

**In the Matter of**  
**SOUTHERN OREGON FLAGGING, INC.**

Case Number 54-98  
Final Order of the Commissioner  
Jack Roberts  
Issued April 7, 1999.

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**SYNOPSIS**

The Agency failed to prove that between October 1 and December 31, 1996, and between April 30 and September 30, 1997, Respondents, a corporation and its president, intentionally failed to pay 100 workers the prevailing wage rate on 32 state regulated projects, in violation of ORS 279.350(1); and where Respondents made contributions to an invalid employee benefit plan between January 1 and April 30, 1997, the Commissioner found that Respondents intentionally failed to pay workers the prevailing wage rate on state regulated projects, in violation of ORS 279.350(1); and where Respondents performed a subcontract on a public works project and posted the prevailing wage rates by using a job book approved by a BOLI compliance specialist, the Commissioner found that Respondents did not intentionally fail to post the prevailing wage rates at the project in violation of ORS 279.350(4); and where Respondents performed a subcontract on a public works project and posted notice of their fringe benefit plan by using a job book approved by a BOLI compliance specialist, the Commissioner found that Respondents did not intentionally fail to post notice of their fringe benefit plan in violation of 279.350(5); and where Respondents performed a subcontract on a public works project and were found by the Commissioner not to have taken action to circumvent the payment of prevailing wage rates, in violation of ORS 279.350(7); and where Respondents performed a subcontract on a public works project

and filed inaccurate and incomplete certified statements, in violation of ORS 279.354, Respondents became ineligible for a period of one month to receive any contract or subcontract for public works, pursuant to ORS 279.361, and the Commissioner assessed Respondents civil penalties of \$6,000.00 for violations of ORS 279.354, pursuant to ORS 279.370. ORS 279.350(1), (4), (5), (7); 279.354; 279.361; 279.370; OAR 839-016-0085, 839-016-0095, and 839-016-0520 to 839-016-0540.

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The above-entitled contested case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on July 21, 22, & 23, 1998, in the Bureau of Labor and Industries Office, Conference Room, 700 E. Main Street, Suite 105, Medford, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Southern Oregon Flagging, Inc. (Respondent SOFI) and Kimberlie Hollinger (Respondent Hollinger) were represented by Thomas Murphy, Attorney at Law. Kimberlie Hollinger was present throughout the hearing on her own behalf and as Respondent SOFI's representative.

The Agency called the following witnesses: Lance Duane Clay, former Respondent employee; John Orsetti, Respondent Hollinger's son-in-law; Jessica Orsetti, Respondent Hollinger's daughter; Shirley Harms, former Respondent employee; Jenny Villalovos-Giles, former Respondent employee; John Richard LeDoux, former Respondent employee; Kathy Dillenburg, former Respondent employee; Shirley Anne Holstad, former Respondent employee; Kathy Lelack-Acevedo, Labor Compliance Officer, Oregon Department of Transportation; Linda Kathleen Harvey, former Respondent employee; Sherryl DeVore, former Respondent employee; Eugene Russell,

former Respondent employee; Jim Reynolds, Investigator/Auditor, Workers' Compensation Division, Department of Consumer Business Services; Kimberlie Dee Hollinger, Respondent; David Gerstenfeld, Compliance Specialist, Wage and Hour Division, BOLI; Sanford Groat, Police Officer, Salem Police Department (former Wage and Hour Compliance Specialist).

Respondents called the following witnesses: Michael Thomas Moore, General Manager, J. C. Compton Contractors; Tim Roseboro, former Respondent employee; Margaret Atkins, former Respondent employee; Brian Keith Lambert, former Respondent employee; Wanda Holcomb, former Respondent employee; Warren Perrine, Respondent employee; Everett Moreland, attorney, Hirschner, Hunter, Andrews, Neil & Smith; Tom Atkins, Respondent employee; Robin D. Richardson, self-employed tax preparer; Kimberlie Dee Hollinger, Respondent.

Having fully considered the entire record in this matter, the Commissioner of the Bureau of Labor and Industries makes 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 2, 1998, the Agency issued a Notice of Intent to Make Placement on List of Ineligibles and to Assess Civil Penalties ("Notice of Intent") to Respondents. The Notice of Intent alleged that (1) Respondents intentionally failed to post the applicable prevailing wage rates on a Port of Hood River bridge public works project in violation of ORS 279.350(4); (2) Respondents intentionally failed to post a notice describing its fringe benefit plan on that project in violation of ORS 279.350(5); (3) Respondents filed inaccurate and incomplete certified statements on the Port of Hood River bridge public works project and on a Lane County paving public works project in violation of ORS 279.354; (4) Respondents intentionally failed to pay the

prevailing wage rate to 100 of its workers on 32 public works contracts in violation of ORS 279.350(1); and (5) Respondents took action to circumvent the payment of the applicable prevailing wage on the Port of Hood River bridge public works project and the Lane County paving public works project in violation of ORS 279.350(7). The Agency alleged aggravating circumstances. The Agency proposed to place Respondents' names on the list of contractors ineligible to receive any contract or subcontract for public works for a period of three years from **the date of publication of their names on the ineligible list, pursuant to ORS 279.361, and to assess civil penalties against Respondents in the amount of \$178,160.30, pursuant to ORS 279.370 and applicable rules. The Agency attached an appendix "A" listing 100 workers who were not paid prevailing wages on 32 public works contracts and listing related civil penalties. The Agency also attached an appendix "B" listing 32 state regulated prevailing wage contracts on which the Agency alleged Respondents intentionally failed to pay workers at the prevailing rate of wage.**

2) On March 24, 1998, Respondents filed an answer. They denied the violations alleged above in the Notice of Intent and stated nine affirmative defenses. Respondents requested a contested case hearing.

3) On May 27, 1998, the Hearings Unit issued to Respondents and the Agency a Notice of Hearing setting forth the time and place of the requested hearing. With the notice, the Hearings Unit sent to Respondents a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process -- OAR 839-050-0440.

4) On June 2, 1998, Respondents moved for a postponement of the hearing based on Respondents' counsel's need for additional time to conduct discovery and to

take care of personal business and Respondents' busy work schedule during the summer months. The ALJ denied the motion because Respondents failed to show good cause as defined in OAR 839-050-0020(10). To alleviate some personal hardship on Respondents' counsel, however, the ALJ rescheduled the hearing for two weeks later than originally scheduled.

5) Pursuant to OAR 839-050-0210 and the ALJ's order, the Agency and Respondents each filed a Summary of the Case.

6) On July 16, 1998, Respondents moved to disqualify the ALJ. The ALJ denied the motion based on Respondents' failure to make a substantial showing of actual prejudice or bias on the part of the ALJ. The ALJ's ruling stated in part:

"Administrative agencies and their staffs typically investigate, prosecute, and adjudicate cases within their jurisdiction. As a result, it is not uncommon for qualified agency staff to perform different functions during their tenure with an agency. It is also not uncommon for agency staff to have occasion to work together at some point in their tenure. That a designated agency adjudicator previously prosecuted a case or cases involving similar issues does not demonstrate actual prejudice against a particular Respondent. Neither does a pre-existing professional relationship between an adjudicator and an agency witness obviate a full and fair hearing before the adjudicator. If that were the case, few hearings would be held in this forum.

"Due process does not require a formal separation between the investigative and adjudicative functions of an administrative agency, nor does it preclude those who perform the latter from participating in the process. *In the Matter of Clara Perez*, 11 BOLI 181 (1993), citing *Fritz v. OSP*, 30 Or App 1117, 569 P2d 654 (1977); *In the Matter of Albertson's, Inc.*, 10 BOLI 199 (1992), citing *Withrow v. Larkin*, 421 US 35 (1975); *In the Matter of City of Salem*, 4 BOLI 1 (1983) (respondent claimed it was denied its rights to an impartial tribunal because the hearings referee was a former BOLI Civil Rights Division employee), citing *Boughan v. Board of Engineering Examiners*, 460 Or App 287, 611 P2d 670 (1980).

"The ALJ has not participated in any way in the investigation or prosecution of this particular case. The ALJ has no knowledge of the particular facts in this case and it is the evidence to be presented at hearing that will form the basis of the ALJ's decision. The ALJ is bound by the laws enforced by the Bureau of Labor and Industries and will apply the applicable law to the evidence presented at hearing. In fact, it is the

Commissioner, not the ALJ, who makes the ultimate determinations of law and fact. Even if Respondents had demonstrated bias on the part of the ALJ, Respondents did not even attempt to show bias on the part of the Commissioner. See, *In the Matter of Oregon Department of Transportation*, 11 BOLI 92 (1992).

"This forum has previously held that without a showing to the contrary, state administrators are assumed to be men and women of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. *In the Matter of Albertson's, Inc.*, 10 BOLI 199 (1992). The same holds true for administrative law judges designated by the agency administrator. The ALJ in this case has no prejudice or bias against Respondents nor Respondents' agents or representative.

"Respondents must make a substantial showing of actual prejudice or bias. *In the Matter of Albertson's, Inc.*, 10 BOLI 199 (1992); *In the Matter of the City of Salem*, 4 BOLI 1 (1983). Respondents have not done so in this case.

"Respondents' motion to disqualify the Administrative Law Judge is **denied.**"

7) At the start of hearing on July 21, 1998, Respondents' attorney said that he had received and read the Notice of Contested Case Rights and Procedures and had no questions about it.

9) The participants waived the requirement that the ALJ advise them of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing. ORS 183.415(7).

10) The proposed order, containing an exceptions notice, was issued November 20, 1998. Two extensions of time were granted to the Agency and Respondents for filing exceptions. The Agency timely filed exceptions received by the forum on January 15, 1999. The forum received no exceptions from Respondents.

#### **FINDINGS OF FACT - THE MERITS**

1) At all times material, Respondent SOFI was an Oregon corporation. Respondent Hollinger was Respondent SOFI's president and sole owner.

2) Mowat Construction Company ("Mowat") was the prime contractor on the Widen Washington Approach -- Hood River/White Salmon Bridge ("Washington Approach") public works project. Port of Hood River was the contracting agency. Respondent SOFI was a subcontractor. Respondents provided flaggers and pilot car drivers on the project.

3) J. C. Compton Contractors ("Compton") was the prime contractor on a Lane County grading, basing, and paving project ("Coburg Road"). Lane County Public Works was the contracting agency. Respondent SOFI was a subcontractor. Respondents provided flaggers and pilot car drivers on the project.

4) The Washington Approach project was 100% funded by the State of Oregon and the Coburg Road project was 100% locally funded and therefore both were not regulated by the federal Davis-Bacon Act.

5) Between February 17 and July 13, 1997, Respondents employed about 35 flaggers on the Washington Approach project.

6) Between June 2 and June 29, 1997, Respondents employed about 15 flaggers on the Coburg Road project.

