

In the Matter of
BARRETT BUSINESS SERVICES, INC.

Case No. 25-98

June 21, 2000

FINAL ORDER ON RECONSIDERATION

SYNOPSIS

Claimant, who did not have a physical impairment, applied for work with Respondent as a timber faller. Respondent hired Complainant, then violated ORS 659.425 by refusing to refer him to a job as timber faller based on Respondent's erroneous perception that he had a physical impairment to his back that prevented him from doing strenuous labor using his back. Respondent also required Complainant to pay for a medical examination and/or the cost of providing a health certificate as a condition of continued employment in violation of ORS 659.330. The forum awarded Complainant \$7,797.60 in back pay and \$20,000 in mental suffering. ORS 659.330; ORS 659.425.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge (hereinafter "ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon (hereinafter "BOLI"). The hearing was held on May 27 and May 28 at BOLI's office at 700 E. Main Street, Suite 105, Medford, Oregon, and on June 17, 1998, in room 1004 of the Portland State Office Building, 800 NE Oregon, Portland.

The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Kelley E. Robbins (hereinafter "Complainant") was present throughout the Medford hearing and was not represented by counsel. Respondent Barrett Business Services, Inc. (hereinafter "Respondent") was represented by Scott H. Terrall, Attorney at Law. James Hardt was present as Respondent's representative during the Medford portion of the hearing.

The Agency called as witnesses, in addition to Complainant, John Abgeris, logging contractor, and Dale Deboy, employee, Occupational Health Dept., Rogue Valley Medical Center. Respondent called as witnesses current employees Lisa Van Wey and James Hardt; Wayne Gamby, occupational health technician; and former employee Heidi Beck.

Administrative exhibits X-1 to X-18 and Agency exhibits A-1 through A-3, A-4, pp.3-22, A-5, A-6, A-7, p.3, A-8, and A-11 through A-13 were offered and received into evidence. Respondent exhibit R-2, p.4, was offered and received into evidence. The record closed on June 17, 1998.

On February 22, 1999, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, having fully considered the entire record in this matter, issued the Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion and Order in this case. Thereafter, Respondent sought judicial review in the Oregon Court of Appeals. On July 20, 1999, through counsel, the Agency filed its Notice of Withdrawal of Order for Purposes of Reconsideration in the Court of Appeals for the specific purpose of correcting a typographical error in the order, specifically, the incorrect agency number on the order.

On July 28, 1999, having revised the order to include the correct agency case number originally assigned to this case, I issued an Amended Final Order correcting the agency number on the order from 57-98 to 25-98.

On June 19, 2000, through counsel, the Agency filed its Notice of Withdrawal of Order for Purposes of Reconsideration in the Court of Appeals.

On June 21, 2000, having reconsidered the record and the back pay computation, I make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion and Final Order on Reconsideration.

FINDINGS OF FACT – PROCEDURAL

1) On June 27, 1996, Complainant filed a verified complaint with CRD alleging that he was the victim of the unlawful employment practices of Respondent in denial of employment based on his perceived physical disability. After investigation and review, CRD issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint.

2) On November 10, 1997, the Agency prepared for service on Respondent Specific Charges alleging that Respondent discriminated against Complainant in refusing to hire him based on perceived physical impairment and record of a physical impairment, and by requiring Complainant to pay for medical records and a medical evaluation as a condition of employment.

3) With the Specific Charges, the forum served on Respondents the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice 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 process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

4) On December 1, 1997, counsel for Respondent filed an answer in which it denied the allegations mentioned above in the Specific Charges, and stated numerous affirmative defenses. At the same time, counsel moved for a postponement on the basis that he was scheduled to be out of state on vacation at the time set for hearing.

5) On December 1, 1997, Douglas A. McKean, the ALJ initially assigned to hear the case, sent a letter to Respondent's counsel requesting an affidavit or other documentation indicating when the vacation was scheduled.

6) On December 29, 1997, Respondent's counsel indicated that after the Christmas holidays he would be filing an affidavit concerning when his spring vacation was scheduled.

7) On February 6, 1998, the ALJ issued a Discovery Order requiring Respondent and the Agency to submit a case summary pursuant to OAR 839-050-0200 and 839-050-0210 by March 13, 1998, thirteen days before March 26, the date set for hearing.

8) On February 13, 1998, Respondent's counsel submitted an Affidavit in support of his motion for postponement stating that in September 1997 he had made plans for a vacation with his family during the time set for hearing.

9) On February 20, 1998, the ALJ granted Respondent's motion for postponement on the basis that Respondent's counsel had a previously scheduled vacation that conflicted with the hearing date and had provided documentary evidence of that fact. The ALJ issued an amended notice resetting the hearing for May 27, 1998, and modified the Case Summary due date to May 15, 1998.

10) On March 9, 1998, the ALJ granted Respondent's motion of March 4 to depose Complainant. The ALJ noted that Respondent had not made a showing of the materiality of Complainant's testimony, gave no explanation of why a deposition rather than informal or other means of discovery was necessary, and did not request that the witness's' testimony be taken before a notary public or other person authorized by law to administer oaths, as required by OAR 839-050-0200(4), but granted the motion on the bases that the Agency did not object and that a Complainant's testimony is normally material.

11) On May 6, 1997, the forum issued an order changing the ALJ from Douglas A. McKean to Warner W. Gregg and advancing the hearing date to May 26,

1998. On May 12, 1998, Respondent's counsel advised the forum that he could not attend the hearing on May 26.

12) On May 14, 1998, the ALJ reset the hearing date to its previous setting of 9:00 a.m. May 27, and on May 15 the Agency and Respondent timely filed their respective Case Summaries.

13) At the commencement of the hearing, counsel for Respondent stated that he had read the Notice of Contested Case Rights and Procedures and had no questions about it.

14) At the commencement of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

15) During the course of the hearing, Respondent moved to dismiss the Specific Charges based on lack of jurisdiction, asserting that all individuals employed by Respondent to work for James Abgeris dba Hilltop Logging in 1996 were California employees because they performed all their work in the state of California. Respondent's motion was denied. That ruling is confirmed, for reasons stated in the Opinion section herein.

16) During the course of the hearing, the Agency moved to amend the Specific Charges to include as damages expenses incurred by Complainant in obtaining alternative employment in Alaska and transporting his wife and children there, noting that the amount of back pay sought by the Agency would be reduced by the same amount. This motion reflected evidence and issues that had already been presented without objection from Respondent. Respondent objected to the motion on the basis that the motion was untimely, thereby prejudicing Respondent. The ALJ advised he would take the matter under advisement and rule on the Agency's motion in the

proposed order. The Agency's motion is granted, for reasons stated in the Opinion section herein.

17) After the Agency called Complainant as a rebuttal witness, the hearing was recessed on May 28 because of the unavailability of Bernadette Yap Sam, the Agency's final rebuttal witness, due to a medical emergency. After consulting the participants, the ALJ set June 12 at 1 p.m. as the time for the hearing to reconvene in room 1004 of the Portland State Office Building, 800 NE Oregon, Portland, Oregon, with the Agency having the option to present Ms. Yap Sam's testimony in person or by affidavit, subject to Respondent objection. The participants were instructed to be prepared to present closing arguments after Ms. Yap Sam's testimony.

