

**In the Matter of**

**SQDL CO. fka: Square Deal Lumber Yard of Silverton,**

**Case Nos. 117-00 and 11-01**

**Final Order of the Commissioner Jack Roberts**

**Issued November xx, 2001**

**SYNOPSIS**

The Agency's Orders of Determination alleged that Design-Build Construction, Inc. failed to pay 34 wage claimants a total of \$70,759.63 in wages due upon termination, in violation of ORS 652.140; that \$47,046.31 of that sum was paid to the claimants out of the Wage Security Fund; that SQDL Co. was a "successor" employer to Design-Build Construction, Inc. under ORS 652.310; and that SQDL Co. was liable to repay \$47,046.31, plus a twenty-five percent penalty of \$11,761.58, to the Wage Security Fund, as well as the remaining \$23,713.32 in unpaid wages. The Commissioner found that SQDL Co. was not a "successor" employer under ORS 652.310 and dismissed the Orders of Determination. ORS 652.140, ORS 652.310, ORS 414.

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The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries ("BOLI") for the State of Oregon. The hearing was held on April 18, 19, and 20,<sup>i</sup> 2001, at BOLI's office located at 3865 Wolverine St. NE, E-1, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Cynthia L. Domas, an employee of the Agency. Respondent was represented by Carl H. Brumund, attorney at law. Eugene ("Gene") Pfeifer, president of Design-Build Construction, Inc. and SQDL Co., was present throughout the hearing to assist in the presentation of Respondent's case.

The Agency called as witnesses: Lynn Lebold, Respondent's former office manager; Newell Enos, BOLI Wage and Hour Division compliance specialist; Marie

Ginder, <sup>ii</sup> former office manager and controller for Design-Build Construction, Inc.; Faith Akin, former assistant to Gene Pfeifer; and Roger Stuckart, former senior project manager for Design-Build Construction, Inc.

Respondent called as witnesses: Gene Pfeifer; Ronald Pfeifer, Gene Pfeifer's brother and part owner of SQDL Co.; and Enos.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-33 (submitted or generated prior to hearing);
- b) Agency exhibits A-1 through A-41 (submitted prior to hearing);
- c) Respondent exhibits R-1 (pp.1-25, 35-54, and 63-148), R-2, R-5, R-6, R-8 through R-11, R-14 and R-15 (submitted prior to hearing), and R-16 through R-19 (submitted at hearing).

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

#### **FINDINGS OF FACT – PROCEDURAL**

1) On March 10, 2000, the Agency issued Order of Determination No. 00-0958 in which it alleged the following:

- (a) Thirty (30) separate wage claimants filed wage claims with the Agency<sup>iii</sup> and assigned those claims to the Agency, alleging that they were all employed in Oregon by "SQDL Company fka: Square Deal Lumber Yard of Silverton as a successor to Design/Build Construction, Inc., d.b.a. Pfeifer Construction and d.b.a. Pfeifer Homes," and that they performed work, labor and services for the employer and were paid all sums due and owing except the sum of \$66,868.46 in unpaid wages, which is due and owing along with interest at the legal rate per annum from November 1, 1999, until paid.

(b) Pursuant to ORS 652.414, the Agency determined that the wage claimants were entitled to receive payment from the Wage Security Fund ("WSF") in the sum of \$47,046.31.

(c) The wage claimants received payment in the amount of \$47,046.31 from the WSF.

(d) The Commissioner of the Bureau of Labor and Industries is entitled by ORS 652.414(2) to recover from the employer the amount paid from the WSF, together with a penalty of 25 percent of the sum paid from the WSF, which amount is \$11,761.58, along with interest at the legal rate per annum from March 1, 2000, until paid.

2) On March 20, 2000, Respondent, through counsel William D. Brandt, filed an answer and request for hearing. Respondent denied all the substantive allegations in the Order of Determination and requested a hearing. Respondent affirmatively alleged that "Square Deal Company is not a successor employer and has never been an employer" of the thirty wage claimants.

3) On August 3, 2000, the Agency filed a "BOLI Request for Hearing" with the forum.

4) On November 14, 2000, the Hearings Unit issued a Notice of Hearing in case 11-01 to Respondent and the Agency stating the time and place of the hearing as January 30, 2001, at 9:00 a.m., at BOLI's Salem office located at 3865 Wolverine St. NE, E-1, Salem. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

5) On September 8, 2000, the Agency issued an Amended Order of Determination No. 00-3641 in which it alleged the following:

(a) Twenty-five (25) separate wage claimants filed wage claims with the Agency<sup>iv</sup> and assigned those claims to the Agency, alleging that they were all employed in Oregon by "SQDL Company fka: Square Deal Lumber Yard of Silverton as a successor to Design/Build Construction, Inc., d.b.a. Pfeifer Construction and d.b.a. Pfeifer Homes," and that they performed work, labor and services for the employer and were paid all

sums due and owing except the sum of \$23,713.32 in unpaid wages, which is due and owing along with interest at the legal rate per annum from November 1, 1999, until paid.

6) On October 9, 2000, the Agency issued a Notice of Intent to Issue Final Order by Default stating that the Agency had not yet received an answer or request for hearing and that if no answer or request for hearing or court trial was received by October 19, 2000, the Agency would issue a Final Order by Default.

7) On October 19, 2000, Respondent, through counsel William D. Brandt, filed an answer and request for hearing. Respondent denied all the substantive allegations of the Amended Order of Determination.

8) On November 9, 2000, the Agency filed a second "BOLI Request for Hearing" with the forum.

9) On November 14, 2000, the Hearings Unit issued a Notice of Hearing in case 11-01 to Respondent and the Agency stating the time and place of the hearing as January 30, 2001, at 9:00 a.m., at BOLI's Salem office located at 3865 Wolverine St. NE, E-1, Salem. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

10) On November 16, 2000, the Agency filed a motion to consolidate hearings in cases 11-01 and 117-00.

