

In the Matter of

HARKCOM PACIFIC, INC. and Mike E. Harkcom,

Case No. 87-03

Final Order of Commissioner Dan Gardner

Issued November 22, 2005

SYNOPSIS

Respondent Harkcom Pacific, Inc. ("HPI") was the prime contractor on a public works project and employed workers for 21 weeks to perform manual labor. HPI violated ORS 279.350 by failing to pay the prevailing wage rate to seven workers. HPI violated ORS 279.354 by filing 20 inaccurate certified payroll reports containing a false certification that its workers had been paid all wages earned. HPI, through its corporate president Mike E. Harkcom, intentionally failed to pay the prevailing wage rate to its seven workers. Respondent Mike E. Harkcom was responsible for HPI's failure to pay the prevailing wage rate. The Commissioner assessed \$34,000 in civil penalties and placed Respondents on the list of contractors ineligible to receive any contract or subcontract for public works for three years. ORS 279.350, ORS 279.354, ORS 279.361; *former* OAR 839-016-0035, *former* OAR 839-050-0050, *former* OAR 839-050-0085, *former* OAR 839-050-0520, *former* OAR 839-050-0530, *former* OAR 839-050-0540.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 20, 2005, in the WW Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Patrick A. Plaza, an employee of the Agency. Mike E. Harkcom was present and represented himself and also acted as authorized representative for Respondent Harkcom Pacific, Inc. ("HPI").

The Agency called Tyrone Jones, former Wage & Hour Division compliance specialist, and Gayle Aheren, Respondent's former office manager, as witnesses. Respondents called Mike E. Harkcom as its only witness.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-17 (submitted or generated prior to hearing), and X-18 (created before hearing, but not included in the original hearings file);
- b) Agency exhibits A-1 through A-19 (submitted prior to hearing), and A-20 and A-21 (submitted at hearing);
- c) Respondent exhibit R-1 (submitted at hearing).

Having fully considered the entire record in this matter, I, Dan Gardner, 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 June 15, 2005, the Agency issued a Notice of Intent to Place on List of Ineligibles and to Assess Civil Penalties in the amount of \$21,000 in which it made the following charges against Respondents:

a) Respondent HPI acted as prime contractor on the Clatskanie High School, Phase 1 public works project ("Clatskanie Project"), a public works subject to regulation under Oregon's prevailing wage rate laws, between July 7 and December 10, 2001. HPI provided manual labor on the Clatskanie Project but intentionally failed to pay \$15,898 in prevailing wages to seven employees, in violation of ORS 279.350 and OAR 839-016-0035. The Agency sought a \$21,000 penalty for these seven alleged violations.

b) The Agency asked that Respondents, and any firm, corporation, partnership or association in which they had a financial interest be placed on the list of those ineligible to receive contracts or subcontracts for public works ("List of Ineligibles") for a period of three years.

The Agency alleged the following aggravating factors:

“Each violation set forth above is attended by one or more of the following aggravating circumstances, which have been considered pursuant to OAR 839-019-0520 in determining the amount of the penalty. Respondent knew, or should have known of the violations and avoiding the violations would not have been difficult. Respondent had the information necessary to pay the appropriate prevailing wages to its employees. * * * [BOLI] conducted an investigation into the underpayment of prevailing wages on the [Clatskanie Project] and informed Respondent in writing of the underpayment of wages. Respondent intentionally failed/refused to pay the appropriate prevailing wage to seven employees after BOLI advised it of the underpayment. Ultimately, Respondents’ surety paid the wages found to be owed. Respondent also failed to pay six of its employees for all overtime hours worked in excess of 8 per day and for any hours worked on Saturdays and Sundays. These are violations of ORS 279.334 and 839-016-0050(2). Based on the facts [alleged elsewhere in the Notice of Intent], it is clear that Respondent knew or should have known of the requirement that it pay the prevailing rate of wage to its employees and consciously and intentionally chose not to pay it. These violations were serious and easily preventable, resulting in a substantial underpayment of prevailing wages and overtime wages to a number of employees on a Public Works. OAR 839-016-0520.”

2) The Notice of Intent instructed Respondents that they were required to make a written request for a contested case hearing within 20 days of the date on which it received the Notice, if Respondents wished to exercise their rights to a hearing.

3) The Agency served the Notice of Intent on Respondents, together with a document providing information on how to respond to a Notice of Intent.

4) Respondents, through Mike E. Harkcom, filed an answer and request for hearing on April 19, 2005, and on April 27, 2005, Respondent HPI filed a letter authorizing Mike E. Harkcom to act as its authorized representative.

5) The Agency filed a request for hearing with the Hearings Unit on June 10, 2005.

6) On June 10, 2005, the Agency filed a motion to amend its Notice of Intent as follows:

a) Naming each of the seven employees whom the Agency alleged were underpaid in the Notice of Intent and stating the specific amount of wages each was underpaid.

b) Alleging that HPI filed 21 “inaccurate and/or incorrect Certified Payrolls” and to assess a \$1,000.00 civil penalty for each of those violations, for a total of \$21,000 in civil penalties. Specifically, the Agency alleged that HPI’s reports “inaccurately certified that employees had been paid all wages earned for the periods listed when in fact they had not been paid all wages earned for the periods listed.” The Agency listed the individual weeks in which the alleged violations occurred in its motion.

7) On June 15, 2005, the Hearings Unit served Respondents with: a) a Notice of Hearing that set the hearing for September 20, 2005; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent.

8) On July 6, 2005, the ALJ ordered the participants to file case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts, a brief statement of the elements of the claim and any civil penalty calculations (for the Agency only). The ALJ ordered the participants to submit their case summaries by July 6, 2005, and notified them of the possible sanctions for failure to comply with the case summary order. The ALJ also sent a form to Respondents that was designed to assist respondents who are not represented by attorneys in filing a case summary.