7) The prevailing wage rates, from the January, 1997, PWR booklet, for flaggers was \$15.50 for straight time and \$7.05 for fringe benefits. The overtime rate was \$23.25.

8) In December of 1996, Respondents adopted an employee benefit plan designated as the Southern Oregon Flagging Medical Reimbursement Plan ("Plan #1") effective October 1, 1996. The plan provided for reimbursement of "qualified medical expenses" incurred by eligible employees (called "participants") during the "plan year." Preferred workers were not covered by the plan. Preferred workers are those workers who are unable to return to regular duty due to an on-the-job injury. Participants were

paid their hourly rate and their fringe benefits were dedicated to the medical reimbursement plan. Preferred workers were paid their fringe benefits in cash. The plan administrator was Respondent SOFI. In Article III of the plan it states "[i]f any balance remains in the Participant's account for any Plan Year after the Employer has made all reimbursements for the Plan Year, the Participant will forfeit the unused amount." In Article VI, the plan states " \* \* \* The Participant may submit the claim for benefits under the Medical Plan during the Plan Year in which incurred or within a 90 day period after the close of the Plan Year. The Participant will forfeit any credits remaining at the end of such 90 day period. Any forfeited amount will inure to the general credit of the Employer." The plan also provided that an administrative fee equal to 5% of each reimbursement be assessed against the reimbursement account to cover processing costs. Prior to the plan's implementation, fringe benefits for workers other than preferred workers went into a pension fund.

9) Employers receive a six month wage subsidy for each preferred worker they hire. Employers receive a rebate for 50% of the worker's wages, including fringe benefits. The preferred worker program benefits workers by providing retraining and specialized tools or equipment, if needed. Respondent Hollinger participated in the preferred worker program. After the six month program ended for a worker, their fringe benefits went into the medical reimbursement plan.

10) On December 31, 1996, BOLI compliance specialist, Sanford Groat, advised his supervisor, Ursula Bessler, that he had reviewed Respondents' payroll records, time sheets, and benefit plan and all appeared to be "in order." He also indicated that he had spoken with the company handling the benefit plan and that Respondents appeared to be following "the guidelines set forth in the law." He told his supervisor that Respondents "appear to be doing a good job of paying their employees

the proper rates and they will fix problems quickly when identified to them." He reviewed the Respondents' benefit plan with his supervisor and there were no problems with it at that time.

11) In December, 1996, Groat told Respondent Hollinger that BOLI approved Respondents' benefit plan.

12) In March, 1997, the Oregon Department of Transportation ("ODOT") received an inquiry from a contractor about Respondents' benefit plan. Kathy Lelack-Acevedo ("Lelack"), an ODOT Labor Compliance Officer, faxed a letter to Respondent Hollinger on March 21, to express her concerns about whether the benefit plan met Davis-Bacon requirements. Lelack indicated that (1) Respondents' plan did not specify what happens to the employees' money if there is a balance in their account at the end of the plan year, (2) that the plan stated an administrative fee equal to 5% of the reimbursement would be deducted from the employee's account for processing of claims which is inconsistent with Davis-Bacon requirements, and (3) that the plan named Respondent SOFI as plan administrator, contrary to Davis-Bacon requirements that fringe benefit contributions be irrevocably made to a trustee or to a third person not affiliated with the contractor or subcontractor. Respondent Hollinger retained attorney, Everett Moreland, to assist her in getting her benefit plan approved by ODOT. She informed Moreland that BOLI had already approved the plan. Moreland revised the plan to Lelack's specifications and the revised plan, entitled Southern Oregon Flagging, Inc. Employee Benefits Plan (Plan #2), was sent by Lelack to the Oregon Department of Justice ("DOJ") for evaluation. DOJ was unable to give an opinion and Lelack advised Moreland to send the revised plan to the U.S. Department of Labor ("USDOL") for review. She told Moreland that if USDOL approved, ODOT would approve the plan. Lelack, in the meantime, contacted Groat who told her that BOLI had previously

reviewed Respondents' benefit plan and it met the standards enforced by BOLI. On May 8, 1997, Moreland sent the revised plan to USDOL in Portland and it was then sent to the regional office in San Francisco. On August 1, 1997, a USDOL representative responded to Moreland's request for review and accepted the plan as within the definition of a bona fide fringe benefit under the Davis-Bacon Act. Within a few days of its receipt, Moreland sent copies of the USDOL letter to Lelack, Respondent Hollinger, Groat, and BOLI Compliance Specialist David Gerstenfeld. The USDOL representative pointed out an area of potential concern involving eligible employees who perform no Davis-Bacon work and enclosed an opinion letter regarding a similar plan for Moreland's "guidance and future reference." Moreland addressed that issue in Article 4.2 of Plan #2 and the amended plan was adopted August 18, 1997, effective "as of January 1, 1997 and restates the Plan document for the [S0FI] Employee Benefits Plan adopted May 27, 1997."

13) In August, 1997, Lelack sent Michael Moore, General Manager for J. C. Compton Contractors a letter stating that Respondents' benefit plan was in compliance and she enclosed a copy of the USDOL letter. Moore understood that the letter from Lelack was in response to his concerns about the benefit plan and understood the letter as approval of the plan. Moore also received a call from Groat in August stating that BOLI approved the benefit plan.

14) Plan #2 established a medical expense reimbursement program and group health insurance program. Group health insurance coverage was funded by amounts held in a "general fund" that was funded in whole or in part from the reallocation of the participants' accounts and by the net earnings of the plan. Reallocation of the participant's accounts occurred when the balance in the participant's account exceeded \$500 at the end of the plan year. The excess amount went into the

general fund and was applied toward the purchase of medical insurance for qualifying employees. The remaining \$500 carried over in the participant's account available for the reimbursement of the participant's medical expenses in the succeeding plan year. The net earnings of the plan for any plan year was allocated to the general fund. Participants whose account balances reached a level equal to or greater than the cost of securing a year's coverage could elect group health insurance coverage. If their accumulated account balance was at least 50% of the annual premium cost they could elect coverage and pay the rest of the premium on an after-tax basis. After 1998, all participants would be eligible to have health insurance coverage purchased on their behalf from the general fund. Available funds would be allocated to purchase the health insurance for particular participants based on the number of hours for which amounts were contributed. The insurance would be purchased starting with participants with the highest number of hours worked, then participants with the next highest number, and on down the line until all available funds were used.

15) Plan #2 eliminated the forfeiture clause contained in Plan #1 and established an employee benefits trust. Respondent Hollinger was the plan administrator and the designated trustee of the trust. Plan #2's Article 4.3 provided that "the Company shall establish a separate Medical Expense Reimbursement Account for each Eligible Employee. Such Reimbursement Account shall be credited with the contributions made by the Company on behalf of the Eligible Employee, and shall be charged with all reimbursements made from such [account] and with all costs, charges and expenses incurred in the administration of the Plan that are allocated to such [account]." Plan #2's Article 8.2 provided that "[a]ll reasonable costs, charges and expenses incurred in the administration of the Plan shall be paid from the trust fund." Article 8.3 provided that "[t]he Company has no beneficial interest in the Trust Fund,

and no part of the Trust Fund shall ever revert or be repaid to the Company, directly or indirectly, except that the Company shall upon written request have a right to recover any amount contributed by the Company through a mistake of fact, provided that such mistaken contributions are returned to the Company within one year after the date such contributions were made." Plan #2 also provided that when a participant's employment is terminated during a plan year, the participant is not eligible to receive reimbursements incurred after the pay period "in which occurs the participant's termination of employment." Plan #2 required the reimbursement requests of terminated employees be made within 90 days after the participant's employment termination date.

16) Sometime in August, 1997, Groat left his position at BOLI to become a police officer and BOLI Compliance Specialist David Gerstenfeld was assigned the case involving Respondents to follow up on a third party complaint filed in mid-1997, by Fair Contracting Foundation. The complaint involved concerns about Respondents' practice of banking hours, filing inaccurate certified payroll, and also mentioned Respondents' fringe benefit plan.

17) Before Gerstenfeld took over the file, Groat investigated two wage claims filed against Respondents in June, 1997, by Kathy Dillenburg and Jodi Underhill. The claims were based on underpayment of overtime. During the investigation, Groat told Respondent Hollinger that her method of calculating overtime was incorrect and he advised her against banking hours<sup>1</sup>, splitting the night shifts at midnight to avoid paying overtime, paying straight time when employees work over eight hours in different classifications on the same day, and paying employees straight time when they work over eight hours on more than one project. Groat also advised her that her payroll records must be factually accurate and not just reflect what wages were actually paid. Respondent Hollinger did not know what the law was until July, 1997, when Groat told

her that her overtime calculations were incorrect. She thought all of the practices were common in the flagging industry. In July, 1997, through Groat, Respondent Hollinger paid Dillenburg \$141.01 and Underhill \$14.32 for overtime wages owed. As a result of the wage claims and Groat's concerns about her overtime calculations, she determined that overtime was owed to Lance Clay in the amount of \$304.72, Stephen Clay in the amount of \$177.30, John LeDoux in the amount of \$397.84, and Timothy Roseboro in the amount of \$27.79. She paid the wages to the workers on August 4, 1997.

18) Between February and July, 1997, Respondent Hollinger used a "job book" to post the applicable prevailing wage rates for the Washington Approach project. The job book was actually a folder that contained certifications for the company, a company policy statement, the employee benefit plan, and a page listing the wage rate for flaggers as: "Regular \$15.50[,] Overtime \$7.75[,] Benefits \$7.05. Due to the changing location of flaggers during the course of a shift, the job book was located in the pilot car with the lead flagger or lead foreman on the job. Employees were told about the job book when they were hired. Employees were mailed a summary of the medical benefit plan quarterly. Sometime in 1996, Respondent Hollinger discussed with Groat the difficulty of posting on flagging projects and he emphasized that she needed to post the wages on each job and encouraged her to come up with her own way of accomplishing the posting. Groat did not object when she described the idea of a job book. After July, 1997, the job book changed to include more information, including any updates on the medical reimbursement plan, information on how to fill out certain paperwork, and an actual copy of the prevailing wage rates out of the "spec" book written for that project. Respondent Hollinger also improved her mechanism for providing information to employees and, in addition to the job book, she now updates

information and company policy by monthly newsletters to each employee and attachments to their paychecks.

19) Sometime prior to August, 1997, Respondent Hollinger met with representatives from the Workers' Compensation Division ("WCD") of the Department of Consumer and Business Services ("DCBS"), including Jim Reynolds, a DCBS auditor, to discuss the accuracy of some of Respondent Hollinger's requests for reimbursement under the WCD's preferred worker program. Respondent Hollinger acknowledged during the meeting that she had not provided accurate payroll records and that she had not been paying her employees properly. She told Reynolds her practices regarding the payment of overtime included (1) paying employees straight time after midnight if their hours exceeded eight in a day because she believed midnight started a new day, (2) paying employees straight time if they worked two different jobs during the same shift and their work day exceeded eight hours, and (3) paying employees straight time when they worked on more than one job site and their hours exceeded eight in a day. Prior to August, 1997, and due to the practices she ascribed to prior to her discussions with Reynolds and Groat, including banking hours, Respondent Hollinger's certified payroll statements to BOLI and WCD did not accurately document the number of hours or the specific days worked by her employees. After August, 1997, the certified payroll reports she provided to the WCD were accurate.