11) On November 17, 2000, the ALJ issued an interim order stating that Respondent had seven days to file a response to the Agency's motion to consolidate.

12) Respondent did not file a response to the Agency's motion to consolidate. On November 29, 2000, the ALJ granted the Agency's motion based on the Agency's representation that the cases involved the same Respondent and had a number of common issues and witnesses.

13) On November 30, 2000, the forum ordered the Agency and Respondent 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; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any wage and penalty calculations (for the Agency only.) The forum ordered the participants to submit case summaries no later than October 27, 2000, and notified them of the possible sanctions for failure to comply with the case summary order.

14) On January 8, 2001, the Agency filed a letter it had received from Carla French of the law firm of Feder Casebeer & French LLP stating that William Brandt, who had been representing Respondent, had been suspended from the practice of law for 13 months, that Brandt was therefore no longer representing SQDL, and that no other attorney in the firm would be representing Respondent. French's letter advised the agency case presenter that Gene Pfeifer had not obtained new counsel and that the case presenter could contact Pfeifer directly regarding the case.

15) On January 8, 2001, the ALJ issued an interim order notifying Respondent that all corporations or unincorporated associations must be represented by an attorney or an authorized representative at all stages of the hearing.

16) On January 8, 2001, the ALJ issued an amended case summary order, along with a form designed to assist unrepresented respondents in complying with the case summary order and mailed it to Carla French and Gene Pfeifer.

17) On January 19, 2001, the Agency filed its case summary, along with attached exhibits A-1 through A-41.

18) On January 20, 2001, the Agency filed Exhibits "A" and "B" of the Agency's case summary, stating they had been inadvertently omitted when the Agency filed its case summary.

19) On January 22, 2001, the Agency filed a letter advising that Debra Kay Maloney-Bolsinger would be testifying by telephone.

20) On January 24, 2001, Carl H. Brumund, attorney at law, filed a motion for a postponement "on behalf of Gene Pfeifer, not in his individual capacity but only as Trustee of the John A. Pfeifer Trust."

21) On January 25, 2001, the Agency filed objections to the motion for postponement on the bases that: (a) the John A. Pfeifer Trust was not a party and therefore lacked standing to request a continuance; and (b) the motion was untimely.

22) On January 25, 2001, the ALJ conducted a prehearing conference with Ms. Domas and Mr. Brumund regarding the motion for postponement. That same day, the ALJ issued an interim order granting the motion for postponement based on the recent suspension of Mr. Brandt, Mr. Brumund's representation that he would be representing Respondent at the hearing and the recent assignment of the case to Mr. Brumund, and the complexity of the case and Mr. Brumund's corresponding need to prepare for hearing. The ALJ concluded that Respondent had shown good cause and there was no reasonable alternative to postponement. In the interim order, the ALJ also required the participants to indicate available dates for hearing in March, April, May, and June by February 6, 2001.

23) On January 25 and 26, 2001, the Agency and Respondent's counsel provided dates of availability for hearing.

24) On February 1, 2001, the ALJ issued an interim order resetting the hearing date for April 18, 2001. The ALJ also ordered that persons already served with

subpoenas were required to honor those subpoenas at the new time and date set for hearing.

25) On February 23, 2001, the ALJ issued a second amended case summary order to Ms. Domas and Mr. Brumund. In the order, the forum acknowledged that the Agency had already submitted its case summary and served a copy on Gene Pfeifer and that the Agency was not required to serve a copy on Mr. Brumund unless he requested service.

26) On April 6, 2001, Respondent filed its case summary, along with attached exhibits R-1 through R-15.

27) At the outset of the hearing, the ALJ explained the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing.

28) Prior to opening statements, Respondent and the Agency stipulated to the admissibility of exhibits A-1 through A-41, R-14, and R-15.

29) Prior to opening statements, Respondent stipulated to the validity of the \$47,046.31 in wage claims made by the wage claimants listed in the appendix to the Order of Determination that was paid out by the WSF and \$23,713.32 in wage claims made by the wage claimants listed in the appendix to the Amended Order of Determination.

30) Prior to opening statements, Respondent stipulated that the Commissioner had made a determination that the wage claimants referred to in the appendix to the Order of Determination were entitled to and had received payment from the WSF in the amount of \$47,046.31.

31) Prior to opening statements, the Agency moved to amend its Order of Determination and Amended Order of Determination to reflect that the Agency was

seeking a total of \$47,046.31 for reimbursement to the WSF, with a 25% penalty, and \$23,713.32 in additional unpaid wages. Respondent did not object and the amendment was granted.

32) At the conclusion of the Agency's case, Respondent moved to dismiss the case on the grounds that the Agency had not presented enough evidence to establish a prima facie case. The ALJ denied Respondent's motion on the grounds that the Agency had arguably presented sufficient evidence to make out its prima facie case.

33) On September 5, 2001, the ALJ issued a proposed order that included a notification to the participants that they were entitled to file exceptions to the proposed order within ten days of its issuance. On September 7, 2001, the Agency requested an extension of time to file exceptions until October 19, 2001. Respondent did not object and the ALJ granted the motion. On September 28, 2001, Respondent filed an exception pointing out an omission that has been corrected in this Final Order. On the same date, Respondent's attorney Brumund notified the forum he was withdrawing as Respondent's counsel. The Agency did not file exceptions.

## **FINDINGS OF FACT – THE MERITS**

### **1945-1995**

1) In 1945, John A. Pfeifer ("J. Pfeifer") started a construction business called John A. Pfeifer Construction Co. ("JAPCC") in Silverton, Oregon. In 1953, he opened a retail lumber and hardware store called Square Deal Lumber Yard of Silverton ("Square Deal"), which did business out of a building and yard located at 600 North Water Street, Silverton, Oregon.