9) On July 6, 2005, the ALJ issued an interim order that granted the Agency’s motion to amend with respect to adding the names of the seven employees alleged to be underpaid and denied the rest of the motion on the basis that the Agency had not demonstrated that “justice required” granting the motion. The ALJ required Respondents to file an amended answer to the amended Notice of Intent by July 15, 2005, stating that the amended allegations regarding the seven employees would be

deemed admitted if Respondents did not file a timely amended answer. Respondent did not file an amended answer.

10) On July 14, 2005, the Agency filed a request for reconsideration of the ALJ's Interim Order. In support of its request for reconsideration, the Agency stated that the allegations in the original Notice of Intent (failure to pay the prevailing wage rate) were directly related to and based on the Wage and Hour Division's review of 21 certified payrolls submitted by Respondent on the Clatskanie Project and that these were the same 21 certified payrolls referred to in the Agency's original Motion to Amend.

11) Respondents did not object to the Agency's motion for reconsideration. On July 22, 2005, the ALJ granted the Agency's motion, finding that "justice requires granting of the Agency's original motion." The ALJ required Respondents to file an amended answer to the Agency's amended certified payroll allegations, stating that the amended allegations would be deemed admitted if Respondents did not file a timely amended answer.

12) On August 10, 2005, Respondents filed an amended answer in which they denied the Agency's certified payroll allegations.

13) On August 9, 2005, the Agency filed a motion for partial summary judgment on two issues. First, that HPI had not paid the prevailing wage rate to the seven employees named in the Agency's amended Notice of Intent, violating *former* ORS 279.350. Second, that HPI had committed 21 violations of *former* ORS 279.354(1) through Mike Harkcom's certification on HPI's certified payroll records that each employee listed had been paid the prevailing wage rate, when in fact those employees had not been paid any fringe benefits. Respondents did not respond to the Agency's motion.

14) On August 26, 2005, the ALJ issued an interim order that granted the agency's motion for partial summary judgment in part and denied it in part. The order stated:

“Introduction

“On August 9, 2005, the forum received the Agency's motion for summary judgment, pursuant to OAR 839-050-0150. The Agency asked for summary judgment in its favor on two legal issues raised in the pleadings: (1) that Respondent failed to pay the prevailing rate of wage to seven workers as alleged the Agency's Notice of Intent; and (2) that Respondent filed 21 inaccurate and incorrect certified payrolls in violation of ORS 279.354. Respondent did not file a response to the Agency's motion.

“Summary Judgment Standard

“A motion for summary judgment may be granted where no genuine issue as to any material fact exists and a participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings. OAR 839-050-0150(4)(B). The standard for determining if a genuine issue of material fact exists is the following:

“ * * * No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at [hearing].” *In the Matter of Larsen Golf Construction, Inc.*, 25 BOLI 206, 208 (2004).

“Failure To Pay the Prevailing Rate Of Wage In Violation Of ORS 279.350

“In its Notice of Intent, the Agency alleged that Respondent Harkcom Pacific, Inc. provided manual labor on the Clatskanie School District Public Works project (“Project”), a project not regulated under the federal Davis-Bacon Act that cost in excess of \$25,000 and was subject to Oregon's prevailing wage rate laws, and that Respondent failed to pay \$15,898 in prevailing wages. In a subsequent amendment, the Agency named the seven employees – Leonard Ballew, Jeremy Cartrette, Dusty Gallinger, Josh Hegnes, Dale Lafever, Danny Lafever, and Glen Wade -- and specified the amount each was underpaid. The Agency alleged that Respondent's failure to pay the prevailing rate of wage on the Project violated ORS 279.350 and OAR 839-016-0035.

“In support of its motion, the Agency provided a copy of a letter from Respondent to BOLI dated April 24, 2002, in which Respondent

admitted that the seven employees named in the amended Notice of Intent were not paid fringe benefits for the work they performed on the Project as painters, carpenters, or laborers. In addition, Respondent did not file a required amended answer to the Agency's amended Notice of Intent. In my ruling granting the Agency's proposed amendment naming the seven employees on the Project and the specific amounts they were owed, I stated that Respondent would be deemed to have admitted the amended allegations if Respondent did not file an amended answer.

"Based on the admission contained in Respondent's April 24, 2002, letter and Respondent's failure to deny the Agency's amended allegations naming the seven employees and the specific amounts they were owed, the forum concludes that there is no genuine issue of fact as to whether Respondent failed to pay the prevailing rate of wage on the Project to those seven employees.

"The forum concludes, as a matter of law, that the Agency is entitled to summary judgment on its allegation that Respondent Harkcom Pacific, Inc. failed to pay the prevailing rate of wage to seven employees named by the Agency on the Project.

"Filing Inaccurate Or Incorrect Certified Payroll Records In Violation Of ORS 279.354.

"In its amended Notice of Intent, the Agency alleged that Respondent committed 21 violations of *former* ORS 279.354, and copies of 21 certified payroll records filed by Harkcom Pacific, Inc. covering pay periods beginning July 8 and ending the week beginning December 16, 2001. The Agency characterized the manner of violation in the following words: "[t]hese reports inaccurately certified that employees had been paid all wages earned for the periods listed when in fact they had not been paid all wages earned for the periods listed."

"Respondent timely filed an amended answer in which Respondents denied committing any certified payroll violations.

"In support of its motion, the Agency attached 21 certified payroll reports filed by Respondents on the Project. Respondents used BOLI's Form WH-38 to file their reports. Respondents did not indicate that fringe benefits had been paid to its seven employees on the Project on any of the reports. On each report, Mike Harkcom signed BOLI's "Certified Statement" in which he certified that "all persons employed on said project have been paid the full weekly wages earned."

"BOLI's argument can be summarized in a few words. Respondents did not pay fringe benefits on the Project, but Mike Harkcom certified they had been paid, and this false certification constitutes a violation of *former* ORS 279.354.

"ORS 279.354 requires a contractor or subcontractor to "file certified statements * * * certifying the hourly rate of wage paid each

worker whom the contractor or the subcontractor has employed upon such public work, and further certifying that no worker employed upon such public work has been paid less than the prevailing rate of wage * * * which certificate and statement shall be verified by the oath of the contractor * * * or subcontractor.”