20) Respondents "banked" hours as a way of providing employees with funds that they would not ordinarily have at the beginning of a project. Typically, workers had to relocate to start a new project and the first weeks were usually "short" weeks. During the project, Respondents paid for a 40 hour work week whether the worker worked more hours or less hours and presumed that the hours would even out at the end of the project. Respondents paid any overtime hours at the end of the project. Some workers

did not want their hours banked and were paid for the actual hours worked each week. Upon advice from Groat, Respondent Hollinger stopped banking hours.

21) Throughout 1997, Respondent Hollinger took measures to control overtime by scheduling additional people to work on projects as break people. She considered the work day as midnight to midnight and tried to manage the overtime hours by sending in break people when an eight hour shift ended during that time frame. The effect was that it limited hours that people wanted to work. John LeDoux complained to Respondent Hollinger that being relieved by break personnel minimized his hours and Respondent Hollinger suggested that since his wife was present on most of the jobs he worked that he should have her certified so she could relieve him when his shift was finished. Respondent also suggested to Lance Clay that his wife be certified so they could share a shift instead of bringing in break people. She did not suggest to workers that they certify their spouses in order to convert their overtime hours into straight time hours for their spouse.

22) On August 6, 1997, Lora Lee Grabe, Lead Worker of the BOLI PWR Unit, sent Respondent Hollinger a letter that said in part: "Compliance Specialist, Sanford Groat, has advised me that he has completed an investigation regarding work performed by your company on a public works contract for the Oregon Department of Transportation. Mr. Groat's findings indicate a failure to pay the prevailing wage rate to certain workers employed on the contract. \* \* \* This will advise you that [BOLI] will consider taking action to place Southern Oregon Flagging Company and any business in which you have a financial interest, on the List of Ineligibles should you or your company be found to have failed or refused to pay the prevailing wage rate *in the future.*" (Emphasis added)

23) When Gerstenfeld was assigned the case in August, he asked Respondent Hollinger to provide time records on the Washington Approach project, documents showing all wages were paid on the Washington Approach project, and information regarding her fringe benefit plan. While reviewing the documents she provided, he also reviewed the prior wage claims and one complaint involving Respondents' pension plan. Gerstenfeld discussed with Respondent Hollinger some of the practices outlined in FOFM #17 of this Proposed Order. She was asked about and acknowledged splitting the night shift at midnight, but told Gerstenfeld that she stopped that practice after her discussions with Groat. Thereafter, Gerstenfeld's investigation focused on the validity of Respondents' employee benefits plan and determining the amount of back wages owed to the employees.

24) In the latter part of August, 1997, Moreland faxed to Gerstenfeld a copy of the 1997 revised benefit plan and a summary of its history, including information about BOLI's prior approval of the 1996 plan and USDOL's subsequent approval of the revised plan. Gerstenfeld reviewed both the 1997 revised plan and a summary of the 1996 plan. Gerstenfeld relied on the applicable statutes and rules and looked to the USDOL Field Operations Handbook for guidance when evaluating each plan.

25) After his review, Gerstenfeld advised Moreland that he did not agree with USDOL's assessment of the plan. On September 15, 1997, Gerstenfeld wrote to Moreland stating that his concerns about the plan "as currently written" were twofold: "1) All fringe benefit contributions must provide a benefit to the individual employee for whom they are contributed. Under the current plan, at the end of the year some of those funds go into the 'general fund' which can purchase benefits for other employees or even be used to cover administrative expenses of the trust. 2) Contributions into the plan must reflect an estimate of the cost of providing benefits, not merely the number of

hours worked on covered projects. This issue is discussed at more length in *Tom Mistick & Sons, Inc.*, WAB Case Nos. 88-25 and 88-26." Gerstenfeld also indicated to Moreland that there were other problems with payments already made into the plan that affected Respondent Hollinger's ability to claim credit against the prevailing wages.

26) In the 1998 BOLI Prevailing Wage Rate Laws Handbook<sup>2</sup> prepared by the Wage and Hour Division, based on the same law that was in effect at times material, it states that to qualify for any credit, the fringe benefit plan must meet all of the following criteria:

"[1] Contributions must be made regularly; at least quarterly.

"[2] Contributions made for prevailing wage work may not be used to fund the plan or program for periods of non-prevailing wage rate work.

"[3] Contributions must not be required by law (such as taxes, workers' compensation, etc.).

"[4] Contributions must be determined and tracked separately for each employee.

"[5] Contributions must be irrevocable and for the employee's benefit.

"[6] Eligibility requirements of the plan itself (e.g. waiting periods) are permissible. If an employee is ineligible to participate in the program, however, no credit can be taken for that employee's fringe benefits. Pension plans with vesting provisions are eligible if they meet the requirements of the ERISA.

"[7]" Details of the plan must be posted conspicuously at the work site."

27) On September 16, 1997, Gerstenfeld and Grabe met with Respondent Hollinger and Moreland to discuss their difficulties with Respondents' benefit plan. Gerstenfeld advised Respondent Hollinger and Moreland that in BOLI's view Respondents did not have a bona fide benefit plan and therefore Respondents' payments to the plan did not qualify as fringe benefits. Gerstenfeld considered the payments as back wages related to an invalid plan that needed to be paid. He informed Respondent Hollinger and Moreland that BOLI can assess liquidated damages in

addition to seeking back wages if back wages are owed and not paid but BOLI's policy is not to pursue liquidated damages where the back wages are paid. Gerstenfeld told Moreland that if Respondents paid the back wages found due without going through a hearing or court trial Respondents would not be assessed liquidated damages. Although he disagreed with Gerstenfeld's interpretation of the prevailing wage rules, Moreland emphasized to Gerstenfeld that he did not want his clients put at risk for penalties. He believed that Gerstenfeld understood he was indicating that his clients were agreeing to pay the wages determined owed provided his clients would not be subject to further penalties.

28) Gerstenfeld realized during the September 16 meeting, that the scope of back wages related to the plan was beyond the Washington Approach project. He requested that Respondents provide him with a summary, by employee, of how much was contributed into the benefit plan for all state regulated projects in order to determine how much in back wages was owed to Respondents' employees. Respondent Hollinger was permitted to offset reimbursement payments actually made to employees. For a period following the September 16 meeting, Respondent Hollinger, Hollinger's attorney, and Gerstenfeld engaged in dialogue by telephone and correspondence to clarify the information needed to determine the amount of fringe benefits owed to Respondents' employees. By November 6, 1997, Respondents provided Gerstenfeld with the information he requested.

29) Respondents, through Gerstenfeld, paid fringe benefits to their employees in the amounts and on the state funded contracts shown in the following table.<sup>3</sup>

30) Respondent Hollinger did not send Gerstenfeld checks for Ed Pauwell, Mike Spitzer, or Jessica and John Orsetti, her daughter and son-in-law. Respondent Hollinger co-signed on a \$14,400.00 loan for Jessica and John Orsetti on June 30,

1997. Respondent Hollinger was making the payments on the loan. On October 19, 1997, Jessica Orsetti signed a promissory note authorizing Respondent Hollinger to deduct \$61.15 out her paycheck to cover a Fred Meyer bill, \$66.24 for money borrowed from Respondent Hollinger, and \$450.00 for "back truck/5th wheel payments." In Ed Pauwell's case, Respondent Hollinger had a court order requiring her to withhold his paycheck for child support payments. The money owed to Pauwell was paid to support enforcement.

31) Between September and December, 1997, Moreland and Gerstenfeld continued to negotiate the terms of Respondents' benefit plan. On January 2, 1998, Moreland submitted to Gerstenfeld an adopted revision of the SOFI Employee Benefits Plan (Plan #3) "effective as of January 1, 1997 and restates the Plan document for the [SOFI] Employee Benefits Plan adopted May 27, 1997, as amended and restated." Moreland also thanked Gerstenfeld for "allowing reasonable expenses of administering the Plan to be charged to Participant's Accounts." On January 8, 1998, Gerstenfeld notified Moreland by letter that "[t]he plan, as submitted, does meet the requirements for state prevailing wage rate purposes."

32) In Plan #3 Respondent SOFI remains as the plan's administrator and Respondent Hollinger remains as the trustee of the Employee Benefits Trust. Article 4.3 added an additional part to read: "[t]he Company shall establish a separate Medical Expense Reimbursement Account for each Eligible Employee. Such Reimbursement Account shall be credited with the contributions made by the Company on behalf of the Eligible Employee, and shall be charged with all reimbursements made from such [account], **with all amounts chargeable under Article 5 to such [account]**, and with all costs, charges and expenses incurred in the administration of the Plan that are allocated to such [account]. (Addition highlighted) Plan #3 eliminated the health

insurance program and the general fund as written in Article 5.2 and replaced it with a group health and accident insurance program that provided: "In November of each Plan Year beginning after December 31, 1997, the Plan Administrator shall purchase and distribute one or more policies of accident and health insurance to each Eligible Employee who is then covered under the Plan and whose Medical Expense Reimbursement Account has a balance as of a prior date sufficient to purchase such policy or policies, and shall charge the cost thereof to the Eligible Employee's Medical Expense Reimbursement Account. To the extent practicable the Plan Administrator shall apply the balance of the Eligible Employee's Medical Expense Reimbursement Account to purchase such policy or policies. Such prior date shall be selected from year to year by the Plan Administrator and shall apply to all Eligible Employees. For purposes of this Article 5, a policy of accident and health insurance is one providing, with respect to the Eligible Employee or the Spouse or Dependent of the Eligible Employee, only one or more of the benefits allowed to be provided by an 'accident or health plan' within the meaning of Section 105 of the Internal Revenue Code and by a 'voluntary employees' beneficiary association' within the meaning of Section 501(c)(9) of the Internal Revenue Code. The selection of such policy or policies with respect to any Eligible Employee shall be made in the discretion of the Plan Administrator on a nondiscriminatory basis."

33) Plan #3 revised the provision concerning treatment of terminated employees and now states that terminated employees remain covered under the plan "for each pay period of the Company for which the Participant has an amount in the Participant's Reimbursement Account, determined on an accrual basis." Plan #3 also added to Article 4.8 a provision reducing the amount to which a participant is entitled as a reimbursement by "(1) any prior reimbursements charged to the [account], (2) any

prior charges under Article 5 to [the account], and (3) any prior charges to such [account] for costs, charges and expenses incurred in the administration of the Plan." In Plan #3 the timing of requests for reimbursements was changed to occur "on or before the end of the third calendar month following the end of the Plan Year in which the Qualified Medical Expense to be reimbursed is incurred." Plan #3 also provides that the net earnings of the plan for any plan year will be allocated among the participants' accounts as the trustee determines appropriate.

