents. The forum has credited his testimony in its entirety.

37) David Northern's testimony during direct and cross examination was like day and night. On direct examination, he answered questions calmly, directly, and without hesitation. Under cross examination by Jaap, he was hostile, combative, evasive, argumentative, abrasive, and sarcastic. At times, his tone of voice and facial expression conveyed disgust or indignation, as though Jaap's questions were absurd and it was an extreme annoyance for him to have to answer them. In addition, one of his answers, repeated twice in response to different questions, showed extreme disrespect for Jaap and the forum.^{iv} Based on D. Northern's demeanor on cross examination, the forum has only credited his testimony when it was uncontroverted or supported by other credible evidence.

38) Honn's testimony was credible with the exception of two statements that the forum did not believe because they were contrary to more credible evidence. Those were her statements that D. Northern told Honn he was a contractor when he called to ask her to meet him at Jerry's to pay for supplies and that she met Claimants at Jerry's on January 20.

39) Laura Jaap was not a credible witness because of her prior inconsistent statements, prior omissions in statements made to the Agency and in her answer, and the inherent improbability of one statement. In her answer and request for hearing, she stated:

"Mr. Northern was paid in full for work that was never completed. He represented himself as a contractor, van and trailor [sic], but apparently no license. It was never an issue, because Mr. Davis was the facilitator. Initially, no money was to be paid. Mr. Daivs [sic] and Mr. Northern were just going to do the repairs to help a friend. Mr. Davis became very busy, so we decided it was fair to pay Mr. Northern something after seeing the damage. We agreed to the \$5,000, plus supplies, which I provided."

In contrast, at hearing Jaap testified that she agreed to pay \$2,500 to D. Northern. She provided no explanation for the \$2,500 discrepancy between the amount stated in her answer and the figure she testified to at hearing. At hearing, Jaap also conspicuously failed to mention that Davis and Northern originally offered to do the work for free and presented no evidence to establish that D. Northern knew either Jaap or Honn before January 5, 2007 or was a "friend." If D. Northern was in fact a contractor, the forum finds it improbable that he would have been willing to do \$5,000 worth of work for free for someone he did not know. A second prior inconsistent statement was that Jaap told Enos on September 10, 2007, that she was not around much because she was out of town while the job was being done, whereas at hearing she testified that she was only gone from January 16-23, 2007.

Regarding prior omissions, Jaap testified at hearing that (1) Claimants performed work at Honn's house that far exceeded the scope of work they were authorized to perform and that she had expected the work to be completed in a week; and (2) that Claimants left Honn's house in a bigger mess than it was when they started work. Jaap did not raise either issue before the hearing, despite opportunities to do so in an August 3, 2007, letter to a former Agency compliance specialist's request for information concerning the wage claims, during a September 10, 2007, interview with Enos, and in her answer. Jaap's failure to raise these issues before the hearing or to present any other witnesses to support her testimony on those issues leads the forum to conclude that her testimony on these issues was fabricated.

Based on the above, the forum has only credited Jaap's testimony when it was corroborated by other credible evidence.

40) Enos is an experienced investigator who responded directly to questions and did not give any speculative answers when he was asked questions he could not answer. Most of his testimony was based on conversations that he contemporaneously documented. He was not impeached and the forum has credited his testimony in its entirety.

41) The forum gives no weight to Ron Boone's written statement because it claims Boone came out to make a carpet bid at Honn's house on February 9, 2007, at which time none of the Claimants were still working at Honn's house.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Laura Jaap was an individual who employed Claimants to perform remodeling and repair work on a house owned by Respondent Honn that is located at 390 N. 6th St. in Harrisburg, Oregon.

2) Jaap hired Claimants on January 5, 2007, and agreed to pay D. Northern \$25 per hour and T. Northern and Swinger \$12 per hour.

3) D. Northern worked for Jaap from January 9 through February 6, 2007, for Jaap. In total, he worked 176 hours, earning \$4,400 in gross wages. He was only paid \$1,000, leaving \$3,400 in due and owing wages.

4) T. Northern worked for Jaap from January 10 through January 30, 2007. In total, he worked 88 hours, earning \$1,056 in gross wages. He was only paid \$288, leaving \$768 in due and owing wages.