“So far as I can determine, this is the first time the Agency has charged a contractor or subcontractor with violating *former* ORS 279.354 in this manner. The facts are undisputed. However, as I read the statute, it is not clear that Respondent has violated *former* ORS 279.354. The statute requires contractors and subcontractors to certify certain facts in certified payroll reports under oath using language that BOLI has prescribed by rule in *former* OAR 839-016-0010. Respondents made the required certification in the prescribed format and the forum is not prepared to state, at this time, that Respondent’s certification to an untrue fact, i.e., that workers were paid “the full weekly wages earned,” constitutes a violation of the statute.

“The Agency’s motion for summary judgment on the issue of Respondents’ alleged 21 certified payroll violations is **DENIED**.

“The Agency is ordered to submit, prior to or at the time of hearing, a statement of Agency policy or a legal brief from legal counsel explaining how Respondents’ certification of an untrue fact as alleged constitutes a violation of *former* ORS 279.354.

“**Conclusion**

“The Agency is **GRANTED** summary judgment with regard to its allegations that Respondents failed to pay the prevailing rate of wage to seven workers on the Project. The Agency is **DENIED** summary judgment with regard to its certified payroll violations. The remaining issues to be heard and decided at hearing are:

“(1) The appropriate amount of civil penalties for Harkcom Pacific’s failure to pay the prevailing rate of wage on the Project;

“(2) Whether Harkcom Pacific’s alleged certified payroll violations were violations of *former* ORS 279.354;

“(3) If Harkcom Pacific’s alleged certified payroll violation was a violation of *former* ORS 279.354, the appropriate amount of civil penalties;

“(4) Whether Harkcom Pacific, Inc. intentionally failed/refused to pay the prevailing rate of wage to its seven workers on the Project and, if so, if Mike Harkcom was a corporate officer or corporate agent responsible for that failure and refusal.

“(5) If Harkcom Pacific, Inc. intentionally failed/refused to pay the prevailing rate of wage to its seven workers on the Project and Mike Harkcom was a corporate officer or corporate agent responsible for that failure and refusal, the length of time they should be placed on the

commissioner's list of those ineligible to receive contracts or subcontracts for public works.

"IT IS SO ORDERED"

15) On September 2, 2005, the Agency filed a statement of Agency policy explaining how Respondents' certification of an untrue fact as alleged constitutes a violation of *former* ORS 279.354.

15) The Agency filed its case summary on September 9, 2005. (Exhibit X-15)

16) At the outset of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Mike E. Harkcom of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

17) During the hearing, the Agency moved to amend its Notice of Intent to allege that Dale Lafever was underpaid \$571.60, instead of \$7,306.81, and Glen Wade was underpaid \$238.52, instead of \$239.94. The ALJ granted the motion.

18) The ALJ issued a proposed order on October 25, 2005, that notified the participants that they were entitled to file exceptions to the proposed order within 10 days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent HPI was a foreign corporation and contractor based in Kelso, Washington, and Respondent Mike Harkcom was HPI's corporate president.

2) HPI has been in business since 1993, and HPI and Mike E. Harkcom performed prevailing wage rate jobs in Oregon before 2001.

3) On May 21, 2001, the Clatskanie School District published its first advertisement for a public works project entitled Clatskanie High School, Phase I ("Clatskanie Project") in Columbia County, Oregon. The Clatskanie Project was not regulated under the Davis-Bacon Act. The contract was awarded to HPI on June 25, 2001, for amount of \$148,000.

4) HPI performed work on the Clatskanie Project between July 8 and December 22, 2001, employing at least seven workers – Leonard Ballew, Jeremy Cartrette, Dusty Gallinger, Josh Hegnes, Dale Lafever, Danny Lafever, and Glen Wade -- who performed work in the classifications of laborer, carpenter, or painter. Mike Harkcom supervised HPI's work on the Clatskanie Project.

5) The Commissioner of the Bureau of Labor and Industries publishes a prevailing wage rate booklet in January and July each year that sets out the applicable prevailing wage rate for the different construction occupations in the state of Oregon. For each occupation, the prevailing wage rate includes a base hourly wage rate and an hourly fringe benefit.

6) The applicable prevailing wage rates for the Clatskanie Project were published in the Commissioner's January 1, 2001, prevailing wage rate booklet. The applicable base wage rates were \$24.78 per hour for carpenters, \$17.97 per hour for laborers, and \$16.40 per hour for painters. The applicable fringe benefits on the Clatskanie Project were \$3.13 per hour for painters, \$5.80 per hour for laborers, and \$8.74 per hour for carpenters. Mike E. Harkcom knew that these wages were posted in the Commissioner's booklet and gave a copy of that booklet to Gayle Aheren, his office manager, and instructed her to pay the applicable wages listed in the booklet.

7) HPI did not pay fringe benefits to Ballew, Cartrette, Gallinger, Hegnes, Dan or Dale Lafever, or Wade for any of the work they performed for HPI on the Clatskanie Project.

8) Cartrette, Hegnes, Dan and Dale Lafever, Gallinger, and Ballew all worked overtimeⁱ on the Clatskanie Project but did not receive time and a half pay for any of their overtime work.

9) HPI completed and submitted 21 weekly certified payroll reports to the Clatskanie School District 6J during the performance of its contract on the Clatskanie Project. Gayle Aheren, HPI's office manager, filled out the certified payroll reports, and Mike Harkcom signed them. The certified payroll reports covered the period starting July 8, 2001, and ending December 16, 2001. Each payroll except one listed hours worked by at least one employee. The exception, a certified payroll report for the week of July 29 to August 4, 2001, lists Cartrette and Dan Lafever as employees, but states that they worked "0" hours.

