In the Matter of

LANE-DOUGLAS CONSTRUCTION, INC.

Case No. 68-00

August 28, 2000

SYNOPSIS

Respondent employed Claimant as its company foreman and paid him a weekly salary, with no additional pay for overtime hours worked, claiming that Claimant was an "executive employee" who was exempt from the provisions of ORS 653.010 to 653.261. The Agency alleged that Claimant was entitled to $5,803.13 to compensate him for 309.5 hour worked over 40 hours in a given work week. The commissioner found that Claimant's primary duty was management of Respondent's field operations, that Claimant customarily and regularly directed the work of two or more other employees, that Claimant's suggestions and recommendations as to hiring, firing, and raises were given particular weight, that Claimant exercised independent judgment and customarily and regularly exercised discretionary powers, and that Claimant earned a salary and was paid on a salary basis. The commissioner concluded that Claimant was an exempt "executive employee" who was not entitled to additional compensation for overtime hours worked and dismissed the Order of Determination. ORS 653.020, ORS 653.025, ORS 653.261, OAR 839-020-0030(1), OAR 839-020-0004(25), (29), (30), OAR 839-020-0005(1).

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 May 10-11 and 16-17 at the Bureau of Labor and Industries' office located at 165 E. 7th, Suite 220, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Cynthia L. Domas, an employee of the Agency. Claimant Ronald G. Smith was present throughout the hearing and was not represented by counsel. Respondent was represented by Brian D. Cox, attorney at law. Michael S. ("Scott") Bond, Respondent's

corporate president, was present throughout the hearing as Respondent's representative.

The Agency called as witnesses, in addition to Claimant: Scott Bond; Harvey R. Epperson, Respondent's bookkeeper and office manager; Shane E. Cogburn, Wayne A. McCormick, and Tim B. Jenrette, former employees of Respondent; Leslie Laing, Agency compliance specialist; and Shelby J. Cogburn, who lived with Claimant during the wage claim period.

Respondent called as witnesses: Bond; Epperson; John I. Strandquist, Respondent's employee; and Cary Kuvaas, general manager of Flex Force.

The forum received into evidence:

a) Administrative exhibits X-1 through X-11 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-15 (submitted prior to hearing), A-16 and A-18 (submitted at hearing);

c) Respondent exhibits R-101 through R-121 (submitted prior to hearing).[1]

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

FINDINGS OF FACT – PROCEDURAL

1) On February 18, 1999, Claimant filed a wage claim with the Agency. He alleged that Respondent had employed him and failed to pay wages earned and due to him.

2) At the time he filed his wage claim, Claimant assigned to the Commissioner of Labor and Industries, in trust for Claimant, all wages due from Respondent.

3) Claimant brought his wage claim within the statute of limitations.

4) On October 6, 1999, the Agency served Order of Determination No. 99-0568 on Respondent based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of $5,822.31 in unpaid wages and $3,000.00 in civil penalty wages, plus interest, and required that, within 20 days, Respondent either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

5) On October 23, 1999, Respondent, through counsel, filed an answer and request for hearing. Respondent's answer included the affirmative defense that Respondent was not required to pay Claimant overtime wages because Claimant was an excluded executive employee. (Exhibit X-1c)

6) On March 6, 2000, the Agency filed a "BOLI Request for Hearing" with the forum.

7) On March 10, 2000, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and the Claimant stating the time and place of the hearing as May 10, 2000, at 9:00 a.m., in Eugene, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

8) On March 14, 2000, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to

the claim (for Respondent only); a statement of any agreed or stipulated facts; and any wage and penalty calculations (for the Agency only.) The forum ordered the participants to submit case summaries by May 1, 2000, and notified them of the possible sanctions for failure to comply with the case summary order.

9) On April 24, 2000, the Agency filed a motion for a discovery order seeking documents relevant to the Claimant's wage claim that had been unsuccessfully sought through an informal exchange of information.

10) On April 28, 2000, the ALJ issued a discovery order requiring Respondent to produce the documents sought by the Agency no later than 5 p.m. on May 2, 2000. The ALJ noted that any objections filed by Respondent would be treated as a request for reconsideration of the discovery order.

11) On April 28, 2000, Respondent filed objections to the Agency's motion for a discovery order, noting that most of the requested documents had been provided and that some of the requested documents did not appear reasonably likely to produce information generally relevant to the case.

12) On May 1, 2000, the ALJ conducted a pre-hearing conference with Ms. Domas and Mr. Cox at the Eugene BOLI office, with the purpose of attempting to resolve any outstanding discovery issues. During that conference, Ms. Domas and Mr. Cox stipulated that Claimant was employed by Respondent between October 5, 1997 through October 10, 1998 (the "wage claim period"), and that Claimant was paid $31,412.19 for work performed in the wage claim period. Mr. Cox further stipulated that Claimant worked 2,256 hours for Respondent in the wage claim period, and that if Claimant was due overtime pay, it would be for 295 hours. Because Ms. Domas had not yet received the documents sent by Mr. Cox in response to the Agency's request for discovery, the ALJ scheduled a follow-up conference for May 3. On May 3, 2000, the

ALJ conducted another pre-hearing conference. During that conference, Ms. Domas indicated she had reviewed the documents provided by Mr. Cox, and withdrew the Agency's request for any additional documentation. Accordingly, the ALJ advised Mr. Cox that Respondent did not need to provide any additional documents in response to the forum's April 28 discovery order.

13) The Agency and Respondent both filed their case summaries, with attached exhibits, on May 1, 2000. The Agency filed an addendum to its case summary on May 4, 2000.

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

15) Prior to opening statements, the Agency and Respondent stipulated that the following exhibits would be admitted without objection:

a) Exhibits A-1, A-2, A-5, A-7 through A-10, and A-13 through A-15;

b) Exhibits R-101 through R-110, R-112 through R-115, R-116 (except for the "cc" note on the bottom of the exhibit), R-117, and R-118.