5) Swinger worked for Jaap from January 9 through February 6, 2007. In total, Swinger worked 176 hours, earning \$2,112 in gross wages. He was only paid \$980, leaving \$1,132 in due and owing wages.

6) All three Claimants voluntarily quit Jaap's employment.

7) Jaap or Davis directed Claimants' work on Honn's house.

8) D. Northern provided most of the tools Claimants used to perform the work and Jaap and Davis provided the remaining tools.

9) Jaap provided and paid for all the materials and supplies used by Claimants.

10) While working on Honn's house, Claimants had no opportunity to make a profit or suffer a loss.

11) Claimants did not work for anyone else while employed by Jaap and were offered limited additional employment by Jaap while they worked on Honn's house.

12) On August 17 and September 12, 2007, BOLI's Wage & Hour Division made written demand for unpaid wages to the Claimants in the same amount sought in the Agency's Order of Determination.

13) Penalty wages for D. Northern, computed under ORS 652.150, equal \$6,000.

14) Penalty wages for T. Northern and Swinger, computed under ORS 652.150, equal \$2,880 each.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Jaap was an employer who directly engaged the personal services of Claimants in Oregon and Claimants were Respondent Jaap's employees, subject to the provisions of ORS 652.110 to 652.200 and ORS 652.310 to 652.405.

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

3) Respondent Honn did not employ the Claimants and the Order of Determination is dismissed with regard to Honn.

4) Respondent Jaap violated ORS 652.140(2) by failing to pay to Claimants all wages earned and unpaid not later than five days, excluding Saturdays, Sundays and holidays, after Claimants quit Jaap's employment. Respondent Jaap owes Claimants the following amounts of unpaid, due, and owing wages: D. Northern - \$3,400; T. Northern - \$768, and Swinger - \$1,132.

5) Respondent Jaap's failure to pay Claimants all wages due and owing was willful and Respondent Jaap owes penalty wages in the following amounts to Claimants: D. Northern - \$6,000; T. Northern - \$2,880, and Swinger - \$2,880. ORS 652.150.

OPINION

CLAIMANTS' WAGE CLAIMS

To establish Claimants' wage claims, the Agency must prove the following elements by a preponderance of the evidence: 1) Respondent(s) employed Claimants; 2) The pay rate upon which Respondent(s) and Claimants agreed; 3) Claimants performed work for which they were not properly compensated; and 4) The amount and

extent of work Claimants performed for Respondent(s). *In the Matter of Creative Carpenters Corporation*, 29 BOLI 271, 277 (2007).

CLAIMANTS WERE NOT INDEPENDENT CONTRACTORS

In determining whether Jaap, Honn, or both employed Claimants, the forum must first address Jaap's affirmative defense that D. Northern was an independent contractor. Respondent Jaap must prove this defense by a preponderance of the evidence in order to prevail. *In the Matter of Gary Lee Lucas*, 26 BOLI 198, 210 (2005). Jaap waived this defense with respect to Claimants T. Northern and Swinger by not raising it in her answer. OAR 839-050-0130(2). Consequently, although the forum's discussion of the facts relevant to Jaap's independent contractor defense necessarily mentions all three Claimants, it only applies to D. Northern.

This forum applies an "economic reality" test to distinguish an employee from an independent contractor under Oregon's minimum wage and wage collection laws. *Id.* The degree of economic dependency in any given case is determined by analyzing the facts presented in light of the following five factors, with no one factor being dispositive:

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

Gary Lee Lucas at 310. 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).

For reasons stated later in this Opinion, the forum has concluded that Respondent Honn was not Claimants' employer. Therefore, the forum only evaluates Jaap's working relationship with Claimants with regard to Jaap's independent contractor defense.

A. Degree of control exercised by Jaap.

Jaap met Claimants at Honn's house their first day of work and was present to direct work and perform work herself at least three days a week except during the week while she was at the Eagle Cap dog sled race. In that week, Davis, whom the forum infers was acting as Jaap's agent, came to Honn's house to direct work in Jaap's absence. Claimants performed the work that Jaap and Davis instructed them to perform. There is no evidence that Claimants were working for anyone else immediately before, during, or after they worked on Honn's house. Although there was no testimony about how closely Jaap and Davis supervised the Claimants, the Claimants credibly testified that Jaap and Davis directed their work. Jaap has the burden of proof on this issue, and the lack of more specific evidence concerning the extent of supervision by Jaap and Davis leads the forum to rely on the Claimants' general testimony and conclude that Jaap and Davis directed their work. This supports the Agency's claim that D. Northern was Jaap's employee and not an independent contractor.