10) Each of the certified payroll reports contains a column entitled "Hourly Fringe Benefit Amount Paid As Wages To Employee," with a space for the person completing the form to write the amount paid to each employee listed in the certified payroll report. In all 20 certified payroll reports that list hours worked by employees, there are no entries in the "Fringe Benefit" column.

11) Aheren was not aware that HPI was required to pay its workers fringe benefit on the Clatskanie Project.

12) Mike Harkcom instructed Aheren to fill out HPI's certified payroll reports on the Clatskanie Project, telling her to "never show overtime." Aheren attempted to comply with Harkcom's instructions by: (a) accurately entering the total number of hours worked per week by each employee, but altering the number of hours worked per day or the day on which those hours were worked; and (b) entering all straight time and overtime hours worked into the "ST" hours worked boxes on the certified payroll reports, with three exceptions.ⁱⁱ HPI's employees complained to Aheren about not being paid overtime and Aheren quit in December 2001 because of her concern about HPI's practice of not paying overtime wages.

13) The back of each certified payroll report contains a “certified statement” in which Mike E. Harkcom certified, among other things:

“I pay or supervise the payment of the persons employed by: Harkcom Pacific Inc on the Clatskanie HS * * * All persons employed on said project have been paid the full weekly wages earned * * * I have read this certified statement, know the contents thereof and it is true to my knowledge.”

Although Harkcom did not read this language each time he signed a certified payroll reports, he is familiar with the language and knows it “by heart.”

14) Each of HPI’s employees filled out a weekly time card while working on the Clatskanie Project. On the time cards, they noted the job number, date and day of the week, and hours worked on each day.

15) HPI’s weekly time cardsⁱⁱⁱ for Cartrette, Hegne, Dale and Dan Lafever, and Dusty Gallinger show that those employees performed work on the following Saturdays and Sundays on the Clatskanie Project:

Leonard Ballew:	8/25 (9 hrs.); 9/1 (5 hrs.); 11/10 (4 hrs.); 11/11 (4 hrs.)
Jeremy Cartrette:	9/2 (8 hrs.); 9/9 (12 hrs.); 9/9 (4½ hrs.); 9/15 (8 hrs.); 9/16 (9 hrs.); 9/22 (9 hrs.); 11/17 (3 ½ hrs.); 12/22 (3 hrs.)
Dusty Gallinger:	9/8 (9 hrs.)
Josh Hegne:	9/9 (12 hrs.)
Dan Lafever:	9/2 (8 hrs.); 9/9 (6½ hrs.); 9/15 (8 hrs.); 9/16 (9 hrs.); 9/22 (9 hrs.); 9/23 (8 hrs); 9/29 (5½ hrs.)
Dale Lafever:	9/1 (2 hrs.)

16) HPI’s certified payroll reports reflect work on the following Saturdays and Sundays on the Clatskanie Project as follows:

Leonard Ballew:	8/25 (9 hrs.); 9/1 (5 hrs.); 11/10 (4 hrs.); 11/11 (4 hrs.)
Jeremy Cartrette:	11/17 (3½ hrs.); 12/22 (3 hrs.)
Dusty Gallinger:	9/9 (5 hrs.)
Josh Hegne:	9/9 (6 hrs.); 10/6 (6 hrs.)

Dan Lafever: 9/9 (3 hrs.)

16) HPI's original time cards also show that Glen Allen Wade worked 5 hours on the Clatskanie Project on 9/4/01 and that he was paid \$17.97 per hour for that work. Wade's name does not appear on HPI's certified payroll report that covers the pay period 9/2-8/01.

17) At all times material herein, Harkcom was aware that HPI was required to pay an hourly base wage rate and separate hourly fringe benefit for all manual labor performed by HPI's workers on the Clatskanie Project. Aheren was not aware of the requirement to pay a separate hourly fringe benefit.

18) On January 8, 2002, John Rowand of the Fair Contracting Foundation filed a written complaint with the Prevailing Wage Rate Unit of BOLI, in which he complained about HPI's labor practices on the Clatskanie Project. He made several allegations, including that HPI's workers had not been paid fringe benefits or overtime and that carpenters had been misclassified as laborers. He enclosed a letter that described his limited investigation and the conclusions he had drawn. He also enclosed a handwritten, unsigned and undated statement by Danny Lafever.

19) Tyrone Jones, a compliance specialist employed by the Wage and Hour Division, was assigned to investigate Rowand's complaint. During his investigation, Jones obtained original time records from HPI, copies of HPI's 21 Clatskanie Project certified payroll records, and two completed questionnaires from Danny and Dale Lafever. Neither questionnaire was completed in affidavit form.

20) On January 17, 2002, Jones sent a letter to HPI, "Attn: Michael E. Harkcom," in which he stated, among other things:

"The Bureau has received a complaint that your company has failed to pay the minimum prevailing rate of wage, failed to pay overtime for hours worked over eight (8) in a day, on holidays and Saturday and misclassified workers for work performed on the [Clatskanie Project]."

Jones followed this paragraph by asking HPI to provide him with information and documentation relevant to the complaint.

21) On January 22, 2002, HPI's current office manager, Robin Holmes, responded to Jones's letter. Holmes provided the last known addresses and phone numbers of employees who worked on the Clatskanie Project and stated she would provide the remainder of the requested documentation and information by February 10, 2002.

22) On March 19, 2002, Jones sent a Notice of Claim for labor to HPI and Clatskanie School District 6J. The letter notified the recipients that BOLI "has a claim for labor * * *. This claim is based on [a] prima facie determination that the prevailing wage as required by ORS 279.350 in the amount of \$15,896.48 has not been paid, plus \$15,896.48 as liquidated damages * * *." Jones attached a summary of the wages due to Ballew, Cartrette, Gallinger, Hegnes, Dale and Danny Lafever, and Wade.

23) On April 24, 2002, Respondent's current office manager, Kim Pacsuta, sent a letter to Jones acknowledging that on the Clatskanie Project, "[t]he fringe benefits that were to be added to the wages. Where [sic] accidentally left off. We know that the employees are intitled [sic] to the missing wage amount." Pacsuta listed the specific amounts owed to Ballew, Cartrette, Gallinger, Hegnes, the Lafever, and Wade. Those amounts totaled \$8,835.17. Pacsuta concluded the letter by stating "[w]e hope that this will resolve matters and that this will be satisfactory to your request."

