

In the Matter of

**LABOR READY, INC., GLEN WELSTAD and
LABOR READY NORTHWEST, INC.,**

Case No. 70-99

June 1, 2000

SYNOPSIS

Respondent Labor Ready, Inc., violated ORS 279.355 and OAR 839-016-0025 by failing to make and maintain records of the daily hours worked by its employees on a public works project. Labor Ready, Inc., also violated those laws by failing to make and maintain records of the daily compensation paid to each of its employees on the project. Labor Ready, Inc., violated ORS 279.354 by filing certified payroll reports that stated inaccurately the projects on which two employees had worked. The commissioner imposed civil penalties totaling \$13,000.00 for these violations.

After the Agency began investigating these violations, Labor Ready, Inc., formed a subsidiary corporation, LRNW. Subsequently, Labor Ready, Inc., failed to comply with the Agency's requests for certain payroll documents. The Agency initially charged all respondents with having violated OAR 839-016-0030, which requires public works contractors and subcontractors to provide documents at the Agency's request. However, the Agency later amended the Notice of Intent to charge only LRNW with those violations. Because LRNW was not a subcontractor on the public works project and had not been asked to supply the documents, LRNW could not be held responsible for any violations of OAR 839-016-0030 that Labor Ready, Inc., may have committed. ORS 279.354, ORS 279.355, ORS 279.370, OAR 839-016-0025, OAR 839-016-0030, OAR 839-016-0520, OAR 839-016-0530, OAR 839-016-0540.

The above-entitled case came on regularly for hearing before Erika L. Hadlock, 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 January 11 and 12, and February 4, 2000, in the hearings room of the Oregon Bureau of Labor and Industries, 800 N.E. Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Linda Lohr, an employee of the Agency. Respondents appeared through their counsel, David J. Sweeney, of Brownstein, Rask, Arenz, Sweeney, Kerr & Grim. Tim Adams, the

director of legal services for Respondent Labor Ready, Inc., was present as Respondents' corporate representative on the first day of hearing.

The Agency called two witnesses: former compliance specialist Melissa Marks and Tim Adams, Labor Ready's director of legal services. Respondents called employees Jill Carter, Lauri Montano-Griffin, Steve Bevins, and Adams as their witnesses.

The forum received into evidence:

a) Administrative exhibits X-1 to X-8 (generated or filed prior to hearing) and exhibits X-9 to X-19 (generated or filed during or after the hearing).

b) Agency exhibits A-1, A-5 to A-16 (submitted prior to hearing with the Agency's case summary) and A-17 to A-19 (submitted during the hearing).

c) Respondents' exhibits R-1 through R-6 (submitted prior to hearing with Respondents' case summary) and R-7 and R-8 (submitted during the hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On July 22, 1999, the Agency issued a Notice of Intent to Assess Civil Penalties in which it made the following charges against Respondents, referred to collectively as "Contractor":

a) Between about October 12, 1998, and November 13, 1998, Contractor failed to make and maintain records of the daily and weekly compensation paid to each of its employees on the Oregon Department of Corrections Columbia River Correctional Institute public works contract, upon which Contractor was a subcontractor, in violation of OAR 839-016-0025(2)(e);

- b) Between about October 12, 1998, and November 13, 1998, Contractor failed to make and maintain records of the daily and weekly hours worked by each of its employees on the Oregon Department of Corrections Columbia River Correctional Institute public works project, upon which Contractor was a subcontractor, in violation of OAR 839-016-0025(2)(f);
- c) Between about October 12, 1998, and November 13, 1998, Contractor filed inaccurate and incomplete certified statements by failing to report workers, hours and dates of work on the Oregon Department of Corrections Columbia River Correctional Institute public works contract, upon which Contractor was a subcontractor, in violation of ORS 279.354; and
- d) Contractor failed to provide certified copies of all of Contractor's time and payroll records upon the written requests of the Wage and Hour Division made on February 8, February 24, March 26, and April 29, 1999, in violation of OAR 839-016-0030(3).

The Agency alleged as an aggravating circumstance that the Agency issued Contractor a warning letter in December 1997 citing Contractor for violations of the Prevailing Wage Rate ("PWR") laws, including failure to pay workers the prevailing wage, that resulted in the collection of unpaid wages. The Agency sought a \$5000.00 civil penalty for each alleged violation, for a total of \$20,000.00 in penalties. The Agency argued that enhanced penalties were warranted "by Contractor's knowledge of the current violations, the magnitude and seriousness of the violations and the ease of opportunity in complying with the law."

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

3) The Agency served the Notice on Respondent Welstad on or about July 30, 1999. The Agency served the Notice on Respondents Labor Ready, Inc., and Labor Ready Northwest, Inc., on or about August 2, 1999.

4) On August 24, 1999, the Agency issued a Notice of Intent to Issue Final Order by Default stating that if the Agency did not receive an answer and request for hearing by September 3, 1999, it would issue a Final Order by Default.

5) Respondents, through counsel, filed an answer and request for hearing on August 31, 1999. In their answer, Respondents denied all substantive allegations in the Notice of Intent to Assess Civil Penalties.

6) On September 29, 1999, the Agency filed a request for hearing with the Hearings Unit.

7) On October 5, 1999, the Hearing Unit served Respondents with: a) a Notice of Hearing that set the hearing for December 14, 1999; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent.

8) On October 14, 1999, Respondents filed an unopposed request for postponement based on their attorney's need to be present at another contested case hearing on December 14, 1999. The ALJ granted the motion and reset the hearing to commence on January 11, 1999.

9) On December 6, 1999, the forum ordered the Agency and Respondents each to submit a case summary including: lists of all persons to be called as witnesses;

identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondents only); a statement of any agreed or stipulated facts; and any wage, damages, and penalties calculations (for the Agency only). The forum ordered the participants to submit their case summaries by December 28, 1999, and notified them of the possible sanctions for failure to comply with the case summary order. The Agency and Respondents both filed timely case summaries on December 28. The Agency filed a supplement to its case summary, including a document labeled Exhibit A-16, on January 7, 2000.

10) At the start of the hearing, counsel for Respondents stated that he had received the Summary of Contested Case Rights and Procedures and had no questions about it.

11) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondents of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

12) At the beginning of the hearing, the participants informed the ALJ that they had stipulated to certain facts, which the Agency case presenter read into the record:

"The CRCI project * * * was a covered project covered by the Oregon PWR statutes.

"Respondents employed workers on the CRCI project during the material times.

"Respondents knew that they were obliged to keep records in accordance with the PWR statutes and rules."

13) During the hearing, the Agency moved to dismiss the Notice of Intent as to Respondent Glen Welstad. Respondents did not oppose the motion, which the ALJ granted.

14) After presenting its rebuttal case, the Agency moved to amend the Notice of Intent to add an alleged violation of ORS 839-016-0030(1) based on evidence that came into the record without objection, as follows:

"Contractor failed to provide to representatives of the Wage and Hour Division records necessary to determine if the prevailing wage rate has been or is being paid to workers."