18) On June 12, 1998, the hearing reconvened at 1 p.m. in room 1004 of the Portland State Office Building, 800 NE Oregon, Portland. The ALJ and Ms. Lohr were present, but Respondent's counsel did not appear. The ALJ sent counsel a letter on June 12 informing him that the Agency had suggested it would present no further evidence and scheduling closing argument for June 17, 1998 at 4 p.m. in the same location. The ALJ further informed counsel that he or an associate must be present unless Respondent wished to waive closing argument.

19) On June 17, 1998, the hearing reconvened at 4 p.m., at which time the Agency and Respondent presented closing arguments.

20) The proposed order was issued on December 23, 1998. An exceptions notice was issued on January 6, 1999, and the participants were given an extension of time until January 18, 1999, to file exceptions. Respondent filed exceptions that were postmarked January 19, 1999. These exceptions were timely because January 18 was a holiday.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a foreign corporation registered to do business in the State of Oregon and was an employer in this state that utilized the personal services of and employed six or more persons, subject to the provisions of ORS 659.010 to 659.435. Respondent's business consists of providing temporary employees to other employers and leasing employees to other employers.

2) Complainant began working in the logging industry in 1974 and has worked almost exclusively in the industry since then. Since 1981, he has worked as a timber faller. From 1987 to July 15, 1995, Complainant worked as a timber faller in Alaska.

3) Timber falling is an extremely strenuous physical occupation. Among other things, it requires repetitive use of the upper and lower back, walking and working on uneven surfaces, repetitive lifting of a 20-25 pound chain saw to waist height, and frequent twisting, reaching, squatting and bending. The other types of logging jobs, e.g. choker setter, are also extremely strenuous.

4) In 1988, Complainant sprained his lower back while working as a timber faller in Alaska. Complainant received several treatments from a chiropractor in Alaska, who told Complainant he thought there was evidence of degenerative disc disease in Complainant's x-rays, that Complainant might be getting degenerative disc disease with age, and that Complainant probably shouldn't be doing hard work or eventually he would get arthritis in his back. Complainant was then examined by a medical doctor, who prescribed 30 days of rest. Complainant rested for 30 days, returned to work as a timber faller, and has not experienced any subsequent related back problems since that time that caused him to see a physician or lose work.

5) In 1992, Complainant injured his neck and upper back while working as a timber faller in Alaska. Complainant visited another chiropractor in Alaska, who took x-

rays, treated him five times over a period of several days, and told him that the cause of his pain was two vertebrae that were twisted slightly. Complainant missed only a few days of work as a result of this injury, returned to work as a timber faller, and has not experienced any subsequent related back problems since that time that caused him to see a physician or lose work.

6) In 1991 or 1992, after his neck and upper back injury, Complainant injured his right knee while working as a timber faller in Alaska when a tree limb struck his knee. Complainant had surgery on his knee, missed about five weeks of work in total, and has not experienced any subsequent related knee problems since that time that caused him to see a physician or lose work.

7) In 1995, Complainant decided to move back to Oregon in order to provide a better education for his high school age children. Complainant had been living on an island in Alaska with limited educational opportunities for his children. Before leaving Alaska, he made numerous phone calls to Oregon in an attempt to locate work.

8) John Abgeris, who owns and operates a logging business called Hilltop Logging, told Complainant he was interested in hiring him as a timber faller, but that Complainant would have to go through Respondent to come to work for him. Abgeris' practice was to refer all job applicants to Respondent, who then screened applicants. If Respondent decided to hire the applicant, Respondent would then lease the applicant to Abgeris.

9) On July 29, 1995, Complainant made application for employment at Respondent's Medford office. Complainant was interviewed by Lisa Van Wey, personnel placement coordinator for Respondent since January 1995. Complainant completed forms describing his employment and medical history, an I-9, W-4, and other standard forms used by Respondent. Complainant took and passed a urinalysis and

underwent Respondent's orientation before being referred out to work as a timber faller for John Abgeris at Hilltop Logging immediately afterwards. During Complainant's employment with Respondent in 1995, Respondent paid unemployment tax and carried workers compensation insurance for Complainant in Oregon.

10) Complainant disclosed the injuries listed in Findings of Fact 4-6 on a form entitled "Medical History Information" that he completed for Respondent as part of his application process.

11) Complainant worked for Hilltop Logging as a timber faller through November 12, 1995, working six days a week, and being paid for six hours of work per day at the rate of \$30/hr. Hilltop Logging, in turn, paid Respondent \$42.90/hr. for Complainant's services. Complainant commuted an average of 70-120 miles round-trip each day to work for Hilltop. All of the work Complainant did for Hilltop was performed in the state of California.

12) Because of environmental conditions, timber fallers in Oregon (and northern California) work a limited season that extends from spring until mid-November. Complainant stopped working for Hilltop Logging on November 12, 1995, because Hilltop's logging season ended.

13) Complainant experienced no physical problems of any kind while working for Hilltop Logging in 1995. Abgeris had no problems with Complainant's work performance. Respondent was Complainant's employer while he worked at Hilltop Logging.

14) Between November 12, 1995, and April 3, 1996, Complainant collected unemployment benefits and also worked cutting timber in Powers, Oregon for one or two weeks. During this time, Respondent considered him to be an "inactive" employee.

15) In early April 1996, Abgeris called all of his leased employees from 1995, including Complainant, and asked them to visit Respondent and complete the drug screen and physical if they wanted to work at Hilltop again in 1996.

16) On April 3, 1996, Complainant visited Respondent's office in Medford to "update" his paperwork. While at Respondent's office, Complainant initially completed Respondent's standard employment forms, then took and passed a urinalysis that was administered by Van Wey. Respondent considered applicants to be hired at the moment they pass a urinalysis and considered Complainant to be hired at that time.

17) After Complainant passed the urinalysis, he was sent downstairs in Respondent's office to undergo a "Back Strength and Flexibility Evaluation" and an "Upper Extremity Evaluation."

18) In 1996, Wayne Gamby contracted with Respondent to conduct physical evaluations of all applicants for jobs classed as physically strenuous. This covered, among other jobs, every job in the logging industry, truck drivers, and reforestation workers.

19) In 1996, Gamby was administrative director of Occupational Services. He had previously worked in the medical field for 26 years as an orderly, a paramedic, and an occupational health technician. He received professional training for all three of these jobs, including training as an occupational health technician by supervisors on how to look for certain things and how to evaluate findings in certain categories. He went to a conference in Seattle on cumulative trauma disorders and injuries to the back and upper extremities. He was not an audiologist or medical doctor and held no current licenses or certificates related to the medical field or certificates except for one authorizing him to perform Audiometric Hearing Testing. The authority he had to perform physical evaluations for job applicants was under the license of Dr. Theodore

Kruse, a medical doctor whom Gamby consulted as necessary. Dr. Kruse also prescribed criteria for Gamby to use in his physical evaluations and "signed off" on the policies and procedures that Gamby used in his business.

20) Gamby conducted the "Back Strength and Flexibility Evaluation" and an "Upper Extremity Evaluation" with Complainant by requiring him to perform various flexibility and strength tests. Based solely on the results of these evaluations, Gamby would not have restricted or limited Complainant's ability to perform physical work in any way.

