

**In the Matter of**  
**MARK A. FRIZZELL and LAUNA G. FRIZZELL**  
**Case No. 05-11**

**Final Order of Commissioner Brad Avakian**

**Issued June 13, 2011**

**SYNOPSIS**

Respondent Mark Frizzell, a commercial fisherman, employed Claimant in 2009 as a crew member to assist Respondent in the 2009-2010 crab harvest. Claimant worked a total of 137 hours preparing Respondent's crab gear for the crab harvest. He was fired shortly before crab season began. If Claimant had participated in the crab harvest, he would have been paid a percentage of the total harvest. Instead, the only pay he received was in the form of cash and check draws and cans that he could cash in for a deposit return, totaling \$497. Under these circumstances, the forum concluded that Claimant was entitled to be paid at the minimum wage rate for all of his work on Respondent's crab gear. Computed at Oregon's 2009 minimum wage of \$8.40 per hour, Claimant earned \$1,150.80, leaving \$653.80 in unpaid, due, and owing wages. Respondent's failure to pay the wages was willful and the forum awarded Claimant \$2,016.00 in penalty wages. The forum also awarded Claimant \$2,016.00 as a civil penalty based on Respondent's failure to pay Claimant the minimum wage for all hours worked. The forum determined that Respondent Launa Frizzell did not employ Claimant and dismissed the charges against her. ORS 652.140(1), ORS 652.150, ORS 653.025, ORS 653.055, ORS 653.261.

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The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 8-9, 2011, at the Newport office of the Oregon Department of Human Services, located at 120 NE Avery Street, Newport, Oregon.

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

Respondents Mark and Launa Frizzell represented themselves and were present throughout the hearing.

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

In addition to themselves, Respondents called the following witnesses: Shawn Callahan and Doug McCall, former crew members; and Tyana Frizzell, Respondents' daughter.

The forum received into evidence:

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

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

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

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

Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

### **FINDINGS OF FACT – PROCEDURAL**

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

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

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

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

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

4) On August 25, 2010, the Hearings Unit issued a Notice of Hearing to Respondents, the Agency, and Claimant setting the time and place of hearing for 9:00

a.m. on March 8, 2011, at the Newport offices of the Oregon Department of Human Services.

5) On August 31, 2010, the ALJ ordered the Agency and Respondents each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and a brief statement of the elements of the claim, a statement of any agreed or stipulated facts, and any wage and penalty calculations (for the Agency only). The ALJ ordered the participants to submit case summaries by February 25, 2011, and notified them of the possible sanctions for failure to comply with the case summary order.

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

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

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

“Mr. Law was paid a higher percentage like all fishermen to cover all gear work that is performed. Commercial Fisherman [sic] do not get paid an hourly wage since they are already being compensated through the percentage. All boat owners would pay a lesser percentage if they paid an hourly wage on top of a percentage of the catch. They are considered self-employed or independent contractor [sic] and received a 1099.

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

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

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

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

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

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

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

“Until the Agency files its case summary, I have no way of knowing, aside from reading the allegations in the Order of Determination, which specific dates and times the agency contends that Claimant \* \* \* worked. I note Respondents’ exhibits appear to concede that Claimant did work some

hours, albeit less than the amount claimed in the Order of the Determination. Even then, the potential existence of a partial discrepancy is not grounds for dismissing the case, as it is possible that a claim may be valid in some respects and not others.”

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

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

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

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

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

The ALJ denied each request.

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

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

## **FINDINGS OF FACT – THE MERITS**

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

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

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

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

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

6) After the fishing trip that ended on September 17, 2009, Claimant, Doug McCall, and Shawn ("Red") Callahan cleaned up the "tuna mess," then sanded and painted the *Intrepid*.