34) Under Article 8.2 of Plan #3 "(a) No cost, charge or expense incurred by the Company in the administration of the Plan shall be charged to any portion (the 'BOLI Portion') of a Participant's Reimbursement Account that is attributable to contributions (and earnings thereon) for Prevailing Wage Contract work that is subject to the jurisdiction of the [BOLI] with respect to qualification of the contributions for Prevailing Wage fringe benefit credit. The Company shall pay such costs, charges, and expenses that are allocable to the BOLI Portion of Participants' Reimbursement Accounts. For purposes of determining the BOLI Portion of a Participant's Reimbursement Account, charges to the Account for reimbursements for Qualified Medical Expenses, and charges to the Account under Article 5, shall be made prorata from the BOLI Portion of the Account and from the other portion (the 'Non-BOLI Portion') of the Account. \* \* \* (b) Costs, charges and expenses incurred in the administration of the Plan (other than those to be paid by the Company as provided in Section 8.2(a) above) shall be paid from the Trust Fund. Such costs, charges and expenses incurred by the Company that are allocable to the Non-BOLI Portion of Participants' Reimbursement Accounts shall be charged to, and may be paid only from, income of the Trust Fund allocable to the Non-BOLI Portion of Accounts. The costs, charges and expenses incurred other than by the

Company in the administration of the Plan shall be allocated among and charged to the Accounts as the Trustee determines appropriate."

35) Except for the changes described in FOFM ## 32, 33, and 34, Plan #2 and Plan #3 are the same.

36) The testimony of Respondent Hollinger, in general, was found to be credible. Her demeanor was direct and sincere. Most of her testimony was corroborated by other credible evidence. She did not attempt to deny or diminish the violations that occurred prior to the BOLI warning letter. Her testimony was responsive to the questions and did not conflict on any material point with any of the credible witnesses. There is no reason not to accept her statements as facts in this matter.

37) Gerstenfeld's testimony was at times inconsistent with other credible testimony and the documentary evidence. For instance, he gave the impression that there were several complaints, wage claims, and investigations involving Respondents prior to his assignment to the case. He testified that "all of the investigations were the result of wage claims" and the complaints concerned unpaid overtime and Respondents' 1996 pension plan. He then acknowledged that the complaints about unpaid overtime were related to the wage claims and that there was one complaint involving the pension plan. The Agency offered documentary evidence of only one investigation of two wage claims. The Agency had the facility to produce the best evidence of additional claims or complaints and did not. Gerstenfeld also testified that Respondent Hollinger volunteered that she was not considering hours spent on two different projects when computing daily overtime. He said she told him that she paid John LeDoux overtime after he complained about it but that she did not go back after LeDoux's complaint and pay those who were also entitled to the overtime. Credible testimonial and documentary evidence shows that after she resolved the two wage

claims and discussed her methods of calculating overtime with Groat, she paid \$907.65 in overtime wages to four workers, including John LeDoux, on August 4, 1997, prior to the issuance of the BOLI warning letter. It is puzzling why it would be in Respondent Hollinger's interest to tell Gerstenfeld that she hadn't corrected any underpayments other than LeDoux's when she clearly had by the Agency's own evidence. In addition, Gerstenfeld's testimony about his review of Respondents' benefit plans is problematic. He testified that in the latter part of August, 1997, he reviewed a summary of the 1996 benefit plan in addition to the 1997 revised plan submitted by Moreland. He stated unequivocally that he only reviewed a summary of the 1996 benefit plan. He stated he had never seen the complete 1996 plan. He testified that based on his review of the 1996 summary, there were a "large number of problems as we saw it then." He said the plan permitted administrative fees which he did not believe were permissible. The other concern he had was that the plan also permitted the entire amount in each account be forfeited to the employer if the employee was fired or quit, and any remaining balance at the end of the year was forfeited to the employer. However, evidence in the record shows that there is no mention of forfeiture in the 1996 summary. The only forfeiture clause is found in the complete 1996 plan. The internal inconsistency is unexplainable. For these reasons, Gerstenfeld's testimony is given weight when corroborated by other credible evidence or inference.

38) Moreland's testimony was credible. His demeanor was straightforward and sincere. He readily responded to questions and his testimony about the September 16, 1997, meeting did not differ factually with Gerstenfeld's account of the meeting. He acknowledged that Gerstenfeld did not specifically say that BOLI would forego further action if his clients paid back wages found to be owed. However, his genuine understanding from the meeting that his clients would not be subjected to any further

monetary penalties once they paid back wages was believable and not unreasonable. His statements are accepted as facts in this matter.

39) Though limited by his memory and the brief nature of his testimony, Groat's testimony was credible. He was straightforward about what he remembered and did not appear biased one way or the other. There is no reason not to accept his statements as facts in this matter.

40) Lelack and Reynolds testified credibly. They both gave straightforward and factual responses and neither was shown to have made inconsistent statements. The forum has no reason not to accept their testimony as establishing facts in this matter.

41) Jessica Orsetti's testimony was not wholly credible. At the time of her testimony she was not getting along with her mother, Respondent Hollinger, and had not since December, 1997. She appeared hostile toward her mother at the hearing. She acknowledged that she took her mother's car on one occasion without her mother's permission and forged her mother's signature to withdraw funds from a bank account. Although she claimed that she did not work on the Washington Approach project and was paid straight time for overtime hours her husband, John, worked, she confirmed that she signed her time sheets for the hours worked. Evidence shows that she also claimed \$63.45 in fringe benefits were owed to her from the Washington Approach project. Because of the inconsistencies in her testimony and the obvious animosity between Orsetti and her mother, the forum has disbelieved all of her testimony except that which was corroborated by other credible evidence.

42) John Orsetti's testimony was not wholly credible. He was not on close terms with his mother-in-law, Respondent Hollinger. He denied any knowledge of a promissory note his wife signed in October, 1997, though his wife testified that he was

aware of the note because they had discussed it together. His testimony that he was not aware that Respondent Hollinger was making all the payments on the loan she co-signed for him was inconsistent with his testimony that he knew he and his wife were three months behind in payments to her. Because of the inconsistencies in his testimony, the forum has disbelieved all of his testimony except that which was corroborated by other credible evidence.

43) Lance Clay's testimony was not wholly credible. The first time he testified he acknowledged the existence of the job book but did not reveal that it included information about the prevailing wage and the medical plan. He said that it contained employment paperwork for hiring, a basic outline for working conditions, and W2 forms. His testimony at the time was believable and the ALJ was impressed by his demeanor. He was recalled to the stand shortly thereafter and brought in what he claimed was the actual job book he was given as foreman on the Washington Approach job. The job book contained the prevailing wage information required by law. The information was divided into seven plastic sleeves. The last sleeve was empty and he stated that it had been as long as he had the job book. His testimony was contradicted by other credible witnesses, including Respondent Hollinger, who testified that she didn't place an empty sleeve in the job book. Her credible testimony was that the benefit plan was in the seventh sleeve. Clay's initial testimony, sans job book, withheld information about the existence of the prevailing wage rates in the job book. After he produced it at a later time his testimony focused on the absence of the medical plan. His testimony was crafted to mislead the forum and for that reason he was not believed unless his testimony was corroborated by other credible evidence.

## **ULTIMATE FINDINGS OF FACT**

- 1) Respondent Southern Oregon Flagging, Inc. is an Oregon corporation. Respondent Hollinger is its president.
- 2) Respondent Southern Oregon Flagging, Inc. received subcontracts on the Washington Approach and Coburg Road public works projects.
- 3) Respondent Southern Oregon Flagging, Inc. intentionally failed to pay the prevailing rate of wage to workers employed upon its public works projects between January 1 and April 30, 1997.
- 4) Respondent Southern Oregon Flagging, Inc. did not intentionally fail to post in a conspicuous and accessible place in or about its public works project the applicable prevailing wage rates on the Washington Approach public works contract.
- 5) Respondent Southern Oregon Flagging, Inc. did not fail to post in a conspicuous and accessible place in or about its public works project a notice describing its fringe benefit plan to which Respondent made contributions on the Washington Approach public works contract.
- 6) Respondents failed to file accurate and complete certified statements on public works contracts prior to the issuance of a BOLI warning letter on August 6, 1997.
- 7) Respondents did not take action to circumvent the payment of the applicable prevailing wage on the Washington Approach and Coburg Road projects.
- 8) Respondent Kimberlie Hollinger, a corporate officer of Respondent Southern Oregon Flagging, Inc. was responsible for Respondent SOFI's failure to pay the prevailing rate of wage. She knew or should have known the amount of the applicable prevailing wages and that such wage rates must be posted.

## **CONCLUSIONS OF LAW**

1) Respondent SOFI employed workers to perform work on public works projects and is subject to the provisions of ORS 279.348 to 279.363.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over Respondents and the subject matter herein. ORS 279.348 to 279.380.

3) ORS 279.350(1) provides in part:

"The hourly rate of wage to be paid by any contractor or subcontractor to workers upon all public works shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality where such labor is performed."

OAR 839-016-0035(1) provides in part:

"Every contractor or subcontractor employing workers on a public works project shall pay to such workers no less than the prevailing rate of wage for each trade or occupation, as determined by the Commissioner, in which the workers are employed."

Respondent SOFI violated ORS 279.350(1) by failing to pay the prevailing rate of wage to workers employed upon its public works contracts between January 1 and April 30, 1997.

4) ORS 279.350(4) provides in part:

"Every contractor or subcontractor engaged on a project for which there is a contract for a public work shall keep the prevailing wage rates for that project posted in a conspicuous and accessible place in or about the project."

OAR 839-016-0033(1) provides:

"Contractors shall post the prevailing wage rates applicable to the project in a conspicuous place at the site of work. The posting shall be easily accessible to employees working on the project."

Respondent SOFI did not violate ORS 279.350(4) as alleged.

5) ORS 279.350(5) provides in part:

"Every contractor or subcontractor engaged on a project for which there is a contract for a public work to which the prevailing wage requirements apply that also provides for or contributes to a health and welfare plan or a pension plan, or both, for its employees on the project shall post notice describing such plans in a conspicuous and accessible place in or about the project. \* \* \* In addition to the description of the plans, the notice shall

contain information on how and where to make claims and where to obtain further information."

OAR 839-016-0033 provides in part:

"(3) When a contractor or subcontractor provides for or contributes to a health and welfare plan or pension plan for employees who are working on a public works project, the contractor or subcontractor shall post a notice containing the following information:

- (a) A description of the plan or plans;
- (b) Information on how and where claims can be made; and
- (c) Where to obtain more information."