21) Gamby also went over Complainant's medical history with Complainant. Besides the information contained on the "Medical History Information" form Complainant completed for Respondent in 1995, Complainant also told Gamby the following:

- a) The chiropractor who treated him in 1988 told Complainant he thought there was evidence of degenerative disc disease in Complainant's x-rays and that Complainant probably shouldn't be doing hard work or eventually he would get arthritis in his back.
- b) The chiropractor who treated him in 1992 told him that the cause of his pain was two vertebrae that were twisted slightly. Complainant couldn't recall if he had been given a release but told Gamby that Ben Thomas, his employer at the time would not let him return to work without a release.¹
- c) He has not experienced any subsequent related back problems since that time that caused him to see a physician or lose work.
- d) He had experience soreness in his upper extremities after clearing ground for his garden.
- e) He occasionally experiences pains going down his legs.
- f) He experienced pain in his arms while cutting brush in 1995 that was resolved after two or three days of rest.

22) Based on Complainant's stated medical history, Gamby assumed that Complainant had a sciatic nerve impingement. Based on Complainant's stated medical history, Gamby recommended Complainant should "LIMIT EXERTIONAL\REPETITIVE

USE OF BACK 2⁰ TO HISTORY WITHOUT A FULL RELEASE."² Gamby's primary concern centered around Complainant's 1988 injury. Gamby documented the findings and conclusions from his evaluation of Complainant.

23) After Gamby completed his evaluation, Complainant and Gamby went back upstairs and met with Van Wey and Heidi Beck, the personnel coordinators in Respondent's Medford office.

24) At the meeting, Gamby stated that Complainant's back was "a ticking time bomb". Van Wey or Beck³ stated to Complainant that he would never work out of any of Respondent's offices that included any kind of strenuous work with his back.

25) At the conclusion of the meeting, Van Wey or Beck⁴ gave Complainant Respondent's "doctor's release packet" along with a detailed job description for the job of timber faller. Complainant was told by Van Wey or Beck⁵ that he could not be put to work as a timber faller until he got an "evaluation/release" from a doctor, and that his medical history was the reason for this condition. Van Wey or Beck told Complainant they were concerned about his 1992 injury.⁶ Had Complainant been referred to Hilltop Logging in 1996, he would have worked in California again and Respondent would have paid unemployment tax and carried workers compensation insurance for Complainant in Oregon.

26) The "doctor's release packet" given to Complainant consisted of a cover letter, a two page document entitled "Physical Capacities Evaluation," a job description for timber faller for Hilltop Logging, a job analysis, and a job analysis for "position modifiers."

27) The cover letter referred to in Finding of Fact – The Merits #26 reads as follows:

"Date: 4-3-96 (date handwritten)

"Dear Doctor,

"Kelly Robbins has been offered employment by our firm based on an assessment of his/her physical capabilities as they relate to the intended Job Description. We have enclosed that document as well as a copy of the Medical history and the Physical Capacities Evaluation form. We would appreciate a description of the evaluation criteria that you utilize for this assessment. (emphasis added)

"Sincerely,

"Heidi Pozarich (signature handwritten)

"Personnel Coordinator"

28) The Physical Capacities Evaluation form referred to in Finding of Fact – The Merits #26 is entitled "PHYSICAL CAPACITIES EVALUATION" and requested the following information regarding Complainant:

"1. Frequency and hours per day" [that Complainant was] "able to perform the following activities": "sitting, walking, lifting, bending, squatting, climbing, kneeling, twisting, and standing."⁷

"2. Maximum weight that [Complainant] could lift/carry/push/pull repetitively for ____ hours per day."⁸

"3. Any "restrictions of function, Range of Motion or position that [Complainant] has in a work setting."⁹

"4. Any "environmental restrictions (heat, cold, dust fumes, etc.) applicable to [Complainant]."¹⁰

"5. If you are not currently treating this worker, when did they become medically stationary for the condition that is indicated on the enclosed medical history."¹¹

"5. If you are currently treating this worker, what is the condition that you are treating and when do you anticipate that the worker will be medically stationary?"¹²

"6. Can you fully release this worker for the enclosed job description, without restriction or qualification?"¹³

29) No medical history was attached to the Evaluation.

30) The job description referred to in Finding of Fact – The Merits #26 lists in detail all the physical activities performed by a timber faller for Hilltop Logging, including shift, % of day different physical movements such as "twisting" are performed, maximum weight lifted, tools/equipment, actual jobs performed, e.g. "falling timber", and safety hazards.

31) The job analysis referred to in Finding of Fact – The Merits #26 specifies the "physical strength level" and "activity level" that corresponds to the job description in Finding of Fact – The Merits #30. "Physical strength level" is rated at "moderate" with "lifting/carrying/pushing/pulling" minimums and maximums listed and "activity level" is rated at "moderate to heavy", with relevant activities and their intensity listed. It also specifies parts of the body for which "repetitive action" and "maximum strength, endurance & flexibility" are required.¹⁴

32) The job analysis with "position modifiers" referred to in Finding of Fact – The Merits #26 specifies particular "condition[s] or apparatus" required for the job of timber faller, e.g. "**WILL** be exposed to excessive noise levels (above 85 decibels, routinely.)" (emphasis in original). Eight out of 17 modifiers are indicated by circling and/or highlighting the modifier.

33) At the conclusion of the meeting, Complainant believed he was required to provide Respondent with a written release from the chiropractor who had treated him in 1992 and have the "Physical Capacities Evaluation" completed by a physician before Respondent would refer him to Hilltop Logging.

34) Shortly after April 3, Complainant attempted to obtain a release from Dr. Hediger, the chiropractor who had treated him in 1992.

35) Complainant also began calling physician's offices in an attempt to schedule a physical capacities evaluation. Complainant was unable to make an appointment for an evaluation. Complainant called the Rogue Valley Medical Center ("RVMC") in Medford, a facility that conducts work performance evaluations. In 1996, RVMC charged \$582 for a medical evaluation like the one contemplated by the "Physical Capacities Evaluation" form provided to Complainant by Respondent and would not conduct such an evaluation without a physician's referral¹⁵ or a referral

through the Occupational Health Department at RVMC. Either Dale Deboy or Debbie McQueen from RVMC's Work Performance Center telephoned Respondent in response to Complainant's inquiry, asked who would pay for the evaluation, and was told by someone in Respondent's office that Respondent would not pay for it.

36) Neither Beck nor Van Wey told Complainant or anyone else at any time that Respondent would pay for the cost of obtaining a medical release or for a physician to complete the "Physical Capacities Evaluation."

37) Gamby consulted Dr. Kruse not long after April 3, 1996 because he thought there might be problems arising from his evaluation. On November 1, 1996, Dr. Kruse noted that he concurred with Gamby's evaluation of Complainant. Kruse never examined Complainant.

38) Complainant got "pretty upset" when he was told in the meeting with Beck, Van Wey, and Gamby that he wouldn't be referred to Hilltop Logging because of his medical history. Afterwards, he went home and was "very upset."

39) Complainant had just purchased a manufactured home in February 1996 and was supporting five children who lived at home with Complainant and his wife in April 1996. He was aware that the work "season" for timber fallers in Oregon had just started and was extremely concerned about finding work.

40) Complainant began a search for other timber faller jobs in the southern Oregon/northern California area after April 3, 1996. From April 3 to April 15, Complainant contacted a minimum of four local sources -- John Abgeris, Estremeda Logging, JMW Logging, and a saw shop -- in an unsuccessful attempt to find work.