2) In 1968, Gene Pfeifer ("G. Pfeifer"), one of J. Pfeifer's sons, went to work for JAPCC. In 1974, G. Pfeifer became an equal partner with J. Pfeifer in the company. In 1987, G. Pfeifer bought out J. Pfeifer's interest, and J. Pfeifer became an employee of JAPCC.

3) From its inception until sometime in the 1970s, JAPCC operated out of the same building as Square Deal. In the 1970s, JAPCC needed more space and built a 500 square foot addition onto Square Deal's 30,000 square foot building. The addition contained three new offices, used only by JAPCC's employees.

4) In the 1980s, JAPCC built another building on the same city block on which Square Deal was located. This building, located at the address of 622 N. Water St., became JAPCC's principal office.

5) In 1989, G. Pfeifer incorporated Design-Build Construction, Inc. ("DBCI"), an Oregon corporation with its primary place of business stated as "622 North Water Street, Silverton, Oregon" in the corporate bylaws. Four other existing companies – JAPCC, Pfeifer Homes, Pfeifer Companies, and Pfeifer Construction -- continued to operate as assumed business names of DBCI. G. Pfeifer became DBCI's president.

6) In 1993, J. Pfeifer incorporated Square Deal Lumber Yard as SQDL Co. ("SQDL"), an Oregon corporation with its primary place of business stated as "600 North Water Street, Silverton, Oregon" in the corporate bylaws. Pfeifer also made provision to give about seven percent of the stock in SQDL Co. to each of seven persons, including G. Pfeifer. From that time on, SQDL has operated under the assumed business name of Square Deal Lumber Yard of Silverton.

7) At all times between 1989 and 1995, DBCI was engaged in the business of designing and constructing buildings. In contrast, SQDL operated a retail hardware and lumber store and did not design or construct buildings.

### **1996-SEPTEMBER 30, 1999**

8) At all times between 1996 and September 30, 1999, DBCI was engaged in the business of designing and constructing buildings. SQDL, in contrast, operated a retail hardware and lumber store and did not design or construct buildings.

9) Between 1996 and September 30, 1999, SQDL conducted its business from a 30,000 square foot building owned by SQDL located at 600 North Water Street, Silverton, Oregon. DBCI's design department was located in three offices that utilized 500 square feet of SQDL's retail building. DBCI's main office was located in another building owned by DBCI on the same city block, with the address of 622 North Water Street. Also located on the same city block were a small storage building used for storage, three buildings with common bearing walls that occupied 25,000 square feet, and a lumber yard. The small storage building was used by DBCI. SQDL owned the three buildings with common bearing walls and used two of those three buildings ("turkey shed" and "storage" building), occupying 21,300 square feet in all, for storing lumber. DBCI used the remaining 3,700 square feet ("tile shed") for storing displays for home shows. The lumberyard was used by SQDL. The property the lumber yard was located on was owned by an adjacent railroad, which leased the property to SQDL. DBCI also used a lot, called the "boneyard," on an adjacent block to store its job trailers and unused lumber brought back from jobs.

10) From 1996 to September 30, 1999, DBCI employed between 50-100 persons. DBCI employed about 20 persons in its office, including persons employed in the design department. The office had a general manager, a controller, marketing personnel, estimators, administrative assistants, assistants to project managers, a shop mechanic, and a shop manager. Persons employed in the construction department included project managers, superintendents, carpenters, painters, an excavation crew, and laborers.

11) From 1996 to September 30, 1999, SQDL employed 7-9 persons. Among these persons were a general manager and an office manager/bookkeeper.

12) From 1996 to September 30, 1999, SQDL and DBCI did not employ any of the same persons and employed separate management teams. However, G. Pfeifer, who owned DBCI, signed checks for both companies.

13) In 1996, DBCI's gross receipts totaled \$8,954,128; SQDL's gross receipts totaled \$2,336,560. In 1997, DBCI's gross receipts totaled \$6,178,797; SQDL's gross receipts totaled \$1,911,611. In 1998, DBCI's gross receipts totaled approximately \$10-12,000,000; SQDL's gross receipts totaled \$1,796,992. In 1999, DBCI's gross receipts totaled approximately \$6,000,000; SQDL's gross receipts totaled approximately \$1,600,000.

14) From 1996 to September 30, 1999, DBCI and SQDL each utilized various services offered and equipment owned by the other company as "in-kind" exchanges. DBCI's shop mechanic maintained SQDL's equipment. SQDL used DBCI's forklifts when SQDL's forklifts needed repair. SQDL put its debris into DBCI's dump box, and DBCI hauled the debris to the dump. SQDL would use one of DBCI's pickups or vans when it had a small load to deliver. On one occasion, DBCI brought some unused inventory back from a construction job, and SQDL sold the inventory and kept the proceeds. SQDL consistently used DBCI's copy machine. DBCI used 500 square feet owned by SQDL for office space and another 3700 square feet for storage. The two companies did not compensate one another for this borrowed use of equipment and services and G. Pfeifer believed this was a "fair exchange."

15) From 1996 to September 30, 1999, DBCI and SQDL purchased inventory from different vendors and sold their goods and services to a different clientele.

16) From 1996 to September 30, 1999, DBCI and SQDL filed separate quarterly reports with the Oregon Employment Department, separate tax returns, and generated separate financial statements.

17) From 1996 to September 30, 1999, DBCI purchased a large amount of the lumber it used for construction from SQDL. However, in early 1999, DBCI purchased approximately \$400,000 worth of lumber from Parr Lumber instead of SQDL because its management team was dissatisfied with the service and product offered by SQDL. On a number of other occasions, the two companies' management teams disagreed over price and the quality of materials, and there was often tension between the two teams.

