

In the Matter of
NORTHWEST PERMASTORE SYSTEMS, INC.

Case No. 40-98

April 4, 2000

FINAL ORDER ON RECONSIDERATION

SYNOPSIS

Respondent, which operated a water tank construction business, failed to pay the prevailing wage rate to five employees for the work they performed on a public works contract. The Forum imposed civil penalties totaling \$1524.29 for the five violations of ORS 279.350. The Forum also found that Respondent committed a single violation of ORS 279.354, which requires the filing of accurate certified payroll records, and imposed a \$1000.00 penalty for that violation.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on August 6, 1998, in the conference room of the Bureau of Labor and Industries, 3865 Wolverine Street, N.E., Suite E1, Salem, Oregon. The Wage and Hour Division ("WHD") of the Bureau of Labor and Industries ("the Agency") was represented by David Gerstenfeld, an employee of the Agency. Respondent was represented by Robert L. O'Halloran, Allen, Yazbeck, O'Halloran & Hanson, Portland. Alice Pender, Respondent's corporate representative, was present throughout the hearing.

The Agency called as witnesses: Alice Pender (Respondent's president, secretary/treasurer, and owner); Lora Lee Grabe (an Agency prevailing wage rate lead worker and compliance specialist); Robert Clerihew (business representative for

Ironworkers Union Local 29); Steve Nelson (business manager for Boilermakers Union Local 500); and Lee Clinton (business manager of Laborers Union Local 121).

Respondent called as witnesses: Alice Pender and Michael Poole (Supervisor, field service operations, A.O. Smith Harvestore Products).

The ALJ admitted into evidence: Administrative Exhibits X-1 through X-17; Agency Exhibits A-1 through A-8, A-14 through A-16, A-18, and A-20; and Respondent's Exhibits R-1 through R-33.

On February 3, 1999, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, having fully considered the entire record in this matter, issued the Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order in this case. Thereafter, Respondent sought judicial review in the Oregon Court of Appeals. On February 14, 2000, through counsel, the Agency filed its Notice of Withdrawal for Purposes of Reconsideration in the Court of Appeals.

On April 4, 2000, having reconsidered the record and the legal issues presented in this case, I make the following Findings of Fact, Ultimate Findings of Fact, Conclusions of Law, Opinion, and Final Order on Reconsideration.

FINDINGS OF FACT – PROCEDURAL

1) On December 3, 1997, the Wage and Hour Division issued a Notice of Intent to Assess Civil Penalties. The Agency cited the following bases for the proposed penalties: failure to pay the prevailing wage rate ("PWR") (five alleged violations) and misclassification of workers on certified statements of payroll record (two alleged violations). The Notice of Intent informed Respondent that it had 20 days in which to request a contested case hearing. The Notice of Intent was served on Robert L. O'Halloran, counsel for Respondent, on December 4, 1997. Six days later, the Notice of Intent also was served on Alice Pender, Respondent's registered agent.

2) Respondent filed a timely Answer on December 30, 1997. Respondent also requested a contested case hearing.

3) On January 7, 1998, the Forum received the Agency's first request for hearing. That request was revised on March 10, 1998, to indicate that the case would be presented by Agency employee Gerstenfeld.

4) On April 15, 1998, the Agency submitted a second request for hearing in this matter.

5) On April 16, 1998, the Forum issued a Notice of Hearing, which set July 28, 1998, as the first day for the contested case hearing. With the Notice of Hearing, the Forum served on Respondent the following: a) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; and b) a complete copy of the Agency's administrative rules regarding the contested case process.

6) On April 24, 1998, ALJ Doug McKean ordered the Agency and Respondent each to submit a summary of the case including: a list of witnesses to be called; the identification and description of any document or physical evidence to be offered, together with a copy of any such document or evidence; and a statement of any agreed or stipulated facts.

7) By order dated May 8, 1998, the case was reassigned to ALJ Warner W. Gregg. The hearing date was reset to commence on Thursday, August 6, 1998, and the deadline for case summaries also was reset. The participants filed timely case summaries.

8) On June 3, 1998, the Forum received the Agency's request for a discovery order. The participants later completed discovery through informal proceedings, and no formal discovery order was issued.

9) By motion dated June 9, 1998, Respondent requested a setover of the hearing "to accommodate the conclusion of a pending NLRB arbitration set for July 10, 1998 which bears on the matters in dispute in this proceeding." The Agency opposed the motion. On June 11, 1998, the ALJ issued an order denying the motion on the grounds that the Commissioner would not necessarily be bound by the result in the other matter, and that the pendency of another proceeding involving similar issues did not warrant a postponement of the hearing.

10) With a June 28, 1998, cover letter, Gerstenfeld provided O'Halloran with a cassette recording of an April 1997, meeting between Pender and Agency investigators. He also informed O'Halloran of the Agency's desire to amend the Notice of Intent to "make the civil penalty amounts more factually accurate."

11) On July 27, 1998, the Agency moved to amend the Notice of Intent. Respondent filed no opposition to the motion, which the ALJ granted at the hearing. The Amended Notice of Intent alleged eight bases for the assessment of civil penalties: seven alleged failures to pay the PWR and one misclassification of workers on certified statements of payroll record. Respondent filed an Answer to the Amended Notice on August 5, 1998.

12) On August 4, 1998, the participants submitted a statement of Stipulated Facts.

13) At the start of the hearing, counsel for Respondent stated that his client had received the Summary of Contested Case Rights and Procedures and said he had no questions about it.

14) 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) On December 30, 1998, the ALJ issued a proposed order that included an Exceptions Notice that allowed ten days for filing exceptions to the proposed order. Respondent filed timely exceptions, which are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all material times, Respondent was a non-union contractor duly registered with the Oregon Construction Contractors Board and was authorized to perform construction in Oregon and several other states. Alice Pender was Respondent's president, secretary, treasurer, and owner.