16) Prior to opening statements, the Agency and Respondent stipulated that Claimant was entitled to $5,803.13 in unpaid overtime wages, based on 309.5 hours worked during the wage claim period over 40 hours in a given work week, if the forum concluded that Claimant was not an excluded executive employee during the wage claim period. The Agency moved, without objection, to amend the Order of Determination to conform to that figure, and the amendment was granted.

17) During the hearing, the Agency offered exhibits A-17 and A-18 as rebuttal evidence. Both appeared to be job descriptions similar in form and substance to R-119. Respondent objected to the admission of both documents. The ALJ did not receive A-17 because it did not rebut any evidence on the record. The ALJ received A-18

because differences between R-119 and A-18 raised the question of which was Claimant's actual job description.

18) The evidentiary record of the hearing closed on May 17, 2000.

19) The ALJ issued a proposed order on July 24, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed with the Hearings Unit.

FINDINGS OF FACT – THE MERITS

1) In June 1994, Scott Bond purchased a construction business from Earl McDonald and incorporated the business as Lane-Douglas Construction, Inc., doing business out of Cottage Grove, Oregon, with Bond as corporate president.

2) Since June 1994, Respondent has been an Oregon corporation in the construction business in the state of Oregon, engaging the personal services of one or more employees.

3) At the time of incorporation, Respondent's primary business was installing retrofit insulation in existing houses, along with some siding and roofing jobs. Respondent's business has evolved continually since then. By May 1997, Respondent was working almost exclusively as a subcontractor on new commercial construction, and the primary jobs being performed by Respondent were caulking, insulation installation, and waterproofing. During the year prior to the hearing, Respondent had also begun performing the jobs of firestopping and fireproofing.

4) Tim Jenrette was employed by McDonald as an applicator[2] in June 1994. Respondent continued Jenrette's employment after purchasing McDonald's business and Bond promoted Jenrette to the position of "working foreman." Jenrette remained in this position until sometime in the latter half of 1996. During this time, Respondent typically worked on only job at a time. Jenrette's job responsibilities involved working side-by-side with Respondent's applicators and making sure "things got done." Based

on Bond's instructions, Jenrette directed applicators where to go. Jenrette trained new employees while working side-by-side with them. He did not directly hire any employees. There was no evidence presented to indicate that he had the authority to recommend hiring or firing employees, recommend raises, order materials, or place a job order for temporary employees. During this time period, Jenrette was paid an hourly wage of $10.00 or $10.50 per hour.

5) Claimant was initially employed by Respondent on June 17, 1996 as an applicator. He was hired as an hourly employee and paid $8.50 per hour. Between June 17, 1996 and August 1997, Claimant installed insulation, did occasional inventory, and assisted in training of new employees as his knowledge of Respondent's business increased. He also made occasional calls to obtain the services of temporary employees from Flex Force, a temporary employment agency used by Respondent.

6) By August 1, 1997, Respondent's business had grown considerably since its inception, and Respondent often worked on multiple jobs at different sites at the same time. In June 1997 Bond hired Harvey Epperson as a bookkeeper and office manager to manage Respondent's office, which was physically located at 80110 Sears Road in Cottage Grove.

7) During Claimant's employment, Bond kept Respondent's supplies, such as insulation and caulking, in a barn located in the Cottage Grove area.

8) After Jenrette left Respondent's employment, Respondent did not have a foreman, and Bond assumed all the supervisory responsibilities. By August 1, 1997, Bond decided he needed to free up more time for himself to do sales and estimating. After discussing the situation with Claimant, he promoted Claimant to the position of company foreman.

9) Bond and Claimant agreed that Claimant would be paid a base salary of $26,000 per year, or $500 per week, for his work as company foreman, regardless of the number of hours he worked. Bond anticipated that Claimant would work about 50 hours per week.

10) During the wage claim period, which extended from October 5, 1997 through October 10, 1998, Claimant's reported work hours per week ranged from a low of 25.5 to a high of 77.5. Claimant worked less than 40 hours during 17 weeks of the wage claim period, and was paid a base salary of $500 for each of these weeks. Claimant was paid more than his base salary of $500 per week during a number of weeks when he worked on prevailing wage rate jobs.

11) Claimant perceived himself as Respondent's company foreman, second in command to Bond, during the wage claim period,[3] and believed he was ultimately responsible for the work done on Respondent's jobs, no matter who did the work. At least two other employees of Respondent, including Bond, also perceived him as the company foreman.

12) After his promotion to company foreman, Claimant gradually assumed the duties of that position under Bond's tutelage.

13) During the wage claim period, Bond's primary work involved doing sales and estimating. Bond performed this work both in Respondent's office and in the field. Sometimes Bond visited Respondent's job sites to see how work was progressing.

14) During the wage claim period, Claimant was in contact, by radio or phone, with Bond or Epperson several times a day to discuss Respondent's jobs. Claimant regularly expressed his opinion during these conversations.

15) During the wage claim period, if a problem arose with a general contractor on one of Respondent's jobs, Claimant usually discussed the problem with Bond.

16) During the wage claim period, Claimant was expected to interview prospective new employees and make a recommendation to Bond as to whether or not the prospective employee should be hired. In total, Claimant interviewed about 5-6 prospective new employees, including Dave Strandquist, Thomas Ortiz, and Joshua and Jason Stroud, and made hiring recommendations to Bond. Bond hired all these employees.

17) Respondent contracted with Flex Force, a temporary employment agency, to provide temporary employees as needed by Respondent. One of Claimant's duties was to ensure that Flex Force was contacted if Respondent needed temporary help on a job. During the wage claim period, Flex Force referred 28 temporary employees to Respondent, some of whom later became permanent employees of Respondent. Temporary employees referred to Respondent by Flex Force reported to the job site designated by Respondent and were not interviewed prior to starting work. Claimant was listed as Respondent's contact person on 14 of the 28 job orders received by Flex Force.

18) During the wage claim period, Claimant had the authority to discipline employees and warned at least one employee, Rick Kilgore, about his work performance.

19) During the wage claim period, Claimant had the authority to recommend raises for employees. Claimant recommended that Kilgore be given a $0.50 per hour raise, and Bond gave Kilgore a $0.50 per hour raise. Claimant promised Eric Cavanaugh a $1.00 per hour raise and recommended this to Bond; Bond gave Cavanaugh a $0.75 per hour raise.