24) On May 2, 2002, Jones sent a letter to HPI in which he stated that BOLI's calculation differed significantly from Pacsuta's calculation. Jones concluded by stating "the wage settlement we are looking for would be those wages as determined by BOLI and provided in the 'Notice of Claim' dated March 19, 2002." (Testimony of Jones; Exhibit A-16)

25) On November 5, 2002, HPI's surety, Travelers Casualty & Surety Co. of America, issued a check in the amount of \$15,898 to BOLI in payment of the claim made by Jones on May 19, 2002. BOLI then issued checks in the amounts listed below to the following seven employees:

Leonard Ballew:	\$ 578.35
Jeremy Cartrette	3,231.37
Dusty Gallinger	3,623.04
Josh Hegnes	346.89
Dale Lafever	571.60
Dan Lafever	7,306.81
Glen Wade	239.94

26) Jones was a credible witness. He presented a serious, professional demeanor and testified in a direct, straightforward manner, readily acknowledging when he did not recall the answer to questions asked of him. The forum has credited his testimony over Harkcom's testimony whenever their testimony conflicted.

27) Aheren, Respondent's office manager during the Clatskanie Project, quit HPI's employment in December 2001. She testified that Harkcom told her not to pay overtime on the Clatskanie Project and that she manipulated HPI's certified payroll reports in response to Harkcom's direction to avoid paying overtime. She also credibly testified that she was unaware that HPI was supposed to pay a separate hourly fringe benefit. Aheren had nothing to gain from altering the certified payroll reports except Harkcom's approval. The only impeachment or rebuttal evidence presented by Respondent was Harkcom's testimony that Aheren was not telling the truth. However, for reasons stated in Finding of Fact 28 – The Merits, the forum has concluded that Harkcom was not a credible witness. Accordingly, the forum has credited Aheren's testimony in its entirety.

28) Mike Harkcom was not a credible witness. He denied any contemporaneous knowledge of HPI's failure to pay overtime or fringe benefits on the Clatskanie Project and tried to put all the blame on Aheren, claiming he was not responsible because he signed the certified payroll reports but wasn't aware of their contents, as he didn't look at them before signing. He claimed to have no knowledge of the specific hours HPI's employees worked on the Clatskanie Project or that they worked overtime on the Clatskanie Project, including weekends. He claimed he had no knowledge of HPI's overtime violations, stating he would have made a settlement offer including those wages in Pacsuta's April 24, 2002, letter, had he known the Agency was alleging unpaid overtime. This denial contrasts sharply with two undisputed facts -- that Jones sent a letter to HPI that was addressed to Harkcom on January 17, 2002, that alleged overtime violations, and that HPI's office manager responded to that letter on January 22, 2002. Given his position as HPI's corporate president and the person who supervised all the work performed by HPI's workers, the forum regards these claims as specious. Even if Aheren's testimony that Harkcom told her to not pay overtime was not believable, the forum would find this "ostrich defense" to be disingenuous and unbelievable. The forum has discredited all of Harkcom's testimony except where it was corroborated by other credible evidence and has believed Jones and Aheren whenever their testimony conflicted with Harkcom's testimony.

ULTIMATE FINDINGS OF FACT

- 1) At all times material herein, HPI was a foreign corporation and contractor based in Kelso, Washington, and Mike Harkcom was HPI's corporate president.
- 2) On June 25, 2001, HPI entered into a public works contract with the Clatskanie School District for amount of \$148,000. The Clatskanie Project was located in Oregon and was not regulated under the Davis-Bacon Act.

3) HPI performed work on the Clatskanie Project between July 8 and December 22, 2001, employing at least seven workers on the Clatskanie Project.

4) HPI did not pay a fringe benefit to any of its workers for manual labor that they performed for HPI on the Clatskanie Project.

5) Six of HPI's workers worked overtime on the Clatskanie Project but were not paid overtime wages.

6) HPI completed and submitted 20 weekly certified payroll reports to the Clatskanie School District 6J during the performance of its contract on the Clatskanie Project that reflected manual labor performed by its employees. Mike E. Harkcom signed a certification on each report in which he certified, among other things:

"I pay or supervise the payment of the persons employed by: Harkcom Pacific Inc on the Clatskanie HS * * * All persons employed on said project have been paid the full weekly wages earned * * * I have read this certified statement, know the contents thereof and it is true to my knowledge."

7) At all times material herein, Harkcom was aware that HPI was required to pay an hourly base wage rate and separate hourly fringe benefit for all manual labor performed by HPI's workers on the Clatskanie Project.

8) Harkcom was responsible for HPI's failure to pay the prevailing wage rate to its workers on the Clatskanie Project.

CONCLUSIONS OF LAW

1) Respondent HPI failed to pay the prevailing wage rate to seven workers who performed manual labor on the Clatskanie Project, committing seven violations of ORS 279.350(1) and *former* OAR 839-016-0035(1).

2) HPI submitted 20 certified payroll reports in which Respondent Mike E. Harkcom falsely certified that all persons employed by HPI on the Clatskanie Project had been paid the full weekly wages earned, constituting 20 violations of ORS 279.354 by HPI.

3) The Commissioner has the authority to assess civil penalties for violations of ORS 279.350 and ORS 279.354 and imposition of \$34,000 in civil penalties for HPI's violations of ORS 279.350 and ORS 279.354 are an appropriate exercise of his authority. ORS 279.370, *former* OAR 839-016-0520, *former* OAR 839-016-0530(3)(a), *former* OAR 839-016-0540(1).