B. The relative investments of Claimants and Jaap.

Claimants had no investment in Honn's house or in the work performed, other than their time. Jaap paid for all the materials and supplies necessary to perform the work. There is no evidence that D. Northern had to spend any money related to Claimants' performance of the work. The forum does not consider D. Northern's ownership of most of the tools that he, T. Northern, and Swinger used on the job as an "investment" because there is no evidence that D. Northern had to purchase any of those tools to perform the work or that the tools would not have been provided by Jaap or Davis if D. Northern had not provided them. Again, the relevant facts favor the conclusion that Claimants were employees, not independent contractors.

C. The degree to which Claimants' opportunity for profit and loss was determined by Jaap.

Claimants were not licensed contractors. They did not bid on the project and were paid based on an agreed hourly rate. The latter fact was established by their credible testimony about their wage agreement with Jaap, Jaap's agreement to pay them by the week, and the fact that Jaap's first cash payment to them corresponded exactly to the hourly wage they agreed to and the number of hours they reported for their first week of employment. Claimants had no opportunity to make more money by working more efficiently and finishing the job in fewer hours. They made no capital investment and therefore risked no loss of money if the project fell through or was not completed. These facts are indicative of an employment relationship.

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

D. Northern had previously worked as a construction contractor in Idaho and has spent most of his adult life doing construction work. However, he did not bid on the work to be done at Honn's house. Once on the job, Jaap told him the work that needed to be done. A hand-drawn floor plan with dimensions and a list of the electrical work to be performed was left on a counter in Honn's house to show Claimants the work that Jaap wanted completed. There were no blueprint plans.

Testimony by the Claimants establishes that Jaap and Davis directed their work, and that Jaap was at Honn's house for one to four hours, at least three days a week, except for her week at the dog races when Davis took her place. There was no specific testimony about how closely Jaap and Davis supervised the Claimants, other than that they directed Claimants' work. Likewise, there was no testimony about the degree of skill or initiative required to perform the specific work done by the Claimants, other than a listing of the tools that they used and the specific rooms they remodeled. Given this paucity of evidence, the forum declines to speculate about the degree of skill, training,

or initiative required to perform that work or the specific amount of supervision exercised by Jaap and Davis.

The fact remains that Jaap and Davis were not at Honn's house the majority of the time that Claimants worked. The forum infers that Claimants necessarily possessed some skill and exercised some initiative in order to perform the work when Jaap and Davis were gone. Again, because there was no specific testimony about the work that D. Northern performed when Jaap and Honn were gone, the forum is unable to draw any conclusions about the skill and initiative required to perform that work, D. Northern's prior experience notwithstanding. Respondent Jaap has the burden of proof to show that the degree of skill and initiative required of D. Northern to perform the work was that of an independent contractor, and she did not meet that burden.

E. The permanency of the relationship between Claimants and Jaap.

Claimants were hired to perform needed repairs and remodeling on Honn's house. Although they were not hired for a specific duration of time, Claimants' testimony establishes that the work was almost complete when they quit. The evidence establishes that, at some time while Claimants worked at Honn's house, Jaap also asked D. Northern to do some repair work on her own house and gave him a key to her house. D. Northern opted not to do that work because Jaap did not pay him in full for the work he performed on Honn's house. There was no evidence that D. Northern or the other two Claimants worked for anyone else while they worked at Honn's house.

In a number of cases, the forum has considered whether a claimant was engaged for an "indefinite period" in evaluating the permanency of the relationship. See *In the Matter of Gary Lucas*, 26 BOLI 198, 212 (2005); *In the Matter of Orion Driftboat and Watercraft Company*, 26 BOLI 137, 147 (2005); *In the Matter of Alphabet House*, 24 BOLI 262, 278 (2003); *In the Matter of Procom Services, Inc.*, 24 BOLI 238, 244