41) Complainant, as a last resort, then decided to seek work in Alaska. Complainant did this as a last choice to avoid the severe financial consequences he and his family would have experienced if they had remained in Oregon and Complainant

had been unable to find work. When he decided to leave, his wife already had a firm job offer as a cook in a logging camp in Whitestone, Alaska. Complainant left for Alaska on or about April 20 with his wife and two of his five children, aged four and 11, all driving in his crew cab pickup. He left three other children at home in Grants Pass. One was a freshman in high school; the second was a sophomore; and the third was his 18-year-old stepdaughter who was seven or eight months pregnant.

42) Leaving for Alaska was a traumatic experience for Complainant. He had originally left Alaska because of his children and was now having to leave three of them at home, one of whom was in the late stages of pregnancy, in order to meet his financial obligations. He felt devastated at having to make this decision. He would not have gone to Alaska if he had found work in Oregon or California.

43) Prior to leaving for Alaska, Complainant did not provide Respondent with a release or the Physical Capacities Evaluation completed by a physician.

44) To get to Alaska, Complainant drove 1500 miles to Prince Rupert, with expenses of approximately \$500. Complainant then took the ferry to Juneau, at a cost of \$602 for the basic fare and about \$100 for food. He arrived at Whitestone on or about April 27. His wife then began working as camp cook and Complainant immediately began working as a timber faller in the same camp. Complainant and his wife paid \$180 for rent for the first month at the Whitestone camp. After about one week, Complainant determined that the camp was an unfit place for his children based on aggressive and out of control behavior of other camp children towards his children. He obtained work in a logging camp near Ketchikan where he had hoped to work when and his wife first came to Alaska. On May 7, Complainant flew alone to Ketchikan, with documented air fare costing him \$128, and two connecting charter flights of undetermined cost. Because of the logging camp's policy on trial service,

Complainant's wife and children could not join him for three weeks. Complainant paid \$12/day room and board for three weeks in Ketchikan. On May 28, his wife and children took the ferry to Ketchikan to join Complainant, with ferry fare costing him \$126. Complainant and his wife then rented a trailer for one month, at a cost of \$280. Complainant's wife worked very little in Ketchikan. While in Ketchikan, there were no public phones, and Complainant had to hitch rides on a boat to get to a phone he could use to call his children in Oregon. On June 21, Complainant and his family left Ketchikan for home. They left because they could no longer stand being separated from the rest of the family. On the way home with his family, Complainant spent \$94.50 for one night's motel lodging. Complainant spent \$346 for ferry fare from Hollis to Ketchikan and from Ketchikan to Prince Rupert. Complainant drove from Prince Rupert back to Grants Pass, another 1500 mile drive.

45) Complainant's total earnings in Alaska were \$7400 gross. Complainant's wife earned a total of \$3265 while working as a camp cook in Alaska. \$2965 of this was earned in Whitestone.

46) Complainant arrived back in Grants Pass in late June and immediately began looking for work. On July 1, 1996, Complainant went to work as a timber faller in Quincy, California. He worked one week in Quincy, then went to work for BMR, who called him in response to his earlier application. Complainant earned \$653.90 working in Quincy. Complainant started work for BMR on July 8, 1996, earning \$200/day.

47) In 1996, timber fallers employed by John Abgeris worked Monday through Saturday, six hours a day, and were paid \$30/hr., for a total of \$180/day. The timber fallers were responsible to pay for their own travel, equipment and fuel expense. This expense amounted to about twenty percent of their wages.

48) Complainant's testimony was generally credible. He testified forthrightly about his medical history, perhaps the most significant issue in the case from his point of view. He did not deny making statements about pain in different parts of his body to Wayne Gamby during Gamby's evaluation and was straightforward with Gamby when it would have been in his best interests to omit items of his medical history or shade the truth. He did not try to minimize his prior injuries in his testimony before the forum, but attempted to explain the specific circumstances of each injury and the treatment he received. He did not try to exaggerate the extent of his job search between April 3 and late April 1996 when he made his decision to go to Alaska. Although the figures he provided in his testimony concerning his wage loss and the cost of going to Alaska and back to obtain work differed between earlier statements and the testimony he provided at hearing, the forum believes that any inconsistent testimony in this regard was a result of his confusion in trying to compare different sets of figures or not having the specific figures available to him. He testified convincingly about the emotions he experienced as a result of Respondent's failure to refer him to Hilltop Logging and was visibly upset at the hearing when he testified about the April 3 post-evaluation meeting and not being referred to Hilltop. He did not try to embellish his mental suffering. He was candid in admitting that he sometimes gets confused when angry, that he might not hear things right when angry, and that he might say something that might not quite be accurate when angry.

49) Dale Deboy's recollection was somewhat vague. The forum credited his testimony regarding Rogue Valley Medical Center's policies, procedures, and costs. Because of his vague recollection, his testimony regarding contacts with Complainant and Respondent was credited where it was corroborated by other credible evidence.

50) John Abgeris' testimony was credible in its entirety.

51) Heidi Beck was not a credible witness. Important parts of her testimony were inconsistent and, in some cases, simply unbelievable. For example, she claimed that Respondent did not use the terminology "physical capacities evaluation," but signed a one paragraph form cover letter created by Respondent referring specifically to a "Physical Capacities Evaluation" form and enclosed the form, which is clearly titled "Physical Capacities Evaluation," with the letter. She testified that Respondent never required anyone to have a formal physical capacities evaluation other than Gamby's assessment, but gave Complainant the above-mentioned "Physical Capacities Evaluation" form and form cover letter with instructions to get a "release/evaluation". She testified it would have been sufficient if Complainant had brought back a release from a physician stating Complainant could do unrestricted work, yet the letter and forms she gave Complainant clearly call for an evaluation and specific responses to specific questions regarding Complainant's ability to utilize different parts of his body in performing physical labor. She referred to Gamby's evaluation both as an "evaluation" and a "medical assessment". She testified that her handwritten notes were made contemporaneous with her phone conversations, yet a conversation with Complainant that clearly took place on April 8, 1996, is dated "4/9/96", with no explanation from Beck as to the reason for the difference. Regarding Respondent's requirement that Complainant obtain a release/evaluation, she testified or wrote variously regarding Complainant's referral to Hilltop that: (1) Complainant was asked to get a release from a physician he had seen that released him for full duty work; (2) Complainant was not told that he had to get a medical exam or physical capacities evaluation (hereinafter "PCE"); (3) She was not requiring an evaluation, but a release; (4) Complainant needed to get an "evaluation/release" from a doctor to be referred; and (5) Complainant was not required "to get a release but that he was welcome to have someone else evaluate

him." Consequently, the forum has credited Beck's testimony only where it was corroborated by other credible evidence.

52) Lisa Van Wey's testimony was colored by her present employment with Respondent. It was rendered suspect by her admission that she discussed Heidi Beck's testimony with Beck after Beck had testified and before Van Wey testified. Like Beck, her testimony was inconsistent. Unlike Beck, who claimed that "PCE" was a term foreign to her, Van Wey thought a PCE was what Gamby did for Respondent. She testified that Exhibit A6, pp.3-5, were Respondent's "release packet", yet claimed she didn't associate PCE with the packet and never noticed page 4 was titled "Physical Capacities Evaluation". She testified that Respondent requires applicants who have seen a doctor "in the last year" (emphasis added) for anything but the "common cold" to get a doctor's release stating if they have any limits, but that Complainant was required to get a release because he said he hadn't been released by a chiropractor or chiropractors who saw Complainant either four or eight years earlier. Like Beck, Van Wey's testimony was credited only where it was corroborated by other credible evidence.