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

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

September 21: 7.5 hours cleaning up tuna mess

September 22: 7.5 hours crab-related work

September 23: 7.5 hours crab-related work

September 24: 7.5 hours crab-related work

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

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

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

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

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

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

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

October 12:	4 hours cleaning up tuna mess
October 13:	4 hours cleaning up tuna mess 1 hour crab-related work
October 14:	5 hours crab-related work
October 19:	7.5 hours crab-related work
October 21:	7.5 hours crab-related work
October 22:	7.5 hours crab-related work
October 26:	5 hours crab-related work
October 27:	5 hours crab-related work
October 28:	5 hours crab-related work
October 29:	5 hours crab-related work
October 30:	6 hours crab-related work
October 31:	5 hours crab-related work
November 1:	5 hours crab-related work
November 4:	5 hours crab-related work
November 5:	5 hours crab-related work

November 7: 6 hours crab-related work  
November 8: 6 hours crab-related work  
November 9: 6 hours crab-related work  
November 20: 5 hours crab-related work  
November 21: 5 hours crab-related work  
November 22: 5 hours crab-related work  
November 23: 7 hours crab-related work

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

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

18) Despite being fired, Claimant showed up for work on November 24, 2009, and worked for at least an hour. There was no evidence presented that M. Frizzell was contemporaneously aware that Claimant was working on November 24 or that he had authorized Claimant to work that day.

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

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

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

22) Claimant received all of his draws from L. Frizzell. Six of them, including four related to the tuna catch, and two related to crab work, were given to Claimant in the form of checks. M. and L. Frizzell's names, address, and phone number is printed on each check, and they are signed by L. Frizzell. The Frizzells did not keep receipts for cash draws that they paid out.

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

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

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

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

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

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

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

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

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

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

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

"If your response to the claim is not received on or before January 14, 2010, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

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

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

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

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

## **CREDIBILITY FINDINGS**

34) Doug McCall and Bernadette Yap-Sam were credible witnesses and the forum has credited their entire testimony.

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

36) Shawn Callahan's testimony was riddled with internal inconsistencies. Although not currently employed by M. Frizzell, Callahan demonstrated a bias towards Respondents by repeatedly volunteering additional information that he perceived would be favorable to them in response to the Frizzell's direct examination. His testimony on direct examination was remarkably specific as to dates that he worked, considering that he appeared to be testifying solely from memory. In contrast, when cross examined about the same dates, he stated in a five-minute time span: "It's hard to remember that far back"; "It's hard to remember all of these"; "It's hard to remember dates"; and "It's just kind of hard to remember because I know we took a lot of days also off for deer and elk season." In addition, his testimony on direct examination about Exhibit R-17, and his handwritten statement describing the dates and hours he and Claimant worked contradicted many of his prior statements on direct examination about the same dates.

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

Callahan testified that he and Claimant never started work at 8 a.m., the time they were scheduled to start, that Claimant often picked him up at 9:30 a.m., that they never did any work for the first 1½ hours they were at the boat, and that they had 1-1½ hour lunches at McDonald's three or four times a week, and that they never worked after 3:30 p.m. If the forum believes this testimony, it must conclude that Claimant and Callahan could not have worked more than 3½-4 hours in a typical day. In contrast, Callahan's written record of hours, which he also testified was accurate, shows that he worked "4-5" or "5-6" hours with Claimant on 11 different days. Considering this contradiction and other testimony by Callahan that he and Claimant only worked on crab gear during four separate weeks<sup>ii</sup> that respectively totaled two, three, four, and five days in duration, the forum views this as another demonstration of Callahan's bias. This bias was further shown by undisputed evidence that Callahan was one of M. Frizzell's hunting partners in the fall of 2009.