18) Between 1997 and 1999, DBCI borrowed money from SQDL approximately eight times to help meet its payroll. Each time, it borrowed about \$5,000. This money was paid back to SQDL.

19) DBCI borrowed \$120,000 from SQDL in December 1997 and \$50,000 in December 1998. G. Pfeifer, acting on behalf of DBCI, signed promissory notes for each loan. These loans were never repaid.

20) J. Pfeifer died in September 1998. Under the terms of his will, G. Pfeifer, his brother Ronald Pfeifer, and five other family members each inherited a seven percent ownership interest in SQDL. The remainder of the trust was owned by the John A. Pfeifer Trust, and G. Pfeifer was appointed as its new trustee and also became SQDL's president as a result of being trustee of the John A. Pfeifer Trust, the majority shareholder of SQDL's stock. Prior to J. Pfeifer's death, G. Pfeifer had participated in SQDL's meetings, but had not been active in the management of SQDL. After J. Pfeifer's death, G. Pfeifer assumed a more active role in the management of SQDL. However, he still spent approximately 99 percent of his time managing DBCI.

21) Beginning in July 1999, DBCI began having troubles meeting its payroll. Because of this, Marie Ginder, DBCI's controller, and G. Pfeifer discussed whether SQDL could be used as a payroll service.

22) After July 1999, DBCI began paying employees draws as needed to survive. DBCI continued to make out regular payroll checks to its employees, but never issued them.

23) DBCI's employees began quitting when they were not paid. By the end of September 1999, only three employees remained. These employees were Will Vinson, a draftsman who worked in one of DBCI's offices in the SQDL's retail building, G. Pfeifer's secretary Faith Akin, who worked in DBCI's primary office building, and Ginder.

24) At the end of September 1999, G. Pfeifer received a notice from the State of Oregon stating that DBCI needed to stop conducting business.

25) At the end of September 1999, DBCI stopped doing any business except for tasks involved in wrapping up the business. By this time, DBCI had finished all but a few of the construction jobs on which it was working. Of the unfinished jobs, the owners of a boat house that DBCI was working on completed the job themselves by hiring some of DBCI's ex-employees, and the bank that financed the remaining unfinished houses took them over and finished them.

26) When DBCI stopped conducting business on September 30, 1999, approximately \$2,000,000 in judgments had been entered against it, including \$450,000 owed to the IRS and \$165,000 owed to the Oregon Department of Revenue.

27) The 34 wage claimants listed in Appendix A to this Final Order were all employed by DBCI and earned wages in the amount of \$70,759.63 that are still due and owing.

28) The Commissioner made a determination that \$47,046.31 of the wage claims filed by the wage claimants listed in Appendix A to this Final Order were valid and caused \$47,046.31 to be paid out from the WSF to 29 of those claimants.

## **OCTOBER 1, 1999 – MAY 2000**

29) When DBCI stopped doing business, SQDL had 7-9 employees. On or about November 1, 1999, G. Pfeifer instructed Lynn Lebold, SQDL's bookkeeper/office manager, to put Faith Akin and Will Vinson on SQDL's payroll. From that date until their termination in April 2000, Akin and Vinson continued to perform the same work they had performed for DBCI, working in the same locations, and were paid by SQDL and reported as employees by SQDL on its quarterly reports. Prior to beginning work on SQDL's payroll, Akin and Vinson completed applications for employment with SQDL, as well as W-4 and I-9 forms.

30) G. Pfeifer's intent, which he had cleared with his CPA, was that Akin and Vinson would continue performing the work required so that DBCI could wind up its business, while using SQDL as a "payroll service." This became necessary because DBCI could no longer issue a payroll, there was still work that needed completion, and Vinson and Akin needed to be covered by workers' compensation insurance and have appropriate deductions taken from their pay. G. Pfeifer decided to use SQDL as a "payroll service" instead of an independent company like Barrett Business Services because the cost was less. G. Pfeifer instructed Lebold to submit bills to DBCI for the amount of wages paid to Akin and Vinson. Subsequently, DBCI paid about \$4,000 to SQDL to reimburse SQDL for wages paid to Akin and Vinson. On November 1, 1999, Faith Akin and Will Vinson went on SQDL's payroll, continuing to perform the same duties they had performed for DBCI.

31) When DBCI stopped doing business, it did not transfer any assets to SQDL, and SQDL purchased no assets of DBCI.

32) SQDL's business did not change after November 1, 1999.

33) At the end of 1999, Akin issued W-2 slips for 94 DBCI employees. Akin and Vinson were the only persons from the 94 who went on SQDL's payroll.

34) Carl Hashenburger was SQDL's manager from sometime in 1998 to October 1999. G. Pfeifer hired Roger Baca to replace Hashenburger in December 1999, then fired Baca five weeks later. G. Pfeifer then hired Matt Miles to replace Baca. Miles managed SQDL until he was murdered on SQDL's premises in March 2000.

35) Ronald Pfeifer ("R. Pfeifer") became temporary manager of SQDL out of necessity after Miles was murdered. R. Pfeifer, like G. Pfeifer, had a seven-percent ownership interest in SQDL. Unlike G. Pfeifer, R. Pfeifer had no ownership interest in DBCI and was never an employee of DBCI.

36) After Miles' murder, G. Pfeifer became more involved in the management of SQDL out of necessity because of the reluctance of SQDL's employees to return to work.

37) On April 30, 2000, Lynn Lebold laid off Akin and Vinson due to SQDL's cash flow problems. At that time, SQDL still had 7-9 employees. Lebold's action was contrary to G. Pfeifer's instructions. Neither Akin nor Vinson ever returned to work for DBCI or SQDL.