53) James Hardt's testimony on critical issues was disingenuous and seemed to be crafted specifically for the hearing. For example, he testified that Respondent sometimes requires applicants to undergo physical exams by physicians and Respondent pays for it. This contradicted Beck's and Van Wey's testimony that Respondent never required applicants to have a physical exam other than Gamby's PCE, and no evidence was offered to support this assertion. Hardt testified that Respondent may FAX requests for a release to a treating physician's office, but there was no evidence that this was ever done in Complainant's case. Notably, neither Van Wey nor Beck mentioned this gratuitous policy in their testimony. He testified that if an

applicant can't get a release, Respondent might find a doctor, have the applicant examined, and pay for it. Again, it is noteworthy that neither Van Wey nor Beck testified to this policy, and no evidence was offered to support this assertion. Finally, Hardt testified that, "with rare exceptions," if there is a problem with employees, he "knows about it almost immediately," and he would make it a top priority to do what he could to put that person to work. Although Hardt was absent from work on April 3, 1996, his subordinates Van Wey and Beck, as well as Gamby, clearly perceived Complainant's situation as a problem. Yet there was no testimony that Hardt was aware that Complainant had even come in to apply, much less that there was a problem with Complainant getting a release. Given Hardt's testimony concerning his awareness of problems in the office, it is simply not believable that he was not aware of Complainant's problem. If he was aware, he clearly did not apply the proactive procedures described earlier in this paragraph. Accordingly, the forum has discredited Hardt's testimony regarding Respondent's gratuitous procedures towards applicants whom Respondent believes need post-hire medical evaluations or releases.

54) The Agency did not challenge Wayne Gamby's testimony regarding the physical evaluation he performed on Complainant and the results of that evaluation, and the forum finds that testimony credible because the evaluation was based on objective physical criteria. However, the forum finds his opinion regarding Complainant's limitations, based solely on Complainant's self-described medical history, not credible based on Gamby's lack of a medical license or any relevant certification. Although Gamby testified that Dr. Kruse verified his opinion, more significant to Gamby's credibility was the conspicuous absence of Dr. Kruse from the witness stand to verify his stamp of approval and the basis on which he granted that stamp of approval.

ULTIMATE FINDINGS OF FACT

- 1) At all times material, Respondent employed six or more persons within Oregon.
- 2) At all times material, Respondent's business was leasing employees to other businesses and providing temporary employees to other businesses.
- 3) Complainant applied for employment with Respondent on April 3, 1996 as a timber faller after being referred to Respondent by Hilltop Logging, an employer who desired to use Complainant's services as a timber faller.
- 4) Complainant passed a drug screen and was considered hired by Respondent before Respondent's agent conducted a Physical Capacities Evaluation on Complainant.
- 5) After Complainant underwent the Physical Capacities Evaluation, Respondent informed Complainant that he was restricted from strenuous activity requiring the use of his back, and that he would not be referred to Hilltop Logging unless he obtained a medical release/evaluation.
- 6) Based on the Physical Capacities Evaluation, Respondent perceived that Complainant had a physical impairment to his back that prevented him from performing any strenuous physical labor requiring the use of his back, including all jobs in the logging industry, the occupation Complainant had worked in his entire adult life.
- 7) At all times material, Complainant had no physical impairment to his back.
- 8) Complainant would have been referred to Hilltop Logging as a timber faller except for Respondent's erroneous perception that Complainant had a physical impairment to his back that prevented him from performing any strenuous physical labor requiring the use of his back, including all jobs in the logging industry, the occupation Complainant had worked in his entire adult life.

9) Although Respondent required Complainant to obtain a medical release/evaluation as a condition of continuation of his employment, Respondent would not pay the cost of the release/evaluation.

10) Complainant lost wages of \$7,797.60 between April 4 and July 7, 1996.

11) Complainant was very upset about Respondent's failure to refer him to Hilltop Logging. He diligently sought work thereafter and moved to Alaska to obtain employment in order to ensure the financial well being of his family. The move devastated him because of the separation of his family.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and 659.330 to 659.460.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659.040, 659.050, and 659.435.

3) The actions of employees Lisa Van Wey and Heidi Beck and agent Wayne Gamby, described herein, and their perceptions and attitudes underlying those actions, are properly imputed to Respondent.

4) At times material herein, ORS 659.425 provided, in pertinent part:

"(1) For the purpose of ORS 659.400 to 659.460, it is an unlawful employment practice for any employer to refuse to hire, employ or promote, to bar or discharge from employment or to discriminate in compensation or in terms, conditions or privileges of employment because:

" * * * * *

"(b) An individual has a record of a mental or physical impairment;
or

"(c) An individual is regarded as having a physical or mental impairment."

At times material herein, ORS 659.400 provided, in pertinent part:

"As used in ORS 659.400 to 659.460, unless the context requires otherwise:

"(1) 'Disabled person' means a person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment.

"(2) As used in subsection (1) of this section:

"(a) 'Major life activity' includes, but is not limited to self-care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property.

"(b) 'Has a record of such an impairment' means has a history of, or has been misclassified as having such an impairment.

"(c) 'Is regarded as having an impairment' means that the individual:

"(A) Has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer or supervisor as having such a limitation;

"(B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others toward such impairment; or

"(C) Has no physical or mental impairment but is treated by an employer or supervisor as having an impairment.

"(3) 'Employer' means any person who employs six or more persons and includes the state, counties, cities, districts, authorities, public corporations and entities and their instrumentalities, except the Oregon National Guard."

At times material herein, OAR 839-06-205 provided, in pertinent part:

" * * * * *

"(2) 'Disability' means a physical or mental (including emotional or psychological) impairment which substantially limits one or more major life activities. Disability does not include the current use of illegal drugs.

"(3) 'Duly licensed health professional', in addition to physicians and osteopathic physicians, includes psychologists, occupational therapists, clinical social workers, dentists, audiologists, speech pathologists, podiatrists, optometrists, chiropractors, naturopaths, physiotherapists, and radiologic technicians insofar as any opinion or evaluation within the scope of the relevant license applies or refers to the individual's physical or mental impairment.

"(4) 'Major life activity' includes but is not limited to: walking, speaking, breathing, performing manual tasks, hearing, learning, caring for oneself and working in general, considering the person's experience and education, as opposed to performing a particular job.

"(5) 'Medical' means authored by or originating with a medical or osteopathic physician or duly licensed health professional.

"(6) 'Misclassified', as used in ORS 659.400(2)(b), means an erroneous or unsupported medical diagnosis, report, certificate, or evaluation, including an erroneous or unsupported evaluation by a duly licensed health professional.

"(7) 'Perceived disability' is:

"(a) A physical or mental condition which does not limit a major life activity but which is thought to be disabling (example: flu thought to be AIDS); or

"(b) The perception of a disability where no condition exists (example: a person who speaks slowly is thought to be mentally impaired); or

"(c) A condition disabling only because of the attitude of others (example: disfigurement because of burns).

"(8) 'Physical or mental impairment' means an apparent or medically detectable condition which weakens, diminishes, restricts or otherwise damages a person's health or physical or mental activity."

Complainant was not a disabled person at times material herein. Respondent perceived Complainant as having a physical impairment to his back that substantially limited Complainant in the major life activity of employment. Respondent violated ORS 659.425 by refusing to refer Complainant to the position of timber faller based on this perception.

5) At times material herein, OAR 839-06-235 provided, in pertinent part:

"(1) An employer may inquire whether an individual has the ability to perform the duties of the position sought or occupied.