"(4) The notice required to be posted in section (3) of this rule shall be posted in a conspicuous place at the site of work and shall be easily accessible to employees working on the project. The notice shall be posted in the same location as the prevailing wage rate pursuant to section (1) of this rule."

Respondent SOFI did not violate ORS 279.350(5) by failing to post a notice describing its fringe benefit plan on the Washington Approach project in a conspicuous and accessible place in or about the project.

- 6) ORS 279.350(7) provides:

"No person shall take action that circumvents payment of the prevailing rate of wage to workers employed on a public works contract, including, but not limited to, reducing an employee's regular rate of pay on any project not subject to ORS 279.348 to 279.380 in a manner that has the effect of offsetting the prevailing wage on a public works project."

Respondent SOFI did not violate ORS 279.350(4) as alleged.

- 7) ORS 279.354(1) provides in part:

" \* \* \* [E]very subcontractor \* \* \* shall file certified statements with the public contracting agency in writing in the form prescribed by the Commissioner of the Bureau of Labor and Industries certifying the hours and rate of wage paid each worker which the \* \* \* subcontractor has employed upon such public work, and further certifying that no worker employed upon such public work has been paid less than the prevailing rate of wage or less than the minimum hourly rate of wage specified in the contract, which certificate and statement shall be verified by the oath of the \* \* \* subcontractor \* \* \* that the \* \* \* subcontractor has read such statement and certificate and knows the contents thereof and that the same is true to the \* \* \* subcontractor's knowledge. The certified statements shall set out accurately and completely the payroll records for

the prior week including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid."

Respondent SOFI violated ORS 279.354(1) by failing to file certified statements that set out accurately and completely the payroll records for the prior week.

8) ORS 279.361 provides in part:

"(1) When the Commissioner of the Bureau of Labor and Industries, in accordance with the provisions of ORS 183.310 to 183.550, determines that a \* \* \* subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed on public works, \* \* \* or \* \* \* a subcontractor has intentionally failed or refused to post the prevailing wage rates as required by ORS 279.350(4), the \* \* \* subcontractor or any firm, corporation, partnership or association in which the \* \* \* subcontractor has a financial interest shall be ineligible for a period not to exceed three years from the date of publication of the name of the \* \* \* subcontractor on the ineligible list as provided in this section to receive any contract or subcontract for public works. The Commissioner shall maintain a written list of the names of those contractors and subcontractors determined to be ineligible under this section and the period of time for which they are ineligible. A copy of the list shall be published, furnished upon request and made available to contracting agencies.

"(2) When the contractor or subcontractor is a corporation, the provisions of subsection (1) of this section shall apply to any corporate officer or corporate agent who is responsible for the failure or refusal to pay or post the prevailing rate of wage \* \* \* ."

OAR 839-016-0095(1) provides:

"The names of the \* \* \* subcontractor or other persons \* \* \* shall remain on the list for a period of three (3) years from the date of publication of such name on the list."

Pursuant to ORS 279.361, the Commissioner has the authority to place the name of Respondents SOFI and Hollinger on the list of persons who are ineligible to receive any contract or subcontract for public works for a period not to exceed three years from the date of publication of their names on that list. Under the facts and circumstances in this record, the forum might be inclined not to place Respondents on the list of persons ineligible to receive public works contracts, but ORS 279.350(4) mandates debarment

for a period not to exceed three years where there is a finding of intentional failure to pay the prevailing rate of wage to workers employed upon public works projects. Therefore, the forum is imposing a minimum debarment period.

Because Respondent SOFI intentionally failed to pay the prevailing rate of wage to workers employed upon public works projects between January 1 and April 30, 1997, as required by ORS 279.350(4), it shall be ineligible for a period of one month from the date of publication of its name on the ineligible list to receive any contract or subcontract for public works.

Because Respondent Hollinger was a corporate officer responsible for the failure to pay and post the prevailing wage rates, she shall be ineligible for a period of one month from the date of publication of her name on the ineligible list to receive any contract or subcontract for public works.

9) ORS 279.370 provides in part:

" (1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$5,000 for each violation of any provision of ORS 279.348 to 279.380 or any rule of the commissioner adopted pursuant thereto.

"(2) Civil penalties under this section shall be imposed as provided in ORS 183.090."

OAR 839-016-0530 provides in part:

"(1) The commissioner may assess a civil penalty for each violation of any provision of the Prevailing Wage Rate Law (ORS 279.348 to 279.380) and for each violation of any provision of the administrative rules adopted under the Prevailing Wage Rate Law.

"(2) Civil penalties may be assessed against any contractor, subcontractor or contracting agency regulated under the Prevailing Wage Rate Law and are in addition to, not in lieu of, any other penalty prescribed by law.

"(3) The commissioner may assess a civil penalty against a contractor or subcontractor for any of the following violations:

"(a) Failure to pay the prevailing rate of wage in violation of ORS 279.350;

"(b) Failure to post the applicable prevailing wage rates in violation of ORS 279.350(4);

"(c) Failure to post the notice describing the health and welfare or pension plans in violation of ORS 279.350(5);

" \* \* \* \*

"(e) Filing inaccurate or incomplete certified statements in violation of ORS 279.354;

" \* \* \* \*

"(h) Taking action to circumvent the payment of the prevailing wage, other than subsections (e) and (f) of this section, in violation of ORS 279.350(7)[.]"

OAR 839-016-0520 provides in part:

"(1) The commissioner shall consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be assessed against a contractor, subcontractor or contracting agency and shall cite those the commissioner finds to be applicable:

"(a) The actions of the contractor, subcontractor or contracting agency in responding to previous violations of statutes and rules;

"(b) Prior violations, if any, of statutes and rules;

"(c) The opportunity and degree of difficulty to comply;

"(d) The magnitude and seriousness of the violation;

"(e) Whether the contractor, subcontractor or contracting agency knew or should have known of the violation;

"(2) It shall be the responsibility of the contractor, subcontractor or contracting agency to provide the commissioner with evidence of any mitigating circumstances set out in section (1) of this rule.

"(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of the underpayment of wages, if any, in violation of the same statute or rule.

"(4) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the contractor, subcontractor or contracting agency for the purpose of reducing the amount of the civil penalty to be assessed under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimants their earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OAR 839-016-0540 provides in part:

"(1) The civil penalty for any one violation shall not exceed \$5,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

"(2) For purposes of this rule 'repeated violations' means violations of a provision of law or rule which has been violated on more than one project within two years of the date of the most recent violation.

"(3) Notwithstanding any other section of this rule, when the commissioner determines to assess a civil penalty for a violation of ORS 279.350 regarding the payment of the prevailing rate of wage, the minimum civil penalty shall be calculated as follows:

"(a) An equal amount of the unpaid wages or \$1,000, whichever is less, for the first violation;

"(b) Two times the amount of the unpaid wages or \$3,000, whichever is less, for the first repeated violation;

"(c) Three times the amount of the unpaid wages or \$5,000, whichever is less, for second and subsequent repeated violations.

" \* \* \* \*

"(5) The civil penalty for all other violations shall be set in accordance with the determinations and considerations referred to in OAR 839-016-0530.

"(6) The civil penalties set out in this rule shall be in addition to any other penalty assessed or imposed by law or rule."

Under the facts and circumstances of this record, and according to ORS 279.370 and OAR 839-016-0500 to 839-016-054, the Commissioner of the Bureau of Labor and Industries has the authority to impose a civil penalty for each violation found herein. The assessment of the civil penalties specified in the Order below is an appropriate exercise of that authority.

## **OPINION**

### **1. Ineligibility for Public Works Contracts**

#### **a. Intentional Failure to Pay the Prevailing Wage Rates**

In its charging document, the Agency alleges that Respondents intentionally failed to pay the applicable prevailing wage rates to 100 workers by "not paying workers

for all hours worked, by not paying overtime for hours worked in excess of eight per day or for hours worked in excess of forty per week and by not paying workers the prevailing hourly wage rates specified by the Commissioner for workers employed as flaggers and pilot car drivers" for the period covering October 1, 1996 to on or about September 30, 1997.

The Agency attached to its charging document an appendix ("Appendix 'A'") listing the 100 workers who were allegedly not paid, the wages for each worker that were allegedly not paid, and the civil penalty calculated for each worker based upon the unpaid wages. The Agency cited as "aggravating circumstances" Respondents' failure to pay workers the prevailing wage rate, failure to pay workers earned overtime, failure to post information regarding fringe benefits, failure to establish and maintain a regular pay day, and failure to file accurate and complete certified payroll as a result of prior investigations of Respondents' employment practices in 1996 and 1997. The charging document also alleges as an aggravating circumstance that as a result of the prior investigations, Respondents were placed on the Agency's "warning list" and issued a warning letter on August 6, 1997.

Under ORS 279.361(1), if a subcontractor has "intentionally failed" to pay or post the prevailing wage rates as required, then the subcontractor "shall be ineligible" for up to three years to receive any contract or subcontract for public works. Under ORS 279.361(2), any corporate officer who is responsible for the intentional failure or refusal to pay or post the prevailing rates shall also be ineligible for up to three years to receive any contract or subcontract for public works.

This forum has previously held that the terms "intentional" and "willful" are interchangeable. *P. Miller and Sons Contractors, Inc.*, 5 BOLI at 156 (citing *Starr v. Brotherhood's Relief & Compensation Fund*, 268 Or 66, 518 P2d 1321 (1974)) (1986).

This forum also adopted the Oregon Supreme Court's interpretation of "willful" set out in *Sabin v. Willamette Western Corporation*, 276 Or 1083, 557 P2d 1344 (1976). "Willful," the court said, "amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent." The *Sabin* court also noted that in defining the term "willful" as it applied to ORS 652.150 which provides for a civil penalty if an employer "willfully" fails to pay wages due, the "purpose is to protect workers from unscrupulous or careless employers who fail to do something although they are fully aware of their obligation to do so." (276 Or at 1093)

**Hours worked/overtime:** There is no dispute between the Agency and Respondents that Appendix "A" of the charging document lists only those workers who were allegedly paid less than the prevailing wage because portions of their wages (the fringe benefits) were paid into a benefit plan that the Agency ultimately determined was not a legally enforceable plan. The undisputed evidence in the record demonstrates that none of the unpaid wages listed in Appendix "A" of the Agency's pleadings were a result of Respondents' failure to pay for hours worked or overtime wages. The evidence does show, however, that as a result of prior investigations, Respondents did fail to pay overtime to two employees who filed wage claims in June, 1997. In July, 1997, Respondents paid out a total of \$158.33 in overtime wages to the wage claimants. At the same time, Respondents were advised by the Agency that their overtime practices were not in compliance and, although no wage claims were filed, Respondents paid four other workers a total of \$907.60 in overtime wages. The Agency subsequently issued a warning letter to Respondents on August 6, 1997, advising them that the Agency would consider placing them on the list of ineligible if they failed or refused to pay the prevailing wage rate in the future. There is no evidence in the record that Respondents

failed or refused to pay any employee overtime wages for work performed after August 6, 1997.