(2003); *In the Matter of Heiko Thanheiser*, 23 BOLI 68, 75-76 (2002); *In the Matter of Debbie Frampton*, 19 BOLI 27, 36-37 (1999); *In the Matter of Elmer DeHart*, 18 BOLI 199, 207-08 (1999). In making the same evaluation, the forum has also considered whether there was a “fixed date” for the claimant’s employment to cease. See *In the Matter of Adesina Adeniji*, 25 BOLI 162, 170 (2004); *In the Matter of William Presley*, 25 BOLI 56, 69 (2004), *aff’d*, *Presley v. Bureau of Labor and Industries*, 200 Or App 113, 112 P3d 485 (2005). The forum has also recognized that “the impermanence of a particular job alone does not create an independent contractor relationship.” *In the Matter of Triple A Construction, LLC*, 23 BOLI 79, 93 (2002). Finally, the forum has noted that “[i]ndependent contractors are generally engaged to perform a specific project for a limited period.” *Id* at 93.

In this case, D. Northern was hired to perform specific repair and remodeling work on Honn’s house, with the option of performing limited repair work on Jaap’s house when the work on Honn’s house was complete. The work on Honn’s house was nearly completed in a few days less than one month, and the scope of work at Jaap’s house was even more limited. Under these circumstances, the facts are indicative of an independent contractor relationship between Jaap and D. Northern.

F. Conclusion.

Four of the five factors used by the forum to determine whether an independent contractor relationship exists indicate that an employment relationship, not an independent contractor relationship, existed between D. Northern and Jaap. Jaap has not met her burden of proof and the forum concludes that D. Northern was not an independent contractor while he worked on Honn’s house.

RESPONDENT JAAP WAS CLAIMANTS' EMPLOYER; RESPONDENT HONN WAS NOT

In its Order of Determination, the Agency alleges that Laura Jaap and her daughter Nettice Honn both employed Claimants. The Agency has the burden of proving that Jaap and Honn were employers and that Claimants were employees. *In the Matter of Kilmore Enterprises*, 26 BOLI 111, 119 (2004). Jaap and Honn are named as individual respondents, and the Agency did not allege a specific legal theory for holding them individually liable.

Under ORS 652.310(1), an "employer" is "any person in this state who, directly or through an agent, engages personal services of one or more employees * * *." Under ORS 652.310(2), an "employee" is:

"any individual who otherwise than as copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services."

Since the Agency has alleged joint individual liability, the forum assumes that the Agency is not pursuing the theory that Jaap was acting as Honn's agent, as agency would not create liability for Jaap but only require the imputation of her actions and statements to Honn. *See, e.g., In the Matter of Crystal Heart Books Co.*, 12 BOLI 33, 39 (1993). Likewise, the Agency did not allege a partnership between Jaap and Honn and, in any event, presented no evidence that would establish a partnership.^v

Based on the Agency's pleading, the only possible remaining theory of liability is that Jaap and Honn were joint employers. In general, a joint employment relationship exists when two associated employers share control of an employee. Joint or co-employers are responsible, both individually and jointly, for compliance with all applicable provisions of Oregon's wage and hour laws. *In the Matter of Kurt E. Freitag*, 29 BOLI 164, 197-98 (2007), *appeal pending*.

The facts relevant to the determination of whether Jaap and Honn were Claimants' joint or individual employers can be summarized as follows:

- Jaap and Honn were not partners.
- Honn gave Jaap complete authority over the repair and remodel work on her house.
- Jaap hired all three Claimants to perform repair and remodel work on Honn's house.
- Jaap agreed to pay Claimants at a fixed hourly rate for their work.
- Jaap paid \$2,268 in wages to the Claimants that corresponded to their agreed hourly rate.
- Jaap paid for all the building materials and supplies.
- Jaap or Jaap's agent Davis directed Claimants' work.
- Honn's only connection with the work was that she owned the house that Claimants worked on and she met Claimants at a building supply store to pay for materials when Jaap was gone. Jaap reimbursed her for the materials.
- Jaap had no ownership interest in Honn's house.

The forum relies on the federal Fair Labor Standards Act ("FLSA"), specifically 29 CFR § 791.2,^{vi} and three prior Final Orders, applied to the above facts, to determine whether Jaap and Honn were joint employers. 29 CFR §791.2 of the FLSA provides:

"(a) A single individual may stand in the relation of an employee to two or more employers at the same time under the [FLSA], since there is nothing in the act which prevents an individual employed by one employer from also entering into an employment relationship with a different employer. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case. If all the relevant facts establish that two or more employers are acting entirely independent of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the Act. On the other hand, if the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the Act * * *.