"(2) An employer may require a post offer medical evaluation of a person's physical or mental ability to perform the work involved in a position:

"(a) The person seeking or occupying a position must cooperate in any medical inquiry or evaluation, including production of medical records and history relating to the person's ability to perform the work involved; and

"(b) If the employer requires a medical evaluation as a condition of hire or job placement and the evaluation verifies a physical or mental impairment affecting the ability to perform the work involved, or verifies a present risk of probable incapacitation, the employer may not refuse to hire or place a person based on the person's impairment unless no reasonable accommodation is possible.

"(c) The employer shall pay the cost of a medical evaluation or the production of medical records it has requested as provided in ORS 659.330.

" * * * * *

"(4) An employer may not use the provisions of this section as a subterfuge to avoid the employer's duty under ORS 659.425."

At times material herein, ORS 659.330 provided, in pertinent part:

"(1) It is an unlawful employment practice for any employer to require an employee, as a condition of continuation of employment, to pay the cost of any medical examination or the cost of furnishing any health certificate.

" * * * * *

"(3) Complaints may be filed by employees, and this section shall be enforced by the Commissioner of the Bureau of Labor and Industries in the same manner as provided in ORS 659.040 to 659.110 and 659.121 for the enforcement of an unlawful employment practice. Violation of subsection (1) of this section subjects the violator to the same civil * * * remedies * * * as provided in ORS 659.010 to 659.110 * * *."

Respondent violated ORS 659.330 by requiring Complainant to pay the cost of a medical examination or furnishing a health certification as a condition of continuation of employment.

OPINION

1. **ORS 659.425(1)(b).**

ORS 659.425(1)(b) prohibits discrimination because an "individual has a record of a physical or mental impairment." When ORS 659.425(1)(b) is read in light of the definitions in ORS 659.400(1) and (2), "has a record of such an impairment" means that an individual has a history of, or has been misclassified as having an impairment which substantially limits one or more major life activities. *In the Matter of Parker Hannifin*

Corporation, 15 BOLI 245, at 262, *citing* ORS 659.400 (2)(b); *Devaux v. State of Oregon*, 68 Or App 322, 326, 681 P2d 156, 158 (1984).

The initial issue is whether the medical history available to Respondent at the time Complainant was told he could not be referred as a timber faller qualifies as a "record". The medical history under scrutiny here was provided by Complainant to Respondent in 1995 and 1996. In 1995, Complainant provided a written medical history to Respondent stating, in relevant part: (1) He suffered a lower back sprain in 1987,¹⁶ was treated by a chiropractor and a physician and had "30 days rest" as treatment; (2) He threw vertebrae out in his neck and upper back in 1991 or 1992, went to the chiropractor five times; and (3) He had scar tissue removed from his right knee in 1991¹⁷ or 1992. Complainant indicated he had no current physical restrictions or limitations as a result of these injuries. In 1996, Complainant told Gamby that the 1988 chiropractor told him he thought there was evidence of degenerative disc disease and Complainant shouldn't be doing hard work, that the 1992 chiropractor told him he had two vertebrae that were slightly twisted, that he had experienced soreness in his upper extremities after clearing ground for his garden, that he occasionally experiences pains going down his legs, and that he experienced pain in his arms while cutting brush in 1995 that was resolved after two or three days of rest.

Complainant's medical history does not disclose any condition that substantially limited any major life activity. The only major life activity even referenced is employment. In order to be substantially limited in employment, one must be unable to perform or significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes. *Former OAR 839-06-205(4); Parker-Hannifin Corporation, supra*, at 265. The medical history shows that Complainant missed some work because of his injuries, but there is nothing indicating anything more than a

temporary impairment. *Former OAR 839-06-240(1)*. The forum concludes that Complainant's medical history acted upon by Respondent does not constitute a "record" of any impairment that substantially limits any major life activity or misclassification of such impairment, and as a result, Complainant did not enjoy the protection of *former* ORS 659.425(1)(b).

2. ORS 659.425(1)(c).

ORS 659.425(1)(c) prohibits discrimination because an individual is regarded as having a physical or mental impairment that substantially limits a major life activity. *OSCI v. Bureau of Labor and Industries*, 98 Or App 548, 780 P2d 743 (1989); *Parker-Hannifin Corporation, supra*. *Former* ORS 659.400(2)(c) provided:

"Is regarded as having [such] an impairment' means that the individual:

"(A) Has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer or supervisor as having such a limitation;

"(B) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitude of others toward such impairment;

"(C) Has no physical or mental impairment but is treated by an employer or supervisor as having an impairment."

An individual must have an "impairment" to come under the protection of *former* ORS 659.400(2)(c)(A) and (B). "Impairment" is defined as "an apparent or medically detectable condition which weakens, diminishes, restricts or otherwise damages a person's health or physical or mental activity." *Former OAR 839-06-205(8)*. There was no evidence presented in this case, other than Gamby's evaluation of Complainant's medical history, that established that Complainant had any condition that weakened, diminished, restricted, or otherwise damaged his health or physical or mental activity. Complainant had spent his entire adult life working as a logger, and the previous 15 years working as a timber faller. Since Respondent's refusal to refer him to Hilltop

Logging, he has worked continuously as a timber faller without injuring himself or losing work due to problems with his back, or having to consult a doctor about his back. The injuries Gamby was concerned about occurred four and eight years prior to 1996, and there is no evidence whatsoever, other than Gamby's opinion, that Complainant was in any way impaired from working as a timber faller or doing any job in the logging industry. In addition, Gamby's objective evaluation of Complainant concluded that Complainant was physically capable of working as a timber faller. Consequently, the forum must conclude that Complainant did not have an "impairment," and that he was not protected by the provisions of *former* ORS 659.400(2)(c)(A) and (B).

The remaining subsection, *former* ORS 659.400(2)(c)(C), was explicitly designed to protect individuals in Complainant's circumstances -- individuals who do not have an impairment but are treated adversely by an employer or potential employer as though they had an impairment which substantially limits one or more major life activities. *OSCI v. Bureau of Labor and Industries, supra* at 746. The question was whether Respondent treated Complainant adversely and whether that adverse treatment was based on Respondent's perception that Complainant was substantially limited in one or more major life activities.

Respondent's refusal to refer Complainant clearly fulfills the adverse treatment requirement of the statute. Whether or not Respondent took this action based on a perception that Complainant had an impairment that substantially limited one or more major life activities requires a further analysis of the facts and applicable law.

The major life activity under scrutiny is employment. In order to be substantially limited in employment, one must be unable to perform or significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes. *Former OAR 839-06-205(4); Parker-Hannifin Corporation, supra*, at 265.

Complainant applied for a job as a timber faller. His chosen field of employment since high school had been the logging industry, and he had worked almost exclusively as a timber faller since 1981. Pursuant to Respondent's standard hiring procedure, which involved having Gamby evaluate everyone who applied for any job in the logging industry, Gamby evaluated Complainant for the job of timber faller. Gamby did that and recommended that Complainant should "limit exertional/repetitive use of back". All jobs in the logging industry that Complainant was qualified to perform require strenuous, repeated use of the back, and the effect of this recommendation was to foreclose Complainant from working in any job in the logging industry, so far as Respondent was concerned. In doing this, Respondent clearly perceived Complainant as "unable to perform" a class of jobs as contemplated by former OAR 839-06-205(4) and violated ORS 659.425(1)(c).