20) During the wage claim period, Claimant had the authority to recommend that temporary and permanent employees be terminated. He recommended that

Cavanaugh and Shane Cogburn be terminated. In response, Bond instructed Claimant to terminate Cavanaugh, but told him not to terminate Cogburn because Cogburn was quitting in two weeks.[4] When Aron Rowe told Claimant he did not want to insulate a crawl floor, Claimant told Rowe he could do the work or go home. Rowe went home and was terminated at that time.[5] After Claimant had experienced numerous performance problems with Kilgore, he discussed these problems with Bond, who instructed Claimant to terminate Kilgore. Claimant followed Bond's instructions and terminated Kilgore.

21) During the wage claim period, Claimant was responsible for all work done on all of Respondent's projects.

22) During the wage claim period, Claimant had authority to make and regularly made independent decisions concerning his work schedule, the particular job sites he visited and the times he visited them, and the work he did on those job sites. Claimant had authority to make and regularly assigned applicators to specific jobs, reassigned applicators to other tasks on a particular job site, and reassigned applicators to other job sites. Claimant also had authority to make and made decisions regarding whether or not temporary labor from Flex Force was needed.

23) During the wage claim period, Claimant had supervisory authority over all of Respondent's applicators, which included all of Respondent's employees except for Bond, Epperson, and an outside salesperson.

24) During the wage claim period, Claimant's job duties included inspection of work in progress at Respondent's different job sites and making sure all work was done correctly and in a timely manner.

25) During the wage claim period, Claimant conducted short employee meetings most mornings before employees left Respondent's barn for a job site. Bond did not usually attend these meetings.

26) During the wage claim period, Claimant often drove other employees, in Respondent's company vehicle, to the job site where Claimant and the employee or employees would be working that day.

27) During the wage claim period, Claimant met with general contractors at Respondent's job sites. Bond had business cards printed for Claimant that identified him as Respondent's foreman and listed the number of his cell phone. Claimant passed these cards out to Respondent's customers, which included general contractors. Bond did this because he wanted customers to call Claimant instead of Bond. Bond was not usually present on Respondent's job sites.

28) During the wage claim period, Claimant consulted nightly with Bond about the status of Respondent's projects and appropriate assignments for Respondent's applicators the next day. Some of these consultations occurred at Respondent's office and others on the phone after Claimant had gone home for the night. The consultations lasted an average of 15 minutes. Claimant did not record this time on his daily time reports.[6]

29) During the wage claim period, Claimant received phone calls at home, on an average of three nights per week, from applicators wanting to know their job assignment for the next day. These calls typically lasted a few minutes.

30) During the wage claim period, Claimant was responsible for training newly hired permanent and temporary employees. Claimant trained these employees by working side-by-side with them while they learned the job. Claimant did not spend substantial amounts of time training employees because insulating and caulking, the

primary types of work performed by applicators, did not require extensive training. In addition, because Respondent had multiple job sites, the most senior or experienced crewmember on the job site routinely acted as a leadworker and did whatever training was required.

31) During the wage claim period, Claimant ordered and picked up materials that had not already been delivered to the job site. Bond and Epperson also ordered materials.

32) During the wage claim period, Claimant completed daily time reports for himself and other applicators who worked with him that day and submitted those time reports to Epperson.

33) During the wage claim period, Claimant spent “15 to 20%” of his time in Respondent’s office doing paperwork related to his position as company foreman.

34) During the wage claim period, Claimant did the same work as Respondent’s applicators when he was not in Respondent’s office or performing the tasks listed in Findings of Fact – The Merits 14-32.

35) During the wage claim period, Claimant carried a combination radio/cell phone with him in order to communicate with Bond, Epperson, general contractors, and Respondent’s applicators. Claimant worked on job sites by himself on 15 to 20 different days. At least 12 of those days, Claimant worked in Roseburg, where his radio/cell phone could not reach any employees on Respondent’s job sites. During those days, Claimant only called Bond.

36) During the wage claim period, Respondent always employed at least two applicators who were supervised by Claimant.

37) In June 1998, Bond went on vacation for a week. During Bond’s absence, Claimant supervised all of Respondent’s crews.

38) While foreman, Claimant filled out daily time reports showing the different amounts of time each day he spent working on the job, driving, and performing "administrative" tasks. [7] The Agency offered, as Exhibit A-5, 196 of these reports as representative samples of the types of work performed by Claimant. On 50 of these, Claimant stated that he had performed no "administrative" tasks.[8] Based on Claimant's testimony that he performed some administrative work every day, and that he did not list the amount of time on the reports he spent on the phone with Bond and crewmembers each night after work, the forum finds that Exhibit A-5 understates the amount of time Claimant spent performing duties during the claim period that would qualify him as an exempt "executive employee." Consequently, the forum has not relied on Exhibit A-5 to determine the exact percentage of time Claimant spent performing duties that would qualify him as an exempt "executive employee" during the claim period. The forum notes that based on Claimant's record of his administrative time contained in Exhibit A-5, including driving and shop time,[9] Claimant spent a far greater amount of time performing his duties as company foreman than his testimony reflected. Exhibit A-5 reflects a total of 836.25 hours worked, including 480.25 hours (57%) spent working on a specific job, and 356 hours (43%) spent in the shop, driving, or doing "administrative" work. In marked comparison, Claimant testified that he spent "75-80%" of his time working shoulder-to-shoulder with Respondent's applicators.

39) During the wage claim period, applicators employed by Respondent were paid the following wages: Shane Cogburn - $6.50 per hour, Wayne McCormick - $8.00 per hour, Dave Strandquist - $9.00 per hour, John Standquist - $8.00 per hour.[10]

40) While Claimant was foreman, Bond counseled Claimant on "multiple" occasions that he was spending too much time doing the job with crewmembers and he needed to spend more time doing administration.