## **CREDIBILITY FINDINGS**

38) Marie Ginder, DBCI's office manager and controller between May and October 1999, was a credible witness who answered questions directly and candidly, without hesitation, and had no apparent bias. The forum has credited her testimony in its entirety.

39) Faith Akin, G. Pfeifer's personal assistant between May 11, 1998, and April 30, 1999, was a credible witness who had no apparent bias. Like Ginder, she

answered questions directly and candidly, without hesitation, and the forum has credited her testimony in its entirety.

40) Roger Stuckart, DBCI's senior project manager, was a credible witness and the forum has credited his testimony in its entirety.

41) Newell Enos was a credible witness. However, the forum has not relied on his testimony or interview notes with G. Pfeifer in determining whether or not SQDL is a successor employer to DBCI because of his lack of personal knowledge or facts relevant to a successor employer determination and because his interview notes contain little or no evidence relevant to that determination.

42) Lynn Lebold, SQDL's bookkeeper and office manager from May 1996 until August 14, 2000, was biased against Respondent. Her demeanor and the substance of her testimony revealed a strong dislike of G. Pfeifer, and she shaded her testimony to have the most negative impact on Respondent. For example, she strongly implied that G. Pfeifer had unlawfully caused DBCI and SQDL to improperly commingle funds by virtue of SQDL's write-off of DBCI's \$500,000 debt to SQDL. When asked by the Agency case presenter how many times DBCI had borrowed money from SQDL, her reply was "countless" times. On cross-examination, she modified her answer to "dozens" of times. This contrasted sharply with G. Pfeifer's more credible estimate of around one dozen times in all. In addition, she was reluctant to provide answers to questions that she perceived might help Respondent's case. Finally, for some inexplicable reason, she refused to acknowledge that Baca and Miles, SQDL's two successive general managers after Harshenburger, had any direct supervisory authority over her. This lessened her credibility, and the forum has only credited her testimony where it was corroborated by other credible evidence or unchallenged.

44) Ronald Pfeifer has a seven percent ownership interest in SQDL and is the brother of G. Pfeifer. Despite this built-in financial and familial bias, the forum found his testimony to be objective and straightforward. In addition, his memory was unimpaired regarding historical events in the evolution of DBCI and SQDL. The forum has credited his testimony in its entirety.

45) Gene Pfeifer, as trustee of the John A. Pfeifer Trust and as a seven percent owner of SQDL, has a large financial and familial stake in the outcome of this proceeding. Despite this inherent bias, the forum found his testimony to be credible. He was not a reluctant witness and voluntarily provided explanations for his answers on cross-examination. He answered questions directly, without hesitation, in a forthcoming manner unless he did not understand the question. The credibility of his testimony was further bolstered by the internal consistency of his answers to the same or similar questions in direct and cross-examination.

#### **ULTIMATE FINDINGS OF FACT**

1) At all times material herein, DBCI was an Oregon corporation engaged in the business of designing and constructing buildings and engaged the personal services of one or more employees in the state of Oregon.

2) At all times material herein, SQDL was an Oregon corporation engaged in the business of operating a retail lumber and hardware store in Silverton, Oregon.

3) DBCI and SQDL were companies that were started in the mid-20<sup>th</sup> century by J. Pfeifer.

4) From the time of its incorporation in 1989 until the time of hearing, DBCI's president and majority shareholder was G. Pfeifer, one of J. Pfeifer's sons.

5) From 1996 to September 30, 1999, DBCI and SQDL had an entirely separate workforce and management team. DBCI employed 50-100 persons, and SQDL employed 7-9 persons.

6) From 1996 to September 30, 1999, DBCI and SQDL utilized various services offered and equipment and space owned by each other as “in-kind” exchanges.

7) J. Pfeifer died in 1998. Upon his death, seven different Pfeifer family members, including G. Pfeifer, inherited a seven percent interest in SQDL. The remaining 51 percent ownership interest remained in the hands of the John A. Pfeifer Trust, of which G. Pfeifer became trustee and president of SQDL. Subsequently, G. Pfeifer participated to a limited extent in the management of SQDL. DBCI and SQDL continued to file separate quarterly reports with the Oregon Employment Department, separate tax returns, and to generate separate financial statements.

8) From 1997-99, DBCI borrowed money from SQDL on at least a dozen occasions to meet payroll expenses and other needs. At least \$170,000 was never repaid.

9) Beginning in July 1999, DBCI began having troubles meeting its payroll, and its employees began quitting when they were not paid. By the end of September 1999, only three employees remained – Will Vinson, a draftsman; Faith Akin, Gene Pfeifer’s personal secretary; and Marie Ginder, DBCI’s controller. At the end of September 1999, DBCI received a notice from the State of Oregon that it needed to stop conducting business, at which time it shut down the business except for wrap-up operations.

10) DBCI ceased business operations on or about September 30, 1999. At that time, DBCI owed \$70,759.63 in earned and unpaid wages to the 34 employees listed in Appendix A to this Final Order.

11) After DBCI ceased business operations, those 34 employees filed wage claims. The Commissioner determined that the wage claims were valid. Subsequently,

the wages listed in the column entitled “WSF Payment” in Appendix A, totaling \$47,046.31, were paid out to the persons listed out of the WSF pursuant to ORS 652.414(1) and the administrative rules adopted thereunder.

12) On November 1, 1999, two of DBCI’s employees – Faith Akin and Will Vinson – were put on the payroll of SQDL. Between November 1, 1999, and April 30, 2000, at which time they were laid off, Akin and Vinson continued to perform the same duties they had performed for DBCI. During this time period, SQDL operated as a “payroll service” for DBCI with regard to Akin and Vinson.