The Agency did not seek additional penalties for this new alleged violation. The ALJ granted the motion, ordered that Respondents were deemed to have denied the new allegation, and granted Respondents a continuance to present evidence regarding the new charge.

15) Counsel for Respondents later notified the ALJ that he would not be presenting any additional evidence, and the ALJ set Friday, February 4, 2000, as the date on which the participants would present closing arguments. The participants made closing statements on that date.

16) On February 3, 2000, the Agency's Legal Policy Advisor sent Respondents a complete copy of the Hearings Unit's amended rules for contested case hearings.

17) By order dated February 14, 2000, the ALJ asked the Agency to submit a legal brief or statement of Agency policy answering two questions:

"1) Is Labor Ready Northwest, Inc., liable for any violations committed prior to December 1998? If so, under what theory? If the Agency believes Labor Ready Northwest, Inc., may be held liable as a successor corporation for any violations committed by Labor Ready, Inc., what is the source for the commissioner's authority to hold successor businesses liable for PWR violations committed by their predecessors?

2) Which Respondent committed any violations that occurred in early 1999? Which Respondent is liable for any such violations, or are both Respondents liable? Under what theory or theories?"

The ALJ ordered the Agency to file its brief or policy statement by March 15, 2000, and gave Respondents two weeks after the Agency filed its brief in which to file a response.

18) The Agency later requested and received an extension of time until March 31, 2000, in which to file its brief or policy statement. On that date, the Agency filed a letter "[i]n lieu of a statement of agency policy," in which it moved to amend the Notice of Intent as follows:

"The Agency is requesting civil penalties for any violations committed by Respondent Labor Ready, Inc. prior to December 1998. The Agency is also requesting civil penalties for any violations committed by Respondent Labor Ready Northwest, Inc. in early 1999. The Agency is not seeking to hold either Respondent responsible for any violations committed by the other. This motion is made to the extent that it explains the Agency's position regarding each Respondent's liability for civil penalties in this matter."

Respondent did not oppose the Agency's motion to amend, which the ALJ granted by order dated April 17, 2000.

19) The ALJ issued a proposed order on May 9, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Respondent filed timely exceptions. The Agency did not file exceptions.

FINDINGS OF FACT – THE MERITS
(findings related to the violations)

1) Labor Ready, Inc. ("Labor Ready") is a Washington corporation headquartered in Tacoma, Washington, and has several hundred branch offices located throughout the United States. Labor Ready is in the business of supplying temporary workers. At all material times, Respondent Glen Welstad was Labor Ready's president.

2) Labor Ready filed as a foreign corporation doing business in Oregon in February 1995. In late 1998, Labor Ready formed ten wholly owned subsidiary companies, each responsible for an area of the United States. One of those subsidiaries is Labor Ready Northwest, Inc. ("LRNW"), which covers Oregon, Washington, Idaho, Montana and Alaska. All of the subsidiaries are incorporated in Washington and are registered as foreign corporations in the states in which they do

business. In December 1998, LRNW registered as a foreign corporation doing business in Oregon. At that point, there was no need for Labor Ready to be registered in this state. Consequently, in January 1999, Labor Ready voluntarily withdrew its Oregon registration.

3) At the time of hearing, LRNW was the only Labor Ready entity doing business in the state of Oregon. LRNW operated the same branches Labor Ready operated when it did business in Oregon. All of Labor Ready's assets were transferred to LRNW at or about the time LRNW registered in Oregon. For the most part, LRNW retained the employees that Labor Ready had employed.

4) At all material times, Labor Ready or LRNW had branch offices throughout Oregon, including several in the Portland metropolitan area. One of those offices was referred to as the Parkrose branch.

5) From about 1995 until late 1999, Steve Bevins was a director of operations for different Labor Ready districts. About one month before hearing, Bevins was appointed LRNW's director of operations.

6) Lauri Montano-Griffin has worked for Labor Ready since 1996. At the time of hearing, she was Labor Ready's district manager for northern Oregon and was responsible for operations of the Labor Ready branches in that area.

7) At all material times, Frankie Sander was an administrative assistant in Labor Ready's Tacoma headquarters and supervised the administrative services department, which was responsible for compliance with prevailing wage rate ("PWR") laws. Sander generally supervised the preparation of certified payroll reports ("CPRs") required by the PWR laws and personally handled CPRs with which there were difficulties.

8) Jill Carter worked as a customer service representative at the Parkrose branch of Labor Ready/LRNW from December 1997 until August 1999. At the time of hearing, she worked in Labor Ready's Vancouver office.

9) In the summer and fall of 1998, Lee Hartfield was manager of Labor Ready's Parkrose branch.

10) Typically, Labor Ready kept track of the hours its employees worked by using work tickets. Each employee took a work ticket to the job site to which he or she had been assigned and gave it to Labor Ready's customer. The customer wrote the number of hours the employee worked on the ticket and signed it. The employee then returned the work ticket to the Labor Ready branch office, which faxed the tickets and related invoices to Labor Ready's corporate office each Friday evening. Employees in the corporate office prepared the corresponding CPRs. For this process to work correctly, a Labor Ready customer service representative needed to mark each ticket on a PWR job to indicate that it related to a public works contract.

11) In the summer and fall of 1998, the Oregon Department of Corrections ("ODOC") made physical improvements to portions of the Columbia River Correctional Institute ("CRCI"), located in Portland, Oregon. The CRCI project was a covered project subject to the Oregon PWR laws.

12) Oregon Welding Service ("OWS") and Central Oregon Mechanical ("COM") contracted for some of the work on the CRCI job. During the same time period, OWS and COM performed work on another project subject to Oregon PWR laws at Eastern Oregon University. Lyle Holden owns both OWS and COM.

13) Labor Ready contracted with OWS and COM to supply some of the workers that OWS and COM used on the CRCI and Eastern Oregon University projects during 1998 and, therefore, was a subcontractor on the CRCI project. Labor Ready's

Parkrose branch had the accounts for at least two of those employees -- Jason Metz and Travis Henderson. LRNW did not yet exist in 1998 and was not a subcontractor on the CRCI project during that year.

14) Respondents knew that they were obliged to keep records in accordance with the PWR statutes and rules.

15) Labor Ready did not follow its usual practice of using work tickets to record daily hours for the employees it supplied to OWS and COM. Rather, OWS and COM supervisors called or faxed the Labor Ready Parkrose office each week to report the total number of hours each employee had worked that week. Labor Ready customer service representatives then completed work tickets reflecting the total number of hours the employees had worked during the week. The customer service representatives did not record the number of hours the employees had worked each day. Hartfield authorized this procedure.

16) The week ending October 16, 1998, Metz worked about 32 hours for OWS on the CRCI project and Henderson worked about 8 hours on that project, in addition to their work at Mt. Tabor.¹ Respondent Labor Ready completed a CPR stating incorrectly that Henderson and Metz had worked only on the Mt. Tabor project that week.

