

**In the Matter of**

**Labor Ready Northwest, Inc.**

**Case Nos. 122-01 and 149-01**

**Final Order of Commissioner Dan Gardner**

**Issued August 19, 2004**

**SYNOPSIS**

Respondent was a subcontractor on three public works projects by providing workers to perform manual labor for other contractors on the three projects. On two of the projects, Respondent paid six workers less than the applicable prevailing wage rate, committing six violations of ORS 279.350(1). Respondent failed to post the prevailing wage rate on two of the projects, in violation of ORS 279.350(4). Respondent filed payroll reports on all three projects that either lacked certified statements, misclassified workers, misstated hours worked, or were untimely, committing eight violations of ORS 279.354 and OAR 839-016-0010. Respondent also failed to timely provide documents requested by the Wage and Hour Division that were necessary to determine if the prevailing wage rate was paid on one of the projects, committing one violation of ORS 279.355 and OAR 839-016-0030. The Commissioner concluded that Respondent intentionally failed to pay the prevailing rate of wage to four workers and intentionally failed to post the prevailing wage rates as required by ORS 279.350(4) on one of the projects and placed Respondent on the list of contractors or subcontractors ineligible to receive any contract or subcontract for public works for one year. The Commissioner also assessed \$58,500 in civil penalties. ORS 279.334(1)(a), ORS 279.348(3) and (5), ORS 279.350(1), ORS 279.350(4), *former* ORS 279.354, ORS 279.355(2), ORS 279.361(1), ORS 279.370(1); OAR 839-016-0004(16) and (17), *former* OAR 839-016-0010, OAR 839-016-0030(1) and (2), OAR 839-016-0033(1), OAR 839-016-0035(1), OAR 839-016-0050(2), OAR 839-016-0085(1) and (4), OAR 839-016-0090, OAR 839-016-0500, OAR 839-016-0520, OAR 839-016-0530, OAR 839-016-0540.

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The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 15 and 16, 2002, in Room 1004, Portland State Office Building, Portland, Oregon.

The Bureau of Labor and Industries (“BOLI” or “the Agency”) was represented by David K. Gerstenfeld, an employee of the Agency. Respondent was represented by David J. Sweeney, attorney at law. Aaron Roblan, an attorney employed by Labor Ready, Inc., and Respondent, was present during the hearing as the person designated by Respondent to assist in Respondent’s case.

The Agency called the following witnesses: Michael Wells, Susan Wooley, and Leslie Laing, BOLI Wage and Hour Division Compliance Specialists.

Respondent called the following witnesses: Shannon Shields, Respondent’s branch manager in Hillsboro, Oregon; Siobhan Rischman, manager of the prevailing wage department for Labor Ready, Inc.

The forum received into evidence:

- a) Administrative exhibits XA-1 through XA-8<sup>i</sup> (generated in case no. 122-01 prior to case consolidation); XB-1 through XB-4<sup>ii</sup> (generated in case no. 149-01 prior to case consolidation); and X-1 through X-6 (generated subsequent to the consolidation of cases 122-01 and 149-01 and prior to hearing);
- b) Agency exhibits A-1 through A-53 and A-62 through A-64 (submitted prior to hearing); and A-66 through A-69 (submitted at hearing);
- c) Respondent exhibits R-1, R-10, R-12 through R-14, and R-17 (submitted prior to hearing).

On June 17, 2002, after fully considering the entire record in this matter, Jack Roberts, then-Commissioner of the Bureau of Labor and Industries, issued the Findings of Fact (Procedural and On the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order in this case. After Respondents timely sought judicial review in the Oregon Court of Appeals on June 19, 2002, I, Dan Gardner, Commissioner of the Bureau of Labor and Industries, filed a Notice of Withdrawal of Order for Purposes of

Reconsideration in the Court of Appeals. Having reconsidered the final order, I hereby issue this Final Order on Reconsideration.

### **FINDINGS OF FACT – PROCEDURAL**

1) On January 30, 2001, the Agency issued a Notice of Intent to Place on List of Ineligibles and to Assess Civil Penalties in the amount of \$46,000 in which it made the following charges against Respondent:

a) Between approximately May 8 and June 9, 2000, Respondent provided manual labor as a subcontractor on the Cornelius Public Works Facility – Phase I Project (the “Cornelius Project”), a public works project subject to regulation under Oregon's prevailing wage rate laws and intentionally failed to pay \$971.90 in prevailing wages to eight employees – Joseph Baker, Catherine Clayton, Chris Francis, Jason Henry, Renaldo Ramirez, Alfredo Rodriguez, Miguel Silva, and David Snyder, in violation of ORS 279.350 and OAR 839-016-0035. The Agency sought a \$24,000 penalty for these eight alleged violations.

b) Respondent filed six certified payroll reports covering the weeks ending June 16, June 30, July 7, July 21, August 11, and August 18, 2000, reflecting work performed on the Cornelius Project “that were inaccurate and/or incomplete by, among other deficiencies, falsely certifying that all wages earned had been paid, in listing improper pay rates and in failing to show overtime wages earned,” in violation of ORS 279.354 and OAR 839-016-0010. The Agency sought an \$18,000.00 penalty for these six alleged violations.

c) Respondent intentionally failed to post the prevailing wage rates in a conspicuous and easily accessible place at the work site on the Cornelius Project, in violation of ORS 279.350(4) and OAR 839-016-0033(1). The Agency sought a \$4,000 penalty for this alleged violation.

d) The Agency asked that Respondent, and any firm, corporation, partnership or association in which it had a financial interest be placed on the list of those ineligible to receive contracts or subcontracts for public works (‘List of Ineligibles’) for a period of three years based on Respondent’s alleged intentional failure to pay and post the prevailing wage rate on the Cornelius Project.

e) The Agency alleged the following aggravating factors: “Respondent knew, or should have known, of the violations and avoiding the violations would not have been difficult. Respondent has a lengthy history of prior violations regarding some of the same types of violations alleged herein and has failed to take appropriate remedial actions to stop their recurrence. The violations are serious and of great magnitude. Respondent has been issued a formal warning letter and been the subject

of a Final order regarding violations of Oregon's prevailing wage rate laws."

2) The Notice of Intent instructed Respondent that it was required to make a written request for a contested case hearing within 20 days of the date on which it received the Notice, if Respondent wished to exercise its right to a hearing.

3) The Agency served the Notice of Intent on Respondent's registered agent on February 5, 2001.

4) Respondent, through counsel, filed an answer and request for hearing on February 23, 2001.

5) On February 28, 2001, the Agency filed a motion to consolidate the hearings in case number 31-01 and the Agency's case against Respondent involving the Cornelius Project. On April 2, 2001, the ALJ heard oral arguments from Respondent and the Agency regarding the Agency's motion to consolidate. That same day, the ALJ issued an interim order denying the Agency's motion. In pertinent part, the order stated:

"There is no dispute that these cases involve common issues of law. The same types of violations are alleged to have occurred in each case, and the same types of sanctions are sought. In addition, the evidence showing Respondent's past history regarding its actions in responding to previous violations of PWR statutes and rules; prior violations, if any, of statutes and rules; and whether Respondent knew or should have known of the violations is likely to be similar in both cases. In contrast, the facts regarding the actual violations will be very dissimilar. The allegations involve two different projects, two different types of work performed by workers, two different sets of witnesses, and two different sets of exhibits. OAR 839-050-0190 gives the ALJ the discretion to order consolidation where the cases involve 'common questions of law or fact.' Here, although there are common questions of law and may be some common questions of fact in the two cases, there are also significant dissimilarities. These dissimilarities lead the forum to conclude that consolidation of the cases would not necessarily result in any substantial gain of efficiencies or savings of time for the participants or the forum."

6) The Agency filed a request for hearing with the Hearings Unit on April 4, 2001.

7) On April 12, 2001, the Hearings Unit served Respondent with: a) a Notice of Hearing in case number 122-01 involving the Cornelius Project that set the hearing for September 17, 2001; 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 April 20, 2001, the Agency issued another Notice of Intent to Place on List of Ineligibles and to Assess Civil Penalties in the amount of \$24,000 in which it made the following charges against Respondent:

a) On or about September 2, 2000, Respondent provided manual labor as a subcontractor on the Addition & Remodel at Central High School project (the "Central Project"), a public works project subject to regulation under Oregon's prevailing wage rate laws and intentionally failed to pay \$315.58 in prevailing wages to its employee, Aaron Wadsworth, in violation of ORS 279.350 and OAR 839-016-0035. The Agency sought a \$5,000 penalty for this alleged violation.

b) Respondent did not file certified payroll reports regarding the work performed by its employee on the Central Project until January 18, 2001, in violation of ORS 279.354 and OAR 839-016-0010. The Agency sought a \$4,000 penalty for this alleged violation.

c) Respondent intentionally failed to post the prevailing wage rates in a conspicuous and easily accessible place at the work site on the Central Project, in violation of ORS 279.350(4) and OAR 839-016-0033. The Agency sought a \$5,000 penalty for this alleged violation.

d) Respondent was a contractor or subcontractor on the Beaver Acres Elementary School Fire Rebuild project ("Beaver Acres Project"), a public works project subject to regulation under Oregon's prevailing wage rate laws. Respondent filed certified payroll reports reflecting work performed by its employees on the Beaver Acres Project, "but these reports were inaccurate and/or incomplete by, among other deficiencies, not being properly certified; inaccurately listing pay rates and amounts; not including the group, where appropriate, for the classification of work its employees performed and omitting required general information about the project. Respondent filed such inaccurate/incomplete certified payroll reports covering the period of approximately April 22 through May 19, 2000 \* \* \* in violation of ORS 279.354 and OAR 839-016-0010." The Agency sought a \$5,000 penalty for this alleged violation.

e) The Agency requested that Respondent provide documents necessary to determine if the prevailing wage rate was paid on the Beaver Acres Project and Respondent failed to provide the Wage and Hour Division with records necessary to determine if the prevailing rate of wage was paid to employees of the Beaver Acres Project within the timeline proscribed by OAR 839-016-0030(2), in violation of ORS 279.355 and OAR 839-016-0030. The Agency sought a \$5,000 penalty for this alleged violation.

f) The Agency asked that Respondent, and any firm, corporation, partnership or association in which it had a financial interest be placed on the list of those ineligible to receive contracts or subcontracts for public works ('List of Ineligibles') for a period of three years based on Respondent's alleged intentional failure to pay and post the prevailing wage rate on the Central Project.

g) The Agency alleged the same aggravating factors as alleged in its Notice regarding the Cornelius Project.

9) The Notice of Intent instructed Respondent that it was required to make a written request for a contested case hearing within 20 days of the date on which it received the Notice, if Respondent wished to exercise its right to a hearing.

10) The Agency served the Notice of Intent on Respondent's registered agent on April 30, 2001.

11) Respondent, through counsel, filed an answer and request for hearing on May 18, 2001.

12) The Agency filed a request for hearing with the Hearings Unit on May 22, 2001.

13) On June 4, 2001, the ALJ ordered the Agency and Respondent each to submit a case summary regarding case number 122-01 that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; a brief statement of the elements of the claim and any civil penalty calculations (for the Agency only); and a brief statement of any defenses to the claim (for Respondent only). The ALJ ordered

the participants to submit their case summaries by September 7, 2001, and notified them of the possible sanctions for failure to comply with the case summary order.

14) On June 29, 2001, the Hearings Unit served Respondent with: a) a Notice of Hearing in case number 150-01 involving the Central and Beaver Projects that set the hearing for January 15, 2002; 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.

15) On July 31, 2001, the Agency filed a motion to amend its Notice in case number 122-01<sup>iii</sup> to allege fifteen specific violations that were only alluded to in the paragraphs in both Notices listing "Aggravating Factors." Four of the allegations were already litigated in case number 31-01.<sup>iv</sup> Five of the allegations were identical to the five violations alleged contained in the Agency's Notice in case number 149-01.<sup>v</sup> The remaining six were as follows:<sup>vi</sup>

"8. At times material, Respondent often required its employees to report to work at Respondent's office, then drive to a particular location to perform work for one of Respondent's clients. At times material, Respondent often required its employees to travel from the place where its employees performed work for Respondent's clients to Respondent's office at the conclusion of the workday. Respondent failed to pay its employees at least the statutory minimum wage of \$6.50 per hour for time spent travelling between Respondent's office and the work location where the employees worked for Respondent's clients (and back again). This is in violation of ORS 653.025 and OAR 839-020-0045(3).

"9. Respondent failed to timely pay an employee, Norm Nicholas, overtime wages he earned working on a prevailing wage rate project in Oregon between approximately June 1 and October 28, 1998 in the amount of \$1,767.37. This is in violation of ORS 279.350, 279.334 and OAR 839-016-0050.

"10. Respondent filed certified payroll records for employees' work on an Oregon prevailing wage rate project (Southern Oregon University Center for the Visual Arts) in or about late 1999. The certified statements did not meet all the requirements of ORS 297.354(1).<sup>vii</sup>

“19. Respondent has previously been adjudicated to have violated ORS 279.354, 279.355 and OAR 839-016-0025 on the Mt. Tabor and CRCI projects in Agency Case No. 70-99 issued June 1, 2000.

“21. Respondent failed to timely pay an employee, Anthony E. Alder, for two hours of work performed on May 1, 2001, resulting in \$13.90 in unpaid wages. This is in violation of ORS 652.120.

“22. Respondent withheld \$282 from the paycheck of its employee (Roger L. Shutz) for the pay period November 19 – December 3, 1998, in violation of ORS 652.610(3).”

The Agency did not seek civil penalties for any of these violations, but merely sought to have them considered as aggravating factors in determining the appropriate amount of civil penalties assessed, if any, after hearing.

16) On August 9, 2001, Respondent filed objections to the Agency’s motion to amend. Among other things, Respondent objected on the grounds that “[f]or a ‘violation’ to be considered by the forum, a previous adjudication must have occurred.”

17) On August 15, 2001, the ALJ conducted a prehearing conference to discuss the Agency’s motion to amend and Respondent’s objections. On August 17, 2001, the ALJ held another pre-hearing conference to discuss possible consolidation of case numbers 122-01 and 149-01.

18) On August 16, 2001, the ALJ issued an interim order renumbering case number 150-01 to 149-01.

19) On August 17, 2001, the ALJ issued an interim order in which he granted the Agency’s motion to amend, consolidated case numbers 122-01 and 149-01 for hearing and rescheduled the hearing to begin on January 15, 2002, and set a case summary due date of December 21, 2001. In addition, the order stated that the allegations previously litigated in case number 31-01 would not be relitigated, but the ALJ would take official notice of the Commissioner’s Final Order in that case. The order also repeated the Agency’s stipulation that, should the Commissioner’s Final Order resulting from case numbers 122-01 and 149-01 order debarment of Respondent

pursuant to ORS 279.361, any debarment periods imposed on Respondent would run concurrently.

20) The Agency and Respondent filed timely case summaries on December 21, 2001.

21) On January 9, 2002, Respondent's counsel filed a letter stating that Tim Adams, Labor Ready's general counsel, who was listed by Respondent as a witness on Respondent's case summary, was unable to attend the hearing and that Respondent would be represented at the hearing by "Corporate Counsel Aaron Roblan." The letter also stated that it was Respondent's intent to have Roblan testify in place of Adams. Respondent faxed this letter to case presenter Gerstenfeld on the afternoon of January 9, 2002.

22) At the outset of hearing, Respondent moved to substitute Roblan's name for that of Adams as a witness in Respondent's case summary. The ALJ granted Respondent's motion, on the condition that Adams would not be allowed to testify at the hearing. Respondent did not subsequently call Adams as a witness at the hearing.

23) At the outset of hearing, Respondent moved to add the exhibits originally attached to R-19, the Agency's investigative report submitted with Respondent's case summary, as Exhibit R-20. Respondent's counsel represented that the added documents had been provided to Respondent by the Agency. The Agency did not object to adding R-20 to Respondent's case summary, reserving the right to object to the admission of the documents. The ALJ also ruled that if Respondent wanted to question Lesley Laing, author of the investigative report, about the documents, Respondent was responsible for providing her with copies of those documents.

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

25) The Agency case presenter waived the ALJ's recitation of the manner in which objections may be made and matters preserved for appeal.

26) At the outset of the hearing, the Agency moved to correct paragraph 10 of its Motion to Amend to read "ORS 279.354(1)" instead of "ORS 297.354(1)." Respondent did not object and the ALJ granted the Agency's motion.

27) At the outset of the hearing, the Agency moved to correct the last sentence of paragraph 7 of its Notice of Intent in Case No. 122-01 to substitute "Beaver Acres" for "Central." Respondent did not object and the ALJ granted the Agency's motion.

28) At the outset of hearing, the Agency case presenter sought clarification that the aggravating factors listed in its July 31, 2001, motion to amend would be considered as aggravating factors for both case numbers 122-01 and 149-01. Respondent's counsel stated he understood this was the case.

29) During the hearing, the Agency offered exhibits A-54 through A-61 and A-72 and A-73. Respondent objected to A-54, A-55, and A-56 on the basis of relevancy, lack of foundation, and hearsay, to A-57 through A-61 on the basis of relevancy, and to A-72 and A-73 on the basis of relevancy. When the Agency offered A-72 and A-73 in rebuttal, Respondent objected on the basis that they did not rebut any evidence in Respondent's case. The ALJ reserved ruling on Respondent's objections until the proposed order. Respondent's objections are sustained, for reasons set out in the opinion. Those rulings are confirmed.

30) After the Agency had completed its case-in-chief, Respondent moved to dismiss the charges that it failed to post the applicable prevailing wage rates on the Cornelius and Central Projects. The ALJ denied Respondent's motion. In the proposed order, the ALJ reversed his ruling and retrospectively granted Respondent's motion to dismiss the charges that Respondent failed to post the applicable prevailing wage rates on the Cornelius and Central Projects. The Agency excepted to the ALJ's reversal of his ruling at hearing. For reasons stated in the Opinion, the forum reverses the ALJ's ruling in the proposed order and considers the merits of whether Respondent failed to post as alleged.

31) On April 22, 2002, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On April 26, 2002, Respondent filed an unopposed motion for an extension of time until May 8 in which to file exceptions. That same day, the ALJ granted Respondent's motion.

32) On May 8, 2002, Respondent filed exceptions to the proposed order. Those exceptions are discussed in the Opinion.

33) On May 8, 2002, the Agency filed a motion for an extension to file exceptions to the proposed order until May 15, 2002. The ALJ granted the Agency's motion, subject to conditions. First, since Respondent had already filed its exceptions, the ALJ ordered that its exceptions, which had been received but not yet been opened by the Agency, must remain sealed until such time as the Agency filed its exceptions. Second, that Respondent was allowed to file an addendum to its exceptions, should it choose to do so.