13) When DBCI stopped doing business, it did not transfer any assets to SQDL, and SQDL purchased no assets of DBCI. SQDL did not complete any of DBCI’s unfinished construction or design jobs.

14) SQDL’s business did not change after November 1, 1999.

15) At all times material, SQDL never did any design or construction work and DBCI never did any retail hardware or lumber sales.

### **CONCLUSIONS OF LAW**

1) During all times material herein, DBCI was an employer and the 34 wage claimants listed in Appendix A to this Order were employees subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.414. At all times material herein, DBCI employed all 34 claimants.

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

3) ORS 652.310(1) provides:

“As used in ORS 652.310 to 652.414, unless the context requires otherwise:

“(1) ‘Employer’ means any person who in this state, directly or through an agent, engages personal services of one or more employees and includes any producer-promoter, and any successor to the business of any employer, or any lessee or purchaser of any employer’s business

property for the continuance of the same business, so far as such employer has not paid employees in full. 'Employer' includes the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity and any of their instrumentalities organized and existing under law or charter but does not include:

“(a) The United States.

“(b) Trustees and assignees in bankruptcy or insolvency, and receivers, whether appointed by federal or state courts, and persons otherwise falling under the definition of employers so far as the times or amounts of their payments to employees are regulated by laws of the United States, or regulations or orders made in pursuance thereof.”

Respondent SQDL is an employer subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.414 but is not a “successor to the business” of DBCI within the meaning of ORS 652.310(1) and is not liable for the \$23,713.32 in unpaid wages owed by DBCI to the wage claimants listed in Appendix A to this Final Order that were not paid out to the claimants from the WSF or the \$47,046.31 in wages that were paid out by the WSF.

4) ORS 652.140(2) provides:

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

DBCI violated ORS 652.140 by failing to pay the 34 wage claimants listed in Appendix A all wages earned and unpaid not later than five days, excluding Saturdays, Sundays and holidays, or the next regularly scheduled payday, after the claimants quit.

5) ORS 652.414 provides, in pertinent part:

“Notwithstanding any other provision of law:

“(1) When an employee files a wage claim under this chapter for wages earned and unpaid, and the Commissioner of the Bureau of Labor and Industries determines that the employer against whom the claim was filed

has ceased doing business and is without sufficient assets to pay the wage claim and the wage claim cannot otherwise be fully and promptly paid, the commissioner, after determining that the claim is valid, shall pay the claimant, to the extent provided in subsection (2) of this section:

“(a) The unpaid amount of wages earned within 60 days before the date of the cessation of business; or

“(b) If the claimant filed a wage claim before the cessation of business, the unpaid amount of wages earned within 60 days before the last day the claimant was employed.

“(2) The commissioner shall pay the unpaid amount of wages earned as provided in subsection (1) of this section only to the extent of \$4,000 from such funds as may be available pursuant to ORS 652.409 (2).

“(3) The commissioner may commence an appropriate action, suit or proceeding to recover from the employer, or other persons or property liable for the unpaid wages, amounts paid from the Wage Security Fund under subsection (1) of this section. In addition to costs and disbursements, the commissioner is entitled to recover reasonable attorney fees at trial and on appeal, together with a penalty of 25 percent of the amount of wages paid from the Wage Security Fund or \$200, whichever amount is the greater. All amounts recovered by the commissioner under this subsection and subsection (4) of this section are appropriated continuously to the commissioner to carry out the provisions of this section.”

Under the facts and circumstances of this record, SQDL is not an “employer” or “person” liable for the unpaid wages paid from the Wage Security Fund.

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Agency’s Order of Determination and Amended Order of Determination filed against Respondent are hereby dismissed.

## **OPINION**

### **INTRODUCTION**

The validity of the underlying wage claims in this matter totaling \$70,759.63 are undisputed, as are the facts that the WSF paid out \$47,046.31 of this sum to reimburse the wage claimants and that DBCI was the wage claimants’ employer. The only remaining issue is Respondent SQDL’s potential liability in this matter to repay the WSF

and to pay the remainder \$23,713.32 due to the wage claimants. This question of liability rests on the issue of whether SQDL is a “successor to the business” of DBCI.

The test for determining whether a person is a “successor” employer is the same for wage claim and WSF recovery cases. *In the Matter of Fjord, Inc.*, 21 BOLI 260, 286 (2001). That test is whether SQDL conducts essentially the same business that DBCI did. The elements to look for include: the name or identity of the business; its location; the lapse of time between the previous operation and the new operation; the same or substantially the same work force employed; the same product is manufactured or the same service is offered; and, the same machinery, equipment, or methods of production are used. Not every element needs to be present for an employer to be a successor; the facts must be considered together. *In the Matter of Fjord, Inc.*, 21 BOLI 260, 286 (2001). A discussion of the relevant facts follows.

### **THE NAME OR IDENTITY OF THE BUSINESS CHANGED**

Retention of the same or a similar name is indicative of successorship, as is similarity of identity. The alleged successor, SQDL, has an entirely different name than DBCI, indicating a lack of successorship.

The name of a business, although entitled to substantial weight, is only one factor in determining if the identity of an alleged successor business is the same as its defunct predecessor. Other factors<sup>v</sup> include, but are not limited to, an historical common identity, common ownership, common management, and common vendors and clients. Except for the fact that DBCI and SQDL were both businesses owned by the same family, they have no common historical identity. SQDL sold hardware and lumber; DBCI used hardware and lumber in construction. They purchased their inventory from different vendors and sold their goods and services to different clients. With the exception of G. Pfeifer’s ownership of DBCI and seven percent interest in

SQDL, SQDL and DBCI were separate corporations with different ownership interests. They had separate management teams that often had serious disagreements; at one point DBCI opted to purchase \$400,000 worth of lumber from another supplier instead of SQDL. SQDL did not acquire any of DBCI's assets and its business did not change after September 30, 1999. In fact, DBCI and its business simply came to a halt.