17) The following week, Metz worked 24 hours for OWS on the CRCI project and also worked at Mt. Tabor. Labor Ready completed a CPR stating incorrectly that Metz had worked only on the Mt. Tabor project that week.

18) The week ending November 6, 1998, Henderson and Metz each worked 22 hours at CRCI and 18 hours at Mt. Tabor. On November 7, 1998, an OWS supervisor called Labor Ready to report the hours that Henderson and Metz had worked. Labor Ready's answering service forwarded the following message regarding that report to Labor Ready:

"Re: Calling in hours for Jason Metz
18 hrs at Mt Tabor & 22 hors [sic] at
Columbia Rive [sic] Correction. Travis
Henderson had the same hours."

Despite this report, Labor Ready completed a CPR stating incorrectly that Henderson and Metz had worked only on the Mt. Tabor project.

19) Henderson worked at CRCI for six hours on Saturday, November 7, 1998. Metz also worked at CRCI the week ending November 13, 1998. An OWS or COM supervisor called a Labor Ready customer service representative to report the total number of hours the two employees had worked that week. The customer service representative recorded that information on work tickets but did not ask how many hours the employees had worked each day, as the representatives had not been instructed to request that information. The representative also reported on the work tickets that Henderson and Metz had worked on some project other than CRCI. These work tickets were not introduced into evidence at the hearing.

20) At some later point, Labor Ready issued corrected work tickets related to the invoices it had sent to OWS for the work performed by Henderson and Metz the week beginning November 7 and ending November 13² to reflect that the work was performed at CRCI. In addition, on the corrected work tickets, Carter noted that Henderson and Metz "were both at the wrong pay." Carter verified at hearing that Henderson and Metz initially had not been paid correctly for the work they performed that week. According to Carter, the correction of the work tickets and related invoices resolved that difficulty.

21) The corrected work tickets state only the total hours Henderson and Metz worked on the CRCI project ending November 13 -- they do not reflect the hours worked each day. The corrected work ticket for Henderson does not indicate that he performed the six hours of work on a Saturday and was, therefore, entitled to overtime pay.

Indeed, Henderson's earning history report for that week shows that he was paid only at the straight hourly rate.

22) At some point, Labor Ready completed a CPR for the week ending November 13 showing that Metz worked a total of 30 hours at CRCI, all on weekdays, and that Henderson worked 6 hours at CRCI on Saturday. Nothing in the record establishes how Labor Ready learned the days on which Henderson and Metz performed their work.³ According to the CPR, Henderson was paid at the straight time rate, not the overtime rate, for the work he did on Saturday.

23) At the time of hearing, Sander did not know whether she ever had corrected the problem with Henderson not having been paid overtime for his Saturday work.

24) The CPRs described in Findings of Fact -- the Merits 15, 16, 17, and 21, *supra*, are reports that Labor Ready completed and submitted to Jim Poore with ODOC, the contracting public agency on the CRCI project.

25) On December 7, 1998, Kevin Taal, an OWS supervisor, filed a claim with the Agency's Wage and Hour Division in which he claimed that OWS had failed to pay him \$800.00 in wages he earned during his last week of employment on the CRCI and Eastern Oregon University jobs. Wage and Hour Division compliance specialist Melissa Marks investigated Taal's claim. During her investigation, Marks received copies of CPRs from the CRCI project from Poore at ODOC. From those documents, Marks determined that Labor Ready had employed workers on the project, because Nicole Meyer at Labor Ready had completed the CPRs. Taal, however, had been employed solely by OWS and COM, and Marks' resolution of his wage claim did not involve Labor Ready.

26) On January 6, 1999, Holden (the owner of OWS and COM) notified Poore by fax of changes that needed to be made to the November 6, 1998, payroll records on the CRCI project.

27) That same day, Holden faxed a letter to Labor Ready in which he pointed out that Henderson's and Metz's hours for the week ending November 6, 1998 needed to be split between the CRCI and Mt. Tabor projects. He asked Labor Ready to "assist us in completing our certified payroll requirements as payment for our services is being withheld and our reserves are exhausted."⁴

28) In a January 15, 1999, fax to "Nicole" at Labor Ready, Holden pointed out the problems with the two CPRs for October 1998. Holden specifically noted that Henderson and Metz had worked at CRCI during the weeks covered by the CPRs, which stated incorrectly that the two employees had worked only on the Mt. Tabor project.⁵ On January 18, Holden sent a fax to Poore pointing out the same difficulties.

29) On January 22, 1999, Poore sent Marks a fax that included copies of the correspondence between Holden and Labor Ready regarding CPRs.

30) After Marks resolved Taal's wage claim, she continued to investigate whether OWS, COM, and Labor Ready had complied with the PWR laws on the CRCI and Eastern Oregon University projects. To determine whether the prevailing wage had been paid, Marks needed to know at least:

- a) The number of hours worked each day, because employees on PWR jobs must be paid overtime for any work they perform in excess of eight hours per day;
- b) The total number of hours worked per week, because employees on PWR jobs must be paid overtime for any work they perform in excess of 40 hours per week;
- c) Whether work was performed on a weekday or the weekend, because employees on PWR jobs must be paid overtime for any work they do on weekends;

- d) The job classification (i.e., Laborer or Carpenter) and group (i.e. Laborer group 1 or Laborer group 2) of the work performed, because each job classification and group has a different rate of pay;
- e) The project on which the work was done, because pay rates can differ between projects, depending on the regions of the state in which the projects are located and the dates on which contracts for the projects were advertised for bid; and
- f) The wage rate paid.

31) On February 4, 1999, Marks wrote a letter to Holden outlining the issues on both the CRCI and Eastern Oregon University projects. With regard to CRCI, Marks stated, in pertinent part:

"On this project, the certified payroll reports seem to accurately reflect the number of people working on the job, although as we discussed, it is improper for Labor Ready to report two projects on the same set of certified payroll reports. However, for the purposes of my calculations I did use the hours worked you indicated on the certified payroll to determine the amount of wages paid for the CRCI project. There were three people working on the project, and I've determined the wages due as follows:

"Travis Henderson \$88.66

** * *

"Jason Metz No wages due

"I've included the wage calculation sheets I used to determine the amounts owed on both projects, please look them over and call if you have any questions. I am sending this information to the appropriate public agencies and to Labor Ready, as well. Please call when you get a chance to review this information and we can discuss the next step. I'll expect to hear from you by next **Thursday, February 11th**. I look forward to speaking with you."

Marks sent a copy of this letter to either Labor Ready or LRNW.

32) Jill Carter, of LRNW's Parkrose branch, called Marks on February 8, 1999, in response to Marks' February 4 letter. Carter said everything related to prevailing wage projects was handled at Labor Ready's Tacoma headquarters, and told Marks to call Frankie Sander in that office. Marks made a contemporaneous written record of this contact with Carter.