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

37) Mark Frizzell testified that most of the crab gear work was done while Claimant was fishing for tuna in the *Intrepid*. In an earlier signed, written statement, he stated that “when John Law started crab gear on October 26, 2009[,] the gear was almost done[.] [T]hey had 130 crab pots to do out of 300 crab pots.” This was in marked contrast to McCall’s credible testimony that 213 crab pots remained to be done when he was let go on October 16, 2009. Like his daughter, M. Frizzell also testified that it gets dark around “4:30-5 p.m.” in October to prove that no outdoor crab work could be done after that time due to the absence of light to work in. Again, this contradicts credible evidence provided by the Agency showing that on sunset occurred at between 6:58 p.m. and 6:08 p.m. in Newport in October 2009. M. Frizzell’s written statement also states that when Claimant did work, M. Frizzell “always give him money for food [and] gas or my wife made them lunch.” This contradicts Callahan’s testimony that he and Claimant usually ate at McDonald’s. M. Frizzell also testified that he hired Claimant in the “sixth or seventh” month in 2009, which contradicts his written statement that he hired Claimant on August 22, 2009. Finally, the forum credits M. Frizzell’s disagreement with the hours Claimant claims to have worked. However, it discredits his testimony that Claimant was paid in draws for all the crab preparation work he performed based on M. Frizzell’s failure to keep any records of the hours Claimant worked and because of the unreliability of L. Frizzell’s record of crew member draws in November 2009. In conclusion, the forum has only credited M. Frizzell’s testimony concerning the amount Claimant was paid and the hours he worked when it was supported by other credible testimony. The forum also treats M. Frizzell’s written statement that Claimant worked five hours whenever he worked as an admission against interest to support the conclusion that Claimant worked a minimum of five hours each day that Callahan testified that he and Claimant worked together.

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

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

After the hearing, the ALJ requested that the Agency submit the original planner and the Agency responded by having Claimant send it directly to the ALJ. After inspecting the original planner, the forum concludes that, while many of the dates and some of the hours in the planner are correct, the entries showing Claimant's dates and hours worked were not made contemporaneously and are not completely accurate. The forum bases this conclusion on the following observations: (1) The first entry in the

planner is on January 23, 2009, and the only dates in the planner that show hours worked per day by Claimant are the days corresponding to his wage claim, whereas there are entries before and after Claimant's employment with Respondent that refer to work on other boats; (2) Why would Claimant keep a contemporaneous record of his hours when he was expecting to be paid based on a percentage of the catch and had no way of anticipating he would be fired before the crab season started when he did not keep a similar record with his other fishing employment that paid him on a percentage of the catch basis? (3) Several of the entries in the original planner do not match the exhibits, leaving the ALJ to conclude that Claimant or Raney either deliberately excluded some entries when making copies for the hearing or changed them after the hearing; (4) The entries in the planner related to Claimant's dates and hours worked for Respondent are all written the same style and appear to be written with the same pen, whereas other entries on those days related to paying bills through November 10, 2009, are written with a different pen in a different colored ink. Based on these observations, the forum has only credited Raney's testimony concerning the dates and hours worked by Claimant when it was corroborated by other credible evidence.

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

First, Claimant's demeanor. On direct examination, Claimant was relaxed and responded confidently and directly to questions. On cross examination, as soon as M. Frizzell and L. Frizzell began grilling him about his hours worked and confronted him with some contradictory evidence, his demeanor underwent a dramatic transformation.

Almost immediately, he became noticeably disturbed and flustered and his confident testimony on direct examination became uncertain and hesitant.

Second, internal inconsistencies in Claimant's testimony. Despite undisputed evidence, including Claimant's own testimony, that Respondent only has 300 crab pots and a permit for 300 crab pots, Claimant testified that he worked on 500 crab pots for M. Frizzell and offered no explanation for this discrepancy.<sup>v</sup> On direct and redirect examination, Claimant testified that he worked on "chew bags." Earlier, he told the Agency investigator that he had worked on chew bags. On cross-examination he testified that he did not recall working on chew bags.