3. Was Complainant "barred" or "refused hire?"

The Agency alternatively alleges that Complainant was either "barred" or "refused hire" by Respondent. ORS 659.425 prohibits both actions. The question is what label to put on Respondent's action. Respondent claims that Complainant was never "barred" or "refused hire", based on their contentions that Complainant was "hired" after passing the drug screen and that Respondent would have referred him to any job for which he was qualified after that.

A review of the facts is in order. Complainant sought Respondent as an employer solely because it was the only way he could be referred to Hilltop Logging, a company that wanted Complainant to work for them as a timber faller for a second consecutive year. If Complainant had applied at Hilltop Logging directly and been turned down because of a negative PCE, he would not have been considered "hired". Respondent may have "hired" Complainant, but Complainant did not stay "hired" after

Respondent refused to refer him to the very job he sought. Respondent's position is without merit. Likewise, Respondent's argument that Complainant was not "barred" because Respondent would have referred him to a lesser paying, non-logging job, is purely one of semantics, lacks substance, and is not supported by credible facts. ORS 659.405, which sets out the public policy of the state of Oregon with regard to disabled persons and employment, is instructive as to the correct approach to this issue. It reads, in relevant part:

"(1) It is declared to be the public policy of Oregon to guarantee disabled persons the fullest possible participation in the social and economic life of the state, to engage in remunerative employment * * *.

"(2) The right to otherwise lawful employment without discrimination because of disability where the reasonable demands of the position do not require such a distinction * * * are hereby recognized and declared to be the rights of all the people of this state. It is hereby declared to be the policy of the State of Oregon to protect these rights and ORS 659.400 to 659.460 shall be construed to effectuate such policy."

The policy behind Oregon's disability statutes make it clear that disabled persons are not to be denied rights guaranteed by the legislature based on legal artifice. There is no doubt that Complainant was not referred to Hilltop based on a perceived physical impairment. The "adverse action" necessary for establishing a prima facie case of discrimination occurred when Complainant was denied referral. Even if Complainant stayed "hired", any subsequent actions of Respondent related to other potential referrals only go to mitigation, and not to whether or not unlawful discrimination occurred.

4. ORS 659.330.

The preponderance of credible evidence showed that Respondent required Complainant to provide a "release/evaluation" as a condition of job placement in the logging industry, that Complainant sought to obtain such a "release/evaluation" through the Rogue Valley Medical Center in order to comply with Respondent's directive, and

that Respondent refused to pay the \$500+ prospective cost of Rogue Valley's evaluation. The type of "release/evaluation" contemplated by Respondent, as evinced by the paperwork provided to Complainant, clearly required a "medical examination"¹⁸ Based on the testimony of Respondent's witnesses, Complainant was in fact "hired" when this condition was placed on him, so there can be no doubt that it was "a condition of continuation of employment." The fact that Complainant did not actually undergo the examination and pay for it out of his own pocket is irrelevant. He was required to undergo a medical examination as a condition of continuation of employment and was required to pay for the examination if he chose to undergo the examination.¹⁹ Under these circumstances, Respondent's actions constituted a violation of ORS 659.330.

5. The Agency's motion to amend the Specific Charges to include the expenses of Complainant's move to Alaska as an element of damages.

During the course of the hearing, the Agency sought to amend the specific charges to include Complainant's moving expenses to and from Alaska as an element of damages. Respondent opposed it on the grounds that damages of this sort were not authorized by law and because Respondent was prejudiced by not having prior knowledge of the Agency's intent.

OAR 839-050-0140 governs amendments in BOLI's contested case hearings. In relevant part, it reads as follows:

" * * * * *

"(2)(a) After commencement of the hearing, issues not raised in the pleadings may be raised and evidence presented on such issues, provided there is expressed or implied consent of the participants. Consent will be implied where there is no objection to the introduction of such issues and evidence or where the participants address the issues. The administrative law judge may address and rule upon such issues in the proposed order. Any participant raising new issues must move the administrative law judge to amend its pleading to conform to the evidence and to reflect issues presented.

" * * * * *

"(2)(c) Charging documents may be amended to request increased damages * * * to conform to the evidence presented at the contested case hearing."

Complainant's out of pocket expenses related to his trip to Alaska were not prayed for in the Specific Charges. Evidence concerning those expenses came into the record without objection, implying consent on the part of Respondent. In past cases before the forum, the Commissioner has consistently granted amendments under these circumstances. *In the Matter of Benn Enterprises, Inc.*, 16 BOLI 69, 71 (1997), *In the Matter of Yellow Freight System, Inc.*, 13 BOLI 201, 203 (1994). The forum follows its own precedent in this case and grants the Agency's amendment.

6. Respondent's motion to dismiss the Specific Charges on the grounds that Hilltop Logging, the employer Respondent have leased Complainant to, did all of its work in California in 1996.

This motion was denied during the hearing. This ruling is affirmed. The evidence is clear that Respondent hired Complainant, an Oregon resident, through their office in Medford, Oregon, and that all of Complainant's workers compensation insurance and unemployment tax was paid in Oregon in 1995 and would have been paid the same in 1996. Under these circumstances, the fact that Complainant would have been sent to work out of state does not convert Respondent into a non-employer for the purposes of ORS 659.400(3).

7. Damages.

Complainant seeks two types of damages, back pay and compensation for mental suffering.

a. Back Pay.

If Complainant had been referred to Hilltop, he would have started work on April 4, 1996, working six days a week, six hours a day, and earning \$180 a day. Through July 7, he would have worked 76 days, earning gross wages in the amount of \$13,680.

On July 8, 1996, he obtained a job that paid \$200 a day, cutting off any further back pay award.

In contrast, Complainant's actual gross earnings during this period of time were \$8,053.90 (\$7,400 in Alaska; \$653.90 in Quincy). These wages must be counted as an offset against the back pay to which he is entitled.

Complainant also incurred expenses getting to and from the logging camps he worked at in Alaska. Since he would not have earned the \$7400 without incurring these expenses, they must be counted as a set-off against the \$7400. The forum has allowed those expenses for which there is documentary evidence or a reasonable estimate of expenses. Expenses allowed include \$1,000 for 3,000 miles round-trip from Grants Pass to Prince Rupert in Complainant's crew cab pickup, \$602 for the ferry ride from Prince Rupert to Juneau, \$128 for Complainant's plane flight to Ketchikan, \$94.50 for motel expenses on the way home to Grants Pass, and \$346 for the ferry ride from Hollis to Prince Rupert, for a total of \$2170.50. Expenses for food are not included, as Complainant and his family would have had to eat anyway. Complainant's rent and room and board is not included, as the forum considers that they offset the estimated "20%" expense reflected in Finding of Fact - The Merits #47.

Based on this analysis, Complainant's back pay can be computed as follows: \$13,680 (gross back pay) *minus* \$8,053.90 (gross wages earned in mitigation) *plus* \$2170.50 (expenses) *equals* gross pay loss of \$7,797.60.

b. Mental Suffering

Awards for mental suffering damages depend on the facts presented by each Complainant. A Complainant's testimony about the effects of a Respondent's unlawful conduct, if believed, is sufficient to support a claim for mental suffering damages. *In the Matter of Jerome Dusenberry*, 9 BOLI 173 (1991).