33) Later that day, Marks faxed a letter to Nicole Meyer at Labor Ready's Tacoma headquarters.⁶ Marks contacted Meyer, rather than Sander, because Meyer had signed the CPRs. In her letter, Marks stated that the Wage and Hour Division had received a PWR complaint on the CRCI project. She also stated that there were problems with the CPRs that Labor Ready had submitted to ODOC. Marks specifically noted that the reports improperly included information for more than one project, explained that "each project must have a separate set of CPRs containing hour and wage information for all employees," and asserted that "[t]his is contrary to Oregon's law[.]" She continued: "I need you to file amended certified payroll reports for the period in question with this office."

34) Neither Labor Ready nor LRNW ever provided the amended CPRs that Marks requested.

35) In the same letter, Marks also asked Labor Ready "to send [her] all time and payroll records for all employees working on the project in question" no later than Friday, February 12, 1999. Neither Labor Ready nor LRNW provided any documents to Marks by that date.

36) At some point, Marks had a conversation with Meyer. In a February 24, 1999, letter to Meyer, Marks stated:

"RE: Prevailing wage investigation: [CRCI] project and Eastern Oregon State College/Ackerman Hall project

"Dear Ms. Meyer;

"Enclosed is a copy of the notice of claim I filed on the bond issued for these projects. Please be aware that you are jointly responsible for the wages of any employees you provided for work on the projects. I look forward to the records you told me you were in the process of compiling. I'll expect to hear from you sometime in the next week, by March 3rd. Thank you for your cooperation."

Marks received no response to this letter by March 3rd.

37) On March 16, 1999, Marks received a package of documents from Sander in Labor Ready's Tacoma office. The cover letter from Sander stated, in pertinent part:

"Enclosed are the earning histories and work tickets for the employee's [sic] in question for the jobs with Oregon Welding (Central Oregon Mechanical [sic]). * * *

"Once you have reviewed the wages please let me know if we need to reimburse any of the employees, and we will take care of it immediately."

The package included work tickets and earnings histories for several Labor Ready employees. Those documents did not indicate on what projects the employees had worked or how many hours the employees had worked each day.

38) The package of documents Sander sent included work tickets and earning histories for Henderson (covering the period June 15 through August 28, 1998) and Metz (for the period August 14 through August 28, 1998). Although Henderson and Metz worked on the CRCI project during October and November 1998, the documents Sander provided related only to their work on some other unidentified project not covered by the PWR laws.

39) On March 25, 1999, Marks received a telephone call from a Mr. Jacob Ryan, who said he was a representative of Labor Ready and was involved with the CRCI and Eastern Oregon University projects. Marks believed Ryan was Labor Ready's attorney.⁷ Marks told Ryan that the records she had received were insufficient.

40) The next day, Marks faxed a letter to Ryan stating, in pertinent part:

"Labor Ready is the joint employer, along with [OWS and COM], of several employees working on the Eastern Oregon University project in La Grande and the Columbia Rivers [sic] Correctional Institute project in Portland. Both Labor Ready and OWS had a statutory duty to keep accurate time and payroll information for all employees working on the jobs. Labor Ready, as far as I know, did not keep separate time records for its employees, and instead relied on the daily time records submitted by OWS. I used those time records to calculate the hours worked and wages owed, documents of which you now have copies. Those documents show the hours worked according to the weekly time sheets sent to Labor

Ready by OWS, and the pay information, if any, which I found on the certified payroll reports filed by Labor Ready.

"However, there are several Labor Ready employees who appear on OWS's timesheets, and consequently on my documents, who do not appear at all on Labor Ready's certified payroll reports. I therefore have no pay information for them, and am working under the assumption that they received no pay at all for the time they spent working.

"I am offering you the chance to refute that assumption, and prove to me that the employees I've determined are due wages have actually been paid for some or all of the time they spent working on the projects in question. Perhaps you can do that by showing me weekly paychecks, or perhaps you have some other method. I do not know, nor do I have a preference. I'll examine any information you want to give me, but I need to get some resolution on this case quickly. If I have any information you need to help you respond, I'd be glad to give it to you. I look forward to hearing from you, which I'd like to do no later than next **Tuesday, March 30th**. Thank you for your attention."

41) On March 29, 1999, Marks received a fax from Ryan to which were attached two pages of payroll data related only to the Eastern Oregon University project. Ryan also had attached a copy of part of a letter Marks had written to somebody other than Ryan, on which someone had written notes related only to the Eastern Oregon project. Nothing in the fax assisted Marks in determining whether Labor Ready employees had been paid the prevailing wage on the CRCI project.

42) Marks again spoke to Ryan on the phone and told him that the documents he had sent were not sufficient. Ryan stated that additional documents would be forthcoming. On April 21, 1999, Marks received copies of Labor Ready paychecks to Henderson and Metz that she had been asking for. Marks does not know whether Ryan or somebody at Labor Ready's corporate office sent the documents.

43) The paychecks Marks received on April 21, 1999, show the net amount paid to each employee during each week. They do not state the number of hours worked each day, the project(s) worked on, or the deductions taken.

44) On April 29, 1999, Marks sent a letter to Ryan in which she stated:

"I have not yet received the daily time cards for the seven employees working on the Eastern Oregon University and Columbia Rivers [sic] Correctional Institute projects, and frankly, I doubt you will be able to provide them for me. It appears to me that Labor Ready field offices did not keep independent time records for its employees, and instead relied on the time records provided by Oregon Welding Service and Central Oregon Mechanical, the same records on which I based my calculations. I believe those records to be accurate as to the number of hours worked by each man on the projects. The question remaining, as I've explained repeatedly, is the amount of wages paid to each man for the hours worked.

"Thus far I have not received any satisfactory answer to that question. You've sent me paychecks, and some kind of computer printout, but the paychecks do not delineate the amount of the check which represents payment for work on the projects in question and the amount which is for work at other sites. The computer records do not make such a differentiation either. ***I must receive that information immediately.*** Please be aware that the Bureau of Labor and Industries has the ability to assess civil penalties or liquidated damages, among other penalties, against your company because of Labor Ready's repeated failure to follow Oregon's prevailing wages laws, and is considering taking such action. Please respond upon receipt of this letter."

45) Marks received no answer to her April 29, 1999, fax to Ryan. On May 4, 1999, Marks spoke to Sander, who stated, without explanation, that Labor Ready would not be providing any additional records. Sander did indicate that Labor Ready would pay the wages Marks believed were due to Henderson for his work on the CRCI project. Marks made a contemporaneous written record of her conversation with Sander. Shortly thereafter, Labor Ready did pay the wages it owed Henderson.

46) At this point, Marks had been told by Taal and another OWS supervisor that, at the end of each week, they either sent a fax to Labor Ready stating the number of hours each employee had worked on each project during that week or called Labor Ready with that information. They stated specifically that they did not report the number of hours each employee had worked on each day, but just the total number of hours they had worked during the week. Sander confirmed to Marks that Labor Ready received information regarding the hours worked from these supervisors and stated that

Labor Ready relied on that information to complete the CPRs. Holden also corroborated the supervisors' statements regarding how hours were reported. From this, Marks concluded that Labor Ready knew only the total number of hours the employees worked per week but had not made or maintained records regarding hours worked per day.