Respondents assert and the forum agrees that the warning letter issued August 6, 1997, threatened debarment for future violations. The Agency alleged violations resulting from prior investigations as aggravating circumstances, i.e., circumstances that enhance the principal charge, and that is the extent to which the forum views the evidence in the record pertaining to Respondents' failure to pay overtime prior to the issuance of the warning letter.

**Payment of rates specified for flaggers and pilot car drivers:** Again, there is no dispute that the principal charge involves only those workers who were allegedly paid less than the prevailing wage because their fringe benefits were paid into a benefit plan that the Agency ultimately determined was not a legally enforceable plan. The prevailing wage rate includes fringe benefits paid into a bona fide benefit plan. ORS 279.348(1) & (4). The threshold issue is whether Respondents had a bona fide benefit plan in place between October 1, 1996, and September 30, 1997.

#### Bona Fide Fringe Benefit Plan

ORS 279.348(4) defines fringe benefits as:

"(a) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a plan, fund or program, and

"(b) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program which is committed in writing to the workers affected, for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other federal, state or local law to provide any of such benefits." (Emphasis added)

OAR 839-016-0004(8) provides in addition to the above definition that "[o]ther bona fide fringe benefits do not include reimbursement to workers for meals, lodging or other travel expenses, nor contributions to industry advance funds (CIAF) for example)."

For a plan to be bona fide, contributions must be (1) irrevocable, (2) for the benefit of the employee, and (3) made to a trust or third party. Contrary to the Agency's argument that administrative costs are not permissible, the statute specifically provides that fringe benefits include the rate of costs to the contractor or subcontractor which may be "reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program which is committed in writing to the workers affected."

The forum finds that Respondents' Plan #1 adopted in December, 1996, was not a bona fide benefit plan. The contributions under the plan were not irrevocable and they were not made to a trust or third party. The forfeiture clause provided that any remaining contributions in an employee's account at the end of the plan year were forfeited and credited back to Respondent SOFI. Any contributions made by Respondents under Plan #1 cannot be considered as fringe benefits.

Witnesses testified and documentary evidence shows that between October 1 and December 31, 1996, fringe benefits were directed into an employee pension plan. The validity of Respondents' pension plan is not at issue in this case. No evidence was presented to show what the prevailing wage was at that time or that Respondents failed to pay applicable fringe benefits into a valid pension plan. The burden is on the Agency to prove that Respondents failed to pay the prevailing wage rates for that time period. It has not done so. The forum, therefore, finds that Respondents did not intentionally fail to pay the prevailing wage between October 1 and December 31, 1996, as alleged.

Plan #1, however, was not revised until ODOT questioned the plan's validity under Davis-Bacon and Respondents corrected the defects. The forfeiture clause was eliminated and an employee benefit trust was established April 30, 1997. Evidence shows that contributions were made to the plan before the revised plan was adopted. Because the plan did not meet the requirements of a bona fide benefits plan before it was revised, the forum finds that between January 1 and April 30, 1997, any contributions made under the plan were not fringe benefits and Respondents intentionally failed to pay the applicable prevailing wage rates.

Respondents presented evidence that as soon as the Plan #1's defects were brought to Respondent Hollinger's attention, she sought assistance from a qualified expert who worked with ODOT and USDOL closely and continuously until the plan met the agencies' approval. When BOLI later disagreed with USDOL's assessment, Respondents continued to cooperate. In spite of their disagreement with the Agency about the validity of the revised plan, previously approved by USDOL and ODOT, Respondents paid the underlying fringe benefits as back wages and made every effort to bring their plan into compliance. This forum has noted before, however, that such cooperation and effort are not considerations when determining whether to debar a subcontractor. *See, In the Matter of Larson Construction, Inc.*, 17 BOLI 54 (1998). OAR 839-016-0095 specifically permits the Commissioner to consider those matters, though, when reviewing a petition to remove a name from the ineligible list. Other matters may be considered by the Commissioner as well, such as a petitioner's history of correcting violations and its likelihood of violating the prevailing wage rate law in the future. The Commissioner may also consider those matters when determining the length of time a contractor shall remain on the list of ineligibles. *See, In the Matter of Intermountain Plastics*, 7 BOLI 142 (1988).

Respondents also contend that because BOLI approved the plan in 1996 and reiterated its approval in 1997, the Agency is estopped from imposing any sanctions against Respondents. This forum has held previously that the doctrine of equitable estoppel does not apply to the agency when enforcing a mandatory requirement of the law. *In the Matter of Larson Construction, Inc.*, 17 BOLI 54 (1998); *In the Matter of Albertson's, Inc.*, 10 BOLI 199, 299 (1992).

Under ORS 279.361(1), if a subcontractor has "intentionally failed" to pay the prevailing wage rates as required, then the subcontractor "shall be ineligible" for up to three years to receive any contract or subcontract for public works.

Under ORS 279.361(2), any corporate officer who is responsible for the failure or refusal to pay the prevailing wage rates shall also be ineligible for up to three years to receive any contract or subcontract for public works. Here, the preponderance of the credible evidence shows that Respondent Hollinger is responsible for Respondent SOFI's intentional failure to pay the prevailing wage rates as required. She intended the benefits plan as adopted in December, 1996, and knew or should have known what the law required for a bona fide benefits plan.

Although technically the violation resulted in underpayment of wages to a number of employees, this is not a case of an artful employer violating the law. As noted previously in this order, Respondent Hollinger took immediate action to correct the deficiencies in her benefits plan even though she had been advised previously that the Agency approved her plan, she continued to cooperate with the Agency as she attempted to bring the plan into compliance, and she paid the underlying fringe benefits as back wages. It is notable that even the so-called experts, including the Department of Justice, could not judge conclusively what constitutes a bona fide benefits plan, although that didn't stop three agencies from approving Respondents' plan to

Respondents' ultimate detriment. Therefore, pursuant to ORS 279.361, OAR 839-016-0085, and 839-016-0095(1), and based on the unique facts in this case, the forum mitigates the punishment otherwise appropriate to Respondents' conduct by limiting the period of ineligibility imposed to one month.

The forum is not persuaded that Respondents' Plan #2, adopted as amended August 18, 1997, was not a bona fide fringe benefit plan. The Agency's expressed concerns with Plan #1 were addressed in the revised plan. The forfeiture clause was eliminated and an employee benefits trust was established. When contrasted with the plan approved by BOLI in 1998, Plan #3, the primary distinctions have to do with the nature of the health insurance program and specifying who bears the costs associated with providing the benefits. ORS 279.349(4) provides that any costs to the subcontractor "reasonably anticipated in providing benefits to workers" are equivalent to fringe benefits. Plan #2 was not noticeably in conflict with the statute.

Plan #3 eliminated the health insurance program as written because, according to the Agency, "all fringe benefit contributions must provide a benefit to the individual employee for whom they are contributed" and under Plan #2 some of the contributions were allocated to the general fund at the end of the plan year to purchase insurance premiums that provided a benefit to some, but not necessarily all, employees. Under the guidelines found in section 15f12 of the USDOL Field Operations Handbook, employers can credit contributions to be made during the eligibility waiting period as fringe benefits "since it is not required that all employees participating in a bona fide fringe benefit plan be entitled to receive benefits from that plan at all times." (Emphasis in original) USDOL did not question Respondents' health insurance program as written in Plan #2. BOLI has a parallel policy of permitting eligibility waiting periods. In the absence of evidence to the contrary, the rationale for permitting credit to be taken for

contributions made during the waiting period must be the same. There was no testimony with regard to each plan so the forum has no guidance in interpreting the more esoteric provisions. However, it need not determine whether Plan #2 was a bona fide benefits plan. The Agency had the burden of proving it was not and has not done so. The forum finds that for the period between April 30 and September 30, 1997, Respondents did not intentionally fail to pay the prevailing wage rates.

**b. Intentional Failure to Post the Prevailing Wage Rates**

Respondents presented credible evidence showing Respondent Hollinger used a "job book" to post the prevailing wage rates on the Washington Approach project. The job book concept was approved by Sanford Groat in early 1997. The job book contained the prevailing wage rates and other information pertaining to worker concerns. The job book was located in the pilot cars with the lead workers and was accessible to any worker who asked. Respondent Hollinger told each new employee about the job book and where it could be found. Witnesses who testified were aware of the job book and what the prevailing wage rate was on the Washington Approach project. Although the witnesses testified that they did not see the prevailing wage rates posted on the Washington Approach job site, each one of them knew about the job book, where it was located, and what was in it. Respondents clearly intended that the rates be posted in some fashion. The statute and rules give no guidance on what constitutes conspicuous and accessible posting. In this case, Respondent Hollinger discussed her problems with posting and her proposed method of compliance with an agency compliance specialist before the Washington Approach project and received approval. The forum will not second guess the Agency's agreement to Respondents' solution. The forum finds that Respondents did not intentionally fail to post the prevailing wage rates.

## **2. Civil Penalties**

### **a. Failure to Pay the Prevailing Wage Rates**

The Agency alleged 100 violations of ORS 279.350(1) related to Respondent's contributions to its benefits plans. In its Notice of Intent it proposed to assess \$139,160.30 in civil penalties for the 100 "third or subsequent violation[s]." The Agency ultimately proved that between January 1 and April 30, 1997, Respondents failed to pay workers the prevailing wage rates on its public works contracts during that period as a result of contributions made to a defective benefits plan. Civil penalties are authorized by ORS 279.370 and OAR 839-016-0530(3)(a).

Evidence shows that Respondents intended to and did adopt a medical reimbursement plan in December, 1996. BOLI, through Sanford Groat and his supervisor, approved the plan in December, 1996. When another agency found defects in the plan in March, 1996, Respondents immediately obtained an attorney experienced in employee benefit plans to rectify any problems with the plan. The plan was revised to meet the specifications of another agency and it was approved by that agency August 1, 1996. Sometime around May, 1997, evidence shows that BOLI again reviewed and approved the plan. It was not until late August, 1997, that Respondents were put on notice by David Gerstenfeld that BOLI questioned their plan and did not consider their contributions to the plan as bona fide fringe benefits.

Given the increasing complexity of the plan as it underwent its metamorphosis, the forum is hard pressed to expect Respondents to know more about what qualifies as a bona fide employee benefit plan than the agencies that reviewed their plan. As soon as there was any indication that the plan had problems, Respondent Hollinger sought assistance from a qualified expert who worked with the agencies closely and continuously until the plan met the approval of both agencies. As noted before in this

opinion, Respondents were cooperative and, in spite of their disagreement with the agency about the validity of the plan, they paid the underlying fringe benefits as back wages and made every effort to bring their plan into compliance.