Complainant testified credibly as to the extent of his mental suffering attributable to Respondent's unlawful employment practices. Complainant, who had been a timber faller for the previous 14 years, including the previous year with Respondent, was understandably "very upset" when Respondent told him he could not do that job based on the opinion of Wayne Gamby. He was aware that the work season for timber fallers in Oregon had just begun and was "extremely concerned" about finding work. This concern was heightened by the fact that he had recently purchased a manufactured home in which to house his family, which he had moved from Alaska to Oregon for his children's sake the previous summer. He tried to find work in Oregon and northern California, but soon realized he would have to move back to Alaska to maximize his chances of finding employment. He made that move, taking his wife and two youngest children with him, and found work immediately. However, the separation from his three high school aged children, including one who was seven months pregnant, was "devastating" to him. While in Alaska, he worked continually, finally leaving when he could no longer stand the separation from his family.

Based on all of the above, the forum concludes that \$20,000 is an appropriate award of mental suffering damages in this case.

8. Respondent's Exceptions to the Proposed Order.

a. ALJ Bias and Witness Credibility

Respondent contends that Barrett's witnesses were credible and believable, that Complainant's story was not believable, and that the ALJ's assessment of credibility was based on the ALJ's bias. Specifically, Respondent notes "what they believe to be a prejudice and bias by the Judge who was hired by the Commissioner and travels with and dines with the BOLI representatives, agents and case presenters while trying the Commissioner's cases." In prior cases, the question of ALJ bias has typically arisen

in the context of a motion to disqualify the ALJ or hearings referee.²⁰ A 1993 BOLI case illustrates the rationale used by this forum in deciding questions of ALJ bias. In that case, Respondent contended that the hearings referee was incapable of giving Respondent a fair hearing and decision because he was an employee of the Agency. The forum observed:

"The mere fact that the Hearings Referee is an employee of the Agency is insufficient to prove bias or prejudice. In addition, administrative agencies typically investigate, prosecute, and adjudicate cases within their jurisdiction. This combination of functions by itself does not violate the due process clause. *Withrow v. Larkin*, 421 US 35, 54, 95 SCt 1456, 43 LEd2d 712 (1975); *Fritz v OSP*, 30 Or App 1117, 569 P2d 654, 656-67 (1977); *Palm Gardens, Inc. v. OLCC*, 15 Or App 20, 34, 514 P2d 888 (1973), *rev den* (1974)." *In the Matter of Clara Perez*, 11 BOLI 181, 182-83 (1993)

In the same case, the forum held that Respondent has the burden of showing actual prejudice or bias. *Id*, at 183.²¹ Here, there is no evidence on the record demonstrating actual prejudice or bias as alleged by Respondent. The ALJ's assessments of witness credibility are supported by substantial evidence in the record. Accordingly, Respondent's exceptions on this point are overruled.

b. Failure to Call Complainant's Wife as a Witness

Respondent argues that the ALJ's bias is further demonstrated by the language in Finding of Fact – The Merits #48 noting that "It was equally within Respondent's power to call Complainant's wife as a witness to impeach Complainant, and Respondent did not do so." That portion of Finding of Fact – The Merits #48 has been deleted, but the forum's assessment of Complainant's credibility stands.

c. Testimony of John Abgeris

Respondent contends that the ALJ should have commented on John Abgeris' testimony that he would want to have a medical release before hiring a timber faller who was stating he had prior back problems and had radiating pain down his legs. Abgeris

had no medical background that would entitle his opinion on this subject to any weight. Respondent's exception is overruled.

d. The Release

Respondent argues that it was reasonable to request a release and that the ALJ should have commented on the fact that Complainant stated he contacted his chiropractor for a release. The issue of reasonableness has been adequately covered in the proposed order. The issue of whether or not Complainant contacted his chiropractor for a release is irrelevant to the outcome of this case, given that Respondent's act of requiring a "release/evaluation" violated ORS 659.330.

e. Damages and Amendment.

Respondent generally excepts to the damages allowed and the amendment granted. The damages are supported by a preponderance of the evidence. The basis for granting the amendment is based on the administrative rules governing procedures in this forum and the forum's precedent. These exceptions are without merit and are overruled.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practices found in violation of ORS 659.330 and ORS 659.425 and as payment of the damages awarded, Respondent **BARRETT BUSINESS SERVICES, INC.** is hereby ordered to:

1) Deliver to the Fiscal Office of the Bureau of Labor and Industries, State Office Building, Ste 1010, 800 NE Oregon Street, # 32, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for KELLY ROBBINS, in the amount of:

a) SEVEN THOUSAND SEVEN HUNDRED NINETY-SEVEN DOLLARS AND SIXTY CENTS (\$7,797.60), less lawful deductions, representing wages lost by Complainant between April 4 and July 7, 1996, as a result of Respondent's unlawful practices found herein, plus

b) TWENTY THOUSAND DOLLARS (\$20,000), representing compensatory damages for the mental and emotional distress suffered by KELLY ROBBINS as a result of Respondent's unlawful practices found herein, plus,

c) Interest at the legal rate from July 7, 1996, on the sum of \$7,797.60 until paid, and

d) Interest at the legal rate on the sum of \$20,000 from the date of the February 22, 1999 Final Order until Respondent complies with this Final Order on Reconsideration.

2) Cease and desist from discriminating against any employee based upon the employee's disability and cease and desist from requiring a medical examination or health certificate at the employee's expense as a condition of continued employment.

¹Complainant's 1995 application with Respondent shows that he worked for Ben Thomas from 1990-95.

²Gamby explained in his testimony that "2" in his handwritten note was his shorthand for "secondary".

³Complainant was confused about the identity of Beck and Van Wey and thought Beck was Van Wey and vice-versa based on a statement made Bernadette Yap-Sam, the Agency's investigator, that misidentified Beck as Van Wey. In addition, it was not clear from the testimony of Beck and Van Wey which one of them said or did what. However, based on Complainant's credible testimony, the forum has concluded that this statement was made by one of the two.

⁴See, *supra*, previous footnote.

⁵*Id.*

⁶*Id.*

⁷The numeral "1" is circled and all activities are highlighted on the original document.

⁸The numeral "2" is circled.

⁹The numeral "3" is circled.

¹⁰The numeral "4" is circled.

¹¹The numeral "5" is circled.

¹²The numeral "5" is circled and should have been "6", based on its sequential placement on the Evaluation.

¹³The numeral "6" is circled and should have been "7", based on its sequential placement on the Evaluation.

¹⁴The specific parts of the body are indicated by highlighting on the original.

¹⁵Dale Deboy, the Agency's witness who testified about this matter, used the term "prescription", not "referral", but the forum infers from the context of his testimony that the term he meant to use was "referral".

¹⁶Testimony by Complainant indicated this injury was actually in 1988.

¹⁷Complainant's medical record showed this injury was actually in 1992.

¹⁸The "Physical Capacities Evaluation" form given to Complainant requires answers to questions about Complainant's physical condition that can only be answered by someone who has examined Complainant, and there is a line at the bottom of the form for a "Physicians Signature."

¹⁹Even if Complainant was only required to obtain a release, which could be considered a "health certificate" under ORS 659.330, there is no credible evidence that Respondent intended to pay any of the cost of obtaining one from Complainant's former treating physicians or chiropractors in Alaska, and the same analysis would apply. Either way, Respondent violated ORS 659.330.

²⁰Administrative law judges (ALJs) employed by BOLI were referred to as "hearings referees" until mid-1995.

²¹See also *Boughan v. Board of Engineering Examiners*, 46 Or App 287, 611 P2d 670, rev den 289 Or 588 (1980).