2) The City of Yoncalla Standpipe and Waterline Extension Project ("the project") was a public works contract contracted for by the City of Yoncalla, a public agency, and was subject to Oregon's PWR laws (ORS 279.348, *et seq.* and the administrative rules adopted thereunder). The project involved installation of a 100,000 gallon water standpipe¹ and installation of waterline, sanitary sewer service line, fire hydrants, and appurtenances. Western Oregon Excavation was the prime contractor on the project.

3) Respondent was the sole bidder for the standpipe work on the project, which the bidding materials described, in pertinent part, as follows: "Furnish and erect a glass-coated, bolted steel water storage tank, including foundation, tank structure and tank appurtenances as shown on the contract drawing and described herein." The contract specified a "model 20 56 Aquastore Tank systems manufactured by A.O. Smith Harvestore Products, Inc. of DeKalb, Illinois," or "[a]lternate glass-fused-to-steel tank products, as provided by other manufacturers * * * ." Respondent was awarded the \$92,096.79 subcontract for the standpipe portion of the project.

4) The contract documents for the project, which governed Respondent's work, included provisions requiring contractors and subcontractors to comply fully with ORS 279.348 through ORS 279.361, the Oregon PWR statutes.

5) The Aquastore tanks produced by A.O. Smith Harvestore Products ("AO Smith") are constructed of 5-foot by 9-foot panels that are made of glass fused to steel using a proprietary process. To build a tank, a concrete and rebar foundation first is laid. Pre-formed panels are then bolted together into a ring, with a sealant placed between the sheets. The first ring of panels is embedded into the concrete foundation. More rings of panels are then constructed. As each ring is completed, it is jacked vertically above the tank foundation and first embedded ring (using another proprietary process), so that another ring can be constructed beneath it. Those two rings are connected, jacked up, and another ring is built beneath them. The process repeats until the tank has reached the specified height. Because of the jacking process, scaffolding is not needed, and the tank erection workers do not work higher than 10 feet off the ground. No welding is involved in the tank construction process. Instead, workers use impact wrenches and torque wrenches to bolt the tank panels together.

6) The AO Smith Aquastore tanks are water- and air-tight except for vents at the top.

7) AO Smith requires its tanks to be installed by "certified builders" who have attended its builders schools, where they learn how to care for and protect the glass-fused-to-steel panels. Many of Respondent's employees have successfully completed AO Smith's training. Respondent is the only licensed dealer of AO Smith products in Oregon and also has exclusive dealerships in all or part of several other states.

8) The opening date for bids on the project was August 23, 1996. Respondent's work on the subcontract commenced the week ending November 30,

1996, and was completed in January 1997. Consequently, the PWRs applicable to Respondent's work on the project are found in the July 1, 1996 Agency document titled "PREVAILING WAGE RATES for Public Works Contracts in Oregon" ("the July 1996 PWR Booklet"). That publication set the basic hourly rate for boilermakers at \$23.57 and the fringe benefits rate at \$8.76/hour. The PWR for Laborers, Group 2 (or "Laborers 2") was \$17.44/hour plus \$7.05/hour fringe benefit and \$0.65/hour Zone 2 differential for sites (like this one) more than 30, but less than 40 miles from the nearest reference city.

9) During November and December 1996, some of Respondent's employees poured concrete and tied rebar for the foundation of the standpipe. Respondent did not start erecting the standpipe itself until sometime in January 1997, and the work was completed during the week ending January 25, 1997. Of the employees listed in the Notice of Intent, only those also listed on payroll records for January 1997 performed tank erection work. Steve Pender and Rick Hlavinka worked only on the foundation.

10) At all material times, Pender believed that tank erection work fell within the classification for Laborers 2 and that the PWR laws required Respondent only to pay Laborers 2 wages for such work. Some time ago, however, based on Pender's discussions with other AO Smith dealers and Respondent's own experience with the United States Department of Labor ("USDOL"),² Respondent started compensating employees who work on tank erection by paying them Laborers 2 wages for 75% of their hours and the higher Ironworkers wages for the remaining 25% of their hours.³ Respondent referred to this method of compensating its employees, which has been its regular practice since about 1993, as the "split wage" system.

11) Respondent's employees generally did not indicate on their timecards the numbers of hours they had spent performing tank erection work, but denominated those

hours (along with hours spent on other tasks) as "labor." Pender then determined, based on her knowledge of the sort of work that had been performed on any day, the days during which employees had done tank erection work, and paid the split wage for those hours.

12) During January 1997, Respondent's employees worked the following numbers of hours performing tank erection work on the project:⁴

<u>Employee</u>	<u>Straight Hours</u>	<u>Overtime Hours</u>
Holbrook	84.5	2.0
Keeshan	76.5	
Meier	40.0	
Janesofsky	8.0	
Rabe	48.0	

For all this time, Respondent initially paid Holbrook, Keeshan, Janesofsky, and Meier \$17.44/hour plus \$7.70/hour fringe benefit and zone differential for their straight hours, and \$27.14/hour plus \$7.05/hour fringe benefit and zone differential for overtime. These wages are the prevailing wages for Laborers 2 listed in the July 1996 PWR Booklet. Rabe performed supervisory work, and Respondent paid him \$1.50/hour more than the other workers.

13) As reflected in the previous paragraph, a relatively inexperienced payroll clerk of Respondent initially paid the workers (other than Rabe) on this project at the Laborers 2 rate for all of the time they had spent at tank erection, instead of compensating them according to the split wage system. Pender discovered the discrepancy after the Agency started its investigation of this matter, and recalculated the employees' wages. She determined that Keeshan and Holbrook would have been entitled to additional pay under the split wage system and paid them those extra wages.

The total wages Respondent eventually paid the five workers for tank erection work they performed in January 1997 (including fringe benefit and zone differential) are as follows:

<u>Employee</u>	<u>Total wages paid</u>
Holbrook	\$2308.20
Keeshan	\$2027.33
Janesofsky	\$201.12
Meier	\$1060.40
Rabe	\$1275.72

14) At no time did Respondent compensate its employees on this project at the PWR for boilermakers.