41) Bond gave Claimant a written job description on August 14, 1998. At that time, Claimant's job title was changed to Construction Operations Supervisor ("COS").[11] Bond took this action because of his concerns that Claimant was not spending enough time on management duties to adequately perform his job or to meet the statutory requirement for an exempt salaried employee. Claimant's duties and rate of pay did not change.

42) During the wage claim period, Claimant spent substantial amounts of time working side-by-side with applicators on job sites because he understood he was responsible for making sure Respondent's multiple jobs got done, and he believed it was the only way he could make sure the jobs were completed. As time went on, Claimant tried to work harder on Respondent's jobs, spreading himself out more to make sure Respondent's applicators had enough help to get the job done, and suggested hiring additional temporary employees when he perceived the need. Throughout the wage claim period, Claimant determined the personnel requirements for Respondent's jobs by personal observation and talking to Respondent's applicators at night.

43) During the wage claim period, Claimant worked 309.5 hours that were hours over 40 hours in a given work week. Based on Claimant's $500 per week salary, overtime wages for Claimant would have been calculated at $18.75 per hour.

44) On October 12, 1998, Bond demoted Claimant to the position of hourly employee, removed his supervisory responsibilities, and reduced his pay to $11.00 per hour. In a memorandum written on or about that same day, Bond documented his action in the following words:

> "Meeting with Ron Smith
>
> "Due to the job responsibilities not being fullfilled (sic) as Construction Operations Supervisor Ron Smith is relinquishing these responsibilities. effective immediately.

"Ron's wages are $11.00 per hour"

45) Respondent did not hire or promote anyone to perform the supervisory duties that Claimant was responsible for as COS. Instead, Bond resumed the field supervisory functions he had performed prior to Claimant's promotion. Since Claimant's demotion, Bond has been Respondent's only supervisory employee.

46) On March 23, 1999, Bond sent a letter to BOLI responding to receiving notice of Claimant's wage claim. In pertinent part, Bond wrote:

> "3. Mr. Smith was warned on several occasions that he was not complying with the time constraints required for salary exempt status and for not fulfilling other responsibilities.
>
> "4. Eventual[ly] Mr. Smith was returned to his former hourly laborers position because he fail[ed] to perform job responsibilities and to schedule time according to what was necessary for exempt status."

47) When Bond wrote Exhibit A-13, he believed that Oregon law required that, to qualify as "a salary overtime exempt employee," that employee had to spend "not less than 51%" of his or her time performing management and supervisory responsibilities and "not more than 49% of his or her time performing on the job duties normally designated for hourly workers."

48) Tim Jenrette's testimony was straightforward and consistent with other credible evidence on the record, and the forum has credited Jenrette's testimony in its entirety.

49) The testimony of Cary Kuvaas was brief and not contradicted by any other evidence in the record, and the forum has credited her testimony in its entirety.

50) John Strandquist appeared to listen carefully to questions asked him and responded in a direct, straightforward manner to all questions asked. His testimony was internally consistent and consistent with other credible evidence on the record and did not appear tailored to benefit Respondent, despite the fact that he was working as

an applicator for Respondent at the time of the hearing. The forum has credited his testimony in its entirety.

51) Shane Cogburn's mother, Shelby Cogburn, had been living with Claimant for almost three years at the time of the hearing, and Shane Cogburn ("Cogburn") lived with them at the time of the hearing, a fact that he did not disclose on direct examination. Cogburn also testified that he was "kind of close" to Claimant and would help Claimant out "if he was in a bind." Weighed against other credible evidence, his statement that he trained other new workers within a couple of days after he was hired was inherently improbable and seemed calculated to aid Claimant's case. Cogburn contradicted himself by testifying on cross-examination that he did not recall Claimant ever changing his task on any job site, then testifying minutes later that it was a fairly routine daily activity for Claimant to reassign him to another task on the same job site. Because of his apparent bias, and the contradiction and improbability in his testimony, the forum has credited Cogburn's testimony only where it was corroborated by other credible evidence.

52) Much of Wayne McCormick's testimony was confusing and he appeared to answer questions without giving them serious consideration, sometimes answering them before they were fully asked. He was not hired until mid-August 1998, which gave him only seven weeks during the claim period to observe Claimant's work. He testified that Claimant was demoted from the COS position "four months" after McCormick was hired, whereas the facts showed that Claimant's demotion occurred only one and one-half months after McCormick's hire, placing further doubt on the reliability of McCormick's testimony. The forum has credited McCormick's testimony only where it was corroborated by other credible evidence.

53) Shelby Cogburn is Claimant's girlfriend and had lived with him for almost three years at the time of the hearing. Her rebuttal testimony was limited in focus, responsive to the questions put to her, and unimpeached. Despite her bias, her testimony was credited in full.

54) Harvey Epperson's answers were responsive to the questions asked of him. He did not attempt to testify to matters of which he had no direct knowledge and did not exaggerate the facts. Although he was Respondent's office manager at the time of the hearing, the forum has concluded that his testimony was not slanted in favor of Respondent and has credited Epperson's testimony in its entirety.

55) Claimant was on the witness stand for almost an entire day. Although a large part of his testimony was credible, there were some significant internal inconsistencies in his testimony. This included conflicting testimony that he spent "15 to 20%" of his time in the office and that he was in the office "two to three times a week" from "minutes up to an hour"; testimony that he spent "75 to 80%" of his time working shoulder-to-shoulder with his crews, compared with his time reports, which showed that he spent 43% of his time driving, in the office, or doing "administrative duties"; testimony that it wasn't his job to go out and pick up materials on the job, compared with his statement in his wage claim form (Exhibit A-2) that his job duties included "picking up materials;" and testimony that he took directions from John Strandquist, contrasted with testimony that he bore the ultimate responsibility for all work done on Respondent's jobs. In addition, Claimant's unequivocal testimony that he had the ultimate responsibility for all work done on Respondent's jobs was in marked contrast with his exaggerated attempts to downplay his authority in actual practice, *e.g.* that his recommendations as to hiring and firing and where applicators should be assigned were given no particular weight by Bond. Consequently, the forum has credited Claimant's

testimony concerning the extent of his authority, his primary job duties, and the amount of time spent performing those job duties only where it is not disputed or is corroborated by other credible evidence. In addition, the forum has credited Claimant's contemporaneous handwritten record of how much time he spent each day in the performance of supervisory duties where it conflicted with his testimony.