4) Respondent HPI intentionally failed to pay the prevailing wage rate to seven workers who performed manual labor on the Clatskanie Project and Respondent Mike E. Harkcom was responsible for that failure. As a result, the Commissioner must place Respondents on the List of Ineligibles for a period not to exceed three years. ORS 279.361. The Commissioner's decision to place both Respondents on that List for three years is an appropriate exercise of his authority.

OPINION

RESPONDENT HPI FAILED TO PAY THE PREVAILING RATE OF WAGE ON A PUBLIC WORKS PROJECT

The Agency alleged that HPI employed workers to perform manual labor on the Clatskanie Project, a project not regulated under the federal Davis-Bacon Act that cost in excess of \$25,000 and was subject to Oregon's prevailing wage rate laws, and that HPI failed to pay \$15,898 in prevailing wages to seven workers. HPI admitted that the seven workers were not paid fringe benefits for the work they performed on the Clatskanie Project as painters, carpenters, or laborers. Based on this admission and HPI's failure to deny the Agency's allegations as to the identity of the seven workers and the specific amounts they were underpaid, the forum granted summary judgment to the Agency as to the allegation that HPI did not pay the prevailing rate of wage to seven workers on the Clatskanie Project. That ruling is SUSTAINED. Fringe benefits are part of the prevailing rate of wage and HPI's failure to pay those benefits to seven workers constitutes seven separate violations of ORS 279.350(1). ORS 279.348.

A. Aggravating circumstances.

HPI, through its president Mike E. Harkcom, knew that fringe benefits were part of the prevailing rate of wage in Oregon and entered into a contract with Clatskanie School District that contained a statement of the applicable prevailing wage rates for the Clatskanie Project. HPI, through its president Mike E. Harkcom, who signed the certified payroll reports, knew that fringe benefits and overtime were not paid to its workers on the Clatskanie Project. Based on Aheren's credible testimony, the forum has concluded that HPI did not pay overtime because Harkcom directed Aheren not to pay overtime on the Clatskanie Project. Had HPI wanted to pay the prevailing wage rate, it could have easily done so simply by ascertaining the applicable rates in BOLI's prevailing wage rate booklet and paying those amounts and by paying its workers for the actual dates and hours that they worked. HPI's failure to pay the prevailing wage rate resulted was serious, in that it resulted in an underpayment of wages amounting to \$15,898. Finally, when the Agency brought the unpaid wages to HPI's attention, HPI did nothing to remedy the problem and the Agency had to collect the unpaid wages from HPI's surety.

B. Mitigating circumstances.

There are no mitigating circumstances.

C. Amount of civil penalty.

In its Notice of Intent, the Agency proposed to assess civil penalties of \$21,000 for HPI's seven violations, calculated at \$3,000 a violation. In determining an appropriate penalty, the forum considers any aggravating circumstances alleged and proved by the Agency, any mitigating circumstances, and prior final orders. *Former* OAR 839-016-0520. The minimum civil penalty is "[a]n equal amount of the unpaid wages or \$1,000, whichever is less[.]" *Former* OAR 839-016-0540(3)(a). This case is

factually similar to *In the Matter of Johnson Builders, Inc.*, 21 BOLI 103, 124 (2000), in which the commissioner assessed \$2,000 in civil penalties for three “first” violations of ORS 279.350(1). This is also HPI’s “first” violation, and the forum concludes that \$2,000 per violation, for a total of \$14,000, is an appropriate assessment of civil penalties.

RESPONDENT HPI FILED 20 INACCURATE CERTIFIED PAYROLL REPORTS ON A PUBLIC WORKS PROJECT

ORS 279.354(1) requires that contractors file certified statements:

“in a form prescribed by the Commissioner of the Bureau of Labor and Industries certifying the hourly rate of wage paid each worker whom the contractor * * * has employed upon [a] public work, and further certifying that that no worker employed upon such public work has been paid less than the prevailing rate of wage * * * which certificate and statement shall be verified by the oath of the contractor * * * that the contractor has read such statement and certificate and knows the contents thereof and that the same is true to the contractor[’s] * * * knowledge. The certified statements shall set out accurately and completely the payroll records for the prior week including the name and address of each worker, the worker’s correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid.”

This unambiguous statutory language requires that a contractor’s certified payroll reports must include the following information and statements to comply with ORS 279.354(1):

- 1) Accurate complete payroll records for the prior week for each worker containing the information prescribed by statute;
- 2) The hourly rate paid to each worker;
- 3) A certification that no worker was paid less than the prevailing rate of wage;
- 4) A certification that the contractor has read the statement and certificate, knows the contents, and that the certification and payroll records are true.

In summary, ORS 279.354(1) requires a contractor to provide (a) truthful payroll information, and (b) a truthful certification that the payroll information is true and that no worker was paid less than the prevailing rate of wage. Truth is the key element.

The Agency alleged that HPI violated ORS 279.354 by filing 20 certified payroll reports that “inaccurately certified that employees had been paid all wages earned for the periods listed when in fact they had not been paid all wages earned for the periods listed.” It is undisputed that HPI submitted 20 certified payroll reports during the performance of the Clatskanie Project showing manual labor performed on the Clatskanie Project by its employees, and that Mike E. Harkcom, as HPI’s agent, signed a certified statement on each in which he certified that “[a]ll persons employed on the [Clatskanie Project] project have been paid the full weekly wages earned.” If Harkcom’s statement is true, then no violation occurred. If it is false, then the forum must find 20 violations.

The “full weekly wages earned” by HPI’s employees on the Clatskanie Project include the hourly base wage rate and the hourly fringe benefit published in the commissioner’s prevailing wage rate booklet. The forum has already concluded that HPI did not pay fringe benefits to any of its workers who worked on the Clatskanie Project and appear on HPI’s 20 certified payroll reports. By not paying fringe benefits, HPI did not pay its workers the full weekly wages they earned and the forum must conclude that Harkcom’s certification on each of the 20 certified payroll reports that no worker was paid less than the prevailing rate of wage constitutes an untruthful certification. Harkcom’s 20 untruthful certifications, as HPI’s agent, constitute 20 violations by HPI of ORS 279.354(1).