15) By letter dated March 16, 1997, Peter Christensen, with the Oregon & Southwest Washington Fair Contracting Foundation, notified the Agency of his belief that Respondent had "paid laborers' wage rates for the erection of a water standpipe." Christensen further asserted that the "Index of Job Classifications to Supplement Prevailing Wage Rates for Public Works Contracts in Oregon" states that standpipe repair and construction is a boilermaker's classification." Christensen included a completed complaint form with his letter to the Agency.

16) By letter dated April 3, 1997, Agency investigator Sanford Groat informed Respondent that the Agency had received a PWR complaint. Groat asserted:

"The contract indicates that the project is an standpipe and waterline extension. Workers involved in the standpipe installation should be paid as Boilermakers. According to the certified payroll that we received from the contracting agency it appears that the workers on the project were paid as general laborers. There were no Boilermakers listed on the certified payrolls."

Groat asked Respondent to submit payroll records for all workers on the project and to explain why it believed the workers properly were classified as laborers. Groat also provided Respondent with a page from the Index of Prevailing Practice stating that

"boilermaker" is the correct classification for standpipe repair and construction work.⁵

Before receiving Groat's letter, Pender never had seen the Index.

17) Pender responded to Groat's letter by a facsimile transmission dated April 14, 1997, stating that she would request a hearing on the matter.

18) The Agency's July 1996 PWR Booklet lists various classifications of workers, including boilermakers, ironworkers, and laborers, and specifies the PWR for each type of worker. The publication does not define what work comes within the "Boilermaker" classification. The publication states:

"These classification titles should be used according to common practice. Try to fit your workers into existing classifications. If you need residential construction rates, or if you have questions about how to classify workers, call the Prevailing Wage Rate Coordinator at (503) 731-4074."

19) At some point in March or April 1997, Pender called the telephone number provided in the July 1996 PWR Booklet. PWR Coordinator Hedera Trumbo informed her that the trade classification for standpipe erection was boilermaker.

20) On April 18, 1997, Groat sent Pender a copy of an Agency flier titled "Determination of Prevailing Wage Rate in Relation to the Prevailing Practice" (the "Prevailing Practice Flier"). That document states, in pertinent part:

"The practices of the majority of workers engaged in construction determine the wages to be paid for work performed in any particular classification on public works projects. If the majority of workers is found to be subject to a collective bargaining agreement, then the practices of those subject to the agreement will dictate the wage rates to be paid and worker classifications to be used for the type of work performed.

"Whether a particular type of work can be performed by workers in a particular classification is not the question when determining prevailing practice. The type of work that is performed by a worker in a particular classification, regardless of whether it can be performed by workers in another classification, is the relevant question.

* * *

"The Labor Commissioner is required to determine the prevailing wage rate, which is defined, in relevant part, as the wage rate paid to the majority of workers in any trade or occupation. To that end, the

Commissioner may consider the findings of an appropriate federal agency which determines prevailing wages. The U.S. Department of Labor (USDOL) has determined that, with few exceptions, the majority of workers in every trade or occupation are covered by a collective bargaining agreement.

"The Commissioner avoids wasteful governmental duplication of existing survey information by accepting the findings of the USDOL. Those findings clearly state that the majority * * * of the workers engaged in heavy, highway or commercial construction work are union workers, and thus are covered by collective bargaining agreements. Those agreements and the body of jurisdictional dispute resolutions which have evolved from them, thus become the logical source for making determinations as to which trade classification would, in the majority of instances, do a particular type of work. This would be, by definition, the Prevailing Practice. In those few cases where USDOL determines the majority rate is not a union rate, then the Prevailing Practice would be determined by the actual practice of the majority of employees of all contractors (both union and non-union) in the particular type of construction and area."

These policies are reiterated in a December 1993 policy statement in the Agency's field operations manual ("FOM").

21) On April 28, 1997, Pender met with Groat and Agency PWR lead worker Lora Lee Grabe to discuss classification of the standpipe erection work.⁶ Groat clarified that the Agency was concerned about only the erection of the glass-fused-to-metal tank itself, and not the construction of the cement and rebar foundation. The Agency agreed not to file against the prime contractor's bond for the wages it believed Respondent owed its employees if Respondent would give the Agency checks for the disputed amounts. Pender provided the Agency with checks made out in the employees' names, with the understanding that the Agency would retain those checks in lieu of filing against the bond.

22) After the meeting, Pender asked Groat to provide her with a copy of the FOM, which he and Grabe had referenced during their meeting. The Agency did not provide the FOM because it already had given Pender the Prevailing Practice Flier, which contains the same information as the portion of the FOM that Groat and Grabe

had discussed at the meeting. The Agency also provided a copy of the applicable administrative rules.

23) On July 15, 1997, Pender informed Groat that other glass-fused-to-steel bolted tank erectors and other bolted steel tank erectors had told her that their employees generally were classified as laborers, not boilermakers. She stated further:

"The exception is when they go on an all-union closed shop project, and they have to have at least one or two of the crew be union, then the classification is either SHEETMETAL WORKERS OR IRONWORKERS. At no time is it Boilermakers! And in those cases the employer chooses the classification which they deem to be most appropriate!

"With the exception of the pressure vessel tanks, the Boilermakers gave jurisdiction in the mid-30's to the Ironworkers for bolted tanks, so when and if a classification other than Laborer is used, it is ironworker, and then only for a portion of the tank work.

* * *

" * * * And to avoid even any question we have always paid a portion of the work on the tank as Ironworkers. I went back to talk with Pamela Graham, our Payroll Clerk, regarding the information I had brought to you, since it only showed Laborers pay and not Ironworkers for tank work. She did not know how we missed paying that. I then had her check every other prevailing wage rate project we have done to insure that the split between classes were in fact paid, and they have been. I would not be adverse to making up the difference between the split wages for the crew * * * and will pay them regardless of the outcome of this dispute."