The Agency alleged aggravating circumstances and requested civil penalties. The Agency presented no evidence that Respondents had any violations or warning letters prior to the period in which the violations were found.<sup>4</sup> Respondents presented credible evidence of mitigation. Due to the particular facts and circumstances in this record, no civil penalties are assessed for the violations of ORS 279.350(1).

b. Failure to Post the Prevailing Wage Rates

The Agency seeks a \$5,000 civil penalty for Respondents' failure to post the prevailing wage rates on the Washington Approach project. A civil penalty is authorized by ORS 279.370 and OAR 839-016-0530(3)(b). The forum finds Respondent Hollinger testified credibly that she posted the prevailing wage rates in the job book she developed to cure the posting problem on flagging job sites. Her testimony that she kept the job book with the lead worker in the pilot car and told employees when they were hired where the job book could be found was corroborated by other credible evidence. The job book concept was deemed acceptable posting by the Agency. For the same reasons described in 1.b. of this opinion, the forum finds Respondents did not violate ORS 279.350(4).

c. Failure to Post Notice of Fringe Benefit Plan

The Agency proposed a \$5,000 civil penalty for Respondents' failure to post notice of its fringe benefit plan on the Washington Approach project, in violation of ORS 279.350(5).

For the same reasons described in 2.b. of this proposed opinion, the forum finds Respondents posted the medical benefit plan in the job book. Respondent Hollinger

testified credibly that the job notebook contained Respondents' benefit plan and her testimony was corroborated by other credible testimony. The forum finds Respondents did not violate ORS 279.350(5).

d. Failure to File Accurate and Complete Certified Statements

The Agency proposed a \$24,000 civil penalty for Respondents' failure to file accurate and complete certified statements for 24 violations of ORS 279.354. A civil penalty is authorized by ORS 279.370 and OAR 839-016-0530(3)(e). The penalty shall not exceed \$5,000 per violation, and the amount will depend on all the facts and on any mitigating and aggravating circumstances. OAR 839-016-0540(1). Those circumstances, pursuant to OAR 839-016-0520(1), include:

- "(a) The actions of the contractor, subcontractor or contracting agency in responding to previous violations of statutes and rules;
- "(b) Prior violations, if any, of statutes and rules;
- "(c) The opportunity and degree of difficulty to comply;
- "(d) The magnitude and seriousness of the violation;
- "(e) Whether the \* \* \* subcontractor \* \* \* knew or should have known of the violation."

Respondents acknowledged and the evidence shows that between February 17 to on or about July 20, 1997, they failed to accurately report hours and dates of work on 20 certified statements filed on the Washington Approach project. Respondents admitted that the certified statements they filed reflected their practices of banking hours, counting the hours after midnight as a new day, and paying straight time for hours worked in excess of eight in a day where workers worked different jobs or on different projects in the same day. Their practices resulted in two wage claims, payment to four other workers of over \$900, and a BOLI warning letter that issued August 6, 1997. There is no evidence in the record that Respondents continued with those practices or filed inaccurate or incomplete certified statements after they received

the warning letter. Nor is there any evidence that Respondents failed to pay the prevailing wage rate to any of their workers after the warning letter issued.

Clearly, the Agency's August 6, 1997, warning letter does not limit the Agency's ability to seek civil penalties six months later for violations that were cured by the Respondents as a result of the warning letter. However, while not expressly mentioned, the forum can infer from the evidence that the Agency's goal is to encourage compliance. Since the warning letter is a mechanism to give contractors the opportunity to correct the deficiencies that caused them to violate, it is inconsistent with this goal to impose substantial penalties months later for violations that were apparently cured, absent a showing of aggravating circumstances. Nevertheless, the forum is mindful that filing false certified statements is a serious violation. Respondent Hollinger knew or should have known she was certifying to false hours and days on the certified statements. All employers are charged with the knowledge of wage and hour laws governing their activities as employers. *In the Matter of Country Auction*, 5 BOLI 256 (1985). The law imposes a duty on employers to know the wages that are due to their employees. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950). Respondents should have known that their payroll methods, as reflected in their certified statements, were illegal. These are without doubt aggravating circumstances.

Having considered the applicable aggravating and mitigating circumstances, the forum assesses Respondents a civil penalty of \$6,000 (\$250.00 per violation) for their 24 violations of ORS 279.350(7).

e. Taking Action to Circumvent the Payment of the Prevailing Wage Rate

The Agency proposed a \$5,000 civil penalty for Respondents' action to circumvent payment of the prevailing wage by requiring overtime hours worked by a worker to be accepted as straight time hours by that worker's spouse, by attempting to

coerce other workers to agree to such a plan, and by threatening retaliation and retaliating against workers who insisted on receiving the full prevailing wages to which they were entitled or if they complained to any government employees about their pay, in violation of ORS 279.370(7). A civil penalty is authorized by ORS 279.370 and OAR 839-016-0530(3)(h).

There is no credible evidence in the record that Respondents required or coerced anyone to report their overtime hours as straight time in their spouse's name. Respondent Hollinger employed couples where both were certified and shared a shift, but it was a method to minimize overtime hours and give those who wanted a chance to increase the number of hours worked instead of being limited to eight in a day.

There is also no evidence that workers suffered adverse consequences if they insisted on receiving the full prevailing wages to which they were entitled or if they complained to government agencies about their pay. To the contrary, the evidence shows that any worker who complained of not receiving overtime hours was paid promptly by Respondents to no apparent detriment.

For the above reasons, there is no violation of ORS 279.370(7) and no civil penalties are assessed.

### **3. Agency's Exceptions to the Proposed Order**

#### **a. Warning Letter**

The Agency asserts that the forum improperly relied on the Agency's warning letter as a bar to the imposition of sanctions for violations covered and not covered in the warning letter issued August 6, 1997. It is not this forum's intent to apply estoppel against the Agency in this case. That portion of the opinion that discusses the warning letter's impact on the sanctions imposed against Respondents is revised to better reflect the forum's view of the evidence.

b. Respondents' Fringe Benefit Plan

The Agency reiterates its argument that the initial versions of Respondents' benefit plan did not constitute bona fide fringe benefits. In particular, the Agency argues that the forum's interpretation of ORS 279.348(4) was incorrect and the "forum incorrectly used the 'rate of costs' definition to determine what can be paid for by money contributed into a bona fide fringe benefit plan." The statute is plain on its face. Included in the definition of fringe benefits is the rate of costs reasonably anticipated in providing benefits to workers, including medical benefits such as those provided in Respondents' benefit plan. Although the Agency, in its exceptions, continues to assert, contrary to the statute, that an employer's costs administering the type of plan contemplated in ORS 279.348(4) are not bona fide fringe benefits, the Agency ultimately approved Respondents' final version of the plan, including the provision "allowing reasonable expenses of administering the Plan to be charged to Participants' Accounts."

The forum's decision in this matter is not based on whether the previous version, other than Plan #1, was a bona fide fringe benefit plan or not, but on the Agency's failure of proof. The Agency's exception on this point is overruled.

c. Posting Violations

The Agency contends in its exceptions that the forum erroneously relied on Sanford Groat's statements to find that Respondents' method of posting met the legal requirements. It also argues that Groat's approval of Respondents' posting method is contrary to Agency policy and interpretation. The Agency, however, presented absolutely no evidence at hearing on this issue nor did it attempt to instruct the forum on what the Agency's policy is or how it would define conspicuous and accessible posting in this particular case. Respondents, on the other hand, presented credible evidence

detailing the difficulties of posting in the flagging industry, including the dynamic nature of flagging and the lack of the traditional job shack. Credible and uncontroverted evidence in the record shows that prior to the conclusion of Groat's investigation, Respondents' posting method was considered to be in compliance by the Agency. There is no indication in the record that posting was ever an issue with Gerstenfeld after he began looking into Respondents' fringe benefits plan.

If the Agency wanted the forum to consider its posting policy and its interpretation of "conspicuous and accessible" in this particular case, then it should have offered evidence at the hearing to support its charge.

d. Gerstenfeld's Credibility

The Agency asserts that the forum confuses the lack of substantiating documentation with the existence of controverting evidence and that the forum found inconsistencies in Gerstenfeld's testimony where there were none. For those reasons, the Agency suggests that Gerstenfeld's testimony be found credible. The forum agrees that the question with Gerstenfeld's testimony was not of honesty but about the reliability of the evidence where the Agency has the documents within its control that would substantiate certain testimony but failed to produce those documents at hearing. Bare assertions that bear directly on the merits, particularly in a case involving debarment and substantial civil penalties, are accorded little or no weight where the Agency has the best evidence within its power to produce and fails to do so without explanation.

In its exception to the assessment of Gerstenfeld's testimony, the Agency attempts to explain certain inconsistencies and the explanations are plausible if not wholly supported in the record. Although the assessment stands for the most part, it is

revised to more accurately reflect the forum's determination that Gerstenfeld's testimony was unreliable in part rather than not credible.

e. Civil Penalty Calculation

The Agency contends the forum "incorrectly calculated" the civil penalties in this case. The exception is without merit. The Commissioner is authorized but not required to assess civil penalties pursuant to ORS 279.370 and OAR 839-016-0530 for the violations found herein. OAR 839-016-0520(4) provides that "the Commissioner shall consider all mitigating circumstances presented by the contractor, subcontractor or contracting agency for the purpose of reducing the amount of civil penalty to be assessed." The forum considered the mitigating evidence and under the facts and circumstances in this record the penalties assessed are appropriate.

f. Debarment Period

The Agency objects to the one month debarment period imposed by the forum citing *In the Matter of Intermountain Plastics*<sup>5</sup> as the only reported contested case that resulted in less than a three year debarment period. In that case, the forum determined that the contractor had not "surreptitiously violated the law" and imposed an eighteen month debarment. The forum found that, although the contractor subsequently refused to abide by the agency's determination of coverage regarding trade classifications, the contractor's "initial efforts to clarify the situation were a constructive and positive step [and] it is on this basis that the Forum mitigates the punishment otherwise appropriate to the Contractor's conduct by limiting the period of ineligibility imposed to eighteen months." 7 BOLI, at 160.

The Agency suggests that in the present case, it is inappropriate for the forum to consider mitigating factors and indicates that "since these factors should not be considered in determining the debarment, the discussion of those factors should be

removed from the order." The Agency is confusing the difference between considering mitigation for determining whether to debar at all and considering mitigation when determining the length of the debarment period. ORS 279.361 mandates debarment for a period not to exceed three years for intentional failure or refusal to pay the prevailing rate of wage. Because the forum found that Respondents intentionally failed to pay the prevailing wage rate as a result of its invalid 1996 fringe benefit plan, the forum does not have a choice but to debar Respondents for some period not to exceed three years regardless of mitigating circumstances. Contrary to the Agency's contention, the forum is not precluded from considering mitigating circumstances in determining the length of the debarment period.