34) On May 15, 2002, the Agency filed exceptions to the proposed order. Those exceptions are discussed in the Opinion.

## **FINDINGS OF FACT – THE MERITS**

1) On December 18, 1998, Respondent Labor Ready Northwest, Inc. (“LRNWI”) registered as a corporation with the Oregon Secretary of State, Corporation Division. Its principal place of business was listed as “1015 A St., Tacoma, WA 98402, with a mailing address of “PO Box 2910, Tacoma, WA 98401.” At all times material herein, LRNWI was registered as a corporation with the Oregon Secretary of State, Corporation Division. As of January 16, 2002, LRNWI’s president was listed as “Timothy J. Adams.” Beginning on September 3, 1999, and at all times material since, Respondent was registered with the Oregon Secretary of State, Corporation Division as the registrant for the assumed business name “Labor Ready.” The principal place of business for “Labor Ready” (“LR”) was listed as “1016 S. 28<sup>th</sup> St., Tacoma, WA 98409” and the authorized representative was listed at the same address.

2) From February 23, 1995, until January 7, 1999, Labor Ready, Inc. (“LRI”) was registered with the Oregon Secretary of State, Corporation Division, with its principal place of business and mailing address listed as “1016 S. 28<sup>th</sup> St., Tacoma, WA 98409.”

3) On July 22, 1999, the Agency issued a Notice of Intent to Assess Civil Penalties against LRI and LRNWI alleging that Respondents had violated Oregon’s prevailing wage rate laws in October and November 1998 and in February 1999 and proposing to assess \$20,000 in civil penalties. The case was set for hearing and assigned case number 70-99. On June 1, 2000, after hearing, the Commissioner issued a final order concluding that LRI had: (a) 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; (b) violated ORS 279.355 and OAR 839-016-0025 by failing to make and maintain records of the daily compensation paid to each of its employees on the project; and (c) violated ORS 279.354 by filing certified payroll reports

that inaccurately stated the projects on which two employees had worked. The commissioner imposed civil penalties totaling \$13,000 for these violations.

4) On November 1, 2000, the Agency issued a Notice of Intent to Assess Civil Penalties alleging that Respondent had violated Oregon's prevailing wage rate laws on the New Bend Middle School Project in May and June 2000. The Notice proposed to assess \$44,000 in civil penalties and to place Respondent on the Commissioner's List of Ineligibles for a period of three years. The case was set for hearing and assigned case number 31-01. On December 13, 2001, after hearing, the Commissioner issued a final order concluding that Respondent had: (a) violated ORS 279.350 by misclassifying eight workers and, as a result, paid them less than the applicable prevailing wage rate, in violation of ORS 279.350(1); (b) failed to post the prevailing wage rate on the public works project on which its workers were employed, in violation of ORS 279.350(4), (c) filed nine payroll statements that contained incorrect information and were not accompanied by appropriate statements of certification, in violation of ORS 279.354 and OAR 839-016-0010; and (d) provided four itemized statements of earnings that contained incorrect information in violation of OAR 839-020-0012. The Commissioner concluded that Respondent's violations of ORS 279.350(1) and (4) were intentional and placed Respondent on the list of contractors or subcontractors ineligible to receive any contract or subcontract for public works for one year and assessed \$34,000 in civil penalties. Respondent appealed the Final Order to the Oregon Court of Appeals, raising the following assignments of error:

(1) "BOLI erred in imposing the one-year debarment and, specifically, BOLI misconstrued ORS 279.361(1) in determining that [LRNW] had 'intentionally failed to pay and post the prevailing wage. (2) BOLI's imposition of \$2,000 in civil penalties for petitioner's alleged failure to 'keep' the prevailing wage posted was based on an erroneous construction of ORS 279.350(4). (3) BOLI erred in rejecting petitioner's estoppel defense to the imposition of any sanctions."

Respondent did not assign error to BOLI's determinations with respect to the payroll reports and itemized statements or to the imposition of civil penalties for those violations. *In the Matter of Labor Ready Northwest*, 22 BOLI 245 (2001), *reversed in part, Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 354 (2003), *rev den* 336 Or 534 (2004). The Court of Appeals held that BOLI erred in debarring Respondent, but rejected Respondent's estoppel defense and upheld the \$2,000 civil penalty for Respondent's alleged failure to keep the prevailing wage posted. *Id.* at 355, 369.

### **THE CORNELIUS PROJECT**

5) Between June 12 and August 12, 2000, Respondent provided manual labor as a subcontractor on the Cornelius Project, a public works project performed in Hillsboro, Oregon, that was subject to regulation under Oregon's prevailing wage rate laws and was not regulated under the Davis-Bacon Act. The Cornelius Project was first advertised for bid on November 8, 1999, and BOLI's July 1999 prevailing wage rate booklet applied to the Cornelius Project. I-5 Excavating, Inc. ("I-5") was the prime contractor on the Cornelius Project. The contract was for the amount of \$1,666,600.

6) On October 10, 2000, John Rowand, a compliance investigator with the Fair Contracting Foundation, filed a complaint with BOLI stating that he had reviewed the certified payroll records submitted by Respondent on the Cornelius Project and found that Respondent "was not paying overtime after 8 hours in a day or on Saturdays." Rowand asked that BOLI "address the overtime issues identified." Based on Rowand's complaint, Michael Wells, a compliance specialist employed with the Wage & Hour Division of BOLI, began an investigation.

7) The applicable prevailing wage rate for laborers on the Cornelius Project was a basic hourly rate of \$20.09 plus \$7.50 in fringe benefits, for a total of \$27.59. The

applicable prevailing wage rate for carpenters was a basic hourly rate of \$23.94 plus \$7.92 in fringe benefits, for a total of \$31.86.

8) Respondent's employees were sent to the Cornelius Project by Respondent's Hillsboro, Oregon office and performed manual work as laborers and carpenters.

9) At the time of hearing, Shannon Shields had been Respondent's Hillsboro branch manager for three years. She dispatched Respondent's employees to work at the Cornelius Project in response to a job order from I-5 for workers to do landscaping at a construction site. The person who placed I-5's job order did not inform Respondent that the Cornelius Project was a public works, and there was no evidence that Shields or anyone else from Respondent's Hillsboro office inquired if the job was a public works. Shields did not believe that the Cornelius Project was a public works and did not discover it was a public works until July 6, 2000, when one of Respondent's employees told her he thought the Cornelius Project was a prevailing wage rate job. Shields then called I-5 and was informed that Respondent's workers were performing work subject to the prevailing wage. At that point, she took a copy of the applicable prevailing wage rates to the job site of the Cornelius Project and gave them to I-5's foreman, telling him the rates needed to be posted. Shields was not aware of anyone from Respondent going to the job site before July 6 to post the prevailing wage rates. Shields did not know if the I-5 foreman posted the prevailing wage rates, and if so, where they were posted, or if they were kept posted.

10) Prior to the Cornelius Project, Shields had received no training regarding how to comply with Oregon's prevailing wage rate laws. Since then, she has received some training from "corporate."

11) During his investigation, Wells received twelve payroll reports<sup>viii</sup> from Respondent reflecting work performed by Respondent's employees on the Cornelius Project. Six of these were Respondent's original reports. The other six were corrected versions of the six original reports. All twelve lacked the statement of certification required by *former* ORS 279.354.<sup>ix</sup>

12) On August 18, 2000, Respondent completed a payroll report for work done by its employees on the Cornelius Project for the week ending June 16, 2000. The report states that Catherine Clayton, Renaldo Ramirez, and Alfredo Rodriguez each worked 5.25 hours of straight time on June 12, 2000, as "laborers" at the wage rate of \$6.50 per hour, earning gross wages of \$34.13 each.

13) Respondent's computer data base shows that Respondent initially paid Clayton, Ramirez, and Rodriguez a total of \$34.13 gross wages, computed at the wage rate of \$6.50 per hour, for work performed on June 12, 2000.

14) On November 21, 2000, Respondent completed a second payroll report for the week ending June 16, 2000, reflecting work performed by Clayton, Ramirez, and Rodriguez on June 12, 2000, on the Cornelius Project. The word "CORRECTION" is stamped on the report. This report states that the three workers each worked 5.25 hours and were paid gross wages of \$144.85, computed at the wage rate of \$27.59 per hour.

15) Respondent's computer data base shows that Clayton, Ramirez, and Rodriguez were each paid an additional \$110.72 in gross wages on November 21, 2000, as "back pay" for their June 12, 2000, work on the Cornelius Project.

16) On November 21, 2000, Respondent created a work ticket seeking "back pay on ticket 54272" from I-5 for 5.25 hours of work that Rodriguez, Clayton, and Ramirez each performed on June 12, 2000. Handwritten on the work ticket are the

words "Back pay on ticket 54272-1128 Date 6/12/00 got paid \$6.50 & was prevailing wage." On November 24, 2000, Respondent created a billing detail for an invoice to I-5 regarding "BACK PAY" that sought \$111.67 additional pay each for Clayton, Ramirez, and Rodriguez based on 5.25 hours work performed by each of them at the "bill rate" of \$21.27 per hour.

17) On July 6, 2000, Respondent created work tickets seeking "back pay" for "work ticket #54753" from I-5 for 6 hours of work performed by Chris Francis on June 28, 2000; "back pay" for "work tickets 54886, 54840" from I-5 for 8 hours of work performed by Joseph Baker on June 30, 2000, and 7 hours performed by Baker on July 3, 2000; and "back pay" for "work ticket 54816-1128" from I-5 for 6 hours of work performed by Faried Harwash on June 29, 2000. Respondent billed I-5 at the rate of \$20.90 per hour on July 7, 2000, for these hours.

18) On August 18, 2000, Respondent completed a payroll report for work done by its employees on the Cornelius Project for the week ending June 30, 2000. The report states that Faried Hawash and Chris Francis both worked 6 hours of straight time on June 28, 2000, as "laborers" at the wage rate of \$31.26 per hour.

19) On November 21, 2000, Respondent completed a second payroll report for the week ending June 30, 2000, that stated the same information as Respondent's original payroll report regarding Hawash's and Francis's work on the Cornelius Project on June 28, 2000. Added to the report was Joseph Baker, who was listed as having worked 8 hours of straight time on June 30 as a "laborer" at the wage rate of \$31.26 per hour. The word "CORRECTION" is stamped on the report.

20) An itemized statement of deductions created by Respondent for Chris Francis shows that Respondent issued a check to Francis on June 28, 2000, for 6 hours worked on June 28, 2000, doing "CARPENTRY – INSTALLATION - CABINETWORK"

for I-5. Francis was paid gross wages of \$60, computed at \$10 per hour. A second itemized statement of deductions created by Respondent for Francis shows that he received a check on July 6, 2000, for 6 hours worked on July 6, 2000, doing "CARPENTRY - NOC" for I-5. Again, he was paid gross wages of \$60, computed at \$10 per hour.

21) An itemized statement of deductions created by Respondent for Faried Hawash shows that Respondent issued a check on June 29, 2000, to Hawash for 6 hours work doing "CARPENTRY – INSTALLATION - CABINETWORK" for I-5. He was paid gross wages of \$54, computed at \$9 per hour.

22) On August 18, 2000, Respondent completed a payroll report for work done by its employees on the Cornelius Project for the week ending July 7, 2000. The report states that Joseph Baker worked as a "laborer" for 7 hours of straight time on July 3 and 15 hours of straight time on July 6 at the wage rate of \$31.26 per hour, earning gross wages of \$700.92.

23) On November 21, 2000, Respondent completed a second payroll report for the week ending July 7, 2000, stating that Baker worked as a "laborer" for 7 hours of straight time on the Cornelius Project on July 3, 2000, at the wage rate of \$31.26 per hour and did not work at all on July 6, earning gross wages of \$218.82. The word "CORRECTION" is stamped on the report.

24) Respondent's computer data base and statements of itemized deductions created by Respondent show that Respondent initially paid Baker \$10 per hour for his work on June 30 and July 3, 2000, and on July 6, 2000, paid him \$21.86 per hour for 15 hours of work as "back pay." These same records show that Respondent initially paid Francis \$10 per hour for his work on June 28, 2000, and paid him \$21.86 per hour for 6 hours of work as "back pay" on July 6, 2000.

25) On July 19, 2000, Respondent created a work ticket showing Chris Francis had worked 9 hours that day as a “carpenter” for I-5 in Cornelius.

26) On August 18, 2000, Respondent completed a payroll report for work done by its employees on the Cornelius Project for the week ending July 21, 2000. The report states that Chris Francis worked as a “laborer” for 4 hours of straight time on Saturday, July 15, 8 hours of straight time on July 17 and 18, and 9 hours of straight time on July 19, earning gross wages of \$906.54 computed at \$31.26 per hour. Respondent’s computer data base also shows that Francis was paid \$31.26 per hour for his work on these days.

27) On November 21, 2000, Respondent completed a second payroll report for work done by its employees on the Cornelius Project for the week ending July 21, 2000. It was identical to the first report except that it was denoted “Payroll No. 6”<sup>x</sup> and was completed by Ivy Finnegan, an “Administrative Assistant.”<sup>xi</sup>

28) On August 25, 2000, Respondent completed a payroll report for work done by its employees on the Cornelius Project for the week ending August 11, 2000. The report states that Chris Francis worked as a “laborer” for 4 hours of straight time on August 7, 8.5 hours of straight time on August 8, and 8 hours of straight time on August 11, earning gross wages of \$640.83, computed at \$31.26 per hour.

29) On November 21, 2000, Respondent completed a second payroll report for work done by its employees on the Cornelius Project for the week ending August 11, 2000. The word “CORRECTION” is stamped on the report. The report states that Chris Francis worked as a “laborer” for 4 hours of straight time on August 9, 8.5 hours of straight time on August 10, and 8 hours of straight time on August 11, earning gross wages of \$640.83 computed at \$31.26 per hour.

30) Respondent's computer data base shows that Francis worked 4 hours on August 9, 8.5 hours on August 10, and 8 hours on August 11, 2000 and was paid \$31.26 per hour for this work.

31) On August 25, 2000, Respondent completed a payroll report for work done by its employees on the Cornelius Project for the week ending August 18, 2000. The report states that Chris Francis worked as a "laborer" for 8 hours of straight time on August 14, earning gross wages of \$250.08, computed at \$31.26 per hour.

32) On November 21, 2000, Respondent completed a second payroll report for work done by its employees on the Cornelius Project for the week ending August 18, 2000. The word "CORRECTION" is stamped on the report. The report shows that Chris Francis worked as a "laborer" for 8 hours of straight time on Saturday, August 12, earning gross wages of \$250.08 computed at \$31.26 per hour.

33) Respondent's computer data base shows that Francis worked 8 hours on August 12, 2000, and was paid \$31.26 per hour for this work.

34) Prior to July 6, 2000, none of Respondent's employees on the Cornelius Project were paid the applicable prevailing wage rate.

35) Francis, Baker, and Hawash worked as carpenters on the Cornelius Project. Clayton, Ramirez, and Rodriguez worked as laborers.

36) Each payroll report submitted by Respondent on the Cornelius Project was accompanied by a "Statement of Compliance" that was signed by one of Respondent's administrative assistants and contained the following language:<sup>xii</sup>

- "1. Payroll Number
- "2. Payroll Statement Date
- "3. Contract Number
- "4. Date

"I, *(name of signatory party)*, *(title of signatory party)*<sup>xiii</sup> do hereby state (1) That I pay or supervise the payment of the persons employed by *(Vendor)*<sup>xiv</sup> on the *(Building or work)*<sup>xv</sup>: that during the payroll period commencing on the \_\_\_ day of \_\_\_\_\_, \_\_\_\_\_,



“(1) That I pay or supervise the payment of the persons employed by; (*contractor, subcontractor or surety*) on the (*building or work*)[:]; that during the payroll period commencing on the \_\_\_\_ day of \_\_\_\_\_, 19\_\_, and ending the \_\_\_\_ day of \_\_\_\_\_, 19\_\_ all persons employed on said project have been paid the full weekly wages earned, that no rebates have been or will be made either directly or indirectly to or on behalf of said \_\_\_\_\_ from the full weekly wages earned by any persons, and that no deductions have been made either directly or indirectly from the full wages earned by any person, other than permissible deductions as specified in ORS 652.610, and described as follows: \_\_\_\_\_.

“(2) That any payrolls otherwise under this contract required to be submitted for the above period are correct and complete; that the wage rates for workers contained therein are not less than the applicable wage rates contained in any wage determination incorporated in the contract; that the classification set forth therein for each worker conforms with work performed.

“(3) That any apprentices employed in the above period are duly registered in a bona fide apprenticeship program registered with a state apprenticeship agency recognized by the Bureau of Apprenticeship and Training, United States Department of Labor, or if no such recognized agency exists in a state, are registered with the Bureau of Apprenticeship and Training, United States Department of Labor.

“I have read this certified statement, know the contents thereof and it is true to my knowledge.

“(name and title)

(signature)”

38) On December 4, 2000, Wells sent a letter to Ivy Finnegan, an Administrative Assistant employed in Labor Ready, Inc.’s prevailing wage unit who had signed a number of Respondent’s payroll reports for the Cornelius Project. Wells stated that his investigation was complete and that eight of Respondent’s employees on the Cornelius Project were owed back wages in the following amounts: David Snyder, carpenter (\$34.16), Cathrine [*sic*] Clayton, laborer (\$110.72), Renaldo Ramirez, laborer, (\$110.44), Alfredo Rodriguez, laborer (\$110.72), Joseph Baker, carpenter (\$9.00), Chris Francis, carpenter (\$196.10), Jason Henry, carpenter (\$34.16), and Miguel Silva, carpenter (\$34.16).

39) On December 13, 2000, Finnegan wrote back to Wells. She stated that the only person still owed back pay was Chris Francis “as he was paid at 31.26 instead of 31.86 for a total of 57.50 hours which would equal 34.50 not 196.10.” She also stated that “the only temp carpenters dispatched from our office where [*sic*] Chris Francis and Joseph Baker.”

40) In the same letter, Finnegan provided computer printouts containing the following information concerning Respondent's Cornelius Project employees:

**Catherine Clayton:** worked 5.25 hours on 6/12/00. Paid \$34.13<sup>xvii</sup> on 6/12/00 (@ \$6.50 per hour) and \$110.72 (@ \$21.09 per hour) on 11/21/00.