24) By letter dated July 16, 1997, Groat asked Pender to submit the names and telephone numbers of the people with whom she had spoken so the Agency could confirm the information in Pender's letter. On July 21, Pender responded that she would get back to Groat once she was able to consult with counsel, since she did not want to expose other contractors to Agency action. The next day, Groat sent a letter to Pender explaining that the Agency process is complaint-driven. He also asked Pender to provide the name of the person who stated that the boilermakers union had given up jurisdiction over this type of work. Pender never provided that information to Groat, and

the Forum has given no weight to her assertion that the boilermakers union had relinquished jurisdiction.

25) On July 28, 1997, Pender asked Groat to provide her with "a copy of the certified payrolls for each and every public works project in the last three (3) years on a project that included erection of a bolted tank" and "copies of each and every project the Boilermakers worked on in the State of Oregon for the last three (3) years." About a week later, Groat sent Pender a letter that stated, in pertinent part:

"The Bureau of Labor is not conducting an investigation of the classification which applies to the work performed by your employees on the subject public works project. The Bureau already has determined that the work in question is classified a [sic] boilermakers work. Since you have disputed that classification, the Bureau has requested that you supply any and all information which reflects that your workers were classified properly as laborer's group two. The burden of proving that another classification applies in any manner, is the employer's. As previously stated, you must submit information which substantiates that it is the prevailing practice of the laborer's union to claim that work. As of this date we have not received any information from you that would substantiate your position."

Groat also explained that the Agency did not maintain certified payrolls for public works contracts. The letter stated further that the Agency would request, at an administrative hearing, liquidated damages and civil penalties in addition to the unpaid prevailing wages, in a total amount of \$6,214.50.

26) Sometime during the summer of 1997, Groat left the Agency to become a police officer and Grabe assumed responsibility for the investigation of Respondent.

27) By letters dated August 25, 1997, the Agency informed John Meier, Timothy Janesofsky, Erich Rabe, William Keeshan, Patrick Holbrook, Frank Janesofsky, Donald Barrow, and Richard Hlavinka that it would be taking legal action against Respondent, and asked the employees to complete and return wage assignment forms if they wished the Agency to pursue the unpaid wages and liquidated damages due them. The employees did not return those forms and did not pursue wage claims

against Respondent. One employee may have told Grabe that he believed he had been compensated properly. Neither Grabe nor Groat interviewed any of the employees.

28) At some point, Pender issued a memorandum to employees stating that the boilermakers classification applied only to work with pressurized vessels and, therefore, did not apply to the type of work that Respondents' employees performed in erecting the AO Smith standpipes. Pender issued the memorandum in response to questions from employees. She also told them that if they believed they were entitled to boilermakers' wages, they should pursue the wage claims. Pender told employees they could use letters from the Agency as toilet paper if they wished.

29) During an August 25, 1997, telephone conversation, Pender informed the Agency that Respondent did not accept the results of the Agency's investigation of the appropriate PWR. The Agency then returned the checks Respondent had provided for the amount of disputed wages.

30) At some point, Respondent submitted a certified payroll record ("CPR") for work done on the project during the week ending January 25, 1997. That record accurately reflected the hours that employees had worked on the project and the wages they initially had been paid. Because of the error in not paying the usual "split wage," however, the CPR stated that all work performed had been "laborer" work. As noted in Factual Finding No. 13, *supra*, Respondent later paid Keeshan and Holbrook additional wages they were due under Respondent's split wage system. Respondent did not file an amended CPR reflecting the payment of those additional wages, but did send the Agency a summary of wages paid. The Agency has accepted as fact Respondent's summary of the "corrected" wages it paid its workers.

31) In 1996 and early 1997, pursuant to then-applicable law, the Commissioner accepted USDOL findings that the majority of workers involved in heavy,

highway, and commercial construction were union workers. At that time, therefore, the prevailing wage rates and practices (such as labor classification) were determined to be the union practices. Accordingly, the Commissioner used local collective bargaining agreements and accompanying jurisdictional evidence to determine the appropriate classification for any given type of work.⁷

32) At all material times, the erection of a water storage standpipe was considered "heavy" construction in the City of Yoncalla area, meaning that union practices for that type of work were the prevailing practices. In addition, the wages and practices of boilermakers, ironworkers, sheetmetal workers, and laborer's unions were found to be the prevailing wages and practices for those trades.

33) The Commissioner's determination of PWRs and prevailing practices are reflected in the July 1996 PWR Booklet and Index of Prevailing Practice. The underlying USDOL findings were not introduced into evidence at the hearing, and Grabe had not reviewed them.

34) Grabe explained that, in determining the appropriate classification for a particular type of work, her general practice was to rely on the PWR Booklet and prior precedent. If those sources did not address the work in question, she looked to the Index of Prevailing Practice, which lists worker classifications. The Index is not an internal Agency document and generally is made available to members of the public who request it. Grabe referred to the Index during this investigation and instructed Groat to refer to it.

35) The July 1996 PWR Booklet does not list a trade called "standpipe erection." Page 9 of the 1996/1997 Index of Prevailing Practice states that persons involved in "Standpipe Repair and Construction" should be classified within the trade of "Boilermakers." That portion of the 1996/1997 Index existed prior to July 1996 and

remained in effect through 1997. The Index was produced by the Agency's PWR coordinator, Helena Trumbo.