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

Finally, Claimant testified that he had little independent recollection as to what work he did for M. Frizzell on any specific day during the wage claim period. Instead, he testified that the nearly 300 total work hours noted by Raney in their shared planner was an accurate record of the dates and hours he worked on crab gear for M. Frizzell. Based on the entire record, the forum has determined that this record is only partly accurate and that Claimant either purposely omitted several entries in copying it to be part of Exhibit A-1 or added them after the hearing before submitting the original planner to the ALJ. Either way, this casts a shadow on Claimant's credibility.

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

### **ULTIMATE FINDINGS OF FACT**

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

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

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

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

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

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

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

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

9) On December 30, 2009, the Agency mailed a document entitled "Notice of Wage Claim" to M. Frizzell that notified Frizzell of Claimant's wage claim and asked that Frizzell submit a check for either the amount of wages sought in the wage claim or the amount that Frizzell conceded was due.

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

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

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

### **CONCLUSIONS OF LAW**

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

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

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

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

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

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

7) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent Mark Frizzell to pay Claimant his earned, unpaid, due and payable wages, penalty wages, and civil penalties, plus interest, on all sums until paid. ORS 652.332.

## **OPINION**

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

To establish Claimant's wage claim, the Agency must prove the following elements by a preponderance of the evidence: 1) Respondents employed Claimant; 2) The pay rate upon which Respondents and Claimant agreed, if other than the minimum wage; 3) Claimant performed work for which he was not properly compensated; and 4) The amount and extent of work Claimant performed for Respondents. *In the Matter of Creative Carpenters Corporation, 29 BOLI 271, 277 (2007).*

## **CLAIMANT WAS EMPLOYED BY RESPONDENT M. FRIZZELL**

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

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

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

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

individual proprietorship owned by either M. Frizzell or L. Frizzell or the Frizzells were partners.

The business in question involves the fishing and crab harvesting operation conducted aboard the vessel *Intrepid* while at sea and the necessary work performed prior to and subsequent to the actual fishing and crab harvesting. Undisputed evidence established that M. Frizzell owns the *Intrepid*, hires crew members and other persons to do piece work in preparation for the crab season and negotiates pay rates with them, determines the work performed by the persons he hires, and supervises them. Undisputed evidence further established that L. Frizzell's only connections with the business were: (1) She was M. Frizzell's bookkeeper; (2) She was married to M. Frizzell; and (3) She signed the checks for the business's accounts payable and her name was printed on the checks immediately below M. Frizzell's name.

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

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

- "In determining whether a partnership is created, the following rules apply:
- "(a) Factors indicating that persons have created a partnership include:
    - "(A) Their receipt of or right to receive a share of profits of the business;
    - "(B) Their expression of an intent to be partners in the business;
    - "(C) Their participation or right to participate in control of the business;
    - "(D) Their sharing or agreeing to share losses of the business or liability for claims by third parties against the business; and

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

“\* \* \* \* \*

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

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

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

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

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

- (1) The degree of control exercised by the alleged employer;
- (2) The extent of the relative investments of the worker and alleged employer;

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

*Id.*

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

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

Although there is a dispute over the number of hours that Claimant actually worked, Respondent testified that he was the boss and told Claimant what to do. Claimant credibly testified that Respondent set his work hours. Respondent testified that he had the right to set Claimant's hours and to tell Claimant when he could not work<sup>vii</sup> as well as when he should work. This evidence indicates an employment relationship.

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

Respondent owned the *Intrepid* and there was no evidence that Claimant made any financial investment in Respondent's business. His only job-related expense was

the gas he bought for his truck so he could drive to work from his home in Toledo.<sup>viii</sup>

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

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

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

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

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

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

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

2010. Claimant's work related to Respondent's crab harvest, which even Respondent agrees began no later than October 26, 2009, would have extended for six months had he not been fired. An anticipated end date to employment, in and of itself, does not indicate either an independent contractor or an employment relationship, as the forum focuses on the anticipated duration of the employment. Based on prior final orders, the forum concludes that the anticipated six-month duration of Claimant's employment indicates an employment relationship.<sup>ix</sup>

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

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

other than a share of the boat's catch, and their share depends on the amount of the catch.