**David Snyder:** worked 8 hours on 7/28/00. Paid \$220.72 (@ \$27.59 per hour) on 7/28/00.

**Renaldo Ramirez:** worked 5.25 hours on 6/12/00. Paid \$34.13 (@ \$6.50 per hour) on 6/12/00. Paid \$110.72 (@ \$21.09 per hour) "back pay" on 11/21/00 based on 5.25 hours worked for I-5 Excavating).

**Alfredo Rodriguez:** worked 5.25 hours on 6/12/00. Paid \$34.13 (@ \$6.50 per hour) on 6/12/00. Paid \$110.72 (@ \$21.09 per hour) "back pay" on 11/21/00 based on 5.25 hours worked for I-5 Excavating).

**Joseph Baker:** worked 8 hours on 6/30/00. Paid \$80 (@ \$10 per hour) on 6/30/00. Worked 7 hours on 7/3/00. Paid \$70 (@ \$10 per hour) on 7/3/00. Paid \$212.16 (@ \$21.86 per hour) "back pay" on 7/6/00.

**Chris Francis:** worked 6 hours on 6/28/00. Paid \$60 (@ \$10 per hour). Paid \$131.16 (@ \$21.86 per hour) "back wages" on 7/6/00. Worked 4 hours on 7/15/00, 8 hours on 7/17/00, 8 hours on 7/18/00, 9 hours on 7/19/00, 4 hours on 8/9/00, 8.5 hours on 8/10/00, 8 hours on 8/11/00, and 8 hours on 8/12/00 (all @ \$31.26 per hour).

41) At the time of hearing, Respondent still owed Chris Francis \$34.50.

42) None of Respondent's payroll reports submitted on the Cornelius Project listed fringe benefits independently from wages.

## **THE CENTRAL PROJECT**

43) The Central Project was a public works project performed at Central High School in Independence, Oregon, that was subject to regulation under Oregon's prevailing wage rate laws and was not regulated under the Davis-Bacon Act. It was first advertised for bid on March 1, 2000, and BOLI's January 2000 prevailing wage rate booklet applied to the Central Project. M. L. Holmes Construction was the prime contractor on the Central Project and was awarded a contract in the amount of \$481,435 on April 26, 2000. On October 25, 2000, the contracting agency anticipated that work on the Central Project would be completed on November 30, 2000.

44) On Saturday, September 2, 2000, Respondent dispatched Aaron Wadsworth to perform work for Andersen Woodworks at Central High School.<sup>xviii</sup> Wadsworth worked 8.5 hours for Andersen on the Central Project on September 2 and was paid \$57.38 in gross wages, computed at \$6.75 per hour.

45) Wadsworth performed work on the Central Project that fit in the classification of Carpenter, Group 1, and Laborer. The applicable prevailing wage rate for Carpenter 1 was \$23.94 per hour plus \$7.92 in fringe benefits.

46) Leslie Laing, a BOLI Wage & Hour Division compliance specialist investigated Andersen Woodworks regarding payment of prevailing wage rates on the Central Project. During her investigation, Laing telephoned Margie Salazar, Respondent's employee in Respondent's Salem office, to discuss Wadsworth's employment. Laing told Salazar that she was conducting an investigation of prevailing wage rates on the Central Project. Salazar told Laing that the Andersen employee who placed the job order had told her that the work was unloading a truck at Central High School and did not disclose that the project was a prevailing wage rate project. Laing told Salazar that Wadsworth needed to be paid the prevailing wage rate and that Laing would determine Wadsworth's correct classification and wage rate and get back to Salazar.

47) Laing interviewed Wadsworth and one of his co-workers and determined that Wadsworth had performed work as a carpenter and laborer for Andersen on September 2, 2000. Because there was no record of hours that Wadsworth had worked in each job, Laing determined that Wadsworth should be paid at the Carpenter, Group 1 rate for all hours that he worked.

48) On January 4, 2001, Laing telephoned Salazar and told her that Wadsworth's correct classification was Carpenter, Group 1, and that Respondent must

pay Wadsworth overtime for all 8.5 hours that he worked because September 2 was a Saturday. Laing told Salazar that the correct rate was \$43.83 per hour. That same day, Salazar caused a check to be issued to Wadsworth in the amount of \$194.50 (\$315.58 gross pay less deductions). This was the total amount due to Wadsworth.

49) On January 18, 2001, Respondent completed a payroll report that showed Wadsworth had worked as a laborer for 8.5 hours of straight time on September 2, 2000, at the pay rate of \$43.83 per hour. Respondent's accompanying "Statement of Compliance" contained the same form language as the payroll reports submitted by Respondent for the Cornelius Project and lacked a statement of certification. Laing received this on January 26, 2001.

### **THE BEAVER ACRES PROJECT**

50) Between April 29 and May 12, 2000, Respondent provided manual labor as a subcontractor on the Beaver Acres Project, a public works project performed in Beaverton, Oregon, that was subject to regulation under Oregon's prevailing wage rate laws and was not regulated under the Davis-Bacon Act.

51) Susan Wooley, a compliance specialist employed by BOLI's Wage & Hour Division, was assigned to investigate a complaint against Horizon Restoration Systems, a contractor on the Beaver Acres Project. On August 4, 2000, Wooley sent a letter addressed to "Labor Ready Northwest, Inc., 1016 S 28<sup>th</sup> St., Tacoma, WA 98409-8020" in which she wrote, in pertinent part:

"We recently received a complaint that shows that your employees may not have received the correct rate of pay on the [Beaver Acres Elementary School Fire Rebuild Project]. To resolve this matter quickly, please supply **any and all** time records, payroll records, and certified payroll records for **all** employees who performed work on the project. If you had apprentices on the project, please provide a list of names of these employees, proof of registration and standing in a bona fide apprenticeship program and ratio standards for the workers.

"In addition, if you paid fringes to a third party trust, plan, fund, or program (such as vacation, holiday, medical, pension, etc.), please provide the hourly fringe rate paid to each program and copies of the monthly statements and copies (front and back) of canceled checks showing payments to the fund.

"I need to have this information in my office no later than **August 21, 2000.**

“\* \* \* \* \*

"Please call me at the number below if you have any questions."  
(Emphasis in original)

52) On August 18, 2000, Wooley received several payroll reports and certified payroll reports from Respondent covering the time periods April 22 through April 28, April 29 through May 5, and May 6 through May 12, 2000, reflecting work done on the Beaver Acres Project. Wooley reviewed the reports but was unable to determine the amount Respondent's employees were paid on the project because Respondent did not send documentation of the pay the employees received.

53) A number of workers are listed on the reports, all classified as laborers. Statements contained on the reports are summarized below:

a) A report for April 22-28 2000, for laborers from Respondent's Tigard location lists the wage rate of all 24 workers as \$6.50 per hour of straight time work. "HORIZON RESTORATION SYSTEMS" is typed on the first line of the report. A handwritten notation on top of the report reads "ST rate 27.59 OT 37.64." After each worker's name is a typed figure in a box showing gross wages calculated at \$6.50 per hour,<sup>xix</sup> which has been crossed out. In the same box, a handwritten figure appears that is much higher and appears to be the result of multiplying the hours worked by \$27.59 per hour.<sup>xx</sup> Respondent's typed entries show that Cheri Lagasse worked 10.5 hours of straight time on April 28, 2000, and was paid \$172.25 for 26.5 hours of straight time work. Handwritten figures in the same boxes show that she was paid for 24 straight time hours and 2.5 overtime hours, with gross wages of \$756.16. Six workers have \$2.00 deducted from their pay with the notation "equip." This report is not accompanied by a statement of certification. (Exhibit A-33, pp. 10-13)

b) A second report for April 22-28, 2000 for laborers from Respondent's Tigard location that has "CORRECTION" marked on it. With one exception, all workers listed are the same. The added worker is Kerry Lee, who is shown as working 8 hours straight time and 5 hours overtime on April 28, 2000, earning gross wages of \$400.92. Lee and all

others on the list are described as “laborers” at the rate of pay of \$27.59 per hour straight time and \$34.64 overtime. The handwritten gross wages on the original report are typed in this report. Cheri Lagasse is shown as having worked 8.0 hours of straight time and 2.5 hours of overtime on April 28. A Statement of Compliance dated “2000/8/9” accompanied this report. It contains a statement above the certificate preparer’s signature that reads: “I have read this Certified Statement, know the contents thereof, and it is true to my knowledge.” (Exhibit A-33, pp. 5-9)

c) A report for April 29-May 5, 2000, for workers from Respondent’s Tigard location that lists David Batson as a “laborer” and lists his wage rate as \$6.50 per hour for 8.5 hours of straight time worked on Saturday, April 29, 2000, with gross wages of \$55.25. This report is not accompanied by a statement of certification. (Exhibit A-33, pp. 3-4)

d) A second report for April 29-May 5, 2000, for workers from Respondent’s Tigard location dated 8/9/2000 with “CORRECTION” marked on it that lists David Batson as a “laborer with a wage rate of \$37.64 per hour for 8.5 hours of overtime worked on Saturday, April 29, 2000, with gross wages of \$319.94. A Statement of Compliance dated “2000/8/9” accompanied this report. It contains a statement above the certificate preparer’s signature that reads: “I have read this Certified Statement, know the contents thereof, and it is true to my knowledge.” (Exhibit A-33, pp. 1-2)

e) A report for May 6-12, 2000, for laborers from Respondent’s Tigard location that lists 25 workers, all classed as “laborers” whose wage rate was \$21.09 per hour straight time and \$31.64 per hour overtime. The report states all 25 performed work only on May 11. The report shows the following number of straight time hours worked by workers: Henry Nono – 16.0, James Wagner – 24.0, Donald Buck – 27.5, David Lagasse – 30.0, Cheri Lagasse – 24.0, Ryan Bruno – 14.0, Vernon Ahlgren -- 30.0, Charles Penn -- 22.0, Dale Saffel -- 16.0. The report also shows that all 25 workers were paid \$21.09 per hour for their work.<sup>xxi</sup> “HORIZON RESTORATION SYSTEMS” is printed across the top of the first page of the report. “CORRECTION FOR ELEM. PW” is typewritten under the box entitled “PROJECT AND LOCATION,” and “Back paid for W/E 4/28 is handwritten in that same box.” “NOT A PAYROLL” is typed in the box entitled “PROJECT OR CONTRACT NO.” This report is not accompanied by a statement of certification. (Exhibit A-33, pp. 14-17)

54) On September 11, 2000, Wooley sent a second letter to Respondent that set a new deadline for providing requested documentation. This letter stated:

“Thank you for providing copies of certified payroll reports on the above prevailing wage project as requested. However, also requested were any and all time records and payroll records for all employees who performed work on this project. These are still needed. Please ensure you provide

this information from all Labor Ready branches that provided workers for this project. The time records should include copies of work tickets for each person who worked on this project, for each day worked. If you have any questions about the type of records being requested, please contact me at the telephone number shown at the bottom of this letter.

“While it appears most workers listed on the certified payroll reports were paid correctly, I have some concerns about the records, and it does appear one person may be due overtime wages. First, Kerry Lee does not appear on the first two version[s] of the certified payroll report, i.e., on the one showing workers earning \$6.50 per hour, nor on the one showing the remaining wages due at \$21.09 per hour. The only time s/he appears is on the version labeled ‘Correction.’ Kerry is also the worker who appears to be due overtime wages. While the base rate shown for Kerry is correct at \$27.59, the overtime rate shown is incorrect. The rate should be \$37.64, but is shown at \$34.64. The gross amount shown on the certified payroll does not match up with either overtime rate, so it is not clear how this gross amount was figured. However, s/he was due \$408.90 for the 13 hours worked on April 27, and was only paid \$400.92. This leaves \$7.97 still owing for these hours. Please review your records, make up the difference in pay to this employee and provide proof of payment to the Bureau.

“Kerry Lee is only one of many workers whose overtime rate is incorrect on the certified payroll. Please explain why, even though the gross amount due is correct in most cases, the overtime rate for the majority of workers is listed on the certified payroll as \$34.64 per hour rather than \$37.64.

“Beaverton School District provided the Bureau with copies of certified payroll, and actually provided more reports than Labor Ready did. Labor Ready provided reports from the Tigard branch only, from April 22 to May 5. However, the School District provided reports from the Tigard branch through May 19, and from the Parkrose branch for work from April 29 to May 19.

“Please explain why Labor Ready did not provide the Bureau all certified payroll reports for this project, as originally requested. Also, at this time, please provide any additional certified payroll reports not yet submitted, from all branches that provided labor for this project.

“Another problem with the certified payroll is that the group number for the Laborer classification is missing. One certified payroll report has “Group 5” hand-written next to the project name, but there is no indication for any of the other workers’ group numbers. Please ensure that future certified payroll reports have this information listed in column 2, as required.

“For several employees, there is a \$2.00 deduction shown on the certified payroll report, with the hand-written notation of “equip.” Please explain what this deduction is for. ORS 652.610 requires that any deductions

from an employee's pay must be for the employee's benefit, and must be authorized in writing by the employee. Please provide copies of the written authorizations for the seven employees with the equipment deductions. If this is an unauthorized deduction, it is possible the amount deducted will need to be refunded to the employees.

"Finally, there may be two employees who worked on this project that did not appear on the certified payroll reports. I have information indicating Daniel Mark and Daryl Single performed work on this project. Please provide any and all information regarding these employees as it relates to this project.

"Please provide all requested documentation by no later than September 22, 2000. Also, please provide a contact name and telephone number for someone at Labor Ready with whom I can speak regarding this investigation. Again, if you have any questions, you may call me at the number shown below."

55) At 11 a.m. on September 29, 2000, Wooley called Respondent's Tacoma office to find out why she had not yet received a response to her September 11 letter. Wooley spoke with Charlene Baldwin, who stated that it was her responsibility to reply to Wooley's request. Baldwin said she had not yet responded because Wooley had stated in her letter that there was "a great deal of wages due." Baldwin said she would find out the status of Respondent's response and call Wooley back at 1 p.m. that day. Baldwin did not call back.

56) On October 2, 2000, Wooley called Baldwin. Baldwin said she hadn't called back because she hadn't finished her calculations until 5:30 p.m. on September 29 and still needed to get the written authorization for the \$2.00 equipment deductions. Wooley explained the seriousness of the matter and explained she must respond timely to Wooley's requests. Baldwin said she would mail out the requested information that day.

57) On October 3, 2000, Wooley received a new set of documents from Baldwin. They consisted of the following:

a) Payroll report for April 22-28, 2000 for "Group 1" laborers from Respondent's Tigard location on the Beaver Acres Project. "CORRECTION" is stamped on this document. This was accompanied by

a statement of compliance with form language identical to that on statements of compliance submitted with payroll reports by Respondent for the Cornelius Project. This report shows that Kerry Lee worked 12.0 hours of straight time and 1.0 hour of overtime on April 28 and was paid gross wages of \$368.72. (Exhibit A36, pp.8-13)

b) Payroll report for April 29-May 5, 2000, for "Group 1" laborers from Respondent's Parkrose location. "CORRECTION" is stamped on this document. This was accompanied by a statement of compliance with form language identical to that on statements of compliance submitted with payroll reports by Respondent for the Cornelius Project. (Exhibit A-36, pp. 1, 3)

c) Payroll report for April 29-May 5, 2000, for "Group 1" laborers from Respondent's Tigard location. "CORRECTION" is stamped on this document. This was accompanied by a statement of compliance with form language identical to those submitted by Respondent for the Cornelius Project. (Exhibit A-36, pp. 6-7)

d) Statement of Eligibility Requirements for Earned Income Credit 2000. (Exhibit A-36, p. 2)

e) Statement by Baldwin certifying that no Respondent employees worked for "Horizon Restoration System" on the Beaver Acres Project from May 6 through May 12, 2000. "CORRECTION" is stamped on this document. (Exhibit A-36, p. 4)

f) Statement by Baldwin re: "CASH ADVANCES/EQUIPMENT." This statement reads:

"Labor Ready's policy is to give a worker, when needed, a few dollars in cash to go to the job site. We will advance him/her \$1.00 to \$5.00 in cash and deduct the amount from their paycheck at the end of the pay period. Occasionally at the worker's request, we will advance them larger amounts (i.e., workers on prevailing wage jobs).

"All cash advances and equipment, borrowed or purchased, are signed for the by [sic] worker involved in the transaction." (Exhibit A-36, p. 5)

58) Based on the information contained in the documents she received from Respondent on August 18 and October 3, Wooley had concerns that there might be prevailing wage rate violations. Wooley also concluded that Respondent's payroll reports did not conform to Oregon law requiring submission of certified payroll reports in several respects.

59) On October 13, 2000, Wooley sent a third letter to Respondent, addressed to Baldwin. In pertinent part, it read as follows:

"I received the amended certified payroll you submitted for the [Beaver Acres Elementary School Fire Rebuild Project]. The amended certified payroll reports are necessary, but simply correcting numbers on a computerized spreadsheet does not provide any proof that the workers were actually paid the amount of wages due them.

"You must still provide documentation that has been requested twice before. This is the third and final request for this documentation. Please provide any and all daily time records (or 'wage tickets,' if this is the Labor Ready term for time records) and payroll records for all employees who performed work on this project. The payroll records I am requesting are not the same as certified payroll reports. If the payroll records do not clearly delineate the number of hours worked and amount of wages paid for the work on the project in question, you must provide all time cards for the duration of each pay period, including those for other projects. The information provided must be for the duration of Labor Ready Inc.'s work on this project; at least from April 22, 2000 through May 19, 2000. If you are unclear as to what is being requested, please contact me so I can explain. Should you fail to provide these requested records, I will be forced to subpoena the records. I will also consider recommending the assessment of civil penalties against Labor Ready Northwest, Inc. and/or Labor Ready, Inc. for violation of ORS 279.355 and OAR 839-016-0030, for failure to provide records showing whether or not the prevailing wage rate has been paid.

"At this time, I am also requesting copies of all canceled checks paid to each and every worker in relation to this project, whether or not those checks include wages earned on different projects. I am also requesting current addresses and phone numbers for each worker on this project.

"In your letter to me, you stated, 'The overtime was calculated correctly for all in question only.' I assume you mean the overtime wages were calculated correctly for all employees on this project, but this is not true. Kerry Lee is still due at least \$8.00 in overtime wages, and perhaps more. \* \* \* Once I review the time cards, payroll records and canceled checks, I will be able to determine what was truly paid to this worker, and the amount of wages actually due.

"Please explain why Kerry Lee was 'omitted from the invoices in question,' and therefore did not appear on the original certified payroll. The explanation you provided in your letter simply said it was 'for some reason,' but I need a more thorough explanation. Were any other workers on this project 'omitted from the invoices in question?' if so, please provide all information on these workers, including names, time cards, payroll records and canceled checks.