47) The forum infers that Labor Ready did not make or maintain records of the daily hours Henderson and Metz worked on the CRCI project during the weeks ending October 16, October 23, and November 6, 1998. The forum bases this finding on: the statements of OWS and COM supervisors that they reported only total weekly hours worked to Labor Ready; Labor Ready's failure to produce any documents other than CPRs showing hours worked each day and the inaccuracy of those CPRs with respect to the jobs on which Henderson and Metz had worked; the fact that the "corrected" work tickets for the week ending November 13 show only total hours worked for the week; and Carter's testimony that customer service representatives were instructed to obtain information regarding only total hours employees worked, not hours they worked each day.

48) The CPRs Labor Ready completed for the weeks of October 16, October 23, and November 6, 1998, did purport to indicate the number of hours Henderson and Metz worked each day. Given that Labor Ready had not recorded those daily hours, the forum finds it probable that Labor Ready engaged in speculation to complete the CPRs -- for example, by assuming that when employees worked a total of 40 hours in a week, they worked eight hours on each of five days.

49) Based on the evidence described in the previous two Findings, and the complete absence of any evidence stating the employees' daily wages, the forum also

infers that Labor Ready failed to make and maintain records of the daily compensation paid each employee.

50) Marks never received any additional documents from Labor Ready regarding the CRCI project. Marks did not see the documents admitted as Respondents' exhibits R-1, R-2, R-3, and R-4 until the day before hearing.

51) The November 13, 1999, CPR Marks received from Poore was the only one she received that showed the daily hours worked by each employee at CRCI. Labor Ready had prepared that document, but Marks did not know what it was based on.

(findings regarding mitigation and aggravation of the violations)

52) In March 1998, at Labor Ready's request, the Agency provided PWR training to Labor Ready employees, including instruction on how to complete CPRs. In December 1998, the Agency performed a second training for Labor Ready employees, again at the company's request. All Labor Ready customer service representatives are required to take annual PWR training. Montano-Griffin also has attended a PWR training session presented by the Agency. In addition, new Labor Ready branch managers receive some training on PWR laws from Adams, Labor Ready's director of legal services.

53) In about June 1999, Montano-Griffin informed Hartfield that his job would be terminated if he did not leave voluntarily, in part because he had violated Labor Ready's record-keeping requirements. Shortly prior to that, Hartfield had been demoted from his position as manager of the Parkrose branch. Hartfield left Labor Ready voluntarily.

54) Sometime after November 1998, Labor Ready implemented a new computerized record-keeping system. Customer service representatives using that

system no longer have to separately flag each work ticket on a PWR job and fax copies of PWR work tickets to the Tacoma office. Instead, the customer service representative needs to make only one computer entry indicating that any particular job is a PWR job. Respondents' utilization of this system lessens the risk that work on PWR jobs will not be designated and treated as such.

55) For some time prior to November 1999, Labor Ready's operations manuals included about a page of material relating to compliance with PWR laws. That material was revised and expanded in November 1999. However, neither version of the manual referred to the importance of recording the number of hours worked each day, as opposed to the total number of hours worked each week, or to the various circumstances under which employees on PWR projects are entitled to overtime pay. Nor did the documents refer to the importance of identifying the specific project or projects on which employees had worked.

56) At the time she testified, customer service representative Carter was aware only that PWR employees were entitled to overtime pay if they work more than 40 hours per week. She did not know that employees on PWR jobs were entitled to "daily overtime" under certain circumstances.

57) In 1997, the Agency investigated Labor Ready in relation to work its employees performed on a public works contract unrelated to this case. The Agency compliance specialist concluded that Labor Ready had failed to pay the appropriate prevailing wage rate, had failed to provide complete payroll and certified statements, and had failed to pay overtime for all hours worked in excess of eight hours per day, as required by law. The Agency sent a letter to one of Labor Ready's Portland offices warning Labor Ready that the Agency would consider taking action to place the company on the List of Ineligibles if it failed to pay the prevailing wage rate in the future.

The letter further warned that "[s]ubstantial civil penalties may also be imposed for any violations of the Prevailing Wage Rate Law."

58) The Agency investigated Labor Ready several other times prior to 1999 for PWR violations. Wages were collected in several of those investigations.

59) At the time of hearing, Labor Ready had ongoing difficulty ensuring that employees were paid overtime for all hours they worked on Saturdays. This problem persisted because Labor Ready's bookkeeping system used Saturday as the first day of the work week.

(credibility findings)

60) The testimony of Carter was not entirely credible. She was very defensive about the errors in Henderson's and Metz's payroll records. In addition, she testified that she never had spoken to Marks or anybody else at the Agency regarding any PWR matters. Marks testified far more credibly that it was Carter who initially referred her to Frankie Sander in Labor Ready's Tacoma office. Because of the unreliability of at least portions of Carter's testimony, the forum has disbelieved that testimony whenever it was contradicted by other credible evidence.

61) Sander's testimony regarding the Agency's investigation of CRCI records was not reliable. Sander denied ever having spoken to Marks or any other Agency employee about records for work on the CRCI project. Instead, she said she had spoken only to an Agency employee named Susan, and only about another job, the Mt. Tabor project. Sander denied ever having been asked to provide payroll records related to anything other than the Mt. Tabor project and also said the only time she provided records to the Agency was when she gave Susan records related to that job. Marks testified credibly to the contrary that she spoke to Sander about the CRCI project in May

1999 and made a contemporaneous record of that contact. In addition, the record includes a letter from Sander to Marks.

62) At the time of hearing, Sander seemed remarkably uninformed about the problems involving CPRs for the CRCI project. She testified that her records indicated that Henderson and Metz worked at CRCI only during the week that ended November 13, 1998. It is true that Meyer prepared only one CPR showing that Henderson and Metz had worked at CRCI. Nonetheless, Holden repeatedly had notified Meyer, one of the people Sander supervised, that Henderson and Metz had worked additional hours at CRCI during other weeks. Either that information never made its way to Sander, or Sander forgot or chose not to remember it. Because of Sander's apparent lack of knowledge regarding the problems with the CRCI records and the unreliability of her testimony regarding contacts with the Agency, the forum has given her testimony little weight except where it was corroborated by other credible evidence or was an admission against Respondents' interests.

63) The testimony of all other witnesses was credible.

ULTIMATE FINDINGS OF FACT

1) The CRCI project was a public works project subject to ORS 279.348 to 279.380.

2) Labor Ready was a subcontractor on the CRCI project and employed workers on that project during 1998. LRNW was not a subcontractor on the CRCI project during 1998.

3) Labor Ready did not make and maintain records of the daily compensation paid to its employees on the CRCI project during the weeks ending October 16, October 23, and November 6, 1998.