56) Scott Bond was truthful in most of his testimony. However, his testimony contained an internal inconsistency that lessened his credibility regarding the extent to which Claimant carried out his primary duties. On one hand, Bond testified at length as to Claimant's freedom to make independent decisions and the extent to which Claimant carried his primary duties in an autonomous or semi-autonomous manner; on the other hand, he testified that Claimant had difficulty making the transition from worker to supervisor, that it was an ongoing process to get Claimant to perform the work necessary to qualify for an executive exemption, that Claimant wasn't doing his job, and that he finally demoted Claimant because he wasn't fulfilling his job responsibilities. In addition, Bond's testimony that Claimant had unilateral hiring and firing authority conflicted with Respondent's actual hiring and firing process.[12] Overall, the forum found Bond's testimony more credible than Claimant's regarding the extent to which Claimant actually performed his primary duties, and the forum has credited Bond's testimony over Claimant's on this issue except for the extent of Claimant's authority in the hiring and firing process. In addition, the forum has credited Bond's testimony in full regarding the nature of Claimant's primary duties and the extent of Claimant's authority.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Lane-Douglas Construction, Inc. was an Oregon corporation doing business in the state of Oregon, and engaged the personal services of one or more employees.

2) Respondent employed Claimant in Oregon from June 1996 through February 4, 1999.

3) Between October 5, 1997, and October 10, 1998 (the "wage claim period"), Claimant's primary duty consisted of management of Respondent's field operations.

4) During the wage claim period, Claimant customarily and regularly directed the work of two or more other employees.

5) During the wage claim period, Claimant's suggestions and recommendations as to the hiring or firing and as to the advancement and promotion of any other change of status of other employees were given particular weight.

6) During the wage claim period, Claimant exercised independent judgment and customarily and regularly exercised discretionary powers.

7) During the wage claim period, Claimant was paid a minimum of $500 per week, a predetermined amount constituting all or part of Claimant's compensation that was never less than the minimum wage and was not subject to deduction because of lack of work for part of a work week.

8) During the wage claim period, Claimant worked a total of 309.5 hours that were hours worked over 40 hours per week in a given work week. Claimant left Respondent's employment on February 4, 1999, and Claimant has not been paid wages for any of the 309.5 overtime hours.

9) At the time Claimant left Respondent's employment, Respondent did not owe Claimant any wages, and did not willfully fail to pay Claimant any earned wages.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405. During all times material herein, Respondent employed Claimant.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.405.

3) ORS 653.261(1) provides, in pertinent part:

> "The Commissioner of the Bureau of Labor and Industries may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to, * * * maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of such employees when computed without benefit of commissions, overrides, spiffs and similar benefits."

OAR 839-020-0030(1) provides, in pertinent part:

> "Except as provided in OAR 839-020-0100 to 839-020-0135 all work performed in excess of forty (40) hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed without benefits of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1)."

ORS 653.020 provides, in pertinent part:

> "ORS 653.010 to 653.261 does not apply to any of the following employees:
>
> "* * * * *
>
> "(3) An individual engaged in administrative, executive or professional work who:
>
> "(a) Performs predominantly intellectual, managerial or creative tasks;
>
> "(b) Exercises discretion and independent judgment; and
>
> "(c) Earns a salary and is paid on a salary basis."

OAR 839-020-0005 provides, in pertinent part:

> "As used in ORS 653.010 to 653.261 and in these rules, unless the context requires otherwise:
>
> "(1) 'Executive Employee" means any employee:
>
> "(a) Whose primary duty consists of the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof * * * and;
>
> "(b) Who customarily and regularly directs the work of two or more other employees therein; and

"(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion of any other change of status of other employees will be given particular weight; and

"(d) Who customarily and regularly exercises discretionary powers; and

"(e) Who earns a salary and is paid on a salary basis pursuant to ORS 653.025 exclusive of board, lodging, or other facilities."

OAR 839-020-0004 provides, in pertinent part:

"(25) 'Primary duty' means, as a general rule, the major part, or over 50 percent, of an employee's time. However, a determination of whether an employee has management as his/her primary duty must be based on all the facts of a particular case. Time alone is not the sole test and in situations where the employee does not spend over 50 percent of his/her time in managerial duties, he/she might have management as a primary duty if other pertinent factors support such a conclusion. Factors to be considered include, but are not limited to, the relative importance of the managerial duties as compared with other duties, the frequency with which the employee exercises discretionary powers, the relative freedom from supervision, and the relationship between the salary paid the employee and wages paid other employees for the kind of non-exempt work performed by the supervisor.

"* * * * *

"(29) 'Salary' means a predetermined amount constituting all or part of the employee's compensation paid for each pay period of one week or longer (but not to exceed one month) and in no instance shall be any amount less than required to be paid pursuant to ORS 653.025.

"(30) 'Salary basis' means a salary as defined in section (29) of this rule, which is not subject to deduction because of lack of work for part of a work week, however, deductions for absences of one day or more may be made if the employee is absent for other reasons. Deductions may not be made for absences of less than one day, except as permitted for employers covered by the federal Family and Medical Leave Act of 1993, Public Law 103-3, for part-day absences due to leave pursuant to that law. Employees who are not paid for work weeks in which they performed no work are considered to be on a salary basis provided they are paid on a salary basis in work weeks when work is performed.

"(b) Payment of additional compensation is not inconsistent with the salary basis of payment."

Claimant was an exempt “executive employee” as defined by OAR 839-020-0005(1). Pursuant to OAR 653.020(3), Respondent was not required to pay Claimant wages for his overtime work.

4) ORS 653.055(1) provides:

> "(1) Any employer who pays an employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261 is liable to the employee affected:
>
> "(a) For the full amount of the wages, less any amount actually paid to the employee by the employer; and
>
> "(b) For civil penalties provided in ORS 652.150."