“Please explain why the rates of pay on the first corrected version of certified payroll were incorrect, yet in most cases, the gross amount of pay was equal to the number of hours shown as worked multiplied by the correct wage rate in the BOLI rate book.

“Please explain why Labor Ready did not provide the Bureau all certified payroll reports for this project, as originally requested. Even with the amended certified payroll you provided with your letter, there are at least two certified payroll reports missing. \* \* \*

“Please explain why Labor Ready has still not provided any certified payroll to the Bureau for the week of 5/13/00 to 5/19/00, from either the Parkrose or the Tigard branch.

“You are using the federal PWR payroll form for this project, but this form is missing some of the information required on Oregon’s certified payroll form, or WH-38. The federal form is missing much of the information required at the top of the State’s form, and is also missing the fringe benefit information found in columns 10 and 11. In this case, it appears Labor Ready is paying the fringe benefit portion of the prevailing wage rate to the worker as wages. At a minimum, this amount must be shown separately from the base amount paid, as directed in column 6 of the State’s form.

“Most importantly, the certifying statement on the State’s form is missing from Labor Ready’s form. You must include the sentence, ‘I have read this certified statement, know the contents thereof and it is true to my knowledge.’ Without this statement, this report is incomplete and is not ‘certified.’ I am enclosing a copy of Oregon’s WH-38 form, along with instructions for completing the form. While you do not have to use this exact form, OAR 839-016-0010 requires that when using a different form, it must contain all of the information required on the WH-38.

“My final comment on the certified payroll report is that you should show a worker’s group number in column 2 of the report, along with the classification. \* \* \* Please ensure future certified payroll forms used by Labor Ready Northwest, Inc. and Labor Ready, Inc. contain all the information required on the State or [*sic*] Oregon certified payroll form. Failure to do so may result in the assessment of civil penalties by the Bureau.

“\* \* \* \* \*

“You must still provide the written authorizations for the \$2.00 ‘equip’ deductions. Without the written authorizations, this deduction is not lawful. Even if you are able to provide those authorizations, however, it is still not clear if this is a lawful deduction. Explain fully what this deduction is for. \* \* \* Without a full explanation as to what this deduction is for, and without signed and dated authorizations from each employee, I will require that Labor Ready refund this money to the workers.

“The final issue deals with Daniel Mark and Daryl Single. The information I have indicates these employees worked on this project. Your response to me stated only, ‘According to our records the two employees, Daniel Mark and Daryl Single, did not work on this project.’ I hope you can understand that I cannot simply accept your assurance that these employees did not work on this project. Labor Ready’s records have not proved to be extremely accurate, either in the past or in this particular case. You must provide documentation showing on which projects these employees did work, the hours and days they worked, payroll records for these employees, from April 22, 2000 through May 19, 2000.

“Please provide all requested documentation and answers to the above questions by no later than October 25, 2000. If you do not provide the requested information by this date, I will subpoena these records, and will take further action as allowed by the prevailing wage rate laws. Please be aware that the Bureau of Labor and Industries has the ability to assess civil penalties and/or liquidated damages against your company for violations of the prevailing wage laws, and will consider taking such action should you fail to provide all requested information. If you have any questions, you may call me at the number shown below.”

(Emphasis in original)

With her letter, Wooley enclosed a copy of BOLI’s form WH-38 and a two-page instruction sheet describing how to complete the WH-38.

60) Wooley did not receive any documents from Respondent through October 25, 2000.

61) On October 26, 2000, Wooley called Respondent. She spoke with Siobhan Rischman, an employee of Labor Ready, Inc.’s prevailing wage unit who managed the unit that issued certified payroll reports. Rischman had assumed the job of responding to Wooley because of her perception that Baldwin had not responded adequately to Wooley’s requests. Rischman stated that most of the documents were ready, but she had just requested copies of the cancelled checks and those would take 10 days to receive. Rischman asked Wooley if Wooley wanted her to mail the documents currently in Respondent’s possession and then send copies of cancelled checks as they were received. Wooley asked Rischman to hold what she had so far and “then mail the entire package of documents when all [were] complete.”

62) Some time later, <sup>xxii</sup> Wooley received two more certified payroll reports from Respondent. The reports were dated “2000-11-3” are summarized as follows:

a) A report for April 29 through May 5, 2000, for laborers from Respondent’s Parkrose location that lists two workers classified as “laborers” whose wage rate was \$27.59 per hour straight time and \$41.39 per hour overtime. “HORIZON RESTORATION SYSTEM” is printed across the top of the first page of the report. “DEMO – BEAVER ACRES” is typewritten under the box entitled “PROJECT AND LOCATION,” and “(Group 1)” is handwritten in that same box.

b) A report for May 13 through May 19, 2000, for laborers from Respondent’s Tigard location that lists three workers classified as “laborers” whose wage rate was \$25.50 per hour straight time and \$37.80 per hour overtime. “HORIZON RESTORATION SYSTEMS” is printed across the top of the first page of the report. “BEAVER ACRES ELEM.” is typewritten under the box entitled “PROJECT AND LOCATION,” and “(Group 5)” is handwritten in that same box.

The certified statements accompanying these payroll reports are identical to the statements submitted accompanying Respondent’s Cornelius Project payroll reports with one significant exception. Above the signature of the individual preparing it appears the typed statement “I have read this Certified Statement, know the contents thereof, and it is true to my knowledge.”

63) On November 17, 2000, Wooley received a certified payroll report from Respondent that showed Kerry Lee had worked 8.0 hours of straight time and 5.0 hours of overtime on April 28, 2000, earning gross wages of \$351.24.

64) None of Respondent’s payroll reports submitted on the Beaver Acres Project listed fringe benefits independently from wages.

65) On January 29, 2001, Wooley sent a letter to Rischman. Among other things, she stated:

“Pending receipt of the proof of voucher payments \* \* \* it appears all employees were paid correctly on this project.”

“\* \* \* \* \*

“When we spoke on Thursday, I mentioned that while I had received some of the requested documentation, Labor Ready had not responded to any

of the questions I asked in my letter of October 13, 2000. At this point, rather than provide individual answers to all those questions, I think it would be more beneficial to simply ask for an answer to one question, which is why there continue to be errors on the certified payroll reports.

“\* \* \* \* \*

“Please provide the requested documentation (proof of payments to workers) and an answer to the question of certified payroll report errors by no later than February 7, 2001. Failure to respond may negatively impact the administrative action currently underway.”

66) On February 5, 2001, Rischman sent a letter to Wooley explaining the reason for the Kerry Lee discrepancies. Rischman indicated that, as a result of Wooley’s audit, she was “recommending that all pay issued to workers on prevailing wage rate jobs be via check so that if need be, we can provide the best documentation of payment possible.” Previously, Respondent had paid some workers by voucher for work on the Beaver Acres Project. The voucher could be exchanged for cash in Respondent’s cash dispensing machine located in Respondent’s local offices.

67) Wooley did not request that Respondent change from vouchers to paychecks, as this change makes no difference in the difficulty of performing an audit to determine if the prevailing wage rate has been paid. (Testimony of Wooley)

68) At the end of her investigation, Wooley concluded that Respondent had paid all wages due to workers on the Beaver Acres Project. Wooley was unable to make this determination until Rischman had responded to her January 29, 2001, request for records.

69) During her investigation, Wooley never made any verbal statements to any representative of Respondent that she would recommend the assessment of civil penalties if Respondent did not timely submit requested records.

## **RESPONDENT’S GENERAL BUSINESS PRACTICES**

70) Respondent’s sole business is providing temporary workers to client businesses.

71) At the time Respondent employed workers on the Cornelius, Central, and Beaver Acres Projects, it was Respondent's typical practice to pay workers on a daily basis if the workers so chose that method of payment.

72) At times material, all the certified payroll reports submitted by Respondent were prepared by staff employed by Labor Ready, Inc. at Respondent's corporate headquarters in Tacoma, Washington. Preparation of certified payroll reports is triggered when one of Respondent's branch office employees makes an entry into Respondent's computer noting that an employee has worked on a prevailing wage rate job.

73) A document used by Respondent in training its employees on prevailing wage rate job requirements includes the following statements:

"II. Prevailing wage laws require three basis [sic] things of Labor Ready:

"(A) *Payment of prevailing wages to workers.* Prevailing wages are usually (but not always) much higher than competitive wages, and they vary from region to region. Prevailing wages may also include daily or weekend overtime obligations which are different from general state law. A statement of the prevailing wage for each job category in a particular region may be obtained from the federal or state (as applicable) Department of Labor.

"\* \* \* \* \*

"It is critically important that we don't fail to identify a prevailing wage job. Become adept at spotting prevailing wage-sounding projects. Do not rely on the customer to advise you as to whether a job is prevailing wage. Call the state or federal Department of Labor and see if the project is listed (although even this is not foolproof). Do a site visit, look for postings regarding prevailing wage, and inquire of other contractors."

## **MITIGATION**

74) Since the Beaver Acres Project, Respondent no longer issues vouchers to workers on prevailing wage rate jobs. Respondent's intent is to provide a clearer record to auditors such as BOLI.

75) Since the Beaver Acres Project, Rischman has created an audit team in her department that conducts daily reviews of two reports. The first is a prevailing wage rate “possibilities” account for Respondent’s jobs that were new the prior day that and not marked as prevailing wage rate jobs, but which contain one of 25 keywords, such as “high,” “school,” and “airport” that indicate a possible prevailing wage rate job. The second is when a branch office flags a job as a prevailing wage rate job, Respondent’s computer system prompts the branch employee to send a prevailing wage rate sheet to corporate headquarters in Tacoma. Upon receipt of the rate sheet, one of Rischman’s subordinates will review it and ascertain that all rates have been correctly paid. Rischman receives an automatic e-mail if this isn’t done.

76) Since the Beaver Acres Project, Respondent now limits reporting of prevailing wage rate work to a daily work ticket instead of a weekly work ticket so that Respondent can have an accurate accounting of prevailing wage rate work on a daily basis.

77) Since the Beaver Acres Project, Respondent has reformatted its payroll reports to include a separate classification for fringe benefits.

78) Since the Beaver Acres Project, Respondent no longer allows any equipment or transportation deductions from workers’ checks on prevailing wage rate jobs.

## **AGGRAVATION**

79) On January 26, 2000, Tyrone B. Jones, a BOLI Wage & Hour Division compliance specialist, sent a letter to Timothy J. Adams at Labor Ready’s corporate office, 1016 S. 28<sup>th</sup> Street, Tacoma, WA 98409. The letter informed Adams that payroll records provided by LRI for the Southern Oregon University Center For The Visual Arts project contained incorrect trade classifications for LRI’s workers and that LRI had not

provided a certified statement that met the requirements of ORS 279.354. On February 1, 2000, LRI provided payroll records for the Southern Oregon project that listed the classification of LRI's sole employee on the job as "laborer" and included a statement of certification containing the following language:

"I have read this certified statement, know the contents thereof and it is true to my knowledge."

The original payroll reports were not offered as evidence.

80) The Agency offered no evidence in support of its allegation contained in its motion to amend the Notice of Intent that Respondent failed to pay its employees at least the statutory minimum wage of \$6.50 per hour for time spent travelling between Respondent's office and the work location where the employees worked for Respondent's clients and back again.<sup>xxiii</sup>

## **CREDIBILITY FINDINGS**

81) Wells, Wooley, Laing, and Shields were credible witnesses and the forum has credited their testimony in its entirety.

82) Rischman's testimony was credible in all respects except one. The forum disbelieved her testimony that Wells instructed Ivy Finnegan, Rischman's subordinate, not to pay Chris Francis the \$34.50 in wages that Respondent admitted were due and owing to Francis. Wells testified credibly that it was not the Agency's practice to instruct employers not to pay wages admittedly due and that he would not have told Finnegan to withhold payment.

## **ULTIMATE FINDINGS OF FACT**

### **CORNELIUS PROJECT**

1) On December 20, 1999, a contract for the Cornelius Project, a public works project in Hillsboro, Oregon, was awarded to I-5 Excavating, Inc. ("I-5"). The

Project was first advertised for bid on November 8, 1999, and its contract was for the amount of \$1,666,600.

2) The Cornelius Project was regulated under Oregon's prevailing wage rate laws and the prevailing wage rates that applied to the project were those published in BOLI's July 1999 prevailing wage rate booklet. It was not regulated under the Davis-Bacon Act.

3) The applicable prevailing wage rate for laborers on the Cornelius Project was a basic hourly rate of \$20.09 plus \$7.50 in fringe benefits, for a total of \$27.59. The applicable prevailing wage rate for carpenters was a basic hourly rate of \$23.94 plus \$7.92 in fringe benefits, for a total of \$31.86.

4) Respondent provided seven workers – Joseph Baker, Catherine Clayton, Chris Francis, Faried Hawash, Renaldo Ramirez, Alfredo Rodriguez, and David Snyder -- to I-5 between June 12 and August 12, 2000. These workers all performed manual labor on the Cornelius Project. Baker, Francis, and Hawash worked as carpenters, and the remaining four worked as laborers.

5) Clayton, Ramirez, and Rodriguez were initially paid \$6.50 per hour for their June 28, 2000, work on the Cornelius Project.

6) Hawash was initially paid \$9 per hour for his June 28, 2000, work on the Cornelius Project.

7) Baker was initially paid \$10 per hour for his June 30 and July 3, 2000, work on the Cornelius Project.

8) Francis was initially paid \$10 per hour for his June 28, 2000, work on the Cornelius Project. Francis worked as a carpenter for Respondent on the Cornelius Project on eight different days between July 15 and August 12, 2000, and was issued eight separate checks. On each check, he was paid \$31.26 per hour.

9) Respondent first learned that the Cornelius Project was a prevailing wage rate job on July 6, 2000.

10) On July 6, 2000, after Respondent's manager learned the Cornelius Project was a prevailing wage rate job, she had checks issued to Baker, Hawash, and Francis for the difference between the amount Respondent paid them for their work before July 6 and the prevailing wage. That same day, she took a copy of the prevailing wage rates to the Cornelius Project and asked I-5's foreman to post them.

11) Snyder was initially paid \$27.59 per hour for his July 28, 2000, work on the Cornelius Project.

12) On August 18, 2000, Respondent filed a payroll report for the week ending June 16, 2000, for work on the Cornelius Project. This report lacked the statement of certification required by ORS 279.354 and OAR 839-016-0010. Respondent's corrected report, filed on November 21, 2000, also lacked a statement of certification.

13) On August 18, 2000, Respondent filed a payroll report for the week ending June 30, 2000, for work on the Cornelius Project. This report lacked the statement of certification required by ORS 279.354 and OAR 839-016-0010 and stated that Hawash's and Francis's work classification was "laborer." Respondent's corrected report, filed on November 21, 2000, also lacked a statement of certification. In addition, it listed an additional worker, Baker, who was not listed on the first report, and stated that Hawash's, Francis's, and Baker's work classification was "laborer."

14) On August 18, 2000, Respondent filed a payroll report for the week ending July 7, 2000, for work on the Cornelius Project. This report lacked the statement of certification required by ORS 279.354 and OAR 839-016-0010 and stated that Baker worked 15 hours of straight time as a "laborer" on July 6. Respondent's corrected

report, filed on November 21, 2000, also lacked a statement of certification and stated that Baker had not worked at all on July 6.

15) On August 18, 2000, Respondent filed a payroll report for the week ending July 21, 2000, for work on the Cornelius Project. This report lacked the statement of certification required by ORS 279.354 and OAR 839-016-0010 and stated that Francis worked as a “laborer” for 4 hours of straight time on Saturday, July 15, and 9 hours of straight time on July 19. Respondent’s corrected report, filed on November 21, 2000, was identical, except for the payroll number, to the first report, and also lacked a statement of certification.

16) On August 25, 2000, Respondent filed a payroll report for the week ending August 11, 2000, for work on the Cornelius Project. This report lacked the statement of certification required by ORS 279.354 and OAR 839-016-0010 and stated that Francis worked as a “laborer” for 4 hours on August 7, 8.5 hours straight time August 8, and 8 hours on August 11. Respondent’s corrected report, filed on November 21, 2000, stated that Francis worked as a “laborer” for 4 hours on August 9, 8.5 hours of straight time on August 10, and 8 hours on August 11. It also lacked a statement of certification.

17) On August 25, 2000, Respondent filed a payroll report for the week ending August 18, 2000, for work on the Cornelius Project. This report lacked the statement of certification required by ORS 279.354 and OAR 839-016-0010 and stated that Francis worked as a “laborer” for 8 hours on August 14. Respondent’s corrected report, filed on November 21, 2000, stated Francis worked as a “laborer” for 8 hours of straight time on Saturday, August 12. It also lacked a statement of certification.

18) Respondent did not post or keep posted the applicable prevailing wage rates at the Cornelius Project at any time while its workers performed work on that project.

19) On November 21, 2000, Respondent issued checks to Clayton, Ramirez, and Rodriguez as “back pay” for the difference between what Respondent had paid them for their work on June 12, 2000, at the Cornelius Project and the prevailing wage.

20) At the time of hearing, Respondent still owed Francis \$34.50 in unpaid prevailing wages, all of which was earned after July 6, 2000. At the latest, Respondent’s corporate headquarters was aware that Francis was owed this back pay on December 13, 2000.

### **CENTRAL PROJECT**

20) On April 26, 2000, the contract for the Addition and Remodel Project at Central High School in Independence, Oregon was awarded to M. L. Holmes Construction. The Central Project was first advertised for bid on March 1, 2000. The contract was for the amount of \$481,435.

21) The Central Project was a public works project regulated under Oregon’s prevailing wage rate laws, and the prevailing wage rates that applied to the project were those published in BOLI’s January 2000 prevailing wage rate booklet. It was not regulated under the Davis-Bacon Act.

22) On Saturday, September 2, 2000, Respondent’s Salem office dispatched Aaron Wadsworth to perform manual labor for Andersen Woodworks at the Central Project. Wadsworth worked 8.5 hours for Andersen on the Central Project that day. Respondent paid him \$57.38 in gross wages, calculated at the rate of \$6.75 per hour. Wadsworth only worked one day on the Central Project.

23) Wadsworth performed work on the Central Project that fit in the classification of Carpenter, Group 1, and Laborer. The applicable prevailing wage rate for Carpenter 1 was \$23.94 per hour plus \$7.92 in fringe benefits, and \$43.83 per hour for wages and fringe benefits for overtime work.

24) Respondent did not complete the certified payroll report required by ORS 279.354 until January 18, 2001.