4) Labor Ready did not make and maintain records of the daily hours worked by its employees on the CRCI project during the weeks ending October 16, October 23, and November 6, 1998.

5) Labor Ready filed certified payroll reports incorrectly stating that employees Henderson and Metz had worked only on the Mt. Tabor project during the weeks ending October 16, October 23, and November 6, 1998. In fact, Henderson and Metz had worked on the CRCI project during each of those weeks.

6) Labor Ready's certified payroll records included assertions of the hours Henderson and Metz had worked each day. Labor Ready had no records on which to base those assertions.

7) Labor Ready did not pay Henderson \$88.66 in overtime pay to which he was entitled for working on Saturday, November 7, 1998, until about May 1999.

8) On February 8, 1999, the Wage and Hour Division informed Labor Ready that it had received a PWR complaint on the CRCI project and believed there were problems with the CPRs Labor Ready had submitted to ODOC. The Wage and Hour Division asked Labor Ready to file amended CPRs for the CRCI project. Labor Ready never filed the amended CPRs.

9) On February 8, 1999, the Wage and Hour Division asked Labor Ready to submit "all time and payroll reports for all employees working on the project in question [CRCI]" no later than February 12, 1999. Labor Ready provided no documents to the Agency by that date.

10) On February 24, 1999, the Wage and Hour Division again asked Labor Ready to provide records related to the CRCI project, this time by March 3, 1999. Labor Ready submitted no documents by that date.

11) Labor Ready later sent some documents to the Wage and Hour Division, none of which provided information regarding the daily hours worked by the employees on the CRCI project or the daily compensation paid to those employees.

12) The Wage and Hour Division must know the daily hours worked by employees on PWR projects and the specific projects those employees worked on to determine whether the prevailing rate of wage and overtime has been or is being paid to the employees.

CONCLUSIONS OF LAW

1) ORS 279.348(3) defines "Public works" as follows:

"Public works' includes, but is not limited to, roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest but does not include the reconstruction or renovation of privately owned property which is leased by a public agency."

OAR 839-016-0004 further provides:

"(17) 'Public work,' 'public works,' or 'public works project' includes but is not limited to roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency the primary purpose of which is to serve the public interest regardless of whether title thereof is in a public agency but does not include the reconstruction or renovation of privately owned property which is leased by a public agency.

"(18) 'Public works contract' or 'contract' means any contract, agreement or understanding, written or oral, into which a public agency enters for any public work."

The CRCI project was a public works project subject to the Oregon prevailing wage rate laws.

2) OAR 839-016-0025 provides, in pertinent part:

"(1) All contractors and subcontractors performing work on public works contracts shall make and maintain for a period of three (3) years from the completion of work upon such public works records necessary to determine whether the prevailing rate of wage and overtime has been or is being paid to workers upon public works.

"(2) In addition to the Payroll and Certified Statement, Form WH-38, records necessary to determine whether the prevailing wage rate and overtime wages have been or are being paid include but are not limited to records of:

"* * * * *

"(e) Total daily and weekly compensation paid to each employee[.]"

OAR 839-016-0510 provides:

"Each violation is separate and distinct. In the case of continuing violations, each day's continuance is a separate and distinct violation."

In failing to make and maintain records of the daily compensation paid to each employee on the CRCI project for the weeks ending October 16, October 23, and November 6, 1998, Labor Ready violated OAR 839-016-0025.

3) OAR 839-016-0025 provides, in pertinent part:

"(1) All contractors and subcontractors performing work on public works contracts shall make and maintain for a period of three (3) years from the completion of work upon such public works records necessary to determine whether the prevailing rate of wage and overtime has been or is being paid to workers upon public works.

"(2) In addition to the Payroll and Certified Statement, Form WH-38, records necessary to determine whether the prevailing wage rate and overtime wages have been or are being paid include but are not limited to records of:

"* * * * *

"(f) The daily and weekly hours worked by each employee[.]"

In failing to make and maintain records of the daily hours worked by each employee on the CRCI project for the weeks ending October 16, October 23, and November 6, 1998, Labor Ready violated OAR 839-016-0025.

4) ORS 279.354 provides, in pertinent part:

"(1) The contractor or the contractor's surety and every subcontractor or the subcontractor's surety shall file certified statements with the public contracting agency in writing in form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying the hourly rate of wage paid each worker which the contractor or the subcontractor has employed upon such public work, and further certifying that no worker employed upon such public work has been paid less than the prevailing rate of wage 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 contractor or the contractor's surety or subcontractor or the subcontractor's surety that the contractor or subcontractor has read such statement and certificate and knows the contents thereof and that the same is true to the contractor or 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.***"

"(2) Each certified statement required by subsection (1) of this section shall be delivered or mailed by the contractor or subcontractor to the public contracting agency. * * *"

(Emphasis added). Labor Ready violated ORS 279.354 by filing CPRs stating inaccurately that employees had worked only on the Mt. Tabor project during three weeks that they also had worked at CRCI.

5) ORS 279.355(2) provides:

"Every contractor or subcontractor performing work on public works shall make available to the commissioner for inspection during normal business hours and, upon request made a reasonable time in advance, any payroll or other records in the possession or under the control of the contractor or subcontractor that are deemed necessary by the commissioner to determine if the prevailing rate of wage is actually being paid by such contractor or subcontractor to workers upon public works."

OAR 839-016-0030(1) and (2) provide:

"(1) Every contractor and subcontractor performing work on a public works contract shall make available to representatives of the Wage and Hour Division records necessary to determine if the prevailing wage rate has been or is being paid to workers upon such public work and records showing contract prices and sums paid as fees to the bureau. Such records shall be made available to representatives of the Wage and Hour Division for inspection and transcription during normal business hours.

"(2) The contractor or subcontractor shall make the records referred to in section (1) of this rule available within 24 hours of a request from a representative of the Wage and Hour Division or at such later date as may be specified by the division."

The Wage and Hour Division asked only Labor Ready to provide it with PWR payroll records by certain dates. LRNW, which was not a contractor or subcontractor on the

CRCI project and was not asked to provide PWR records to the Wage and Hour Division, did not violate ORS 279.355(2) or OAR 839-016-0030(1) by failing to provide those records.

6) OAR 839-016-0030(3) provides:

"When a prevailing wage rate claim or complaint has been filed with the Wage and Hour Division or when the division has otherwise received evidence indicating that a violation has occurred and upon a written request by a representative of the Division a public works contractor or subcontractor shall send a certified copy of such contractor's or subcontractor's payroll records to the Division within ten days of receiving such request. The Division's written request for such certified copies will indicate that a prevailing wage rate claim has been filed or that the division has received evidence indicating that a violation has occurred."

The Wage and Hour Division asked only Labor Ready to provide amended CPRs within ten days of its request for the documents. LRNW, which was not a contractor or subcontractor on the CRCI project and was not asked to provide the amended CPRs, did not violate OAR 839-016-0030(3) by failing to provide the documents.