"(b) Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the

workweek, a joint employment relationship generally will be considered to exist in situations such as:

“(1) Where there is an arrangement between the employers to share the employee’s services, as, for example, to interchange employees; or

“(2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or

“(3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.”

This forum has found joint employment relationships to exist in three prior cases.

In *Freitag*, the forum found that an individual respondent and a corporate respondent jointly employed a claimant when they: (1) shared an interest in the property being developed on a construction site; (2) the individual respondent controlled and directed the work performed by claimant and other laborers on the construction site and signed their paychecks, which he paid to them as a sole proprietor using an assumed business name; (3) the corporate respondent maintained an office where claimant and other laborers submitted their timesheets and controlled, to some extent, how, when, and whether claimant would be paid; and (4) the facts supported an inference that the claimant was under the simultaneous control of Respondents and simultaneously performed services for both. *Freitag* at 299-301. In the second case, the forum found three respondents – an individual and two corporate respondents – liable as joint employers when they shared work crews and equipment, the claimant performed work that benefited all three respondents, and the claimant was issued separate paychecks drawn on the accounts of each respondent. *In the Matter of Jack Crum Ranches, Inc.*, 14 BOLI 258, 271 (1995). In the third case, an employer leased the wage claimant from an employee leasing company. The forum found that each respondent retained sufficient control of the terms and conditions of the claimant’s employment to be

considered a joint employer and held both respondents jointly and individually liable for the claimant's unpaid wages. *In the Matter of Staff, Inc.*, 16 BOLI 97, 114-16 (1997).

A joint employment relationship cannot exist unless each alleged "joint" employer is also an individual employer. Consequently, the forum must determine whether Jaap and Honn each individually employed Claimants. The evidence shows that Jaap hired Claimants to work in Harrisburg, Oregon; agreed to pay them a fixed hourly wage; that Claimants performed the work they were hired to do; and that Jaap paid them part of their wages, paid for all the materials involved in the job, provided some tools, and directed their work, either by herself or through Davis. In contrast, there is no evidence that Honn had any involvement whatsoever in any of those actions or any contact with or control over the Claimants, other than meeting them at a building supply store at Jaap's request. Under the facts of this case, Honn's mere ownership of the house is insufficient evidence to establish that she "engage[d] the personal services of [Claimants]," and the forum concludes that Honn was not Claimants' employer.^{vii} The fact that Honn, by her ownership of the house, may have benefited from Claimants' work is not enough to make her their employer as a matter of law. Jaap's actions, on the other hand, place her squarely within the definition of "employer" set out in ORS 652.310(1), and the forum concludes that Jaap employed Claimants during the period of time encompassed by the wage claims.

THE PAY RATE UPON WHICH JAAP AND CLAIMANTS AGREED

The Claimants credibly testified that Jaap made individual agreements with them to pay D. Northern \$25 per hour, T. Northern \$12 per hour, and Swinger \$12 per hour. This testimony was supported by Jaap's payment in cash to them after their first week of work (January 9-13) that exactly corresponded to the amount of wages they had earned, calculated at \$25 and \$12 per hour, in that first week of work.^{viii} In contrast,

Jaap testified that she agreed to pay D. Northern \$2,500 for the entire job and that she paid him in advance. Jaap's testimony conflicted with (1) her answer, in which she stated that she agreed to pay D. Northern \$5,000 for the entire job; (2) her testimony that she paid D. Northern in full before the job was done, whereas she only paid Claimants \$2,268 in total; (3) her payment in cash to each Claimant individually; (4) her payment to them of the exact wages they had earned after their first week of employment; and (5) her payment of a \$500 "draw" to Swinger after she returned from the dog sled races. Based on the above, the forum concludes that Jaap agreed to pay D. Northern \$25 per hour, T. Northern \$12 per hour, and Swinger \$12 per hour.