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

The forum next looks at whether industry tradition or IRS rules make Claimant an independent contractor as a matter of law or otherwise exempt Respondent from paying Claimant the minimum wage. There is no provision in Oregon law that defines crew members on commercial fishing boats as independent contractors. Likewise, there is

no exception in Oregon law for industry tradition that exempts owners of commercial fishing boats from paying the statutory minimum wage to crew members on their boats.<sup>xiii</sup> Even assuming that the Oregon State University's ("OSU") representation of IRS rules for crew members is accurate,<sup>xiv</sup> IRS rules do not preempt the Commissioner's authority to determine whether a wage claimant is an independent contractor. Even if they did, the IRS's purported rules would arguably not apply here because (1) Claimant received cash draws from Respondent that bore no percentage relationship to the share of the catch, and (2) Claimant did not receive an actual share of the catch.

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

## **Conclusion**

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

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

Claimant testified that Respondent agreed to pay him 14 percent of the crab catch; Respondent testified that the agreement was 12 percent. The exact percentage that Claimant and Respondent agreed to is immaterial because the Agency is not seeking to recover unpaid wages based on an agreed rate, but on the 2009 Oregon statutory minimum wage of \$8.40 per hour. When there is an agreed rate of pay between an employer and employee but there is no way of determining that rate because of a failure of proof, the minimum wage becomes the applicable wage rate by default.<sup>xv</sup> By analogy, when there is an undisputed agreed rate of pay between an employer and employee consisting of a set percentage of a future unknown amount (proceeds from Respondent's crab harvest) contingent upon the employee's participation in a work activity (Claimant being aboard the *Intrepid* while it harvested crab) but that contingency is unsatisfied, the minimum wage becomes the applicable wage rate by default. Accordingly, the forum concludes that Claimant was entitled to be paid Oregon's 2009 statutory minimum wage of \$8.40 per hour.

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

### **A. Amount Claimant was paid.**

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

First, the crab draws. Claimant contends that he only received \$240 in cash or check draws while he worked on crab gear, whereas Respondent contends that

Claimant was paid \$475. Respondent's argument is based on L. Frizzell's November 2009 calendar of draws for *Intrepid* crew members and Callahan's testimony. The forum finds Claimant more credible than Respondent for several reasons. First, Launa Frizzell testified that her November 2009 calendar of draws for *Intrepid* crew members was accurate. Second, Callahan testified that he and Claimant received draws at the same time in November for the same amounts and that they each received \$475. If this is true, then L. Frizzell's calendar cannot be accurate, because it only shows \$170 in draws received by Callahan. The calendar also shows that Claimant received draws on two days that Respondent claims Claimant did not work and that Callahan got two of his three draws on days Callahan and Respondent claim that Callahan did not work. It shows that Claimant got draws on seven different days, and that Callahan only received draws on two of those days, two of which – November 12 and 16 -- Callahan testified that he and Claimant did not work together. Finally, it shows that Callahan and Claimant received the same amount of draw on only one day, November 20. In addition, Respondent produced no receipts for the alleged cash draws. Based on these contradictions and Respondent's failure to produce records, the forum credits Claimant's testimony that he only received \$240 in cash or checks for crab draws.

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

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

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

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

**B. Hours worked by Claimant.**

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

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

**C. Conclusion.**

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

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

Claimant, Respondent, and Callahan were the only witnesses who had any direct knowledge of the hours Claimant worked. All were less than credible. There are two written records – the record Raney created in the planner she and Claimant used and Callahan's 2010 written statement noting the hours he and Claimant worked. Neither can be credited in its entirety because the credibility problems noted in the Findings of Fact – The Merits. There is also Respondent's written statement that Claimant and Callahan worked five hours when they worked together. Finally, Respondent kept no record of Claimant's hours, claiming he had no responsibility to do so because Claimant was not an employee.