ORS 652.140(2) provides:

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

Respondent did not owe Claimant any unpaid wages at the time Claimant left Respondent’s employment and did not violate ORS 652.140(2).

5) ORS 652.150 provides:

> “If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued.”

Respondent did not willfully fail to pay any wages or compensation to Claimant and does not owe any penalty wages to Claimant.

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the wage claim and Agency's Order of Determination filed against Respondent, as amended at hearing, are hereby dismissed.

OPINION

INTRODUCTION

The Agency alleges that Respondent owes Claimant $5,803.13 based on 309.5 hours worked in excess of 40 hours in a given work week during the wage claim period. Respondent does not dispute the number of hours or amount of overtime wages computed for those hours. The only issue is whether Respondent is liable for payment of those wages, based on Respondent's affirmative defense that Claimant was an "Executive Employee" under ORS 653.020, and as such, exempt from the overtime requirements of ORS 653.261(1) and OAR 839-020-0030(1). To resolve this issue, the forum examines ORS 653.020, OAR 839-020-0004(25)(29)(30), OAR 839-020-0005(1), prior Final Orders, and related federal statutes and administrative regulations.

"EXECUTIVE EMPLOYEE"

Respondent bears the burden of proof of establishing that Claimant was exempt as an "executive employee" from the overtime requirements of ORS 653.261 and OAR 839-020-0030(1). *In the Matter of Diran Barber*, 16 BOLI 190, *n*. 198 (1997). Simply giving Claimant the title of company foreman and putting him on salary is not enough to automatically exclude him from the requirements of Oregon's minimum wage law regarding payment of overtime wages. *See, e.g., Barber*, at 16 BOLI 190, *n*. 197; *In the Matter of Burrito Boy, Inc.*, 16 BOLI 1, 19 (1997). Rather, Respondent must establish all three elements of ORS 653.020(3) and the five elements contained in OAR 839-020-0005(1)'s definition of "Executive Employee" in order to prevail in this matter.

In this case, those elements are as follows:

(1) Claimant's primary duty consisted of the management of Respondent's field operations [ORS 653.020(3)(a); OAR 839-020-0005(1)(a)];

(2) Claimant customarily and regularly directed the work of two or more other employees in Respondent's field operations [OAR 839-020-0005(1)(b)];

(3) Claimant had authority to hire or fire other employees, or his suggestions and recommendations as to the hiring or firing and as to the advancement and promotion of any other change of status of other employees was given particular weight [OAR 839-020-0005(1)(c)];

(4) Claimant exercised independent judgment and customarily and regularly exercised discretionary powers [ORS 653.020(3)(b); OAR 839-020-0005(1)(d)];

(5) Claimant earned a salary and was paid on a salary basis pursuant to ORS 653.025 [OAR 839-020-0005(1)(d)].

The forum evaluates these elements in order of their factual and legal complexity, starting with the simplest.

A. Claimant Earned a Salary and was Paid on a Salary Basis.

"Salary" is a "predetermined amount constituting all or part of the employee's compensation paid for each pay period of one week or longer" that cannot be less than minimum wage. OAR 839-020-0004(29). It is undisputed that Claimant was paid a base salary of $500 per week, on a weekly basis, during the wage claim period, and that his pay rate never went below the minimum wage. "Salary basis" means a "salary" that is not subject to deduction because of "lack of work for part of a work week." OAR 839-020-0004(30). Undisputed evidence also establishes that Claimant was paid his full salary each week during the wage claim period, including 17 weeks when he worked fewer than 40 hours. Accordingly, the forum concludes that Claimant earned a salary and was paid on a salary basis during the wage claim period.

B. Claimant Customarily and Regularly Directed the Work of Two or More Other Employees in Respondent's Field Operations.

The evidence was undisputed that Claimant had supervisory authority over all of Respondent's applicators on all of Respondent's job sites, and that there were a minimum of two applicators employed by Respondent at all times during the wage claim period. Although Claimant attempted to downplay the extent to which he actually exercised this authority, the forum has determined, based on assessments of witness credibility, that Claimant exercised his supervisory authority in Respondent's field operations on a customary and regular basis, directing the work of two or more employees.[13]

C. Claimant's Suggestions and Recommendations as to the Hiring or Firing and as to the Advancement and Promotion of any Other Change of Status of Other Employees were Given Particular Weight.

Bond, Respondent's president, testified that Claimant had unilateral hiring and firing authority, and the evidence shows that Aron Rowe was terminated, apparently by Claimant, when he refused to perform an assigned task. However, the forum remains skeptical that Claimant had unilateral hiring and firing authority throughout the wage claim period. The main reason for this is because undisputed evidence showed that Respondent's hiring process for applicators consisted of an interview with Claimant, who in turn made a recommendation to Bond, who made the final hiring decision. The same type of process was followed with terminations and raises – Claimant made recommendations to Bond, who made a final decision.

The forum draws a different conclusion as to the weight Bond gave to Claimant's recommendations. Claimant opined that Bond did not give his recommendations regarding hiring, firing, or raises any particular weight. However, this opinion is not borne out by the facts. First, Bond hired every person recommended by Claimant, and there is no evidence that he hired anyone whom Claimant had not recommended by

Claimant. Second, Claimant recommended that Eric Cavanaugh and Shane Cogburn be terminated, and discussed Rick Kilgore's numerous performance problems with Bond. Bond instructed Claimant to terminate Cavanaugh and Kilgore, but told him not to terminate Cogburn on the grounds that Cogburn would be leaving in two weeks anyway. Third, Claimant recommended that Kilgore and Cavanaugh be given raises of $0.50 per hour and $1.00 per hour, respectively, and Bond gave Kilgore and Cavanaugh raises of $0.50 per hour and $0.75 per hour. In sum, except for his disagreement that Cogburn should be terminated immediately, and his decision that Cavanaugh should get a $0.75 per hour raise instead of the $1.00 per hour recommended by Claimant, Bond followed every one of Claimant's recommendations regarding hiring, firing, and raises. This undisputed evidence, coupled with Bond's credible testimony that he listened to Claimant's recommendations and gave them weight, overcomes Claimant's unsupported opinion that Bond did not give Claimant's recommendations any particular weight, and leads the forum to conclude exactly the opposite.