A. Aggravating circumstances.

HPI, through its president Mike E. Harkcom, knowingly signed a false certification on all 20 certified payroll reports certifying that HPI’s employees had been paid their full weekly wages. HPI could have easily avoided this problem simply by ascertaining the applicable rates in BOLI’s prevailing wage rate booklet and paying those amounts and

by paying its workers for the actual dates and hours worked. Had HPI done so, Harkcom's certification would have been truthful. HPI's untruthful certification was serious, in that it disguised HPI's failure to pay its workers \$15,898 in earned wages.

B. Mitigating circumstances.

There are no mitigating circumstances.

C. Amount of civil penalty.

In its amended Notice of Intent, the Agency proposed to assess civil penalties of \$21,000 for HPI's 21 violations,^{iv} calculated at \$1,000 per violation. Again, in determining an appropriate penalty, the forum considers any aggravating circumstances alleged and proved by the Agency, any mitigating circumstances, and prior final orders. The commissioner considers inaccurate or falsified certified payroll reports to be a serious matter, as shown by the fact that the commissioner has assessed a minimum of \$1,000 and a maximum of \$4,000 for violations of ORS 279.354 involving individual inaccurate or falsified certified payroll reports over the past five years.^v Based on these precedents and the aggravating factors present in this case, \$1,000 per violation is an appropriate assessment of civil penalties for HPI's 20 violations of ORS 279.354.

RESPONDENT MIKE E. HARKCOM WAS RESPONSIBLE FOR HPI'S FAILURE TO PAY THE PREVAILING RATE OF WAGE ON A PUBLIC WORKS PROJECT

Respondent Mike E. Harkcom, HPI's president, attempted to shift all the responsibility for HPI's failure to pay the prevailing rate of wage on the Clatskanie Project to Gayle Aheren, HPI's office manager. Harkcom claimed that he was completely ignorant of the fact that HPI's workers were not paid fringe benefits or overtime during the life of the Clatskanie Project. Despite acknowledging that he supervised HPI's work on the Clatskanie Project, he even claimed ignorance of the fact that HPI's employees worked some Saturdays and Sundays. For reasons stated in Finding of Fact 28 – The Merits, the forum did not believe Harkcom's claims.

There are several key facts that show that Harkcom was integrally involved in HPI's failure to pay the prevailing rate of wage on the Clatskanie Project. First, as corporate president of HPI and supervisor on HPI's projects, the forum infers that he was aware of the extent of the work being performed by HPI's employees on the Clatskanie Project. Second, he was an experienced Oregon and Washington contractor on prevailing wage rate projects and is presumed to know the law, including the requirements of paying fringe benefits and overtime. Third, he knew that HPI was required to pay fringe benefits on the Clatskanie Project. Fourth, the forum disbelieves his testimony that he did not know that HPI's employees worked overtime, including Saturdays and Sundays, on the Clatskanie Project due to the fact that he supervised the project. Instead, the forum believes Aheren's testimony that Harkcom instructed her not to pay overtime on the Clatskanie Project. Fifth, he signed all of HPI's certified payroll reports, none of which reflected any payment for fringe benefits to any of HPI's employees. The forum regards Harkcom's claim that he never looked at any of the payroll information that Aheren wrote on the certified payroll reports as disingenuous. Finally, the forum regarded his lack of credibility under oath at the hearing as a further indication of his capacity to knowingly make a false certification. In conclusion, the overwhelming weight of credible evidence presented at hearing established that Respondent Mike E. Harkcom was responsible for HPI's failure to pay fringe benefits and overtime to its workers on the Clatskanie Project.

PLACEMENT ON THE LIST OF INELIGIBLES

The Agency seeks to debar^{vi} Respondents for three years based on HPI's intentional failure to pay the prevailing rate of wage on the Clatskanie Project and Mike E. Harkcom's responsibility for that failure.

A. Liability of Respondents.

ORS 279.361 provides that when a contractor intentionally fails or refuses to pay the prevailing wage rate to workers employed upon public works, the contractor and any firm in which the subcontractor has a financial interest shall be placed on the list of persons ineligible to receive contracts or subcontracts for public works for a period not to exceed three years. The forum has already concluded that HPI failed to pay applicable prevailing wage rates on the Clatskanie Project and that Mike E. Harkcom was responsible for that failure. The only question is whether that failure was “intentional.” If so, the Commissioner is required to place Respondents on the List of Ineligibles.

B. Intentional Failure to Pay.

To “intentionally” fail to pay the prevailing rate of wage, “the employer must either consciously choose not to determine the prevailing wage or know the prevailing wage but consciously choose not to pay it.” *In the Matter of Labor Ready Northwest, Inc.*, 22 BOLI 245, 287 (2001), *rev’d in part, Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 364, 71 P3d 559 (2003), *rev den* 336 Or 534, 88 P3d 280 (2004). The inclusion of the word “intentionally” in ORS 279.361(1) implies a “culpable mental state,” indicating that debarment should not be “triggered by merely innocent, or even negligent, failure to pay.” *Id.* at 360. Under this standard, the forum must assess Mike E. Harkcom’s state of mind at the time that HPI’s employees were not paid the prevailing wage in order to determine whether HPI “intentionally” failed or refused to pay the prevailing wage.

In this case, Harkcom knew the Clatskanie Project was a prevailing wage rate job and that the applicable prevailing wage rates were posted in the Commissioner’s

prevailing wage rate booklet. Harkcom knew that HPI's workers were entitled to fringe benefits, in addition to an hourly wage, on the Clatskanie Project. Despite this knowledge and the fact that none of HPI's certified payroll reports showed that fringe benefits had been paid, he certified that HPI's workers had been paid all wages earned. Although he knew that HPI's employees worked overtime^{vii} on the Clatskanie Project and that they were entitled to be paid overtime wages for that work, he directed his office manager not to show overtime on the certified payroll reports. There was no evidence that he took any action to make sure HPI's employees were paid all the wages they earned on the Clatskanie Project. This behavior reflects a conscious and intentional choice not to pay the prevailing wage rate on the Clatskanie Project. Harkcom and HPI are both subject to debarment based on Harkcom's intentional choice not to pay the prevailing wage rate.