25) Respondent did not post or keep posted the applicable prevailing wage rates while Wadsworth performed work on the Central Project.

26) Respondent did not know that the Central Project was a prevailing wage rate job until notified of that fact by BOLI in January 2001.

### **BEAVER ACRES PROJECT**

27) Between April 29 and May 12, 2000, Respondent provided manual labor as a subcontractor on the Beaver Acres Project, a public works project performed in Beaverton, Oregon, that was subject to regulation under Oregon's prevailing wage rate laws and not regulated under the Davis-Bacon Act.

28) Respondent filed several payroll reports required by ORS 279.354, including two sets of corrected reports, for the Beaver Acres Project. Respondent's three original reports all lack the statement of certification required by ORS 279.354 and OAR 839-016-0010. The three original reports all show that one or more workers worked more than eight hours as straight time on various days. The first set of corrected reports includes a statement above the preparer's signature that reads: "I have read this Certified Statement, know the contents thereof, and it is true to my knowledge."

29) On August 4, 2000, Susan Wooley, a compliance specialist employed by the Wage & Hour Division of BOLI, sent a letter to Respondent in which she requested, among other items, "any and all time records, payroll records, and certified payroll records for all employees who performed work on the project." Wooley requested these records because she was unable to determine if Respondent had paid the prevailing

rate of wage to its employees on the Beaver Acres Project without them. Wooley requested that these records be provided to her no later than August 21, 2000.

30) On August 18, 2000, Wooley received several payroll reports from Respondent reflecting work done by Respondent's employees on the Beaver Acres Project. Wooley reviewed the reports but was unable to determine the amount Respondent's employees were paid on the project because of confusing information on the payroll reports and because Respondent did not send any time records or payroll records.

31) On September 11, 2000, Wooley sent a second letter to Respondent that renewed her request for "all time records and payroll records for all employees who performed work on this project." In the letter, Wooley pointed out some of the discrepancies she found on the payroll reports. Wooley asked that this documentation be provided no later than September 22, 2000.

32) On October 3, 2000, Wooley received a new set of documents from Baldwin that consisted of corrected payroll reports for the Beaver Acres job. This set of reports lacked the statement of certification quoted in Ultimate Finding of Fact 23. One of the reports showed that a worker had worked 12 hours of straight time and one hour of overtime on a single weekday.

33) After reviewing Respondent's October 3 submissions, Wooley was still unable to determine if Respondent's workers had been paid the prevailing wage rate. On October 13, 2000, she sent a third letter to Respondent that again requested time records showing the hours Respondent's workers had worked and payroll records documenting the pay that Respondent's workers had actually received. Wooley also requested copies of all canceled checks issued to Respondent's workers on the Beaver Acres Project and other information concerning the workers. Wooley requested that this

documentation be provided no later than October 25, 2000, and stated that she would subpoena the records if they were not provided by that date and “take further action as allowed by the prevailing wage rate laws.”

34) On October 26, 2000, Wooley telephoned Respondent and spoke with Rischman, who told Wooley she had just requested copies of the canceled checks and they would take 10 days to receive, and that she had most of the other documents requested. Wooley told Rischman to send all the documents at once when Rischman had received them all.

35) Between October 26, 2000, and January 29, 2001, Wooley received several more certified payroll reports from Respondent. On January 29, 2001, Wooley sent a final letter to Rischman requesting, among other things, proof of payments to workers and an explanation for the continued errors on Respondent’s certified payroll reports.

36) On February 5, 2001, Rischman sent a letter to Wooley explaining the reason for inconsistencies in Respondent’s certified payroll reports. After receiving that letter, Wooley was finally able to determine that Respondent had paid all wages due to its workers on the Beaver Acres Project.

### **CONCLUSIONS OF LAW**

1) ORS 279.348(3) provides:

“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(17) provides:

“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.”

ORS 279.348(5) provides:

“Public agency’ means the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity and any of their instrumentalities organized and existing under law or charter.”

See also OAR 839-016-0004(16) (same). The Cornelius, Central, and Beaver Acres Projects were public works projects. Respondent was a subcontractor who employed workers on all three Projects.

2) ORS 279.350(1) provides, in pertinent 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. The obligation of a contractor or subcontractor to pay the prevailing rate of wage may be discharged by making the payments in cash \* \* \*.”

OAR 839-016-0035(1) provides:

“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.”

ORS 279.334(1)(a) provides, in pertinent part:

“In all cases where labor is employed by the state, county, school district, municipality, municipal corporation, or subdivision, through a contractor, no person shall be required or permitted to labor more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity, emergency, or where the public policy absolutely requires it, in which event, the person or persons who employed for excessive hours shall receive at least time and a half pay:

“(A) For all overtime in excess of eight hours a day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday; or

“\* \* \* \* \*

“(C) For all work performed on Saturday \* \* \*.”

OAR 839-016-0050(2) provides, in pertinent part:

“Contractors and subcontractors required by ORS 279.334 to pay overtime wages shall pay such wages as follows:

“(a) Workers must be paid at least time and one-half the hourly rate of pay, excluding fringe benefits, for all hours worked:

“(A) On Saturdays;

“\* \* \* \* \*

“(D) Over eight (8) hours in a day[.]”

Respondent committed five violations of ORS 279.350(1) and OAR 839-016-0035(1) on the Cornelius Project by initially paying Catherine Clayton, Renaldo Ramirez, and Alfredo Rodriguez \$6.50 per hour for their work on June 12, 2000; by initially paying Joseph Baker \$10 per hour for his work on June 30 and July 3, 2000; and by initially paying Chris Francis \$10 per hour for his work on June 28, 2000, then paying him \$31.26 per hour for his work after July 6, 2000.

Respondent committed one violation of ORS 279.350(1) and OAR 839-016-0035(1) on the Central Project by initially paying Aaron Wadsworth \$6.75 per hour for his work on September 2, 2000.

3) *Former* ORS 279.354 provided, 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. Certified statements shall be submitted as follows:

“(a) For any project 90 days or less from the date of award of the contract to the date of completion of work under the contract, the statements shall be submitted once before the first payment and once before final payment is made of any sum due on account of a contract for a public work.

“(b) For any project exceeding 90 days from the date of award of the contract to the date of completion of work under the contract, the statements shall be submitted once before the first payment is made, at 90-days intervals thereafter, and once before final payment is made of any sum due on account of a contract for a public work.”

*Former OAR 839-016-0010 provided, in pertinent part:*

“(1) The form required by ORS 279.354 shall be known as the Payroll and Certified Statement, Form WH-38. The Form WH-38 shall accurately and completely set out the contractors or subcontractor’s payroll for the work week immediately preceding the submission of the form to the public contracting agency by the contractor or subcontractor.

“(2) A contractor or subcontractor must complete and submit the certified statement contained on Form WH-38. The contractor or subcontractor may submit the weekly payroll on the Form WH-38 or may use a similar form providing such form contains all the elements of Form WH-38.

“(3) When submitting the weekly payroll on a form other than Form WH-38, the contractor or subcontractor shall attach the certified statement contained on Form WH-38 to the payroll forms submitted.

”(4) Each Payroll and Certified Statement form shall be delivered or mailed by the contractor or subcontractor to the public contracting agency. Payroll and certified statement forms shall be submitted as follows:

“(a) For any public works project of 90 days or less from the date of award of the contract to the date of completion of work under the contract, the form shall be submitted once within 15 days of the date the work first began on the project and once before the agency makes its final inspection of the project;

“(b) For any public works project exceeding 90 days from the date of award of the contract to the date of completion of work under the contract, the form shall be submitted within 15 days of the date work first began on the project, at 90-day intervals thereafter, and before the agency makes its final inspection of the project.

“(5) Subcontractors beginning work on a project later than 15 days after the start of work on the project or finishing work 90 days prior to the final inspection of the work by the agency shall submit the payroll and certified statement as follows:

“(a) For any public works project of 90 days or less from the date of award of the contract to the date of completion of work under the contract, the form shall be submitted once within 15 days of the date the subcontractor first began work on the project and once before the contractor makes its final inspection of the work performed by the subcontractor;

“(b) For any public works project exceeding 90 days from the date of award of the contract to the date of completion of work under the contract, the form shall be submitted within 15 days of the date the subcontractor first began work on the project, at 90-day intervals thereafter, and before the contractor makes its final inspection of the work performed by the subcontractor[.]”

Respondent filed six payroll reports for work performed by its employees on the Cornelius Project that did not meet the requirements of ORS 279.354 and OAR 839-016-0010, constituting six violations of ORS 279.354 and *former* OAR 839-016-0010.

Respondent filed one payroll report for work performed by its employee on the Central Project that did not meet the requirements of ORS 279.354 and OAR 839-016-0010, constituting one violation of ORS 279.354 and *former* OAR 839-016-0010(5).

Respondent filed several payroll reports for work performed by its employee on the Beaver Acres Project that did not meet the requirements of ORS 279.354 and OAR 839-016-0010, constituting one violation of ORS 279.354 and OAR 839-016-0010.<sup>xxiv</sup>

4) ORS 279.350(4) provides:

“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. Contractors and subcontractors shall be furnished copies of these wage rates by the commissioner without charge.”

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 did not post or keep posted the prevailing wage rates for the Cornelius or Central Projects, committing two violations of ORS 279.350(4) and OAR 839-016-0033(1).

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 provides, in pertinent part:

“(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 fees paid 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.”

Respondent committed one violation of ORS 279.355 and OAR 839-016-0030(2) by failing to make available records necessary to determine if the prevailing wage rate was paid to its employees on the Beaver Acres Project at the time requested by a representative of the Wage and Hour Division.

6) ORS 279.370 provides, in pertinent 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.”

OAR 839-016-0500 provides:

“As used in OAR 839-016-0500 to 839-016-0540, a person acts knowingly when the person has actual knowledge of a thing to be done or omitted or

should have known the thing to be done or omitted. A person should have known the thing to be done or omitted if the person has knowledge of facts or circumstances that would place the person on reasonably diligent inquiry. A person acts knowingly if the person has the means to be informed but elects not to do so. For purposes of the rule, the contractor, subcontractor and contracting agency are presumed to know the circumstances of the public works construction project.”

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."

OAR 839-016-0530 provides, in pertinent 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);

“\* \* \* \* \*

“(e) Filing inaccurate or incomplete certified statements in violation of ORS 279.354.”

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.

“(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 the 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.”

The Commissioner’s imposition of the penalties for Respondent’s violations of ORS 279.350(1) and OAR 839-016-0035(1), ORS 279.350(4) and OAR 839-016-0033(1), ORS 279.354 and OAR 839-016-0010, and ORS 279.355 and OAR 839-016-0030 is an appropriate exercise of his discretion.

7) ORS 279.361(1) provides:

“(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 contractor or subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works \* \* \* or a contractor or subcontractor has intentionally failed or refused to post the prevailing wage rates as required by ORS 279.350(4), the contractor or subcontractor or any firm, corporation, partnership or association in which the contractor or 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 contractor or 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.”

OAR 839-016-0085 provides, in pertinent part:

“(1) Under the following circumstances, the commissioner, in accordance with the Administrative Procedures Act, may determine that for a period not to exceed three years, a contractor, subcontractor or any firm, limited liability company, corporation, partnership or association in which the contractor or subcontractor has a financial interest is ineligible to receive any contract or subcontract for a public work:

“(a) The contractor or subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed on public works as required by ORS 279.350;

“\* \* \* \* \*

“(c) The contractor \* \* \* has intentionally failed or refused to post the prevailing wage rates as required by ORS 279.350(4) and these rules.”

“\* \* \* \* \*

“(4) The Wage and Hour Division shall maintain a written list of the names of those contractors, subcontractors and other persons who are ineligible to receive public works contracts and subcontracts. The list shall contain the name of contractors, subcontractors and other persons, and the name of any firms, corporations, partnerships or associations in which the contractor, subcontractor or other persons have a financial interest. Except as provided in OAR 839-016-0095, such names will remain on the list for a period of three (3) years from the date such names were first published on the list.”

Respondent intentionally failed to pay the prevailing wage rate to one employee – Francis -- for his work on the Cornelius Project. Respondent intentionally failed to post

the prevailing wage rates on the Cornelius Project. As a result, the Commissioner must place Respondent on the List of Ineligibles for a period not to exceed three years. The Commissioner's decision to place Respondent on that list for one year based on Respondent's intentional violation of ORS 279.350(1) and intentional violation of ORS 279.350(4) related to the Cornelius Project is an appropriate exercise of his discretion.

## OPINION

### RULINGS RESERVED FOR PROPOSED ORDER

#### A. Exhibits A-54 through A-56.

These exhibits documented a wage claim filed by Anthony Alder on May 4, 2001, alleging he was employed by "Labor Ready" and not paid for 2.5 hours work moving furniture at the Marriott Motel on May 1, 2001, that BOLI sent a demand letter, and that BOLI received a check from Labor Ready in the amount of \$15.64 made out to Anthony Alder. These exhibits were offered as evidence that Respondent had previously violated statutes and rules, constituting an aggravating circumstance under OAR 839-016-0520(1)(b). The violations alleged in the Agency's Notices of Intent regarding the Cornelius, Central, and Beaver Acres Projects all took place in the year 2000. Alder's wage claim cannot constitute a "prior violation" for the reason his alleged unpaid wages became due in the year 2001, making it an alleged *subsequent* violation. Respondent's objection to these exhibits on the basis of relevance is sustained.

In its exceptions, the Agency acknowledged that Exhibits A-54 to A-56 did not establish a "prior violation" within the meaning of OAR 839-016-0520(1)(b), but argued that they were relevant to show "[t]he actions of the \* \* \* subcontractor \* \* \* in responding to previous violations of statutes and rules" under OAR 839-016-0520(1)(a). The forum disagrees. This rule is intended to penalize contractors and subcontractors for actions taken after an actual determination that a previous violation occurred.<sup>xxv</sup> It does not apply to actions taken before such a determination has been made. This rule

is in contrast to the “prior violation” rule, which turns on the date the action constituting the violation occurred, not the date the action was determined to be a violation. In this case, December 13, 2001, the date the Final Order in Case No. 31-01 issued, was the first date on which Respondent was determined to have committed a violation. Respondent’s “actions” with regard to Alder took place in May 2001, and cannot be evaluated as responding to a subsequent determination. The Agency’s exception is DENIED.

**B. Exhibits A-57 through A-61.**

These exhibits documented a wage claim filed by Roger Shurtz on February 9, 1999, alleging he had been employed by “Labor Ready” and was still owed \$282 for work performed between August 21 and December 3, 1998, that BOLI sent a demand letter to “Labor Ready, Inc.,” and that BOLI received a check from “Labor Ready” in the amount of \$282 made out to Roger Shurtz. These exhibits were also offered as evidence that Respondent had previously violated statutes and rules, constituting an aggravating circumstance under OAR 839-016-0520(1)(b). Evidence produced by the Agency shows that Respondent was not registered to do business in Oregon until December 18, 1998, and there is no evidence that Shurtz was employed by Respondent LRNWI, as opposed to LRI, which was registered to do business in Oregon at that time. Respondent’s objection to these exhibits on the basis of relevance is sustained because the Agency did not establish that Shurtz’s claim was against Respondent.

**C. Exhibits 72 and 73.**

These exhibits consist of documents that the Agency downloaded from the Internet between the first and second day of hearing. They were offered in rebuttal to show that the operations of LRNWI and LRI were sufficiently intertwined so that LRI’s

prior violations should be imputed to LRNWI for the purpose of assessing civil penalties. However, although these documents supported the allegations in the Agency's amended Notice of Intent, they did not rebut any evidence presented by Respondent and were irrelevant for that purpose. Respondent's relevancy objection to Exhibits A-72 and A-73 is sustained.

### **RESPONDENT'S MOTION TO DISMISS THE AGENCY'S CHARGE THAT RESPONDENT FAILED TO POST THE APPLICABLE PREVAILING WAGE RATES ON THE CORNELIUS AND CENTRAL PROJECTS**

At the conclusion of the Agency's case-in-chief, Respondent moved to dismiss the Agency's charges that Respondent failed to post the applicable prevailing wage rates on the Cornelius and Central Projects, arguing that the Agency elicited no testimony and presented no other evidence in support of these charges. In response, the Agency argued that it had presented a prima facie case through three pieces of evidence: (1) evidence that Respondent did not pay the prevailing wage rate on the Cornelius Project until July 6, 2000; (2) evidence that Respondent did not pay the prevailing wage rate on the Central Project until the Agency told Respondent's representative that the Central Project was a prevailing wage rate job; and (3) evidence cited in the final order issued in case number 31-01 that Respondent did not post on prevailing wage rate jobs in the year 2000. The ALJ denied Respondent's motion. In the proposed order, the ALJ reconsidered this ruling and reversed it, granting Respondent's motion with respect to both the Cornelius and Central Projects on the grounds that the Agency had not presented a prima facie case in its case in chief. In this reconsideration, the ALJ declined to consider evidence relevant to the Agency's posting allegations that came in after the Agency had rested its case. The Agency filed exceptions to the ALJ's conclusions, arguing that it had presented a prima facie case in its case in chief and that evidence presented after the Agency had rested its case must

be considered in a review of Respondent's motion to dismiss. The Agency cited Oregon appellate court decisions in support of both points.

After reviewing the Agency's exceptions, the forum concludes that the ALJ's ruling at hearing was correct and the ALJ should not have reconsidered that ruling in the proposed order, and that even if the ALJ was justified in reconsidering his original ruling, he was required to consider *all* the evidence presented during the hearing.

As the Agency points out, on judicial review of denial of a motion to dismiss for failure to establish a prima facie case, the reviewing court will view the evidence "in the light most favorable to the plaintiff and \* \* \* plaintiff is entitled to the benefit of every reasonable inference which may be drawn from the evidence." *Scott v. Mercer Steel Co., Inc.*, 263 Or 464, 466-67 (1972). The same standard is applicable to contested case hearings.