D. Claimant Exercised Independent Judgment and Customarily and Regularly Exercised Discretionary Powers.

This forum has not previously discussed this element of the executive exemption in any depth, and there are no reported Oregon cases on point. Consequently, the forum looks for guidance to the federal regulations interpreting the federal exemption statute, which is nearly identical to ORS 653.020(3).[14] Those regulations provide that this requirement will be met by an employee who normally and recurrently is called upon to exercise and does exercise discretionary powers in the day-to-day performance of his duties, but will not be met by the occasional use of discretionary powers. 29 CFR § 541.107. A person whose work is so completely routinized that he has no discretion does not qualify for an executive exemption. *Id.*

Based on its credibility assessments, the forum finds that Claimant's depiction of the extent to which he exercised independent judgment and customarily and regularly exercised discretionary powers was understated in the same manner that he attempted to downplay the extent to which he supervised Respondent's applicators. The evidence established that Claimant independently exercised a number of discretionary powers, including determining when temporary help was needed; determining if work was being done correctly and in a timely manner; disciplining employees; deciding his own work schedule, the particular job sites he visited, the times he visited them, and the work he did on those job sites; assigning applicators to specific jobs; reassigning applicators to other tasks on a particular job site; and reassigning applicators to another job site. Some of these discretionary powers may have been exercised on an occasional basis, such as disciplining employees, but on the whole they involve the type of discretion that a company foreman who had ultimate responsibility over Respondent's field operations would be expected to normally and recurrently exercise in the day-to-day performance of his duties. A preponderance of evidence presented at the hearing established that Claimant in fact independently exercised these discretionary powers on a regular basis. Based on the above, the forum concludes that Respondent has met its burden of proof on this element.

E. Claimant's Primary Duty Consisted of the Management of Respondent's Field Operations.

OAR 839-020-0004(25) contains the definition of "primary duty" as it relates to the "executive employee" exemption:

> "'Primary duty' means, as a general rule, the major part, or over 50 percent, of an employee's time. However, a determination of whether an employee has management as his/her primary duty must be based on all the facts of a particular case. Time alone is not the sole test and in situations where the employee does not spend over 50 percent of his/her time in managerial duties, he/she might have management as a primary duty if other pertinent factors support such a conclusion. Factors to be

> considered include, but are not limited to, the relative importance of the managerial duties as compared with other duties, the frequency with which the employee exercises discretionary powers, the relative freedom from supervision, and the relationship between the salary paid the employee and wages paid other employees for the kind of non-exempt work performed by the supervisor."

The forum interprets Bond's written acknowledgment that Claimant "was not complying with the time restraints required for salary exempt status" during the wage claim period,[15] coupled with the fact that Bond believed a supervisory employee had to spend "not less than 51%" of work time performing management and supervisory duties to be exempt from overtime,[16] as an admission that Claimant spent less than 51% of his time performing duties that would qualify him as an "executive employee" under OAR 839-020-0005(1). If percentage of time spent in performance of management duties were the sole determinant of whether or not Claimant's "primary duty" was management of Respondent's field operations, the forum's inquiry would be at an end. However, because OAR 839-020-0004(25) specifically provides that the forum's determination "must be based on all the facts of a particular case," and that "[t]ime alone is not the sole test * * *," the forum must consider the other factors listed in the rule to determine if Claimant's "primary duty consist[ed] of management of * * * a customarily recognized department or subdivision" of Respondent's business, in this case, Respondent's field operations. OAR 839-020-0005(1)(a). Before examining the other factors listed in OAR 839-020-0004(25), the forum notes that there is no dispute that Claimant's duties as company foreman were carried out in relationship to Respondent's field operations, or that Respondent's field operations meet the definition of "a customarily recognized department or subdivision" of Respondent's business.

1. The relative importance of Claimant's managerial duties as compared with other duties.

An accurate perspective of the relative importance of Claimant's managerial duties, as compared with his other duties, can be obtained by reviewing the evolution of Respondent's business and Claimant's role and responsibilities during that evolution.

When Claimant was first hired by Respondent in June 1996, Respondent typically worked on only one job at a time, performing commercial and residential caulking and insulation. Respondent employed Tim Jenrette as a "working foreman," at the wage rate of $10.00 or $10.50 per hour, to work side-by-side with applicators and make sure "things got done" on Respondent's jobs. Scott Bond performed all other managerial responsibilities, such as hiring and firing. By the time Claimant was promoted to company foreman in August 1997, Respondent's business had undergone a substantial change. Respondent was working almost exclusively as a subcontractor on new commercial construction, had begun doing waterproofing, and frequently worked on multiple jobs at different job sites at the same time. Because of these changes, Bond determined that he needed to hire a company foreman in order to free himself to spend more time on sales and estimating.

Bond met with Claimant, and they mutually agreed to Claimant's promotion, new duties, and salary, which represented a substantial increase in pay. Although the participants disagreed as to the extent to which Claimant subsequently performed his new duties, they were in agreement as to the nature of those duties, which made Claimant responsible for virtually every aspect of running Respondent's field operations.

During the wage claim period, Claimant identified himself as the "company foreman" who had ultimately responsibility for the work done on Respondent's multiple job sites, no matter who did the work. Claimant was the only foreman employed by Respondent in that time, and Bond was the only person above him in the company

hierarchy. Testimony by Bond and time reports maintained by Claimant establish that Claimant spent 40-50% of his time performing duties of the type listed in OAR 839-020-0005(1). He received warnings from Bond that he was inadequately performing his foreman duties, and he was finally demoted for that reason, taking a substantial reduction in pay.[17] There is no evidence that Claimant was ever criticized for "applicator" work he performed during the wage claim period, or that his demotion was based on unsatisfactory "applicator" work.

Based on the relative importance that both Claimant and Bond ascribed to Claimant's "foreman" duties and the actual amount of time Claimant spent performing those duties, the forum concludes Claimant's managerial duties were of greater relative importance than his non-managerial duties.