The forum, however, has revised the opinion section of this order to clarify and specify the reasons for determining the one month debarment period as an appropriate sanction under the circumstances.

g. FOFM #20 Amendment

The Agency solicits an amendment to FOFM #20 to reflect that unpaid overtime wages were paid on August 4, 1997, rather than at the end of the project, and only after the general contractor on the project requested copies of Respondents' payroll records. FOFM #20 is a finding pertaining to Respondents' general prior practice of banking hours on projects. FOFM #17 addresses specific employees who, based on evidence in the record, claimed unpaid overtime and were paid on August 4, 1997, as a result of Sanford Groat's investigation on behalf of the Agency.

h. FOFM #28 Amendment

FOFM #28 is expanded, at the Agency's request, to more accurately reflect the evidence in the record.

## ORDER

NOW THEREFORE, as authorized by ORS 279.361, the Commissioner of the Bureau of Labor and Industries hereby orders that Respondents Southern Oregon Flagging, Inc. and Kimberlie Hollinger or any firm, corporation, partnership, or association in which they have a financial interest shall be ineligible to receive any contract or subcontract for public works for a period of one month from the date of publication of their names on the list of those ineligible to receive such contracts maintained and published by the Commissioner of the Bureau of Labor and Industries.

FURTHERMORE, as authorized by ORS 279.370, the Commissioner of the Bureau of Labor and Industries hereby orders that Respondents Southern Oregon Flagging, Inc. and Kimberlie Hollinger deliver to the Bureau of Labor and Industries, Business Office, Ste 1010, 800 NE Oregon Street #32, Portland, Oregon 97232-2109, a certified check payable to the Bureau of Labor and Industries in the amount of Six Thousand Dollars (\$6,000), plus any interest that accrues at the annual rate of nine percent between a date ten days after the issuance of the final order and the date Respondents comply with the final order. This assessment is for the following civil penalties against Respondents: \$6,000 for 24 violations of ORS 279.354.

### Appendix

EMPLOYEE	PROJECT	AMOUNT PAID
Laura Anderson	12th & Lovejoy	\$105.75
Shirley Arenz	Pacific Hwy	\$2,131.80
Evelyn Arthur	Grand Ronde	\$356.03
Tom Atkins	Milton-Freewater, Grand Ronde, St. Helens, Vernonia, Clatskanie	\$1,285.80
Margaret Atkins	Grand Ronde, Vernonia	\$67.98
Hyrarn Brodniak	Grandpa Erfo, Pacific Hwy, Wilsonville, St. Helens, Fairgrounds	\$593.87
Gina Brown	Hood River	\$36.30
Jacques Buteau	Pacific Hwy, John Day, Vernonia	\$472.06
Darcy Calchina	Wilsonville	\$56.40
Phyllis Carson	Washington Approach	\$10.58

Candace Chambers	Hood River	\$61.56
James Clark	Pacific Hwy, John Day, Seaside, Newport, 12th & Lovejoy	\$537.23
Jason Clark	Washington Approach, Grand Ronde, MP94	\$1,149.56
Lance Clay	Washington Approach, Coburg Road	\$4,984.36
Stephen Clay	Washington Approach	\$178.33
John Conley	Coburg Road, Hwy 58	\$244.58
Damon Cooper	Pacific Hwy, 12th & Lovejoy, Arlington	\$454.58
Joseph Corn	Grand Ronde	\$500.55
Debbie Denman	Milton-Freewater, Pacific Hwy, Washington Approach, Grand Ronde, 12th & Lovejoy, Vernonia, Clatskanie, Hood River, Hermiston	\$2,055.10
Eydie Dennis	Wilsonville	\$24.68
Sherryldeen Devore	Grand Ronde	\$1,128.00
Kathy Dillenburg	Grand Ronde	\$523.25
Sandra Dodge	Hood River, SE Foster Rd	\$60.57
Sean Duffy	Coburg Road, Vernonia, Junction City	\$588.21
Ellana Flood	Washington Approach	\$232.65
Katherine Flynn	Pacific Hwy	\$56.10
James French	Milton-Freewater	\$423.00
Stacey Fuller	42nd & Jasper, Filbert Lane, Fairgrounds, 32nd & Jasper	\$627.45
Ricky Gillepsie	Hwy 58, 32nd & Jasper	\$489.98
Elisha Groom	Wilsonville	\$28.20
Daniel Guest	Coburg Road, Hwy 66, Vernonia, MP94	\$729.45
Tamara Sue Hill	Pacific Hwy, Wilsonville, Grand Ronde, 12th & Lovejoy, SE Foster Road	\$1,935.46
Rick Hoffman	John Day, Newport, Seaside	\$225.60
Wanda Holcomb	Milton-Freewater, MP94, Washington Approach, Hood River	\$1,885.47
Joshua Hollinger	Pacific Hwy, Washington Approach, Wilsonville, Hwy 66, 12th & Lovejoy, MP94, Arlington	\$752.74
Edgar Hollinger	Chambers, Hwy 58, Broadway/Lincoln, 32nd & Jasper, MP94, Hood River	\$343.88
Natasha Hollinger	Pacific Hwy, Washington Approach, 12th & Lovejoy,	\$363.56
Mindy Hollinger	Pacific Hwy, Washington Approach, Wilsonville, St. Helens, 12th & Lovejoy, Columbia Slough	\$1,562.79
Shirley Holstad	Wilson River, Grand Ronde	\$511.13
Roger Hooper	Grandpa Erfo, Milton-Freewater	\$401.85
Richard Hubbard	Hwy 58	\$31.73
Warren Idzerda	Pacific Hwy, Grand Ronde	\$153.30
Ralph Johnson	Grandpa Erfo	\$52.88
Tratina Jones	Junction City	\$66.98
Joshua Jones	Coburg Road, John Day, Hwy 66, Vernonia,	\$807.25

	32nd & Jasper, Arlington	
Lois Kachaturian	Pacific Hwy, Wilsonville	\$424.18
William King	Washington Approach, Milton-Freewater, Grandpa Erfo	\$803.70
Karey Lamp	Coburg Road	\$77.55
Cleo Larkin	MP94	\$465.30
Matt Leavitt	Pacific Hwy, 10th & Willamette, Wilson River, Wilsonville, Fairgrounds, Grand Prairie	\$1,718.42
Charles LeDoux	MP94	\$172.73
John LeDoux	Washington Approach, MP94, Arlington	\$1,885.88
Cherie Levig	Coburg Road	\$14.10
Debbie Liniger	Pacific Hwy, Wilsonville	\$78.60
Kim Mangold	Hwy 66	\$112.80
James Martinson	42nd & Jasper, Wilsonville	\$80.68
Candy McEntire	Milton-Freewater	\$45.83
Teresa McGarry	Fairgrounds	\$186.83
Scott McGetrick	Milton-Freewater	\$116.33
Dorothy Morrison	MP94	\$172.73
Scott Murry	Grandpa Erfo, Pacific Hwy, Grand Ronde, St. Helens, Vernonia	\$342.23
Charlene Nelson	Pacific Hwy, Grand Prairie	\$90.45
Joann Nelson	Wilsonville	\$35.25
Jessica Orsetti	Washington Approach, Grand Ronde, MP94, Arlington	\$0 [425.72 claimed]
John Orsetti	Washington Approach, Coburg Road, Grand Ronde, MP94, Arlington	\$0 [\$1,603.37 claimed]
Ed Pauwell	Filbert Lane, Milton-Freewater, Washington Approach	\$0 [\$55.00 claimed]
Warren Perrine	Milton-Freewater	\$672.28
R Pierce	Milton-Freewater	\$35.25
Nikki Pool	Hwy 66	\$49.36
Ricardo Ramirez	Milton-Freewater	\$102.23
Michelle Richards	Washington Approach, MP94, Hood River	\$900.52
Jose Robles	Pacific Hwy, Wilsonville	\$119.85
Joe Rogers	Grand Ronde	\$45.83
Kathryn Roman	Pacific Hwy	\$69.30
Tim Roseboro	Pacific Hwy, Coburg Road, John Day, Wilsonville	\$874.10
Aaron Rosenberg	Coburg Road, 12th & Lovejoy, Vernonia, Arlington, Junction City	\$306.66
Eugene Russell	Fairgrounds, Hwy 58, 32nd & Jasper	\$109.28
Cheryl Salvey	MP94	\$447.68
Joe Sanders	Coburg Road, Grand Ronde, Fairgrounds, 32nd & Jasper, Junction City, Broadway/Lincoln	\$426.53
Casey Sanders	Pacific Hwy, Coburg Road, Wilsonville,	\$523.14

	Fairgrounds, 32nd & Jasper	
Kyle Sanders	42nd & Jasper, Pacific Hwy, Coburg Road, Wilsonville, Fairgrounds, Chambers, 32nd & Jasper	\$1,541.75
Travis Sanders	Wilsonville, Columbia Slough	\$183.30
Walt Scott	Elk Creek, Coburg Road	\$755.30
Karen Spence	Milton-Freewater	\$42.30
Mike Spitzer	Grandpa Erfo, Pacific Hwy, Coburg Road, Wilsonville, St. Helens, Vernonia, 32nd & Jasper	\$0 [1,349.80 claimed]
Tracy St. Clair	Grand Ronde	\$56.40
Matthew Stokes	Hood River, Hermiston	\$66.12
Debbie Stratton	Grand Ronde	\$24.68
Tom Sunseri	Filbert Lane, Clackamas Hwy, Pacific Hwy, Wilson River, Wilsonville, Grand Prairie, Multnomah Blvd.	\$49.35
William "Bucky" Taylor, Jr.	Hood River	\$52.80
Bill Taylor	Hood River	\$58.32
Belinda Taylor	Pacific Hwy, Wilson River, Grand Ronde, Clatskanie	\$800.93
Shela Torrence	Arlington, Hermiston	\$297.24
Sherrol Trent	MP94	\$521.70
Jodi Underhill	Grand Ronde	\$162.58
Kathy Wake	Pacific Hwy, Washington Approach, MP94	\$919.93
Michael Waldron	Pacific Hwy, Wilsonville, Arlington	\$609.38
Curt Wallace	Coburg Road, Grand Ronde, Fairgrounds, Hwy 58, 32nd & Jasper, Junction City	\$509.14
Freddie Williams	MP94	\$437.10
Alan Winans	Washington Approach, MP94	\$0.20

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<sup>1</sup> See definition *infra* FOFM #20.

<sup>2</sup> There was no BOLI Prevailing Wage Law Handbook before 1998.

<sup>3</sup> Ed. note: for ease of publication, the table originally located at this point in the Final Order has been moved to the end of the Order and has been titled "Appendix."

<sup>4</sup> The wage claims and warning letter issued August 6, 1997, occurred after the period covered by the 1996 fringe benefits plan.

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<sup>57</sup> BOLI 142 (1988)