On the other hand, DBCI and SQDL did share some equipment, services, and space on the basis of an "in-kind" exchange, and DBCI frequently borrowed money from SQDL, a large sum of which was never repaid.<sup>vi</sup> G. Pfeifer was president of DBCI and also became president of SQDL after his father's death, by virtue of his status as trustee of the John A. Pfeifer trust.

Taken as a whole, the commonalities described above are but a minor part of an evidentiary portrait showing that SQDL and DBCI were businesses with distinct and separate identities, before and after DBCI went out of business. This indicates a lack of successorship.

### **THE LOCATION OF THE BUSINESS DID NOT CHANGE – IT CEASED TO EXIST.**

After September 30, 1999, DBCI did not engage in any more construction, the guts of its business, and SQDL has never engaged in construction. The only part of DBCI's business that remained was the wind-up operation conducted by G. Pfeifer, Faith Akin, and Will Vinson. All three continued working in the same offices they had previously occupied, including Vinson's office in SQDL's retail store that had historically been used by DBCI's design department, and G. Pfeifer's office, which was shared by Akin, in the DBCI building located at 622 North Water Street. Although Akin and Vinson did no work for SQDL, they became joint employees of SQDL and DBCI by virtue of their placement on SQDL's payroll. SQDL continued to conduct its business in the

same location and did not occupy any or use any of the space formerly occupied or used by DBCI.

In a sense, this evidence shows that the location of DBCI's business did not change. However, the business itself – construction – ceased to exist, and SQDL did not continue any part of DBCI's business, other than serving as a convenient payroll service for Akin and Vinson. Because SQDL did not conduct any of DBCI's business, the fact that G. Pfeifer, Akin and Vinson continued to work in the same location does not indicate successorship.

### **WHAT WAS THE LAPSE IN TIME, IF ANY, BETWEEN THE PREVIOUS AND NEW OPERATION?**

This test is inapplicable because DBCI's business stopped and SQDL did not continue any aspect of it.

### **DOES SQDL EMPLOY THE SAME OR SUBSTANTIALLY THE SAME WORK FORCE AS DBCI?**

Faith Akin and Will Vinson, two employees of DBCI, went on SQDL's payroll on November 1, 1999. The evidence showed that this was a procedure whereby DBCI used SQDL as a payroll service while Akin and Vinson continued to do work for DBCI. Vinson was a draftsman, and Akin was G. Pfeifer's personal secretary. Neither were managerial employees nor performed any construction work. Ninety-two other persons who were employed by DBCI in 1999, including all of DBCI's managerial employees and construction crew, did not go to work for SQDL. These facts indicate a lack of successorship.

## **DOES SQDL MANUFACTURE THE SAME PRODUCT OR OFFER THE SAME SERVICE AS DBCI?**

DBCI performed design and construction; SQDL continues to be a retail hardware and lumber store and has never engaged in design and construction. This indicates a lack of successorship.

## **DOES SQDL USE THE SAME MACHINERY, EQUIPMENT, OR METHODS OF PRODUCTION AS DBCI?**

Prior to September 30, 1999, SQDL used DBCI's copy machine, the services of its equipment mechanic, and some of its equipment. The record does not reveal whether SQDL continued to use DBCI's copy machine and any of its equipment after September 30, 1999. Assuming, *arguendo*, that it did, SQDL used a small percentage of DBCI's equipment and none of its method of production. Again, this indicates a lack of successorship.

## **CONCLUSION**

The test for determining whether SQDL is a "successor" employer to DBCI in this WSF recovery case is whether SQDL conducts essentially the same business as DBCI. There are six elements that must be evaluated in making this determination. Although all six elements do not have to be present for an employer to be a successor, in this case none of the elements are present.<sup>vii</sup> The Agency's case is supported by evidence related to historical commonalty of identity, described in detail in this opinion under the heading of "The Name Or Identity Of The Business Changed," the fact that Will Vinson and Faith Akin, two out of DBCI's 92 employees in 1999, became SQDL's employees while continuing to perform the same work, in the same location, for DBCI, ownership by the same family – although different members -- and the geographical proximity of their principal places of business of SQDL and DBCI. This evidence pales in comparison to undisputed evidence that SQDL acquired none of DBCI's assets,

engages in an entirely different line of business, and has employed only of DBCI's former employees, both non-managerial. Considering all of the facts together, the forum concludes that SQDL is not a "successor" employer under ORS 652.310 and is not liable to repay either the wages paid out by the WSF or the wages still unpaid by DBCI or the WSF to the wage claimants listed in Appendix A to this Final Order.

### **ORDER**

NOW, THEREFORE, as Respondent has been found not to be a successor employer to Design-Build Construction, Inc. pursuant to ORS 652.310, the Commissioner of the Bureau of Labor and Industries hereby orders that Order of Determination 00-0958 and Amended Order of Determination 00-3641 against SQDL Co. are hereby dismissed.