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

- If Claimant testified that he worked on a given day, but Callahan disagreed, and Claimant or Callahan telephoned one another before 8:00 a.m., the forum has credited Claimant as working that day.<sup>xix</sup>
- If Callahan and Claimant agreed that Claimant worked on a given day after October 26, Claimant was either credited with five hours<sup>xx</sup> or Callahan's maximum estimate of hours worked, whichever is greater, unless Callahan's testimony contradicted Callahan's written statement, in which case the forum has credited Claimant's estimate of hours worked.
- If Claimant stated in his planner that he did not work on a given day but Respondent or Callahan testified that Claimant did work on that day, Claimant

was credited with five hours worked or Callahan's maximum estimate of hours worked, whichever is greater.

- If Claimant testified that he worked on a given day and Callahan disagreed, Claimant was not credited with any hours worked if there were no telephone calls between Callahan and Claimant that day.
- Based on McCall's testimony that it takes a day or more to clean up the *Intrepid* after a tuna fishing trip, the forum has subtracted 16 hours from Claimant's claim of hours worked because Claimant was paid for those hours from his tuna draws related to tuna fishing trips.
- On three dates – September 21, September 22, and September 23 -- when Callahan's testimony on direct and cross examination was contradictory regarding the number of hours that Claimant worked, the forum has credited Claimant's version of the number of hours he worked.
- The forum subtracted .5 hours for Claimant's lunch on October 19, 21 and 22.

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

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

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

The Agency established by a preponderance of the evidence that Claimant was an employee who was entitled to be paid Oregon's statutory minimum wage of \$8.40 per hour, that Respondent set Claimant's work hours and was aware of them, that Respondent fired Claimant and did not pay him for all hours worked, and that the Agency made a written demand for Claimant's unpaid wages and Respondent made no payment in response. It is an employer's duty to keep an accurate record of the hours worked by its employees. ORS 653.045; *In the Matter of Norma Amazola*, 18 BOLI

209, 218 (1999). The fact that Respondent kept no record of Claimant's hours worked does not allow him to evade his responsibility for penalty wages, nor does his failed defense that Claimant was an independent contractor.<sup>xxi</sup> There is no evidence that Respondent acted other than voluntarily and as a free agent in underpaying Claimant and the forum concludes that Respondent acted willfully in failing to pay Claimant his wages and is liable for penalty wages under ORS 652.150.

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

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

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

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

The Agency provided documentary and testimonial evidence that its investigative staff made the written demand contemplated by ORS 652.150(2) for Claimant's wages on December 30, 2009. The Agency's Order of Determination, issued on May 19, 2010, repeated this demand.<sup>xxii</sup> Respondent failed to pay the full amount of Claimant's unpaid wages within 12 days after receiving the written notices and has still not paid them. Consequently, the forum assesses penalty wages at the maximum rate set out in ORS 652.150(1) (hourly rate x eight hours per day x 30 days = penalty wages). Using this equation, penalty wages for Claimant equal \$2,016.00 (\$8.40 per hour x eight hours x 30 days).

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

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

## **RESPONDENT'S EXCEPTIONS**

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

1. Respondent gave Claimant \$235.00 in draws that were not credited to Respondent by the ALJ in the Proposed Order.
2. The ALJ credited Claimant with 28.5 hours work related to crab gear that were tuna-related.
3. The ALJ ordered Respondent to pay "26.555%" of the amount sought by the Agency in the Order of Determination and it is not right that Respondent should have to pay penalty wages and civil penalties when Claimant "falsely claimed all these hours against us and we were forced to defend ourselves."
4. It was unnecessary to have a police officer at the hearing. The only reason a police officer was requested was to damage Respondent's credibility.