36) The Index's classification of standpipe erection as boilermakers' work is consistent with union jurisdictional practice in the City of Yoncalla area. Boilermakers Union Local 500 has jurisdiction throughout Oregon, including the Yoncalla area. The boilermakers claim jurisdiction over the erection of water tanks, including those that are bolted together and constructed of glass fused to steel. Those tanks fell within the boilermakers' jurisdiction throughout 1996 and 1997. In January 1997, the business manager of Local 500 (Steve Nelson) wrote a letter to Christensen confirming the boilermakers' jurisdiction over all vessels requiring "tight joint." He further stated that "[t]he type and method of construction you described makes no difference whatsoever," since "[t]he bolting of vessels has been around for over 100 years and the jacking process that allows the workman to remain on the ground has been in existence in excess of 25 years." At the hearing, Nelson testified credibly that anything that is waterproof is considered "tight-joint" and, therefore, is claimed by the boilermakers.

37) In about July 1997, Groat contacted the boilermakers union as part of his investigation and made the following notes regarding his conversation with Nelson:

"I called the union to discuss the water tanks that were built by Northwest PermaStore. I advised him of the information that I received and the glass to fused steel tanks. I described the process as described to me by the ER. Says that is all Boilermakers work, they are the ones who build the tanks and have built most of the municipal water tanks in the area and are in the process of building one in Camas right now. Says that the Ironworkers have been trying to claim this work but any time they are building storage container that is air, water, gas tight it is within the jurisdiction of the Boilermakers. I explained what the ER said and he indicated that is not true that type of work is always Boilermakers work."

In a letter to Groat, Nelson confirmed that the construction of standpipes is the work of boilermakers.

38) Nelson's assertions regarding the boilermakers' jurisdiction are consistent with a 1926 agreement between the international boilermakers and ironworkers unions. The agreement specifies that the boilermakers' jurisdiction includes "steam, air gas, oil, water, or other liquid tanks or containers requiring tight joint, including tanks of riveted, caulked or welded construction in connection with swimming pools." A later agreement clarified that ironworkers retained jurisdiction over the construction of certain catwalks, stairways, and ladders that were supported by something other than the tanks (such as the ground). These agreements are effective throughout Oregon and remained valid and in force during all of 1996 and 1997. The boilermakers union does not have a similar agreement with the laborer's union.

39) Ironworkers Union Local 29 has jurisdiction throughout Oregon and some of southwest Washington. Construction of water tanks and standpipes, including those constructed by bolting together glass-fused-to-steel panels, does not fall within the ironworkers' jurisdiction.

40) Laborers Union Local 121 has jurisdiction in 21 Oregon counties, including the county where Yoncalla is located. The construction of water tanks and standpipes, including those constructed by bolting together glass- or ceramic-fused-to-steel panels, is not within the laborers' jurisdiction and has not been for many years. Nor does the laborers' union claim that work in Oregon.

41) Since 1984, the boilermakers have constructed potable water tanks on public works contracts in Oregon and southwest Washington. Nelson testified credibly that the boilermakers have constructed many more than seven such tanks, and could not say whether they had worked on more or fewer than 100. Nelson was not aware of how many of those projects were performed in 1996, but knows that the boilermakers built one water tank for the City of Seaside that year. He did not know what percentage

of the Oregon market for municipal water tanks has been constructed utilizing boilermaker labor. The boilermakers have not been employed on any of Respondent's projects in the last 10 years. They have worked on erection of at least two non-pressurized bolted-together water-storage tanks coated with enamel or epoxy. Those tanks were manufactured by Peabody, a division of AO Smith. AO Smith does not require Peabody tanks to be constructed by certified builders, and the construction process does not incorporate the jacking system used to construct the AO Smith Aquastore tanks.

42) For a brief time in 1997, the Oregon Employment Department circulated a document that included the following definition of the work performed by boilermakers:

"Construct, assemble, maintain, and repair stationary steam boilers and boiler house auxiliaries. Align structures or plate sections to assemble boiler frame tanks or vats, following blueprints. Work involves use of hand and power tools, plumb bobs, levels, wedges, dogs, or turnbuckles. Assist in testing assembled fittings, such as safety valves, regulators, automatic-control mechanisms, water columns, and auxiliary machines."

That document also stated that ironworkers include workers "who erect metal storage tanks."

43) In some other states, the USDOL has determined that Ironworker and/or Laborer 2 is the correct PWR classification for erection of AO Smith Aquastore tanks. The Agency does not consider determinations from other jurisdictions to be persuasive evidence of the prevailing practice in Yoncalla, Oregon.

44) Respondent paid its workers at laborer's rates because Pender believed that was the common practice in the trade of constructing glass-fused-to-steel potable water tanks. Pender reached that conclusion through her conversations with other AO Smith dealers,⁸ her knowledge that she was the only AO Smith dealer in Oregon, and her belief that Respondent had constructed most of the bolted-together municipal water tanks constructed in Oregon during the last 10 years. Pender also believed that the

type of work Respondent's employees performed was more like the work generally performed by laborers than it was the types of work generally performed by boilermakers or ironworkers.

45) The testimony of all witnesses was credible. Although each non-Agency witness had some sort of economic interest in the outcome of this dispute, none of their testimony was exaggerated or overly self-serving. Each witness gave straightforward testimony regarding matters of which they had personal knowledge, and frankly admitted when they could not answer certain questions.

46) The only significant factual dispute concerned Respondent's share of the Oregon market in the construction of water tanks over the last 10 years. The testimony on this point was somewhat unclear. Nelson, the business manager of Boilermakers Union Local 500, testified that Respondent *had not* constructed virtually all of the municipal water tanks built in Oregon in the last 10 years. Pender at first appeared to give contrary testimony, suggesting that Respondent *had* erected all but one of the public works potable water tanks constructed in the last 10 years in Oregon. She then clarified her testimony, stating that, of the 30 to 40 tanks that are bid each year, 30% to 50% are welded tanks, 15% to 20% are concrete tanks, and Respondent builds the rest. The Forum finds only that Respondent built most of the *bolted-together municipal* tanks that were constructed in Oregon within the last 10 years and that Respondent built almost all of these bolted-together tanks that also were constructed of glass-fused-to-steel panels. The Forum makes no finding regarding Respondent's share of *all* water tanks built in Oregon during that time-frame. Although all the witnesses appeared to testify honestly, the Forum was not convinced that any witness had sufficient knowledge of the water-tank construction industry as a whole to make precise statements on that

subject. Nor was there sufficient evidence for the Forum to make findings regarding the wages typically paid to workers who construct all types of water tanks.