The Agency established the following relevant facts in its case in chief. First, Respondent did not begin paying the prevailing wage rate until July 6, 2000, well after its employees began working on the Cornelius Project. Second, Respondent underpaid its worker on the Central Project until the Agency notified Respondent that the Central Project was a prevailing wage rate job. Third, Timothy Adams, Respondent's general counsel and executive vice president, previously testified on June 19, 2001, a year after Respondent employed workers on the Cornelius and Central Projects, that the posting of prevailing wage rates on job sites by Respondent where Respondent has workers "is not part of our compliance process."<sup>xxvi</sup> As the Agency correctly points out, proof includes both facts and inferences. *In the Matter of City of Umatilla*, 9 BOLI 91, 104 (1990), *affirmed without opinion*, *City of Umatilla v. Bureau of Labor and Industries*, 110 Or App 151 (1991); *Arkad Enterprises v. Bureau of Labor and Industries*, 107 Or App 384, 386-87 (1991), (quoting *City of Portland v. Bureau of Labor and Industries*, 298 Or

104, 118 (1984). A reasonable inference can be drawn from these facts that Respondent did not post the applicable prevailing wage rates on the Cornelius or Central Projects. Consequently, the forum confirms the ALJ's original ruling at hearing to deny Respondent's motion to dismiss the Agency's posting allegations and reverses the ALJ's contrary ruling in the proposed order.

The forum also reverses the ALJ's ruling in the proposed order that evidence presented after the Agency rested its case and Respondent's motion to dismiss was denied would not be considered in a reconsideration of that ruling. As pointed out in the Agency's exceptions, Oregon appellate courts have long held that, when reviewing a denial of a motion to dismiss or for a nonsuit or directed verdict, the reviewing court must consider all the evidence in the record, not only that presented prior to the time of the motion. See *Scholes v. Sipco Services and Marine, Inc.*, 103 Or App 503-, 506 (1990); *Reagan v. Certified Realty Co.*, 47 Or App 35, 37 (1980); *Ballard v. Rickbaugh Orchards, Inc.*, 259 Or 200, 203 (1971); *Hinton v. Roethler*, 90 Or 440, 446-67 (1918); *Roundtree v. Mount Hood R.R. Co.*, 86 Or 147, 151 (1917). That same standard is applicable to the ALJ's reconsideration of a denial of Respondent's motion to dismiss at hearing or to reconsideration of the same issue in a final order.

### **RESPONDENT FAILED TO POST THE PREVAILING WAGE RATES FOR THE CORNELIUS AND CENTRAL PROJECTS**

ORS 279.350(4) requires all subcontractors who employ workers on a public works project to "keep the prevailing wage rates for that project posted in a conspicuous and accessible place in or about the project." The Oregon Court of Appeals has interpreted this language to require that "every contractor and subcontractor engaged in a public project to personally initially post the prevailing wage and to maintain that posting throughout the course of its employees' work on the project. *Labor Ready*

*Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 369, 71 P3d 559, 572 (2003), *rev den* 336 Or 534 (2004).

**A. The Cornelius Project.**

Respondent was unaware that the Cornelius Project was a public works until July 6, 2000, when one of Respondent's employees told Shannon Shields, manager of Respondent's Hillsboro office who had dispatched Respondent's employees to the Project, that he thought the Cornelius Project was a prevailing wage rate job. Shields then called I-5, the prime contractor, and was informed that Respondent's workers were performing work subject to the prevailing wage. That same day, Shields took a copy of the applicable prevailing wage rates to the Cornelius Project job site, gave them to I-5's foreman, and asked him to post them. It is undisputed that Respondent did not pay its workers on the Cornelius Project the prevailing wage rate before July 6, 2000. Based on Shields' testimony that she did not believe the Cornelius Project was a public works project before July 6, 2000, and her attempted posting that date, the forum infers that Respondent had not posted or made an attempt to post the prevailing wage rates for the Cornelius Project before July 6, 2000. There is no evidence that Shields or any other representative of Respondent took any other action after July 6, 2000, to post the rates on the Cornelius Project or to verify that they had been posted or were kept posted. Respondent's failure to personally initially post the prevailing wage and to maintain that posting throughout the course of its employees' work on the Cornelius Project constitutes a violation of ORS 279.350(4).

1. Aggravating circumstances.

The violation is a serious one that requires placement on the Commissioner's List of Ineligibles if the Commissioner finds that the violation was intentional. The magnitude is substantial because Respondent did not provide its workers with any way

of finding out they were being underpaid and six workers were initially paid less than the prevailing wage rate. There was no evidence that Respondent made any inquiry as to whether the job was a public works when taking the job order. Respondent also failed to take adequate steps to post once it learned the Cornelius Project was a public works. In addition, Respondent previously violated the same statute on the New Bend Middle School Project.

2. Mitigating circumstances.

There are no mitigating circumstances. The forum does not consider Shields' visit to the job site with a copy of the prevailing wage rates as mitigation because there is no evidence that either she or anyone else employed by Respondent took any steps to ascertain that the rates were in fact posted and kept posted.

3. Amount of civil penalty.

The Agency sought a \$4,000 civil penalty for Respondent's violation. In the New Bend Middle School case, the Agency sought and the Commissioner assessed a \$2,000 civil penalty for the same violation. This is Respondent's second violation, and the forum finds that a \$4,000 civil penalty is appropriate.

**B. The Central Project.**

In contrast to the Cornelius Project, where Respondent employed workers for several months, Respondent only employed one worker for one day on the Central Project. The Agency presented evidence that Respondent initially paid its worker \$6.75 per hour, as opposed to the prevailing wage rate of \$43.83 per hour, and that Respondent sent a check for the difference to BOLI four months later when BOLI informed Respondent's Salem branch office that the Central Project was a public works. Based on Rischman's testimony, Respondent's statements in its training manual, and Respondent's prompt payment of wages owed in the Cornelius and Central Projects

when Respondent learned those projects were public works, the forum concludes that Respondent has a corporate policy of paying its workers the prevailing wage rate on public works where Respondent is aware that the job is a public works. Since Respondent did not initially pay its worker the prevailing wage rate in this case, the forum infers that Respondent did not know the Central Project was a public works until so notified by BOLI. Lacking knowledge that the Central Project was a public works, Respondent would have had no reason to post, and there was no evidence presented that Respondent did post. From this evidence, the forum concludes that Respondent did not post the Central Project and violated ORS 279.350(4).

1. Aggravating circumstances.

Respondent's violation is a serious one that requires placement on the Commissioner's List of Ineligibles if the Commissioner finds that the violation was intentional. The magnitude is substantial because Respondent did not provide its worker with any way of finding out he was being underpaid and Respondent initially paid him less than the prevailing wage rate. There was no evidence that Respondent made any inquiry as to whether the job was a public works when taking the job order, even though the evidence indicates Respondent knew the job was at a high school. In addition, Respondent previously violated the same statute twice on the New Bend Middle School and Cornelius Projects.

2. Mitigating circumstances.

There are no mitigating circumstances.

3. Amount of civil penalty.

ORS 279.370(1) gives the Commissioner the authority to assess civil penalties for violations of ORS 279.350(4) based merely on Respondent's failure to perform its statutorily prescribed obligation, which was to post and keep the prevailing wage rates

posted on the Central Project as long as its worker was employed on that project. *Labor Ready at 360*. Respondent's intent is immaterial. *Id.* The Agency sought a \$5,000 civil penalty for Respondent's violation. This is Respondent's third violation, and the forum finds that a \$5,000 civil penalty is appropriate.

## **RESPONDENT FAILED TO PAY THE PREVAILING RATE OF WAGE ON THE CORNELIUS AND CENTRAL PROJECTS**

ORS 279.350(1) requires payment of the prevailing rate of wage on public works contracts. To establish a violation of that statute, the Agency must prove: (1) The project at issue was a public work, as that term is defined in ORS 279.348(3); (2) Respondent was a contractor or subcontractor that employed workers on the public works project whose duties were manual or physical in nature; and (3) Respondent failed to pay those workers at least the prevailing rate of wage for each hour worked on the project. *In the Matter of William George Allmendinger*, 21 BOLI 151, 169-70 (2000). In this case, elements (1) and (2) are undisputed on both the Cornelius and Central Projects.

### **A. The Cornelius Project.**

The Agency alleged that Respondent failed to pay the prevailing wage rate to eight workers – Joseph Baker, Catherine Clayton, Chris Francis, Jason Henry, Renaldo Ramirez, Alfredo Rodriguez, Miguel Silva, and David Snyder -- on the Cornelius Project. The evidence shows that Respondent employed both laborers and carpenters on the Cornelius Project, and that the applicable prevailing wage rate, including fringe benefits, was \$27.59 per hour for laborers and \$31.86 per hour for carpenters. Respondent's records show that six workers – Clayton, Ramirez, Rodriguez, Baker, Francis, and Faried Hawash -- were initially paid less than the prevailing wage rate. There is no evidence that Henry or Silva worked on the Cornelius Project or that Snyder was underpaid. With one exception, Respondent subsequently issued back pay checks to

all six workers, bringing their wages up to the prevailing wage rate. That exception is Francis, who received a check for back pay, but was still owed \$34.50 in unpaid wages at the time of hearing. Although Respondent's subsequent payment of back wages may be considered as a mitigating factor,<sup>xxvii</sup> it is not a defense to the alleged violation. See *In the Matter of Loren Malcolm*, 6 BOLI 1, 11 (1986). The forum does not consider Respondent's failure to pay Hawash the prevailing wage rate a violation for the reason that Hawash's name was not included in the Agency's list of eight underpaid workers in its Notice of Intent, and the Notice was not amended to include it. The forum finds that Respondent committed five violations of ORS 279.350(1) by failing to pay Clayton, Ramirez, Rodriguez, Baker, and Francis the prevailing wage rate when their wages were initially paid.

1. Aggravating circumstances.

First, Respondent knew or should have known of its violation. OAR 839-016-0500 provides:

"As used in OAR 839-016-0500 to 839-016-0540, a person acts knowingly when the person has actual knowledge of a thing to be done or omitted or should have known the thing to be done or omitted. A person should have known the thing to be done or omitted if the person has knowledge of facts or circumstances that would place the person on reasonably diligent inquiry. A person acts knowingly if the person has the means to be informed but elects not to do so. For purposes of the rule, the contractor, subcontractor and contracting agency are presumed to know the circumstances of the public works construction project."

Giving Respondent the benefit of the doubt, Respondent's violation stemmed from its initial lack of knowledge that the Cornelius Project was a public works project. Although Respondent's branch manager testified that no one from I-5 informed Respondent that the Cornelius Project was a public works project, there was no evidence presented that anyone from Respondent inquired if the job was a public works project prior to July 6, 2000, over three weeks after Respondent first sent workers to that project. This

violation might have been avoided altogether if Respondent had simply made that inquiry when taking I-5's job order or had sent someone to visit the job site. However, Shields testified that she had received no training about prevailing wage rate jobs prior to the Cornelius Project. If she had received this training, she might have been aware of Respondent's corporate advice to "not rely on the customer to advise you as to whether a job is prevailing wage."<sup>xxviii</sup>

This violation is a serious one that requires debarment if the Commissioner finds that the violation was intentional. The magnitude is substantial because it resulted in the underpayment of six workers, three of whom -- Rodriguez, Clayton, and Ramirez -- did not receive their full pay until November 21, 2000, five months after their pay was due, and a fourth -- Francis -- who was still owed wages at the time of the hearing. This occurred even though Respondent acquired actual knowledge on July 6, 2000, that the Cornelius Project was a prevailing wage rate job.

Finally, Respondent previously violated the same law on the New Bend Middle School Project by failing to pay eight workers the applicable prevailing wage rate on a public works project between April 4 and June 2, 2000.

## 2. Mitigating circumstances.

There are two circumstances that mitigate Respondent's five violations to a limited degree. First, Respondent eventually paid full back pay to five workers and all but \$34.50 in back pay to a sixth. Second, Respondent's prevailing wage unit manager has created an audit team in her department that conducts daily reviews of two reports in an attempt to minimize the possibility that Respondent has unknowingly sent workers to prevailing wage rate jobs.<sup>xxix</sup>

### 3. Amount of civil penalty.

ORS 279.370(1) gives the Commissioner the authority to assess civil penalties for violations of ORS 279.350(1) based solely on Respondent's failure to perform its statutorily prescribed obligation, which was to pay the prevailing wage rate to workers it employed on the Cornelius Project. *Labor Ready at 360*. Respondent's intent is immaterial. *Id.* The Agency alleged that Respondent's violations were "second repeated" violations and sought \$3,000 in civil penalties for each alleged violation, for a total of \$24,000. The forum has found five violations. OAR 839-016-0540(2) defines "repeated violations" as "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." Here, Respondent's only prior violation occurred at the New Bend Middle School project and is reflected in the Commissioner's final order in case number 31-01. Consequently, Respondent's five Cornelius Project violations are properly classified as "first repeated" violations. OAR 839-016-0540 provides that the *minimum* civil penalty for a first repeated violation is "[t]wo times the amount of the unpaid wages or \$3,000, whichever is less[.]"

Although the Agency mischaracterized the repetitive nature of Respondent's violations, when the forum considers all the aggravating and mitigating circumstances, \$3,000 per violation, for a total of \$15,000, is still an appropriate civil penalty for Respondent's five violations of ORS 279.350(1).

### **B. The Central Project.**

The Agency alleged that Respondent failed to pay the prevailing wage rate to one worker, Aaron Wadsworth, who was employed by Respondent as a carpenter and laborer on the Central Project. The evidence shows that Respondent employed Wadsworth on that project for 8.5 hours on one day. That day was September 2, 2000,

a Saturday. Credible evidence established that Wadsworth performed work fitting into the classifications of both carpenter and laborer. The Agency established that Wadsworth was entitled to be paid a carpenter's wage, the higher rate, because there was no way to determine how many hours he worked in each classification. The applicable prevailing wage rate on the Central project for carpenters was \$23.94 per hour plus \$7.92 per hour in fringe benefits, with an overtime rate totaling \$43.83 per hour. Instead, Respondent paid Wadsworth \$6.75 per hour. Four months later, Respondent issued a back pay check to Wadsworth, bringing his wages up to the prevailing wage rate. Again, although Respondent's subsequent payment of back wages may be considered as a mitigating factor, it is not a defense to the alleged violation. *Loren Malcolm*, 6 BOLI at 11. The forum finds that Respondent committed one violation of ORS 279.350(1) by failing to pay Wadsworth the prevailing wage rate at the time his wages were initially paid.

1. Aggravating circumstances.

Respondent's work ticket for the Central Project indicates that Wadsworth was referred to work at a "high school." This should have alerted Respondent's branch manager to inquire if its worker would be working on public works project, and the forum imputes this knowledge to Respondent pursuant to OAR 839-016-0500.

The evidence indicates that Respondent's problem was caused by its apparent ignorance that the Central Project was a public works project. Again, there was no evidence presented that Respondent's branch manager inquired of Andersen Woodworks, the employer to whom it dispatched Wadsworth, if the job was a prevailing wage rate job. Respondent's violation might have been avoided altogether if its representative had simply made that inquiry when taking the job order or had sent someone to visit the job site.

This violation is a serious one that requires debarment if the Commissioner finds that the violation was intentional. Although only one worker was underpaid, the magnitude is substantial because of the extreme contrast between the wage Wadsworth was initially paid -- \$6.75 per hour, and the wage he was entitled to -- \$43.83 per hour, and the fact that he did not receive his full back pay until it was four months overdue.

Finally, Respondent violated the same law on two prior occasions. First, on the New Bend Middle School Project when it failed to pay eight workers the applicable prevailing wage rate on a public works project between April 4 and June 2, 2000. Second, on the Cornelius Project, by failing to pay the applicable prevailing wage rate to six workers.

## 2. Mitigating circumstances.

There are two circumstances that mitigate Respondent's single violation to a limited degree. First, Respondent sent the Agency a check for the full amount of back pay owed to its worker, Wadsworth, shortly after the Agency notified Respondent of the underpayment. Second, Respondent's prevailing wage unit manager has created an audit team in her department that conducts daily reviews of two reports in an attempt to minimize the possibility that Respondent has unknowingly sent workers to prevailing wage rate jobs.

## 3. Amount of civil penalty.

The Agency alleged that Respondent's violation was a "second and subsequent repeated" violation and sought \$5,000 in civil penalties for the alleged violation. OAR 839-016-0540(2) defines "repeated violations" as "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." Here, Respondent had two violations within two years of September 2, 2000. First, the New Bend Middle School Project violation that is

reflected in the final order in case number 31-01. Second, Respondent's violations at the Cornelius Project. Consequently, Respondent's Central project violation is properly classified as a "second and subsequent repeated" violation. OAR 839-016-0540 provides that the *minimum* civil penalty for a second and subsequent repeated violation is "[t]hree times the amount of the unpaid wages or \$5,000, whichever is less[.]"

Considering all the aggravating and mitigating circumstances, the forum finds that \$5,000 is an appropriate civil penalty for Respondent's violation of ORS 279.350(1) on the Central Project.

### **RESPONDENT FILED PAYROLL STATEMENTS THAT LACKED A STATEMENT OF CERTIFICATION AND CONTAINED INACCURATE INFORMATION.**

*Former* ORS 279.354 required contractors and subcontractors on public works projects to file certified statements, in writing, "in form prescribed by the Commissioner of the Bureau of Labor and Industries." The certification was to 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." It also contained the requirement that the certified statements "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." *Former* OAR 839-016-0010 implemented this statute by creating a form, the "WH-38," for contractors and subcontractors to use in complying with *former* ORS 279.354. The rule allowed contractors and subcontractors to use their own form, so long as it contained "all the elements of Form WH-38." The rule further required that "the certified statement contained on Form WH-38" must be attached to "payroll forms submitted" if the contractor or subcontractor used their own payroll form. In addition, both the statute and rule established deadlines for submitting the forms.

**A. The Cornelius Project.**

The Agency alleged that Respondent filed six payroll reports “that were inaccurate and/or incomplete by, among other deficiencies, falsely certifying that all wages earned had been paid, in listing improper pay rates and in failing to show overtime wages earned.” An inspection of Respondent’s original payroll reports and comparison with subsequent corrected payroll reports and payroll records reveals a number of deficiencies. First, all six payroll reports lacked the certification language required by ORS 279.354 and contained on the Agency’s WH-38. That language reads “I have read this certified statement, know the contents thereof and it is true to my knowledge.” Respondent argues that the language printed under the signatory’s name on its “Statement of Compliance” accompanying its payroll reports – “The willful falsification of any of the above statements may subject the contractor or subcontractor to civil or criminal prosecution” – is the “functional equivalent” of the language contained on the Agency’s WH-38. Respondent misses the mark. The language on the WH-38 is an affirmative oath that mirrors the statute; the language on Respondent’s form merely states the consequences of willfully providing false information. Second, none of the payroll reports list the location of the project – they merely state “PUBLIC WORKS BUILDING.” Third, five of Respondent’s payroll reports incorrectly classify Joseph Baker, Faried Hawash, or Joseph Baker as “laborers” instead of “carpenters.” Fourth, Respondent’s payroll report for the week ending July 7, 2000, incorrectly reported that Baker had worked 15 hours straight time<sup>xxx</sup> on July 6. Sixth, Respondent’s payroll report for the week ending July 21, 2000, reported that Francis had worked 4 hours straight time on Saturday, July 15, and 9 hours of straight time on July 19.<sup>xxx</sup> Seventh, based on

Respondent's corrected report, Respondent's payroll report for the week ending August 11, 2000, reported Francis had worked days that he had not worked and did not report days that he did work.