C. Length of debarment.

ORS 279.361 provides that debarment shall be for "a period not to exceed three years." Although that statute and the Agency's administrative rules interpreting it do not explicitly authorize the forum to consider mitigating factors in determining the length of a debarment, the commissioner has held that mitigating factors may be considered in determining whether the debarment of a contractor or subcontractor should last less than the maximum three-year period allowed by law. See *In the Matter of Larson Construction Co., Inc.*, 22 BOLI 118, 165 (2001); *In the Matter of Keith Testerman*, 20 BOLI 112, 129 (2000); *In the Matter of Southern Oregon Flagging, Inc.*, 18 BOLI 138, 169 (1999); *In the Matter of Intermountain Plastics*, 7 BOLI 142, 160 (1988). Aggravating factors may also be considered. See, e.g., *Testerman* at 129. The aggravating circumstances considered may include those set out in OAR 839-016-0520(1).

There are multiple aggravating circumstances in this case and no mitigating circumstances. The aggravating circumstances include: Harkcom's knowledge that the Clatskanie Project was a prevailing wage rate job and that fringe benefits and overtime must be paid; Harkcom's falsification of 20 certified payroll reports in an apparent attempt to deceive the contracting agency and to avoid paying almost \$16,000 in earned wages to HPI's workers; Harkcom's directive to HPI's office manager to falsify HPI's certified payroll reports so they did not show overtime; the seriousness of the HPI's violations, in that they resulted in an underpayment of wages of \$15,898 to HPI's workers; and HPI's failure to correct the problem when the Agency brought it to HPI's attention.^{viii} There are no mitigating circumstances.

Under the circumstances, the forum finds that three years is an appropriate period of debarment based on HPI's intentional failure to pay the prevailing rate of wage to workers employed on the Clatskanie Project and Mike E. Harkcom's responsibility for that failure.

ORDER

NOW, THEREFORE, as authorized by ORS 279.361, the Commissioner of the Bureau of Labor and Industries hereby orders that Respondents **Harkcom Pacific, Inc.** and **Mike E. Harkcom** or any firm, corporation, partnership, or association in which either **Harkcom Pacific, Inc.** or **Mike E. Harkcom** has a financial interest shall be ineligible to receive any contract or subcontract for public works for three years from the date of publication of their names on the list of those ineligible to receive such contracts maintained and published by the Commissioner of the Bureau of Labor and Industries.

FURTHERMORE, as authorized by ORS 279.370, and as payment of the penalties assessed as a result of its violations of ORS 279.350(1), ORS 279.354, *former* OAR 839-016-0035(1), and *former* OAR 839-016-0050(2), the Commissioner of the Bureau of Labor and Industries hereby orders **Harkcom Pacific, Inc.**, 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:

A certified check payable to the Bureau of Labor and Industries in the amount of THIRTY FOUR THOUSAND DOLLARS (\$34,000), plus interest at the legal rate on that sum between a date ten days after the issuance of the final order and the date Respondent **Harkcom Pacific, Inc.** complies with the Final Order.

ⁱ Some of the overtime consisted of time worked over eight hours on weekdays and some of it consisted of time worked on weekends. ORS 279.334(1). This finding is based on hours reported on the employees' original time cards and on HPI's certified payroll reports.

ⁱⁱ The certified payroll reports contain two boxes for each day of the week for each worker listed in which the contractor can list hours worked as "ST" or "OT." The certified payroll reports contain 25 entries in the "ST" box which reflect overtime hours worked that should have been written partially or completely (in the case of hours worked on Saturdays and Sundays) in the "OT" box. There are only three entries in an "OT" box, and two of those are in error and should be in the "ST" box.

ⁱⁱⁱ Unlike the certified payroll reports, which are HPI's version of all work performed on the Clatskanie Project, there are only 14 of these time cards in evidence, each representing one week of work by one employee during the period of time that HPI performed work on the Clatskanie Project.

^{iv} At hearing, the Agency acknowledged that there were only 20 violations, as HPI's certified payroll report for the week of July 29 to August 4, 2001, did not list any employees.

^v See *In the Matter of Labor Ready Northwest*, 26 BOLI 1, 59 (2004), *appeal pending* (\$4,000 assessed for single violation); *In the Matter of Labor Ready Northwest, Inc.*, 22 BOLI 245, 287 (2001), *rev'd in part*, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), *rev'd en banc* 336 Or 534, 88 P3d 280 (2004) (\$2,000 assessed for each of nine violations); *In the Matter of Larson Construction Co., Inc.*, 22 BOLI 118, 158-59 (2001) (\$1,000 assessed); *In the Matter of William George Allmendinger*, 21 BOLI 151, 172 (2000) (\$1,000 assessed for each of two violations); *In the Matter of Johnson Builders, Inc.*, 21 BOLI 103, 126-27 (2000) (\$1,250 assessed for each of 23 violations); *In the Matter of Northwest PermaStore Systems, Inc.*, 20 BOLI 37, 60 (2000), *aff'd Northwest PermaStore Systems v. Bureau of Labor and Industries*, 172 Or App 427 (2001) (\$1,000 assessed for single violation); *In the Matter of Keith Testerman*, 20 BOLI 112, 128-29 (2000) (\$1,000 assessed for each of three violations).

^{vi} In this Order, "debar" and "debarment" are synonymous with placement on the List of Ineligibles.

^{vii} Even if the forum believed Harkcom's story that he did not know that HPI's employees worked on Saturdays and Sundays on the Clatskanie Project, it would still conclude he knew HPI's employees had worked overtime based on his specific instruction to Aheren to not show any overtime wages on the Clatskanie Project.

^{viii} All of Harkcom's listed actions were taken in his capacity as president of HPI, and these actions are therefore imputed to HPI.