ULTIMATE FINDINGS OF FACT

1) Respondent bid on and received a subcontract on a public works project, namely the City of Yoncalla Standpipe and Waterline Extension Project.

2) Respondent's employees performed standpipe erection work on the project in January 1997. The Commissioner properly determined that the local prevailing practice at that time was to classify such work as boilermakers' work. In January 1997, the PWR for boilermakers was \$23.57/hour plus \$8.76/hour fringe benefit.

3) Respondent paid its employees less than the PWR for boilermakers.

4) Respondent filed at least one CPR that inaccurately classified its employees as laborers instead of as boilermakers.

5) Pender knew prevailing wages were required on the project and caused Respondent to pay the workers at wage rates under the appropriate PWR. If Pender had called the telephone number identified in the 1996 PWR Booklet as the number to call to discuss PWR classification questions, she would have discovered that the correct classification for standpipe erection workers was "boilermaker."

CONCLUSIONS OF LAW

1) Respondent employed workers upon public works in Oregon. The Commissioner of the Bureau of Labor and Industries has jurisdiction over Respondent and the subject matter herein. ORS 279.348 to 279.365.

2) The actions, inactions, statements, and motivations of Pender, Respondent's president, secretary, treasurer, and owner, properly are imputed to Respondent.

3) *Former* ORS 279.348(1)⁹ provided:

"Prevailing rate of wage' means the rate of hourly wage, including all fringe benefits under subsection (4) of this section, paid in the locality to the majority of workers employed on projects of similar character in the same trade or occupation, as determined by the Commissioner of the Bureau of Labor and Industries. In making such determinations, the commissioner may take into consideration findings of an appropriate federal agency which determines prevailing wages and bargaining agreements in force in the locality for particular trades or occupations. If there is not a majority in the same trade or occupation paid at the same rate, the average rate of hourly wage, including all fringe benefits under subsection (4) of this section, paid in the locality to workers in the same trade or occupation shall be the prevailing rate. If the wage paid by any contractor or subcontractor to workers on any public work is based on some period of time other than an hour, the hourly wage shall be mathematically determined by the number of hours worked in that time period. If it appears to the commissioner data necessary to determine the prevailing rate of wage in a locality is not available or is not sufficient, the Commissioner of the Bureau of Labor and Industries may adopt the prevailing rate of wage as determined by the Secretary of Labor of the United States."

Former ORS 297.359(1)¹⁰ provided:

"The Commissioner of the Bureau of Labor and Industries shall determine the prevailing rate of wage for workers in each trade or occupation in each locality under ORS 279.348 at least once each year and make this information available at least twice each year. The commissioner may amend the rate at any time."

The Commissioner properly determined that the prevailing practice in Yoncalla, Oregon, at all material times, was to classify tank erection workers as boilermakers. The Commissioner properly determined that the PWR for boilermakers was \$23.57/hour plus \$8.76/hour fringe benefit.

4) ORS 279.350(1) provides:

"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, by the making of contributions of a type referred to in ORS 279.348(4)(a), or by the assumption of an enforceable commitment to bear the costs of a plan or program of a type referred to in ORS 279.348(4)(b), or any combination thereof, where the aggregate of

any such payments, contributions and costs is not less than the prevailing rate of wage."

Respondent committed five violations of ORS 279.350(1) by failing to pay the prevailing rate of wage to five workers who performed tank erection work on the Yoncalla project. The Commissioner has the authority to impose civil penalties for these violations. ORS 279.370(1); *former* OAR 839-16-530(3)(a).

5) ORS 279.354(1) provides:

"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 * * *. The certified statements shall set out accurately and completely the payroll records for the prior week including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid."

Respondent violated ORS 279.354(1) by submitting a CPR inaccurately stating that five workers on the project were laborers when, in fact, their correct classification was boilermakers. The Commissioner has the authority to impose a civil penalty for this violation. ORS 279.370(1); *former* OAR 839-16-530(3)(e).

OPINION

VIOLATIONS OF THE PWR LAWS

Respondent acknowledges that it did not pay boilermakers' wages to five workers who performed standpipe erection work on the Yoncalla standpipe project. Credible evidence in the record establishes that the Index of Prevailing Practice reflects the Commissioner's prevailing practice determinations. The 1996/1997 Index classified standpipe erection workers as boilermakers. The Forum infers that the prevailing practice at all material times was to classify standpipe erectors as boilermakers. Based

on these facts, the Forum concludes that Respondent committed five violations of ORS 279.350(1).

Respondent's sole argument against this conclusion is that the Commissioner's classification of the workers as boilermakers was faulty because it was based on union jurisdictional agreements, rather than on a field survey of industry practices. Such an argument has no place in this forum.

The PWR laws explicitly prohibit the type of challenge respondent seeks to raise. ORS 279.350(2) provides:

"After a contract for a public works is executed with any contractor or work is commenced upon any public works, the amount of the prevailing rate of wage shall not be subject to attack in any legal proceeding by any contractor or subcontractor in connection with that contract."

As found above, before the contract here was executed and work was commenced on that contract, the Agency had determined -- through its 1996-1997 Index of Prevailing Practice -- that the prevailing wage rate for the work at issue was the rate paid to boilermakers. Respondent argues that the Agency's determination was faulty. That is precisely the type of legal challenge foreclosed by ORS 279.350(2): After execution of a public works contract or the commencement of work on public works, the Agency's prevailing wage rate determination "shall not be subject to attack in any legal proceeding by any contractor or subcontractor in connection with that contract." *Id.*

Respondent does not avoid this bar by attacking the classification of the work rather than the determination of the prevailing wage rate for boilermakers. Classifying the work in its proper trade is equally central to the prevailing wage rate determination as the determination of the wage rate prevailing for that trade.