1. Aggravating circumstances.

First, it should have been simple for Respondent to comply with *former* ORS 279.354 and *former* OAR 839-016-0010. The statute and rule are very specific about the information required, and the BOLI provides a specific form that contractors or subcontractors may use to comply with the law. Instead, Respondent opted to use its own form, which was allowed by *former* OAR 839-016-0010 so long as it contained all the elements of the Agency's form, including a certified statement. Respondent's form did not contain all the required elements, and even Respondent's corrected submissions lacked the required certified statement. Respondent's original submissions also incorrectly reported the classification of workers and hours worked. If Respondent had original time records that were correct and had taken care to determine the type of work its workers were performing, these inaccuracies would not have occurred.

Second, Respondent's violation was serious, as the inaccurate information provided affected the Agency's ability to determine if Respondent's workers had been paid properly. The magnitude was also substantial, in that Respondent's submissions contained inaccurate information about at least six workers.

Third, Respondent was on notice and had knowledge that its practices regarding certified payroll reports required by *former* ORS 279.354 were defective. All of Respondent's reports are prepared by staff employed by Respondent's corporate parent in Tacoma, Washington. That corporate parent was notified by the Agency on January 26, 2000, that its certified payroll reports must contain the following language: "I have read this certified statement, know the contents thereof and it is true to my knowledge."

There was no evidence that Respondent has modified its forms to meet that requirement.

Fourth, Respondent violated the same statute and rules on two prior occasions, on the New Bend Middle School case, where it committed nine violations, and on the Beaver Acres Project, where it committed one violation.

2. Mitigating circumstances.

Respondent eventually submitted payroll reports that showed the correct hours and wages earned by its workers; however, its corrected reports still lacked the required statement of certification. Respondent has reformatted its reports to include a separate box for fringe benefits. Respondent now requires prevailing wage rate work to be reported on a daily, instead of a weekly basis, in order to ensure that its reporting of hours and days worked by workers is accurate.

3. Amount of civil penalty.

In its charging document, the Agency sought an \$18,000 civil penalty for Respondent's six violations. In case number 31-01 involving the New Bend Middle School project, the Commissioner assessed \$18,000 in civil penalties for Respondent's nine violations of ORS 279.354, or \$2,000 per violation. Considering all the aggravating and mitigating circumstances, a civil penalty of \$18,000, or \$3,000 per violation, is appropriate.

**B. The Central Project.**

The Agency's sole allegation concerning Respondent's payroll report submitted for the Central Project is that it was untimely filed. The evidence does not clearly establish the starting and completion date of the project, or whether the project took more or less than 90 days to complete. Either way, under OAR 839-016-0010(5), Respondent was required to submit its payroll and certified statement "within 15 days of

the date [Respondent] first began work on the project[.]” Respondent’s employee, Wadsworth, worked on September 2, 2000. This made Respondent’s reports due on September 17, 2000. Respondent did not complete its report to the Agency until January 18, 2001. This constitutes one violation of ORS 279.354 and *former* OAR 839-016-0010(5).

1. Aggravating circumstances.

First, it should have been simple for Respondent to comply with *former* ORS 279.354 and *former* OAR 839-016-0010. The rule is specific about the time limits for filing certified payroll statements, and the BOLI provides a specific form that contractors or subcontractors may use to comply with the law. In this situation, Respondent’s problem stemmed from its apparent failure to ascertain that it had sent its worker to a public works project. This problem might have been entirely avoided if Respondent had exercised reasonable care in taking the job order from Andersen Woodworks.

Second, Respondent’s failure to file a report at all until prompted by the Agency was serious. However, the magnitude was limited, in that it only affected one worker.

Third, based on OAR 839-016-0600, the forum imputes knowledge that the Central Project was a prevailing wage rate job to Respondent and concludes that Respondent knowingly failed to file a certified payroll report.

Fourth, Respondent violated the same statute and rules on three prior occasions, on the New Bend Middle School case, where it committed nine violations, on the Beaver Acres Project, where it committed one violation, and on the Cornelius Project, where it committed six violations.

2. Mitigating circumstances.

Respondent's prevailing wage unit manager has created an audit team in her department that conducts daily reviews of two reports in an attempt to minimize the possibility that Respondent has unknowingly sent workers to prevailing wage rate jobs.

3. Amount of civil penalty.

In its charging document, the Agency sought a \$4,000 civil penalty for Respondent's single violation of *former* ORS 279.354 and *former* OAR 839-016-0010. Considering all the aggravating and mitigating circumstances, \$4,000 is an appropriate civil penalty.

**C. The Beaver Acres Project.**

Respondent's payroll reports for the Beaver Acres Project provide a textbook example of why accurate reports are important and how inaccurate payroll reports make it nearly impossible for the Agency to determine if the prevailing wage rate has been paid.

The Agency alleged that Respondent filed payroll reports "that were inaccurate and/or incomplete by, among other deficiencies: not being properly certified; inaccurately listing pay rates and amounts; not including the group, where appropriate, for the classification of work its employees performed and omitting required general information about the project." Respondent filed several original payroll reports and two versions of corrected payroll reports for the Beaver Acres Project. The original and second corrected payroll reports all lack an appropriate statement of certification. The originals do not specify the "group" classification for Respondent's workers<sup>xxxii</sup> and state the name, but not the location of the project. Among other things, the payroll reports also report some overtime hours as straight time hours and contain multiple entries for

the same category, e.g. gross wages, for a large number of workers. They also fail to break out fringe benefits from hourly wages.

1. Aggravating circumstances.

With one exception, the same aggravating circumstances apply to the Beaver Acres Project as the Cornelius Project. That exception is that Respondent had only one prior violation -- the New Bend Middle School Project -- prior to its violation on the Beaver Acres Project. In addition, the magnitude of the violation was higher than on the Cornelius Project because of the number of workers involved and because the inaccuracies and inconsistencies in Respondent's reports caused the Agency to expend considerable time in determining that Respondent had in fact paid its workers the prevailing wage rate. Also, there are several reports, each of which would comprise a separate violation had the Agency chosen to plead multiple violations, that were consolidated by the charging document into one violation.

2. Mitigating circumstances.

No workers were underpaid as a result of Respondent's defective payroll reports. Respondent has reformatted its certified payroll reports to reflect fringe benefits and has eliminated deductions for equipment and transportation on prevailing wage rate jobs. Respondent now requires prevailing wage rate work to be reported on a daily, instead of a weekly basis, in order to ensure that its reporting of hours and days worked by workers is accurate.

3. Amount of civil penalty.

In its charging document, the Agency alleged a single violation of *former* ORS 279.354 and *former* OAR 839-016-0010 by Respondent on the Beaver Acres Project and sought a \$5,000 civil penalty. Considering all of the aggravating and mitigating circumstances, \$5,000 is an appropriate civil penalty.

**RESPONDENT FAILED TO TIMELY PROVIDE RECORDS DEEMED NECESSARY BY THE COMMISSIONER TO DETERMINE IF THE PREVAILING RATE OF WAGE WAS ACTUALLY BEING PAID BY RESPONDENT TO ITS WORKERS ON THE BEAVER ACRES PROJECT**

This issue arose pursuant to a complaint that employees of Horizon Restoration Systems had not received the correct rate of pay on the Beaver Acres Project. During her investigation of Horizon, Susan Wooley, an Agency compliance specialist, determined that Respondent had provided workers to Horizon. On August 4, 2000, Wooley sent a letter to Respondent requesting “**any and all** time records, payroll records, and certified payroll records for **all** employees who performed work on the project.” (Emphasis in original) Wooley requested these records no later than August 21, 2000. On August 18, 2000, Wooley received some certified and uncertified payroll reports reflecting work done on the project, but not the original time and payroll records she had requested. On the payroll reports she received, Respondent listed workers as having worked days they did not work, listed workers as having worked more hours in a single day than were actually worked, listed some overtime hours worked as straight time hours, listed some incorrect hourly wages, and had multiple entries in the gross wages and deductions column.

Because of the inaccuracies and inconsistencies in the reports submitted by Respondent, Wooley was unable to determine whether Respondent’s workers had been paid the correct prevailing wage rate. On September 11, 2000, she made a second request for “any and all time and payroll records” for employees who had performed work on the Beaver Acres Project. She asked that the documents be provided no later than September 22, 2000. On October 3, Respondent provided corrected copies of the earlier payroll reports that lacked the statement of certification required by ORS 279.354.

On October 13, 2000, Wooley sent Respondent a third letter explaining that “simply correcting numbers on a computerized spreadsheet does not provide any proof that the workers were actually paid the amount of wages due them.” Wooley again asked Respondent to provide “any and all daily time records (or ‘wage tickets,’ if this is the Labor Ready term for time records) and payroll records for all employees who performed work on this project.” Wooley asked that Respondent submit these records by October 25, 2000.

Sometime between October 13 and October 26, 2000, Respondent’s prevailing wage unit manager became involved and requested copies of canceled checks issued to Respondent’s workers on the Beaver Acres Project. After several more exchanges with Rischman, Wooley finally obtained the records she needed to determine that Respondent’s employees all been paid the prevailing wage rate. This was sometime between January 29 and February 7, 2001.

An objective determination of whether workers have been paid the prevailing rate of wage requires documentation in the form of time and payroll records, and a comparison of those records. This is precisely what Wooley requested in her letter dated August 4, 2000. OAR 839-016-0030 provides that such records must be made 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 “later date” specified by Wooley was August 21, 2000.

On August 18, 2000, Wooley received some certified and uncertified payroll reports that contained significant inaccuracies and omissions and raised serious questions about whether Respondent’s workers had been paid the prevailing wage rate. Copies of original time and payroll records were not provided. If there was any question

about the reasonableness of Wooley's original request in demanding "any and all" time and payroll records, the problems in Respondent's payroll reports dispelled all doubts.

Some months later, after several more letters and phone calls, Wooley eventually received sufficient records to be able to determine that Respondent had in fact paid the prevailing wage rate to its employees on the Beaver Acres Project.

Respondent argues that Wooley kept extending the due date for the time and payroll records in her subsequent letters, and that Respondent complied with the final deadline. Respondent's argument lacks merit. Wooley's original deadline of August 21, 2000, is the submission deadline that matters. Wooley's credible testimony established that she needed those records to determine if Respondent had paid the prevailing wage rate, and Respondent did not comply with Wooley's request until months after August 21. In fact, Respondent did not even try to obtain the canceled checks until late October 2000.

Respondent's failure to provide Wooley with "any and all time records, payroll records, and certified payroll records for all employees who performed work on the project" by August 21, 2000, was in violation of ORS 279.355 and OAR 839-016-0030.

**A. Aggravating circumstances.**

There are several aggravating circumstances present. First and most important, Respondent's lack of cooperation. It took Respondent five months to comply with Wooley's initial request for payroll and time records, whereas it should have been relatively simple to comply with Wooley's straightforward request to provide those records within two weeks. Instead, Wooley had to make multiple requests. There was no evidence that Respondent even attempted to provide any records other than payroll reports prior to late October 2000 when Rischman became involved. The seriousness of the violation was considerable because the Agency was unable to perform its

statutorily mandated duty of determining that workers have been paid the prevailing wage rate without obtaining these records. The magnitude was high because of the number of workers involved in the audit.

**B. Mitigating circumstances.**

There are two mitigating circumstances. First, when Respondent eventually provided the requested records, Wooley was able to determine that all workers had been paid the correct prevailing wage rate. Second, Respondent has eliminated deductions for equipment and transportation on prevailing wage rate jobs, making it marginally easier for an auditor to determine if Respondent has correctly paid its workers.

**C. Amount of civil penalty.**

The Agency sought a civil penalty of \$5,000 in its charging document. Based on all the aggravating and mitigating circumstances, a civil penalty of \$2,500 is appropriate.<sup>xxxiii</sup>

**PLACEMENT ON THE LIST OF INELIGIBLES**

The Agency seeks to debar<sup>xxxiv</sup> Respondent for two concurrent three year periods on the basis that Respondent's failures to pay and post the applicable prevailing wage rate on the Cornelius and Central Projects were intentional.

**A. Liability of Respondent.**

ORS 279.361 provides that when a subcontractor intentionally fails or refuses to pay the prevailing wage rate to workers employed upon public works or when a subcontractor "intentionally" fails or refuses to post the prevailing wage rates as required by ORS 279.350(4), the subcontractor and any firm in which the subcontractor has a financial interest shall be placed on the list of persons ineligible to receive contracts or subcontracts for public works for a period not to exceed three years. The

forum has already concluded that Respondent failed to pay and post the applicable prevailing wage rates on the Cornelius and Central Projects. The only question is whether those failures were “intentional.” If so, the Commissioner is required to place Respondent on the List of Ineligibles.

**B. Intentional Failure to Pay.**

To “intentionally” fail to pay the prevailing wage, “the employer must either consciously choose not to determine the prevailing wage or know the prevailing wage but consciously choose not to pay it.” *Labor Ready at 364*. The inclusion of the word “intentionally” in ORS 279.361(1) implies a “culpable mental state,” indicating that

debarment should not be “triggered by merely innocent, or even negligent, failure to pay.” *Id. at 360*. Under this standard, the forum must assess Respondent’s state of mind at the time that its employees were not paid the prevailing wage in order to determine whether Respondent “intentionally” failed or refused to pay the prevailing wage.

1. The Cornelius Project.

On the Cornelius Project, the evidence was undisputed that Respondent was unaware that it was sending its employees to a public work until July 6, 2000, three weeks after it sent its first employee to the Cornelius Project. Between June 12 and July 6, 2000, Respondent employed six workers on the Project – Clayton, Ramirez, Rodriguez as laborers, and Francis, Baker, and Hawash as carpenters. Respondent paid all six substantially less than the prevailing wage during that time period. Prior to July 6, there is no evidence that Respondent was aware that it was sending its workers to a public work subject to the prevailing wage rate, or that Respondent consciously

chose not to determine the prevailing wage or knew the prevailing wage but consciously chose not to pay it. Rather, Respondent's underpayment can be characterized at best as an "innocent" mistake and at worst as "negligent." Based on the Court of Appeals' earlier decision, the forum concludes that Respondent's failure to pay its workers the prevailing wage prior to July 6, 2000, was not intentional under ORS 279.261(1).

On July 6, 2000, Shields, Respondent's Hillsboro branch manager, learned that the Project was subject to the prevailing wage rate. Shields immediately began paying the applicable prevailing wage rate for laborers or carpenters to the workers Respondent employed on the Project. Shields also immediately issued "back pay" checks to Francis, Baker, and Hawash for the difference between their initial pay prior to July 6 and the prevailing wage.<sup>xxxv</sup> This evidence establishes that, as of July 6, 2000, Respondent, through its manager Shields, knew that its workers were employed on a public work, knew the correct prevailing wage for laborers and carpenters on the Cornelius Project, and knew that it had not paid its workers the prevailing wage. Despite this knowledge, Respondent did not issue "back pay" checks to three other workers – Clayton, Ramirez, and Rodriguez -- until November 21, 2000, and provided no explanation for this failure. There was no evidence presented at hearing to explain this failure.<sup>xxxvi</sup>

The question is whether Respondent's delay in paying "back pay" to Clayton, Ramirez, and Rodriguez and failure to pay "back pay" to Francis rises to the level of "intentional." This requires proof that Respondent knew "the prevailing wage but consciously choose not to pay it." *Labor Ready at 364.*

The inclusion of the word "intentionally" in ORS 279.361(1) implies a "culpable mental state," indicating that debarment should not be "triggered by merely innocent, or even negligent, failure to pay." *Id. at 360.* As stated earlier, this requires an

assessment of Respondent's state of mind after Shields learned on July 6 that "back pay" was due. The statutory requirement to pay the prevailing wage includes an obligation to pay all earned, due, and unpaid prevailing wages, which Respondent acknowledged by immediately paying three of its workers for the difference between their pay earned and received before July 6 and the prevailing wage.<sup>xxxvii</sup> However, there is no evidence as to why Clayton, Ramirez, and Rodriguez were not issued "back pay" checks until November 21, 2000. Respondent's failure to fulfill its statutory duty to issue "back pay" checks to these three workers no later than 35 days after they performed the work, without any evidence that Respondent made a conscious choice not to issue the checks, does not establish that Respondent "intentionally" failed to pay these three workers the prevailing wage rate. Consequently, Respondent may not be debarred for its untimely issuance of "back pay" checks to these three workers.

Respondent's failure to pay Chris Francis \$34.50 in prevailing wage rate "back pay" is a different matter. This "back pay" amount was earned *after* July 6, 2000, when Respondent knew it was required to pay its workers the prevailing wage on the Cornelius Project. Francis worked as a carpenter and was entitled to be paid \$31.86 per hour, as Respondent tacitly acknowledged on July 6, 2000, when it paid Francis \$21.86 per hour for six hours of "back pay" earned on June 28, 2000.<sup>xxxviii</sup> Respondent admitted owing this amount to Francis on December 13, 2000, but still had not paid Francis at the time of the hearing. Respondent's defense was that BOLI had instructed Respondent not to pay these wages to Francis, but the Administrative Law Judge found that the testimony supporting this defense was not credible.<sup>xxxix</sup>

In summary, it is undisputed that (1) Respondent knew the prevailing wage after July 6, but underpaid Francis by \$.60 per hour for a total of 57.5 hours worked as a carpenter after that date; (2) on December 13, 2000, Respondent's corporate

headquarters knew it had underpaid Francis by that amount; and (3) that Respondent still had not paid Francis at the time of hearing. Respondent's decision not to pay Francis the \$34.50 it owed him was a conscious choice. Based on undisputed evidence that Respondent knew "the prevailing wage but consciously choose not to pay it, the forum finds that Respondent "intentionally" failed to pay the prevailing wage rate to Francis on the Cornelius Project, subjecting Respondent to debarment. *Id.* at 364.

## 2. The Central Project.

Respondent sent one worker to the Central Project for one day and did not pay that worker the prevailing wage until later notified by BOLI that the Central Project was a public work. When BOLI notified Respondent of that fact, Respondent immediately sent a check for the total amount of unpaid prevailing wages due to its worker. Although Respondent's job order indicated that its worker would be working at a high school, there was no evidence that Respondent knew the Central Project was a public work until notified by BOLI or that Respondent made a conscious choice not to determine that the Central Project was a public work.<sup>x1</sup> As a result, the forum concludes that Respondent's failure to pay its worker the prevailing wage was not an intentional failure.