### **APPENDIX A**

<b>NAME</b>	<b>UNPAID WAGES</b>	<b>WSF PAYMENT</b>	<b>BALANCE DUE</b>
<b>Akin, Faith</b>	<b>\$2,028.25</b>	<b>\$2,028.25</b>	<b>0</b>
<b>Alayon, Shantelle</b>	<b>\$1,607.97</b>	<b>\$1,118.17</b>	<b>\$489.80</b>
<b>Bauer, Ervin</b>	<b>\$773.69</b>	<b>\$376.88</b>	<b>\$396.81</b>
<b>Beyea, Robert J.</b>	<b>\$210.74</b>	<b>0</b>	<b>\$210.74</b>
<b>Bigelow, Brian</b>	<b>\$802.37</b>	<b>\$11.00</b>	<b>\$802.37</b>
<b>Braff, Harold</b>	<b>\$868.00</b>	<b>0</b>	<b>\$868.00</b>
<b>Cathay, Nava</b>	<b>\$1,112.05</b>	<b>\$1,112.05</b>	<b>0</b>
<b>Currie, Leslie</b>	<b>\$1,091.13</b>	<b>\$1,091.13</b>	<b>\$511.88</b>
<b>Dalisky, Eric</b>	<b>\$802.15</b>	<b>\$802.15</b>	<b>0</b>
<b>East, Eric</b>	<b>\$448.03</b>	<b>\$144.00</b>	<b>\$304.03</b>
<b>Fonseca, Ronda</b>	<b>\$178.39</b>	<b>\$178.39</b>	<b>0</b>
<b>Gilpatrick, Wayne</b>	<b>\$3,019.99</b>	<b>\$3,019.00</b>	<b>\$.99</b>
<b>Hannan, Timothy</b>	<b>\$4,048.02</b>	<b>\$4,000.00</b>	<b>\$48.02</b>
<b>Harris, Gary</b>	<b>\$2,036.18</b>	<b>\$1,046.18</b>	<b>\$990.00</b>
<b>Jones, Goode</b>	<b>\$2,793.02</b>	<b>\$2,224.00</b>	<b>\$569.02</b>
<b>Kelley, Kerry</b>	<b>\$1,857.05</b>	<b>\$763.30</b>	<b>\$763.30</b>

<b>Lenhart, Joseph</b>	<b>\$303.60</b>	<b>0</b>	<b>\$303.60</b>
<b>Lenhart, Rick</b>	<b>\$272.83</b>	<b>0</b>	<b>\$272.83</b>
<b>Loukojarvi, Larry</b>	<b>\$2,381.01</b>	<b>\$2,381.01</b>	<b>0</b>
<b>Maloney-Bolsinger, D.</b>	<b>\$3,007.48</b>	<b>\$2,488.18</b>	<b>\$519.30</b>
<b>Mashburn, Marie</b>	<b>\$2,002.38</b>	<b>\$680/wk.</b>	<b>\$2,002.38</b>
<b>McDowell, Dannie</b>	<b>\$861.60</b>	<b>\$560.25</b>	<b>\$301.35</b>
<b>McKinney, Elden</b>	<b>\$729.64</b>	<b>\$726.55</b>	<b>\$43.09</b>
<b>Nguyen, Chien</b>	<b>\$861.44</b>	<b>0</b>	<b>\$861.44</b>
<b>Olsen, Sverre</b>	<b>\$6,880.00</b>	<b>\$2,890.00</b>	<b>\$3,990.00</b>
<b>Pennington, Steven</b>	<b>\$285.95</b>	<b>\$285.95</b>	<b>0</b>
<b>Pfeifer, Bryan</b>	<b>\$3,750.00</b>	<b>\$300.00</b>	<b>\$3,450.00</b>
<b>Pfeifer, Kevan</b>	<b>\$1,832.83</b>	<b>\$461.54</b>	<b>\$1,371.29</b>
<b>Roldan, Antonio</b>	<b>\$3,244.43</b>	<b>\$3,244.43</b>	<b>0</b>
<b>Spencer, Michael</b>	<b>\$4,914.09</b>	<b>\$2,144.15</b>	<b>\$2,769.94</b>
<b>Stuckart, Roger</b>	<b>\$5,709.23</b>	<b>\$4,000.00</b>	<b>\$1,709.23</b>
<b>Szymanski, Gary</b>	<b>\$850.24</b>	<b>\$850.24</b>	<b>0</b>
<b>Vinson, William</b>	<b>\$1,208.54</b>	<b>\$1,050.00</b>	<b>\$158.54</b>
<b>Weiser, Steven</b>	<b>\$5,105.11</b>	<b>\$4,000.00</b>	<b>\$1,105.11</b>

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<sup>i</sup> On April 20, 2001, the Agency case presenter and Respondent's counsel made their closing arguments from BOLI's Salem office via speakerphone to the ALJ, who was located in his Eugene office.

<sup>ii</sup> Ginder's last name was Mashburn during her employment with Design Build Construction.

<sup>iii</sup> The wage claimants, total unpaid wages, amount paid by the WSF, and remaining unpaid wages are listed in Appendix A to this Final Order. Appendix A also incorporates wage claims made in the Agency's subsequent Amended Order of Determination that do not involve payouts by the WSF. See Finding of Fact – Procedural 5 and footnote 2, *infra*.

<sup>iv</sup> The wage claimants, total unpaid wages, amount paid by the WSF, and remaining unpaid wages have been incorporated into Appendix A to this Final Order.

<sup>v</sup> These are factors in addition to the other five elements of the successor test, all of which also relate in some way to identity.

<sup>vi</sup> The forum notes that this sum amounts to only ten percent of the total unsatisfied judgments against Design-Build Construction, Inc., which total approximately two million dollars. See Finding of Fact – The Merits 26, *supra*.

<sup>vii</sup> Compare *In the Matter of Gerald Brown*, 14 BOLI 154 (1995) and *In the Matter of Susan Palmer*, 15 BOLI 226 (1997) (all six elements indicated successorship in both cases); *In the Matter of Anita's Flowers & Boutique*, 6 BOLI 258 (1987), *In the Matter of Tire Liquidators*, 10 BOLI 84 (1991), and *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242 (1999) (five out of six elements indicated successorship all three cases); *In the Matter of Fjord, Inc.*, 21 BOLI 260 (2001), *appeal pending* (five out of six elements indicated successorship, with the sixth being neutral).