To the extent that the text and context of ORS 279.350(2) leave any room for debate, the legislative history supports interpreting the statute to preclude Respondent's

challenge. That provision originally was proposed as part of SB 208 (1981). At the time SB 208 was proposed, the case that resulted in the opinion in *State ex rel Roberts v. Miller*, 50 Or App 423, 623 P2d 1081 (1981), was pending in the Oregon Court of Appeals. The legislative history shows that the bill was introduced at the Department of Justice's request, to remove a persistent source of expensive litigation facing the Bureau of Labor and Industries. Contractors had signed contracts for public works and then used litigation to challenge the commissioner's determination of the prevailing wage rate. The bill was intended to "prohibit[] the rates determined by the commissioner from being attacked in connection with a particular contract after the contract is awarded." Testimony, Senate Labor Committee, SB 208, January 27, 1981, Tape 6, Side A at 10-36 (statement of Bruce Hugo, Executive Assistant to the Labor Commissioner).

Mr. Hugo offered the then-pending *Miller* case as an illustration of the type of lawsuit that the bill would preclude. *Id.* at 36-70, 210-23. Shortly after the January 27, 1981, hearing, the Court of Appeals decided *Miller*. In *Miller*, a contractor had successfully bid on a public works project. The contract provided that the prevailing wage rates determined by the commissioner were the minimum hourly wage rates applicable to work under the contract. The commissioner had previously determined and published those prevailing wage rates. The contractor, however, paid wages at lower rates, and was sued by the commissioner as assignee of an employee's wage claim. The contractor argued that the commissioner's prevailing wage rate determination was invalid on the ground that it was not done in compliance with ORS 279.359. The court held that the contractor could not challenge the commissioner's prevailing wage rate determination. *Miller*, 50 Or App at 426. At the Senate Labor Committee's March 5, 1981, hearing on SB 208, Mr. Hugo told the committee about the

Miller decision. See Testimony, Senate Labor Committee, SB 208, March 5, 1981, Tape 35, Side A at 42.

Later, in the Senate's floor debate on SB 208, Senator Hannon explained that the bill would "prohibit[] contractors from attacking the prevailing rate of wage after the contract is awarded * * * or work is commenced." Senate Floor Debate, SB 208, March 12, 1981, Tape 26, Side A at 362 (statement of Sen. Hannon). SB 208 passed the Senate. Ultimately, and with no substantive discussion, the House added SB 208 to SB 207 (also concerning the PWR laws) as section 19, and enacted that bill as Oregon Laws 1981, chapter 712.

Thus, the legislative history of ORS 279.352(2) plainly shows the legislature's intent to forbid a contractor or subcontractor from challenging the prevailing wage rate after signing a public works contract or beginning work. The statute's unambiguous terms reflect that intent.

One could argue that *Miller*, standing alone, would not prohibit all such legal challenges. *Miller* could be read to apply only to wage claims brought by an employee, or by the commissioner as assignee of a wage claim.

ORS 279.350(2), however, contains no such limitation. That statute prohibits contractors from challenging prevailing wage rates "in any legal proceeding." That phrase covers **all** types of proceedings, including this one: a civil penalty proceeding brought by the Agency against a contractor under ORS 279.370. Consequently, to the extent one might read *Miller* to apply only to wage claim proceedings, ORS 279.350(2) sweeps far more broadly.

In sum, ORS 279.350(2) bars Respondent from challenging the Commissioner's preexisting determination that the prevailing wage rate applicable to the work in question was the rate prevailing for boilermakers.

In any event, Respondent's argument misconstrues the nature of the Agency's burden of proof in this case. ORS 279.350 requires contractors and subcontractors on public works projects to pay at least "the prevailing rate of wage." *Former* ORS 279.348(1) defined "prevailing rate of wage" as "the rate of hourly wage, including all fringe benefits under subsection (4) of this section, paid in the locality to the majority of workers employed on projects of similar character in the same trade or occupation, as *determined by the Commissioner of the Bureau of Labor and Industries.*" (Emphasis added). Thus, to prove five violations of ORS 279.350, the Agency had to prove only that Respondent had not paid five workers the PWR *as determined by the Commissioner.* The Agency did that by demonstrating: 1) that the Index of Prevailing Practice classified standpipe erection workers as boilermakers; and 2) that Respondent had not paid five of its standpipe erection workers the PWR for boilermakers.

The Agency was not required to also prove that the Commissioner followed proper statutory procedure in determining the prevailing wage rate. Even if the Agency had that burden, however, it would be met by the evidence in this record, which demonstrates that the Commissioner acted within the scope of his authority. *Former* ORS 279.348 specifically permitted the Commissioner to "take into consideration findings of an appropriate federal agency which determines prevailing wages and bargaining agreements in force in the locality for particular trades or occupations" in determining the PWR and prevailing classification practice. The uncontroverted evidence demonstrates that the Commissioner did just that, by relying on USDOL findings that, in the City of Yoncalla area, the prevailing practices for heavy, highway, and non-residential construction work were the union practices.

Respondent asserted, as its first affirmative defense, that the Commissioner's classification was incorrect:

"It is not and has not been the 'prevailing practice' of the construction industry in Oregon to classify as 'Boilermakers' workers engaged in the type of work carried out by Erich Rabe, Tim Janesofsky, Pat Keeshan, Patrick Holbrook, John Meier, Steve Pender and Richard Hlavinka on behalf of Respondent."