### **C. Intentional Failure to Post.**

ORS 279.350(4) "requires every \* \* \* subcontractor engaged in a public project to personally initially post the prevailing wage and to maintain that posting throughout the course of its employees' work on the project." *Labor Ready* at 369. A "negligent or otherwise inadvertent failure" to post the prevailing wage rate is insufficient to require debarment. *Id.* A "heightened level of culpability [must] be proven before an employer [can] be debarred" based on an intentional failure to post. *Id.* at 366.

1. The Cornelius Project.

Prior to July 6, 2000, Respondent's failure to post the prevailing wage rates on the Cornelius Project cannot be considered intentional, as Respondent was not aware that the Cornelius Project was a public work before that time and could not have consciously chosen not to post. On July 6, 2000, Respondent became aware that the Cornelius Project was a public work. Respondent's manager took a copy of the prevailing wage rates to the job site and asked the general contractor's foreman to post them.<sup>xii</sup> It is undisputed that Respondent's manager knew the correct prevailing wage rate for carpenters and laborers, the two classifications in which its workers were employed, and that she took no action to post the rates herself at that time or any subsequent time and made no effort to determine whether the rates had been posted or were kept posted. There was no evidence that anyone else employed by Respondent took any action to post the rates or determine whether the rates had been posted or were kept posted

In the prior *Labor Ready* case, Respondent made no attempt to post the prevailing wage on a public work where its workers were employed. The Court of Appeals held that Respondent's failure to post the applicable prevailing wage rate was not "intentional" within the meaning of ORS 279.361(1) "for either of two reasons":

"First, [Labor Ready] acted from a good-faith, albeit legally mistaken, belief that the posting in the general contractor's shack obviated any need for petitioner itself to post. \* \* \* Thus, there was no conscious choice on petitioner's behalf not to perform a known duty. Second, as noted, [Labor Ready] was mistaken as to the correct prevailing wage for its employees' work; thus, it did not know the correct rate and, consequently, did not elect not to post *that rate.*" *Labor Ready at 366.*

Neither of those circumstances is present in this case. As noted earlier, ORS 279.350(4) requires every subcontractor "to personally initially post the prevailing wage and to maintain that posting throughout the course of its employees' work on the

project. *Id.* at 369. Once Respondent's manager knew that posting was required, Respondent's failure to personally post and maintain that posting was a conscious choice and an intentional failure within the meaning of ORS 279.261(1), subjecting Respondent to debarment.

## 2 The Central Project.

Respondent employed one worker for one day on the Central Project and was unaware that the Central Project was a public work until contacted by BOLI several months after its worker worked on the Central Project. Although Respondent's job order indicated that its worker would be working at a high school, there was no evidence that Respondent knew the Central Project was a public work until notified by BOLI or that Respondent made a conscious choice not to determine that the Central Project was a public work.<sup>xiii</sup> As a result, the forum concludes that Respondent's failure to post the prevailing wage rate was not intentional

### **D. Length of debarment.**

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

aggravating circumstances considered may include those set out in OAR 839-016-0520(1).

Aggravating circumstances in this case include: (1) Respondent's failure to pay three workers the prevailing wage for five months *after* it learned its workers were entitled to the prevailing wage rate and failure to pay one worker the prevailing wage by the time of the hearing; (2) Respondent's initial failure to pay the prevailing wage to eight workers employed on the New Bend Middle School public works project; (3) Respondent's six violations of ORS 279.354 on the Cornelius Project; (4) Respondent's single violations of ORS 279.354 and ORS 279.355 on the Beaver Acres Project; (5) Respondent's initial failure to pay the prevailing wage on the Central Project; (6) Respondent's failure to post on the Central Project; and (7) Respondent's failure, despite a prior warning, to correct the certification statement attached to its payroll report.

In mitigation, the forum considers that Respondent: (1) has paid back wages in full to all but one worker on the Cornelius and Central Projects; (2) has made changes to its payroll records and reports that make them easier to audit and less likely to contain errors concerning hours and dates worked; (3) promptly paid back wages owed to its worker on the Central Project when the Agency made a demand for payment; (4) through Rischman, has created a corporate "audit team" that conducts daily reviews designed to identify prevailing wage rate projects; and (5) has given Shields, its Hillsboro branch manager, some training on prevailing wage rate jobs.

Under the circumstances, the forum finds that one year is an appropriate period of debarment based on Respondent's intentional failure to pay the prevailing rate of wage to workers employed on the Cornelius Project and Respondent's intentional

failure to post the prevailing wage rates as required by ORS 279.350(4) on the Cornelius Project.

## **RESPONDENT'S REMAINING EXCEPTIONS**

### **A. Exception 1.**

Respondent excepted to the finding that Timothy Adams agreed that Respondent had violated Oregon's prevailing wage rate law with respect to wage claimant Norm Nicholas, on the basis that the Agency failed to prove that Nicholas's wage claim was against Respondent. The forum has reviewed Michael Wells's testimony and Exhibits A-47 to A-53 and concurs with Respondent that the Agency did not meet its burden of proof in establishing that Respondent, not Labor Ready, Inc., was Nicholas's employer. Respondent's exception is GRANTED and Proposed Finding of Fact 79 – The Merits has been deleted.

### **B. Exception 2.**

Respondent excepted to the language contained in Proposed Finding of Fact 82 – The Merits that concluded that Rischman's testimony relating to the withholding of \$34.50 in wages to Chris Francis was not credible. The preponderance of the evidence shows that Rischman's testimony on this issue was not credible. Respondent's exception is DENIED.

### **C. Exception 3.**

Respondent excepted to Proposed Finding of Fact 41 – The Merits and proposed to add language to the effect that Francis had not been paid \$34.50 based on BOLI Compliance Specialist Wells's lack of response to Respondent's inquiry about whether it should pay the amount. This exception lacks merit and is DENIED.

**D. Exceptions 4A and 4B.**

Respondent excepted to the conclusion that Respondent intentionally failed to pay the prevailing wage rate on the Cornelius and Central projects. Respondent's exception is based on its contention that the forum wrongfully applied the *Sabin* "willful" standard in determining that Respondent's violations were "intentional" in the original Final Order. Respondent's exception is DENIED with regard to the Cornelius Project for reasons stated in the Opinion of this Final Order on Reconsideration. Respondent's exception is GRANTED with regard to the Central Project for reasons also stated in the Opinion of this Final Order on Reconsideration.

**E. Exceptions 5 and 11.**

Respondent excepted to the ALJ's use of prior violations found in the Final Order of the Commissioner on the New Bend Middle School project, Case No. 31-01, issued December 13, 2001, as an aggravating factor in determining Respondent's period of debarments. Respondent's argument was based on the fact that the final order in Case No. 31-01 was on appeal to the Oregon Court of Appeals at the time Respondent filed its exceptions. That final order has been reversed in Respondent's favor on the issue of debarment. However, in that case Respondent did not appeal the Commissioner's conclusion in that final order that Respondent violated ORS 279.350(1) by failing to pay its workers the prevailing wage on the New Bend Middle School project. Consequently, those violations stand and are properly considered as an aggravating factor in determining Respondent's period of debarment. Respondent's exception is DENIED.

**F. Exceptions 6 and 12.**

Respondent excepted to the ALJ's use of Respondent's violations of ORS 279.354 on the Cornelius and Central Projects as aggravating factors in determining Respondent's period of debarment. Respondent's argument is that violations of ORS

279.354 are not aggravating factors “because it is impossible to have a correct certified payroll statement where there is an underlying failure to pay the prevailing wage rate \* \* \* A failure to correctly certify a payroll statement automatically occurs in every instance of a failure to pay the applicable prevailing wage. Thus, this is not an aggravating factor; it is the same factor.” Respondent’s argument is misplaced. Failure to pay the applicable prevailing wage rate and failure to properly certify, though one may flow from the other, constitute two distinct, separate actions, as well as violations of two different statutes.<sup>xliv</sup> For that reason, Respondent’s ORS 279.354 violations are properly considered aggravating factors.

**G. Exceptions 7 and 13.**

Respondent excepted to the ALJ’s use of Respondent’s violations of ORS 279.354 and ORS 279.355 on the Beaver Acres project as aggravating factors in determining Respondent’s periods of debarment because “it involve[d] a different physical location and different conduct.” For the purpose of debarment, the Commissioner is not limited to consideration of violations of ORS 279.350(1) and (4) the same project on which the debarment is founded. Respondent’s argument lacks merit and is DENIED.

**H. Exceptions 8 and 14.**

Respondent excepted to the ALJ’s use of Respondent’s failure to correct the certification statement attached to its payroll report as an aggravating factor in determining Respondent’s periods of debarment, arguing that “[a]n aggravating factor must deal with the type of conduct for which the penalty of debarment is sought.” Respondent’s exception is DENIED for the same reason that Exceptions 7 and 13 were denied.

**I. Exceptions 9 and 15.**

Respondent excepted to the ALJ's use of the conclusory statement that it had "committed serious violations of considerable magnitude" to support the proposed length of debarment based on Respondent's violations on the Cornelius and Central projects. The forum agrees with Respondent that this conclusion, which was intended to refer to other aggravating factors previously listed, is simply cumulative and has deleted it in the Opinion.

**J. Exception 10.**

Respondent excepted to the ALJ's use of the conclusion that Respondent "underpaid one worker and took five months to issue a back pay check to that worker" as an aggravating factor used to support the length of Respondent's debarment on the Central project. The forum has modified this statement in the Opinion in response to Respondent's exception.

**K. Exception 16.**

The forum has added an additional mitigating factor regarding the length of Respondent's debarment in response to Respondent's exception.

**L. Exceptions 17 and 18.**

Respondent excepts to the length of debarments imposed in the Proposed Order on both the Cornelius and Central Projects on the grounds that they are "grossly excessive, not supported by the evidence, and an abuse of discretion by the forum/Commissioner." In this Order on Reconsideration, the length of debarment has been reduced to one year and is based solely on violations on the Cornelius Project. To that limited extent, Respondent's exception is GRANTED.

**ORDER**

NOW, THEREFORE, as authorized by ORS 279.361, the Commissioner of the Bureau of Labor and Industries hereby orders that Respondent **Labor Ready**

**Northwest, Inc.** or any firm, corporation, partnership, or association in which it has a financial interest shall be ineligible to receive any contract or subcontract for public works for one year based on its intentional violations of ORS 279.350(1) and ORS 279.350(4) on the Cornelius Project from the date of publication of their names on the list of those ineligible to receive such contracts maintained and published by the Commissioner of the Bureau of Labor and Industries.

FURTHERMORE, as authorized by ORS 279.370, and as payment of the penalties assessed as a result of its violations of ORS 279.350(1), ORS 279.350(4) ORS 279.354, ORS 279.355, OAR 839-016-0010, OAR 839-016-0030, OAR 839-016-0033(1), and OAR 839-016-0035, the Commissioner of the Bureau of Labor and Industries hereby orders **Labor Ready Northwest, Inc.**, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries in the amount of FIFTY EIGHT THOUSAND FIVE HUNDRED DOLLARS (\$58,500), plus interest at the legal rate on that sum between a date ten days after the issuance of the original final order on June 17, 2002, and the date Respondent **Labor Ready Northwest, Inc.** complies with the Final Order.

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<sup>i</sup> These exhibits were originally numbered X-1, X-2, etc. The forum has renumbered them to avoid confusion due to the later consolidation of cases 122-01 and 149-01.

<sup>ii</sup> *Id.*

<sup>iii</sup> At hearing, in response to the ALJ's inquiry, the Agency and Respondent agreed that the alleged violations listed in the Agency's motion to amend applied to case number 149-01 as well as case number 122-01.

<sup>iv</sup> These allegations were spelled out in paragraphs 11-13 of the Agency's motion to amend. Case number 31-01 was heard on June 19-20 and August 8, 2001, and the Commissioner issued a Final Order on December 13, 2001. That Final Order was offered and received as Exhibit A-64.

<sup>v</sup> See Finding of Fact 8 – Procedural, *supra*.

<sup>vi</sup> The allegations are referred to by the same numbers in the Agency's motion to amend.

<sup>vii</sup> At hearing, the Agency moved to correct the statutory citation to 279.354(1). Respondent did not object and the ALJ granted the motion.

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viii Throughout this Final Order, the forum uses the term “payroll report” to refer to documents submitted by Respondent to meet the requirements of ORS 279.354(1), but which lack the certification required by following language in that statute: “\* \* \* which certificate and statement shall be verified by the oath of the contractor or the contractor’s surety or subcontractor 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.”

ix See *id.*

x The original payroll report was denoted “Payroll No. 5.”

xi Sherry Johnson, another “Administrative Assistant,” completed the first report.

xii The cited text reproduces the language, but not the specific format of the Statement of Compliance.

xiii Each was filled in with the words “Administrative Assistant.”

xiv Each was filled in with the words “Labor Ready Northwest, Inc.”

xv Each was filled in with the words “Public Works Bldg”

xvi Each was filled in with the words “Labor Ready Northwest, Inc.”

xvii All payments represent gross wages.

xviii The words “High School” appear in the “Other” box of Respondent’s September 2, 2000, work ticket reflecting Wadsworth’s work.

xix For example, Arturo Perez’s gross wages for 8 hours equal \$52.00.

xx For example, Arturo Perez’s handwritten gross wages are \$220.72 (8.0 x \$27.59).

xxi For example, Dale Saffel’s gross wages were \$337.44 (16.0 x \$21.09).

xxii Wooley did not testify as to the date these certified payroll reports were received, and they do not have a BOLI date stamp on them showing the date they were received.

xxiii See Finding of Fact 15 – Procedural, *supra*.

xxiv The forum finds one violation because the Agency only alleged one violation.

xxv Examples of a “determination” that would establish the existence of a “prior violation” include a Commissioner’s Final Order, an admission of liability by a respondent, or a previous adjudication in another forum of the alleged “prior violation.”

xxvi See *In the Matter of Labor Ready Northwest, Inc.*, 22 BOLI 245, 283, fn. 18 (2001), *reversed in part*, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346 (2003), *rev den* 336 Or 534 (2004).

xxvii *Id.*, 22 BOLI at 286.

xxviii See Finding of Fact 73 – The Merits, *supra*.

xxix See Finding of Fact 75 – The Merits, *supra*.

xxx ORS 279.334(1)(a) provides that all time worked on Saturdays and in excess of eight hours from Monday through Friday must be paid at the overtime rate.

xxxi *Id.*

xxxii The payroll reports state that each worker was a “laborer.” BOLI’s “Prevailing Wage Rate” book effective July 1, 1999, describes five different groups of laborers, differentiated by type of work performed, with each group entitled to a different rate of pay.

xxxiii Compare *In the Matter of William George Allmendinger*, 21 BOLI 151, 171-72 (2000) (\$3,500 civil penalty assessed for violation of ORS 279.355 where respondent failed to provide records and also failed

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to pay prevailing wage rate to two workers); and *In the Matter of Johnson Builders, Inc.*, 21 BOLI 103, 129 (2000) (\$5,000 civil penalty assessed where respondent failed to provide records and also failed to pay prevailing wage rate to eight workers).

<sup>xxxiv</sup> In this Order, “debar” and “debarment” are synonymous with placement on the List of Ineligibles.

<sup>xxxv</sup> See Finding of Fact 17 – The Merits, *supra*.

<sup>xxxvi</sup> The only evidence even tangentially related to Respondent’s delay in paying Clayton, Ramirez, and Rodriguez was the following testimony of Shields:

“Q: From that point forward, from the time you became aware that it was a prevailing wage rate job, were all the workers dispatched by Labor Ready on that job, paid prevailing wages?”

“A: Yes.

“Q: And did you, at that time, to the best of your ability, go back and attempt to pay all the workers that had been on the job up to that point, prevailing wage?”

“A: Yes.”

<sup>xxxvii</sup> Cf. ORS 652.120, which requires employers to pay employees “the wages due and owing to them” no more than 35 days after the employees performed their work.

<sup>xxxviii</sup> Francis had only been paid \$10 per hour, and the additional \$21.86 per hour brought his total wage to \$31.86 per hour, the correct prevailing wage for carpenters. See Finding of Fact 24 – The Merits, *supra*.

<sup>xxxix</sup> See Finding of Fact 82 – The Merits, *supra*.

<sup>xi</sup> If Respondent had knowledge of, but recklessly disregarded, facts or circumstances that would lead a reasonable employer to inquire if its worker was employed upon public work, the worker was in fact employed upon a public work, and Respondent did not pay its worker the prevailing wage, the forum would conclude that Respondent made a conscious choice not to determine the prevailing wage and thereby intentionally failed to pay the prevailing wage. The mere fact that the job order from Andersen Woodworks stated that it needed a worker at a high school does not constitute such facts or circumstances. In contrast, a job order stating that a worker was needed to perform labor on a substantial construction project at a high school, or evidence that Respondent’s employee taking the job order was aware that a substantial construction project was taking place at that high school, would likely constitute facts or circumstances that would have put Respondent on notice that its worker was likely employed upon a public work.

<sup>xii</sup> The forum infers that Respondent’s manager would not have taken the prevailing wage rates to the job site and asked the general contractor’s foreman to post the rates unless Respondent’s manager believed that posting was required.

<sup>xiii</sup> If Respondent had knowledge of, but recklessly disregarded, facts or circumstances that would lead a reasonable employer to inquire if its worker was employed upon a public work, that worker was in fact employed upon a public work, and Respondent did not post the prevailing wage, the forum would conclude that Respondent made a conscious choice not to post the prevailing wage and thereby intentionally failed to post the prevailing wage. See fn. 38, *supra*.

<sup>xiiii</sup> Compare *In the Matter of Larson Construction Co., Inc.*, 17 BOLI 54, 76 (1998), where the commissioner held that mitigating factors may not be considered in the “initial determination of whether to debar a subcontractor.”

<sup>xlv</sup> The forum notes that on the Beaver Acres project, Respondent apparently paid the prevailing wage rate to all its workers, yet still violated ORS 279.354 by inaccurately completing the reports and not completing an appropriate statement of certification. Respondent’s problem on the Central Project was that it did not initially pay the prevailing wage rate and untimely filed its payroll statement. On the Cornelius Project, all six of Respondent’s payroll reports lacked an appropriate certification statement, a

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violation of the statute and administrative rule that would have existed even if Respondent had paid the prevailing wage rate.