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

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

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

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

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

## ORDER

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

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

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

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

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

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

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

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

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

<sup>vi</sup> See *In the Matter of Bubbajohn Howard Washington*, 21 BOLI 91, 100 (2000) (when there was no evidence presented that a co-respondent participated in the decision to hire claimant; that she directed claimant's work in any way; that she shared in any profits or liability from respondent's business; or that she controlled the operation of the business, other than taking money from customers, the forum concluded that the co-respondent was not a partner). Compare *In the Matter of Richard Ilg*, 11 BOLI 230, 233, 237, 239 (1993) (two respondents, a father and son, were partners when (1) they filed for an assumed business name together as parties in interest; (2) they operated as a partnership; (3) both had signatory authority on the business bank accounts; and (4) both assigned and supervised the work of the claimants); *In the Matter of Flavors Northwest*, 11 BOLI 215, 224, 228-29 (1993) (two respondents, a husband and wife, were partners when they were co-registrants of an assumed business name; the public viewed the wife as a co-owner; the claimants viewed her as a co-owner and operator of the business with her husband; and she had an active role in obtaining applications and other documents, keeping records, and preparing payrolls for the business).

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

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

<sup>ix</sup> See *In the Matter of Forestry Action Committee*, 30 BOLI 63, 76 (2008) (Impermanence of a particular job alone, when claimant's tenure with respondent was limited to six months by the terms of respondent's contract with a

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funding agency, did not create an independent contractor relationship); *In the Matter of Triple A Construction, LLC*, 23 BOLI 79, 93 (2002) (When claimants were laborers hired for a short term remodeling project to perform a variety of tasks that did not require them to possess a high degree of initiative, judgment, foresight, or any special skills, the forum held that the impermanence of a particular job alone does not create an independent contractor relationship). Compare *In the Matter of Laura M. Jaap*, 30 BOLI 110, 124-25 (2009), *appeal pending* (When claimants were hired to perform specific repair and remodeling work on respondent's daughter's house, with the option of performing limited repair work on respondent's house when the work on the daughter's house was complete; the work on the daughter's house was nearly completed in a few days less than one month; and the scope of work at respondent's house was even more limited, the forum concluded that the facts were indicative of an independent contractor relationship between respondent and claimants, even though there was no evidence that claimants worked for anyone else while they worked at respondent's daughter's house); *In the Matter of Gary Lee Lucas*, 26 BOLI 198, 212 (2005) (On a construction job, when claimants testified that respondent told them only that there might be other projects in the future, the forum concluded that was insufficient evidence from which to conclude that respondent hired them for an indefinite period of time).

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

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

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

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

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

<sup>xv</sup> See *In the Matter of TCS Global*, 24 BOLI 246, 258 (2003) (In the absence of evidence that claimant was entitled to the same pay rate - \$10.00 per hour - that respondent agreed to pay him for his flagging and pilot car work, the forum concluded that claimant was entitled to receive the applicable minimum wage rate for each hour he worked as a dispatcher). See also *In the Matter of Elisha, Inc.*, 25 BOLI 125, 150 (2004), *affirmed without opinion, Elisha, Inc. v. Bureau of Labor and Industries*, 198 Or App 285, 108 P3d 1219 (2005) (When the forum found there was no evidence showing that the wage claimants agreed to a "package deal" that included a 2.5 percent commission for all of the guests they checked in, plus free use of an apartment adjoining the motel office, paid utilities, including cable television and local telephone calls, and free use of respondent's laundry facilities, the forum concluded that the wages owed to the wage claimants should be computed at the minimum wage rate, including overtime).

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

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

<sup>xviii</sup> Compare *In the Matter of William Presley*, 25 BOLI 56, 69 (2004), *affirmed Presley v. Bureau of Labor and Industries*, 200 Or App 113, 112 P3d 485 (2005) (When respondent was aware of the work claimant performed and there was no evidence respondent ever told claimant to leave respondent's car lot or not

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to perform a particular job, the forum found that respondent “suffered or permitted” claimant to work and thereby “employed” claimant).

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

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

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

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