2. The frequency with which Claimant exercised discretionary powers.

This issue was discussed in the Opinion, *infra*, under the subtitle "D. Claimant Customarily and Regularly Exercised Discretionary Powers," in which the forum concluded that Claimant exercised a number of discretionary powers associated with management of Respondent's field operations on a regular basis. The frequency to which Claimant exercised his discretionary powers points to the conclusion that Claimant's primary duty was managerial in nature.

3. Claimant's relative freedom from supervision.

Claimant's only supervisor was Bond. Claimant testified that his daily contacts with Bond consisted of up to several phone calls a day to discuss the status of Respondent's jobs and a 15 minute consultation with Bond each night to discuss the next day's work, as well as the status of Respondent's jobs. The rest of the time, Claimant determined the manner in which he carried out the tasks he performed each day. While it is undoubtedly true that Bond had a say in how Claimant performed his

daily tasks, the same holds true for any management employee who is not the owner or CEO of a company. The bottom line is that Claimant supervised the employees he spent the bulk of his time with each day; they did not supervise him. This evidence supports a conclusion that Claimant's primary duty was management.

4. The salary paid the Claimant and wages paid to other employees for the kind of non-exempt work performed by Claimant.

Claimant earned $8.50 per hour before his promotion, the equivalent of $12.50 per hour during the wage claim period,[18] and $11.00 per hour after he was demoted. Other applicators employed during the wage claim period earned $6.50 to $9.00 per hour for performing the kind of non-exempt work performed by Claimant. This substantial difference in pay rate supports a conclusion that Claimant's primary duty was management.

5. Conclusion.

Based on the four factors discussed above, the forum concludes that Respondent satisfied its burden of proving that Claimant's "primary duty" consisted of the management of Respondent's field operations. In doing so, Respondent has established that Claimant was an "executive employee" pursuant to ORS 653.020(3) and OAR 839-020-0005(1) who was exempt from the requirements of ORS 653.010 to 653.261, including the entitlement to overtime wages for hours worked over 40 in a given work week.

ORDER

NOW, THEREFORE, as Respondent has been found to have paid Claimant all wages due and owing by the date of his termination from Respondent's employment, the Commissioner of the Bureau of Labor and Industries hereby orders that Order of Determination 99-0568 against Lane-Douglas Construction, Inc., is hereby dismissed.

[1] This includes Exhibit R-105a, which was submitted prior to hearing, but renumbered at hearing.

[2] "Applicator" was the term consistently used by witnesses during the hearing to describe Respondent's crewmembers who had no supervisory responsibilities, and the forum uses that term throughout the proposed order to refer to employees who fall into this category.

[3] When Claimant was asked if he was John Strandquist's supervisor, he testified "I was the foreman of the company."

[4] Cogburn testified he quit Respondent's employment in September 1998 to attend college.

[5] This event occurred on 9/8/97, prior to the wage claim period but after the time Claimant had been promoted to company foreman.

[6] *See* Finding of Fact – The Merits 38, *infra*.

[7] Although Claimant and Bond used the term "administrative" in listing the types of supervisory or management-related work Claimant was supposed to list on Claimant's time reports, based on the affirmative defense plead in Respondent's answer, which exactly mirrors the definition of "Executive Employee" contained in OAR 839-020-0005(1), the forum understands Respondent's affirmative defense to be that Claimant was exempt from overtime as an "Executive Employee," not as an "Administrative Employee" pursuant to OAR 839-020-0005(2), and has evaluated Claimant's claim and Respondent's defense under that standard.

[8] Claimant testified that, for purposes of filling out the time reports, he considered "administrative" tasks to be time spent driving, loading and unloading materials, waiting for deliveries, and sometimes training new employees. Because there were often a number of time reports for the same date, these 50 time cards did not reflect that Claimant wrote he had worked no "administrative" time on 50 separate days. In fact, they only reflected four days within the wage claim period for which Claimant recorded no "administrative" time.

[9] Claimant and Bond seemed to be in agreement that the time Claimant reported as "shop," "drive," and "administrative" time was related to Claimant's job as company foreman. This is supported by testimony that Claimant's time in the shop involved meeting with Bond, doing paperwork, and meeting with applicators, as well as testimony that Claimant's driving time included transporting applicators to job sites in one of Respondent's vehicles, and driving from one job site to another. In the context of Claimant's overall job duties, these specific duties were management functions. Accordingly, the forum infers that all the time recorded by Claimant as "shop," "drive," and "administrative" time was time spent in performance of duties that would qualify Claimant as an exempt "executive employee."

[10] No evidence was presented concerning the wage rate received by other crewmembers employed by Respondent while Claimant was company foreman.

[11] To avoid confusion, the forum has referred to Claimant as a "foreman" throughout the wage claim period.

[12] *See* Opinion, section "C," *infra*, for a more detailed discussion on this point.

[13] *See* Findings of Fact – The Merits 22-26, 29-30, 35-37, 50-56, *supra*.

[14] See 29 USCS § 213 (1), which exempts:

> "[a]ny employee employed in a bona fide executive, administrative, or professional capacity * * * (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative procedure Act * * *)[.]"

[15] *See* Finding of Fact – The Merits 46, *supra*.

[16] *See* Finding of Fact – The Merits 47, *supra*.

[17] The Agency argued that the circumstances of Claimant's demotion proved that Claimant's primary duties were not managerial, in that Claimant was demoted based on not spending at least 51% of his time performing those duties and his inadequate performance of those duties, the latter flowing in part from the former. Where there is no evidence of subterfuge showing that the employer is deliberately attempting to circumvent the overtime laws, the extent of duties assigned to an employee is undisputed, and those duties place an employee within the statutory definition of an "Executive Employee," the forum does not

believe that the law was intended to make the employee's inadequate performance of those duties a basis for retroactively lifting the employee's exemption from entitlement to overtime pay.

[18] This figure is derived from the Agency's calculations of overtime wages and civil penalty wages, both of which were based on an hourly figure of $12.50 per hour.