7) ORS 279.370(1) provides:

"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."

See also OAR 839-016-0530 (similar). OAR 839-016-0540 provides, in pertinent 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."

** * * * *

"(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."

OAR 839-016-0520 provides:

"(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 subsection (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 any 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."

The commissioner's decision to assess a civil penalty of \$4000.00 for each of Labor Ready's two charged violations of OAR 839-016-0025 and a civil penalty of \$5000.00 for Labor Ready's single charged violation of ORS 279.354(1) is an appropriate exercise of his discretion.

OPINION

THE VIOLATIONS

A. Failure to Make and Maintain Records of the Daily and Weekly Hours Worked by Each Employee

To establish that a respondent violated OAR 839-016-0025(2)(f), the Agency must prove: 1) that the respondent was a contractor or subcontractor on a public works contract subject to the Oregon prevailing wage rate laws; and 2) that the respondent failed to make and maintain records of the total daily and weekly hours worked by each employee. In this case, the participants agree both that Respondent Labor Ready was a subcontractor on the Oregon Department of Correction's CRCI project and that the CRCI project was a public works project subject to Oregon prevailing wage rate laws.

The only remaining issue is whether Labor Ready failed to make and maintain the required records.

The Agency presented compelling evidence that Labor Ready did not make or maintain records of the hours Henderson and Metz worked each day on the CRCI project during the weeks ending October 16, October 23, and November 6, 1998.⁸ A Labor Ready supervisor instructed customer service representatives to accept OWS and COM supervisors' reports of the total hours employees worked each week. He did not instruct them to also determine the number of hours the employees had worked each day, and the supervisors did not provide that information.

The CPRs Labor Ready filed did purport to state the daily hours worked by its employees. Given the fact that Labor Ready did not obtain or record that information, the forum has inferred that the CPRs are based on nothing more than assumptions by the person completing them. For example, Labor Ready may have assumed that an employee who worked a total of 40 hours in a week must have worked eight hours on each weekday. In any event, the CPRs do not constitute accurate records of the daily hours worked by each employee on the CRCI project.

By failing to make and maintain records of the daily hours worked by each employee during each of three weeks, Labor Ready arguably committed multiple violations of OAR 839-016-0025(2)(f).⁹ However, the Agency charged Labor Ready with having violated the rule only once. Accordingly, the forum finds only that Labor Ready committed a single violation of OAR 839-016-0025(2)(f).

B. Failure to Make and Maintain Records of the Daily and Weekly Compensation Paid to Each Employee

The Agency also alleged that Labor Ready violated OAR 839-016-0025(e) by failing to make and maintain records of the daily compensation paid each employee. Based on Labor Ready's failure to record daily hours worked, and the complete

absence of any evidence indicating the wages Labor Ready paid its employees each day, the forum concludes that Labor Ready failed to make and maintain records of the daily compensation paid each employee during the weeks ending October 16, October 23, and November 6, 1998. The forum finds that Labor Ready committed a single violation of OAR 839-016-0025(e), as charged in the Notice of Intent.¹⁰

C. Filing Inaccurate or Incomplete Certified Statements

Contractors and subcontractors on PWR jobs are required to file certified statements -- CPRs -- that "set out accurately and completely the payroll records for the prior week." ORS 279.354(1). Labor Ready violated this law by filing CPRs that contained inaccurate information regarding the projects on which its employees had worked. Again, in accordance with the one violation charged in the Notice of Intent, the forum finds that Labor Ready committed a single violation of ORS 279.354(1).¹¹

D. Failure to Submit Certified Copies of Payroll Records Upon Request

The Agency initially charged all Respondents with violating OAR 839-016-0030(3) by failing to provide the Wage and Hour Division with payroll records it required on several occasions during early 1999. However, after the hearing, the Agency amended the Notice of Intent to clarify that it was charging only LRNW -- not Labor Ready -- with any violations that occurred in 1999. But LRNW was not a subcontractor on the CRCI project, the Wage and Hour Division asked only Labor Ready -- not LRNW -- for the amended CPRs, and only Labor Ready was responsible for supplying those documents. The Agency, therefore, failed to prove the violation of OAR 839-016-0030(3) charged in the amended Notice of Intent.

E. Failure to Provide Records Necessary to Determine if the PWR Has Been Paid

Near the conclusion of the hearing, the ALJ granted the Agency's motion to amend the Notice of Intent to add an allegation that Respondents violated OAR 839-

016-0030(1) by failing to provide the Wage and Hour Division with records necessary to determine if the PWR was paid. However, the Agency's later amendment of the Notice of Intent resulted in it charging only LRNW with this violation. Again, because LRNW was not a subcontractor on the CRCI project and was not asked to provide records to the Wage and Hour Division, it cannot be held responsible for any violation of OAR 839-016-0030(1).

PENALTIES

The forum has concluded that Labor Ready committed two violations of OAR 839-016-0025(2) by failing to make and maintain records of daily hours worked by, and daily compensation paid to, each of its employees on the CRCI project. The commissioner is authorized to assess a civil penalty of up to \$5000.00 for each of these violations, the amount sought by the Agency. In considering the appropriate magnitude of penalty to impose, the commissioner must consider any underpayment of wages in violation of statute or rule and:

- "(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."

OAR 839-016-0520(1); see OAR 839-016-0520(3).

Several aggravating factors demand a heavy penalty in this case. This is not the first time that the Agency has investigated Labor Ready for violations of the PWR laws. Labor Ready's response to those investigations was less than impressive. Although Labor Ready did arrange for its staff to receive PWR training, serious problems persisted at the time of hearing. For example, when she testified, Carter still was

unaware that employees on PWR projects could be entitled to overtime if they worked more than eight hours in one day, even if they worked less than 40 hours that week.¹² Sander admitted that Labor Ready still had problems ensuring that PWR employees were paid at the overtime rate for work they performed on Saturdays.

In addition, because of Labor Ready's failure to record daily hours worked and compensation paid, Henderson did not receive all the wages he was due for working on Saturday, November 7, 1998, until about May 1999. This failure to pay the prevailing wage demonstrates the seriousness of Labor Ready's violations. If a company does not record daily hours worked and daily compensation paid, neither it nor the Agency can determine whether employees have been paid any overtime wages to which they may be entitled under the PWR laws. Moreover, Labor Ready could have easily complied with the law by instructing its staff to determine and record the number of hours employees worked each day.

Labor Ready argues that several factors militate against the \$5000.00 penalty the Agency seeks for each violation. Labor Ready points out that it has requested and received PWR training; it no longer employs the manager who instructed employees to accept reports of total weekly hours worked on the CRCI project; it implemented a new computer system; and it has revised the PWR materials in its training manual.