CLAIMANTS PERFORMED WORK FOR WHICH THEY WERE NOT PROPERLY COMPENSATED

As discussed above, all three Claimants were paid in full after their first week of work (January 9-13) for the work they performed that week. D. Northern was paid \$1,000 for 40 hours work ($\$25 \text{ per hour} \times 40 \text{ hours} = \$1,000$); T. Northern was paid \$288 ($\$12 \text{ per hour} \times 24 \text{ hours} = \288); and Swinger was paid \$480 ($\$12 \text{ per hour} \times 40 \text{ hours} = \480). There is no dispute that they continued to work after that first week and that D. and T. Northern were paid nothing more for that work. This establishes that D. and T. Northern performed work for which they were not properly compensated. Swinger was paid an additional \$500 on January 24. According to the contemporaneous record of hours worked maintained by D. Northern and Swinger's credible testimony, Swinger had worked another 64 hours by the end of the work on January 24. At \$12 per hour, \$500 only compensated Swinger for 41.67 hours of work. This differential establishes that Swinger performed work for which he was not properly compensated.

AMOUNT AND EXTENT OF WORK CLAIMANTS PERFORMED FOR RESPONDENT

The final element of the Agency's case requires proof of the amount and extent of work performed by the Claimants. The Agency provided a calendar on which D. Northern, who worked every day that T. Northern and Swinger worked, created a contemporaneous record of the hours worked by all three Claimants, supported by the testimony of each Claimant.

When the forum concludes an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. When the employer produces no records, the forum may rely on evidence produced by the agency from which "a just and reasonable inference may be drawn." *In the Matter of Kilmore Enterprises*, 26 BOLI 111, 122 (2004). A claimant's credible testimony may be sufficient evidence to show the amount of hours worked by the claimant and amount owed. *Id.* at 123.

There was no evidence that Jaap maintained any record of the hours worked by Claimants. She produced no records showing the hours worked by Claimants. Jaap was out of town from January 16-23 and had no personal knowledge of the hours Claimants worked during that time period. However, Davis was at the worksite that week, acting on behalf of Jaap, and presumably could have been called as a witness by Jaap to support Jaap's defense that Claimants worked fewer hours than they claimed. Jaap did not call Davis as a witness, despite listing him as a potential witness on her motion for a telephone hearing, and the forum infers that his testimony would not have aided Jaap's case.

In contrast, all three Claimants testified credibly that the hours shown on D. Northern's calendar were an accurate record of the dates and hours they worked for Jaap and were able to describe the work they had performed. This testimony was not

impeached on cross examination, and there was no evidence that the calendar was not an authentic copy of a contemporaneous record. Based on this evidence, the forum concludes that D. Northern worked 176 hours, T. Northern worked 88 hours, and Swinger worked 176 hours.

COMPUTATION OF WAGES OWED TO CLAIMANTS

D. Northern earned \$4,400 in gross wages (\$25 per hour x 176 hours = \$4,400) and was only paid \$1,000. Jaap owes him \$3,400 in unpaid, due and owing wages.

T. Northern earned \$1,056 in gross wages (\$12 per hour x 88 hours = \$1,056) and was only paid \$288. Jaap owes him \$768 in unpaid, due and owing wages.

Swinger earned \$2,112 in gross wages (\$12 per hour x 176 hours = \$2,112) and was only paid \$980. Jaap owes him \$1,132 in unpaid, due and owing wages.

CLAIMANTS ARE OWED PENALTY WAGES

The forum may award penalty wages when a respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission "willfully" if he or she acts (or fails to act) intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

The Agency established, by a preponderance of the evidence, that: (1) Jaap knew Claimants' agreed rate of pay; (2) Jaap paid Claimants in full for their first week of work; (3) Jaap knew Claimants worked additional hours after their first week of work but did not pay D. or T. Northern any additional wages; and (4) Jaap paid Swinger additional wages, but those wages were less than what he earned. It is an employer's duty to keep an accurate record of the hours worked by its employees. ORS 653.045; *In the Matter of Tina Davidson*, 16 BOLI 141, 148 (1997). The fact that Jaap kept no record of Claimants' hours worked does not allow her to evade her responsibility for

penalty wages, nor does her claim that D. Northern was an independent contractor, which contains the implication that she was not required to keep track of Claimants' hours. See, e.g., *In the Matter of Bukovina Express, Inc.*, 27 BOLI 184, 203 (2006) (a respondent's ignorance or misunderstanding of the law does not exempt that respondent from a determination that it willfully failed to pay wages earned and owed.) There is no evidence that Jaap acted other than voluntarily and as a free agent in underpaying Claimants.