The forum does not find these facts persuasive. First, the PWR training Labor Ready employees received does not appear to have had much practical effect, given Sander's testimony that Labor Ready still had difficulty paying overtime for work on Saturdays at the time of the hearing. Second, although Montano-Griffin testified that she encouraged the manager to leave because of his problems with record keeping, there is no evidence that her decision to get rid of him was related to the specific events that gave rise to the violations at issue. Third, Labor Ready's new computer system

may help track which jobs are subject to the PWR laws, but there is no evidence suggesting that the computer has anything to do with whether Labor Ready staff actually record the specific number of hours employees work each day. Nor is there any evidence that the computer will help ensure that employees are paid any overtime to which they may be entitled for working on weekends or for working more than a certain number of hours each day or week. Finally, Labor Ready's revised PWR materials do not discuss the importance of recording daily hours worked, the various circumstances under which employees may be entitled to overtime pay, or the importance of identifying the specific project or projects upon which employees work.

This forum has not previously had occasion to determine the appropriate penalty for failure to make and maintain records of the daily hours worked by, and compensation paid to, employees on PWR projects. The forum has imposed the maximum \$5000.00 penalty per violation where respondents deliberately avoided compliance with the PWR laws. See *In the Matter of Larson Construction Co., Inc.*, 17 BOLI 54, 79-80 (1998). In this case, it appears that Labor Ready's failure to make and maintain the required records was not a deliberate attempt to circumvent the law. However, the shocking inadequacy of the record-keeping system at the company's Parkrose Branch, together with the fact that some problems remained with the company's ability to track compliance with Oregon PWR laws at the time of hearing,¹³ convince the forum that large penalties are appropriate. The forum hereby imposes a penalty of **\$4000.00** for Labor Ready's violation of OAR 839-016-0025(e) and a **\$4000.00** penalty for Labor Ready's violation of OAR 839-016-0025(f).

The same aggravating factors weigh in favor of a large penalty for Labor Ready's filing of CPRs that inaccurately reflect the jobs on which each employee worked. Because the prevailing wage rates may differ from one job to another, neither the

Agency nor the employer can determine whether the prevailing wage rate has been paid in the absence of accurate information on this point. However, the problems with Labor Ready's CPRs are even more serious than the problems with its records of hours worked. As discussed above, Labor Ready knew only the total number of hours Henderson and Metz had worked during each of three weeks. Nonetheless, Labor Ready filed CPRs for those weeks that included assertions regarding the number of hours the two employees had worked each day. There is no credible evidence in the record that anything other than sheer speculation or assumptions led Labor Ready staff to decide how many hours to report for each worker each day. The deliberate nature of Labor Ready's decision to include possibly inaccurate information regarding daily hours worked leads the forum to impose a **\$5000.00** penalty for its violation of ORS 279.354(1).

RESPONDENTS' EXCEPTIONS

Respondents filed exceptions taking issue with two statements in the ALJ's Proposed Opinion. First, Respondents excepted to the ALJ's use of the phrase "shocking inadequacy of the company's record-keeping system," on the ground that a reader might infer, incorrectly, that Labor Ready had difficulties with its record-keeping system on a nation-wide basis. The exception is well taken. As Respondents point out, the evidence demonstrates only that one manager, in a single Labor Ready office, abandoned the company's usual practice of requiring employees to complete daily work tickets and, instead, relied on weekly reports of hours. No evidence suggests that managers in other offices instructed their staff to accept weekly reports of hours. The phrase to which Respondents objected has been changed to state more accurately that the inadequacies in record keeping existed at Labor Ready's Parkrose branch.

Respondents also excepted to the phrase in the Proposed Opinion stating that the inadequacies in record-keeping “had not been effectively remedied by the time of hearing.” That phrase was, in fact, somewhat misleading as it implied that the problems at the Parkrose branch had not been corrected by the time of hearing. In fact, it was another problem that Labor Ready had in complying with Oregon’s PWR laws that had not been corrected – the difficulty the company had in ensuring that workers were paid overtime for work they performed on Saturdays. The phrase has been changed to state more accurately that “some problems remained with the company’s ability to track compliance with Oregon PWR laws at the time of hearing.”

ORDER

NOW, THEREFORE, as authorized by ORS 279.370(1), OAR 839-016-0530 and OAR 839-016-0540, and as payment of the penalty assessed as a result of Respondent Labor Ready, Inc.’s violations of ORS 279.354(1) and OAR 839-016-0025(e) and (f), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Labor Ready, Inc.**, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232, a certified check payable to the Bureau of Labor and Industries in the amount of THIRTEEN THOUSAND DOLLARS (\$13,000.00), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order in this case until Labor Ready, Inc., complies with the Final Order.

¹ The record includes at least two daily timesheets from OWS purporting to cover this period. One states that Henderson and Metz worked 8 and 32 hours at CRCI, respectively. The other states that Henderson and Metz worked 7 and 33.5 hours at CRCI, respectively. There is a third timesheet in the record that has slightly different hours and that may relate to the same week (Exhibit A-6 at 2). For purposes of this case, it is not important which of these reports prepared by OWS is correct. The significant fact is that Labor Ready certified incorrectly that Henderson and Metz had worked exclusively on the Mt. Tabor project.

² Under Labor Ready's record-keeping system, each work week started on a Saturday. The forum takes official notice of the fact that November 7, 1998, was a Saturday. The earning history sheets labeled as exhibits R-2 and R-4 make sense only if the "Tk Date" - November 7 - is the date of the Saturday on which the week *began*, not the day on which the week ended, as Carter testified. With this understanding, the last entry on page 2 of exhibit R-4 shows that Henderson worked 6 hours the week starting November 7 and ending November 13, which corresponds to the CPR located at page 13 of exhibit A-5. The corrected work tickets (exhibits R-1 and R-3) also relate to the week *beginning* November 7, not a week ending on that date.

³ Sander testified that the original work tickets showed the days on which Henderson and Metz had worked. The forum has not credited Sander's testimony on this point because of the inherent unreliability of much of her testimony and because Labor Ready did not produce either of the original work tickets at hearing.

⁴ This fax and several of the other documents in the record originally were printed in all capital letters. The forum has changed the quoted text to lower case for easier reading.

⁵ See Findings of Fact - the Merits 16 and 17, *supra*.

⁶ Marks also mailed the letter to Carter, but sent it to the wrong address.

⁷ In fact, Ryan was employed by a firm named Clovis and Roche, which was a combination private investigation/collections agency that Labor Ready often used on large accounts. Somebody at Labor Ready or LRNW apparently contacted Ryan about Marks' inquiries, and he attempted to respond on Labor Ready's behalf. Marks was not aware that Ryan worked primarily on collection matters.

⁸ See Findings of Fact - the Merits 15, 19 and 47, *supra*.

⁹ See OAR 839-016-0510 ("Each violation is separate and distinct. In the case of continuing violations, each day's continuance is a separate and distinct violation").

¹⁰ It could be argued that, under these circumstances, multiple violations were committed. See note 9, *supra*.

¹¹ Again, it could be argued that multiple violations were committed. See note 9, *supra*.

¹² See ORS 279.334(1)(a)(A).

¹³ See Findings of Fact - the Merits 23 and 59, *supra*.