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

“(1) Except as provided in subsections (2) and (3) of this section, if an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 * * *, then, as a penalty for the nonpayment, the wages or compensation of the employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced.

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

The Agency provided documentary and testimonial evidence that its investigative staff made the written demand contemplated by ORS 652.150(2) for Claimants' wages on August 17 and September 12, 2007, and the Agency's Order of Determination, issued on October 1, 2007, repeated this demand.^{ix} Each demand was for the actual amount of wages found due and owing in this Final Order. Jaap failed to pay the full amount of Claimants' unpaid wages within 12 days after receiving the written notices and has still not paid them. Consequently, the forum assesses the penalty wages in the manner provided for in ORS 652.150(1) (hourly rate x eight hours per day x 30 days = penalty wages). Penalty wages for D. Northern equal \$6,000 (\$25 per hour x eight hours x 30

days). Penalty wages for T. Northern and Swinger equal \$2,880 (\$12 per hour x eight hours x 30 days).

ORDER

NOW, THEREFORE, as authorized by ORS 652.140(2), ORS 652.150, ORS, and ORS 652.332 and as payment of the unpaid wages and penalty wages, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **LAURA M. JAAP** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Claimant David D. Northern, in the amount of NINE THOUSAND FOUR HUNDRED DOLLARS, less appropriate lawful deductions, representing \$3,400 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from March 1, 2007, until paid; and \$6,000 in penalty wages, plus interest at the legal rate on that sum from April 1, 2007, until paid.

(2) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Thomas A. Northern, in the amount of THREE THOUSAND SIX HUNDRED AND FORTY-EIGHT DOLLARS (\$3,648), less appropriate lawful deductions, representing \$768 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from March 1, 2007, until paid, and \$2,880 in penalty wages, plus interest at the legal rate on that sum from April 1, 2007, until paid.

(3) A certified check payable to the Bureau of Labor and Industries in trust for Claimant John B. Swinger, in the amount of FOUR THOUSAND TWELVE DOLLARS (\$4,012), less appropriate lawful deductions, representing \$1,132 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from March 1, 2007, until paid, and \$2,880 in penalty wages, plus interest at the legal rate on that sum from April 1, 2007, until paid.

ⁱ It was undisputed that the "Laura Zapp" named in the wage claims and "Laura Jaap," the named Respondent in this case, are the same person.

ⁱⁱ His wage claim alleged January 9 through February 6, 2007, but the Agency calendar of hours worked (Form WH-127) that he filled out when he filed his wage claim only showed that he worked through January 30.

ⁱⁱⁱ The only evidence presented on this issue was Honn's following testimony:

Q: "Was the decision about what the ultimate floor plan was to be – were those your mother's?"

A: "I don't know."

Q: "Okay, it was your house, right?"

A: "Yeah."

Q: "Did you give her the authority to do whatever she pleased with the place for the purposes of this remodel?"

A: "Yes."

^{iv} Q: "You just stated you couldn't get things done in the length of time I needed. What length of time was that?"

A: "You wanted a wham, bam, thank you ma'am and I refused to do it in a wham bam, thank you ma'am attitude."

Q: "What amount of time was that, Mr. Northern?"

A: " * * * get in and get out. And I refused to do that."

^v A partnership is never presumed. *In the Matter of John Steensland*, 29 BOLI 235, 263 (2007).

^{vi} See *In the Matter of Kurt E. Freitag*, 29 BOLI 164, 197-98 (2007), *appeal pending*, in which the forum first relied on 29 CFR §791.2 as a standard for determining if a joint employment relationship existed.

^{vii} Compare with ORS 87.010 and 87.030, which entitle persons who perform labor upon construction projects to a construction lien on the property on which the labor was performed. These statutes do not apply in this case because there is no evidence that such a lien was ever perfected, as required by ORS 87.035, and because the Commissioner lacks jurisdiction to enforce such a lien, even if it had been perfected.

^{viii} See Finding of Fact #16 – The Merits.

^{ix} See *In the Matter of MAM Properties, LLC*, 28 BOLI 172, 190 fn. 7 (2007) (the Agency's Order of Determination constitutes a written notice of nonpayment of wages).