(Exhibit X-17).¹¹ Even assuming that ORS 279.350(2) and *Miller* allow such a defense, Respondent did not meet its burden of proving it. Respondent presented no credible evidence to controvert the Agency's evidence that the boilermakers' union claims jurisdiction over the erection of bolted-together water tanks in the Yoncalla, Oregon area, whether or not those tanks are air-tight or pressurized. Respondent's evidence regarding the union practices in other states simply has no relevance to the determination of the prevailing practices in Oregon. Nor does its evidence regarding a short-lived Employment Department definition of boilermakers' work, developed and distributed for some unknown purpose presumably unrelated to the PWR laws.

Respondent's real argument is that, whatever the union jurisdictional practice may be, the actual industry practice in Oregon is to pay laborers' wages to standpipe erection workers. Even if this argument had legal merit,¹² it would fail on the facts. As explained in Factual Finding No. 46, the Forum was not convinced by Pender's testimony regarding Respondent's share of the water storage tank construction business in Oregon. Because Respondent did not prove what percent of all water tanks it had built, the fact that it pays its workers the split laborers/ironworkers wage does not prove that is the prevailing (or majority) practice for tank erection work. This result is not changed by the fact that Respondent constructed most of the *bolted-together* municipal tanks built in Oregon within the last few years. The Commissioner has determined that *all* standpipe erection workers are boilermakers, and nothing in the record persuades the Forum that workers who erect bolted-together tanks should be classified differently.¹³ If Respondent believed its workers perform a function so unique

that they should not be classified with other standpipe erection workers, it should have applied for the addition of a trade pursuant to OAR 839-016-0006.

In sum, the Agency proved that Respondent committed five violations of ORS 279.350(1) by failing to pay five standpipe erection workers the PWR for boilermakers. The Agency also proved that Respondent committed a single violation of ORS 279.354(1) by submitting a CPR inaccurately stating that five workers on the project were laborers when, in fact, their correct classification was boilermakers.

RESPONDENT'S OTHER AFFIRMATIVE DEFENSES

As its second affirmative defense, Respondent asserted that "the Commissioner has acted inconsistently with an established prior agency practice by proposing that civil penalties be assessed against respondent," because it has not been the prevailing practice of the construction industry to classify the type of work performed by Respondent's employees as boilermaker work. Respondent did not, however, identify any "prior agency practice" that would have permitted it to pay laborers' wages to its standpipe erection workers. Having pointed to no change in Agency practice, Respondent cannot prevail on this theory.

Respondent's third affirmative defense is merely a restatement of its first two affirmative defenses and requires no further discussion. In its fourth affirmative defense, Respondent argued that the Commissioner may not rely on union jurisdictional assertions in determining prevailing practice. That argument fails for the reasons set forth above. Respondent's fifth and seventh affirmative defenses are that "the Commissioner has erroneously interpreted and applied a provision of law" and that "[t]he Commissioner has failed to state a claim for which relief may be granted." Respondent did not elaborate upon those defenses at the hearing and did not establish that the Agency's case suffered from any such defects.

CIVIL PENALTIES

The Commissioner has authority to impose a civil penalty not to exceed \$5000.00 for each violation of ORS 279.348 to 279.380 and the administrative rules adopted pursuant thereto. ORS 279.370(1). The Agency has promulgated a rule specifying the minimum penalties to be imposed for PWR violations:

"(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[.]"

The Agency sought this minimum penalty, in an amount equal to the unpaid wages, for each of Respondent's failure to pay the PWR. Given Respondent's cooperation with the Agency and the fact that it has no prior violations, the Forum agrees that the minimum penalty is appropriate. See *former* OAR 839-16-520.

The Forum, therefore, orders Respondent to pay a civil penalty in an amount equal to the wages it failed to pay Holbrook, Keeshan, Janesofsky, Meier, and Rabe for tank erection work they performed in January 1997. Respondent should have paid each of those employees at the boilermakers rate of \$32.33/hour for straight time and \$44.12/hour for overtime.¹⁴ The following table shows the total wages Respondent should have paid the employees:

<u>Employee</u>	<u>Hours Worked</u>	<u>Boilermaker rate</u>	<u>Boilermaker wages</u>
Holbrook	84.5 straight hours	\$32.33/hour	\$2731.89
	2.0 overtime hours	\$44.12/hour	<u>\$88.24</u>
			\$2820.13
Keeshan	76.5 straight hours	\$32.33/hour	\$2473.25
Janesofsky	8.0 straight hours	\$32.33/hour	\$258.64
Meier	40.0 straight hours	\$32.33/hour	\$1293.20
Rabe	48.0 straight hours	\$32.33/hour	\$1551.84

The differences between what Respondent did pay, and what it should have paid, are as follows:

<u>Employee</u>	<u>Boilermaker wages</u>	-	<u>Wages paid</u>	=	<u>Unpaid wages</u>
Holbrook	\$2820.13		\$2308.20		\$511.93
Keeshan	\$2473.25		\$2027.33		\$445.92
Janesofsky	\$258.64		\$201.12		\$57.52
Meier	\$1293.20		\$1060.40		\$232.80
Rabe	\$1551.84		\$1275.72		\$276.12

The Forum assesses these unpaid wages as the civil penalty for Respondent's five violations of ORS 279.350(1), in a total amount of **\$1557.71**.

For the single violation of ORS 279.354(1), the Agency sought a penalty of \$1000.00. The Forum agrees that a **\$1000.00** penalty is appropriate under the circumstances of this case, taking into account the factors listed in *former* OAR 839-16-520.

RESPONDENT'S EXCEPTIONS

Respondent filed extensive exceptions to the factual findings in the proposed order. Many of those exceptions do not actually challenge the facts found, but rather argue that the Commissioner should not rely on those facts (exceptions to proposed factual findings 16, 19, 20, 31, 32, 33, 37, and 39). Except as noted below, these exceptions are rejected because the challenged findings are supported by substantial evidence in the record and provide ample support for the legal conclusions in this Final Order.

In response to Respondent's exceptions to proposed factual findings 16 and 35, finding 35 has been clarified to state explicitly that the portion of the Index of Prevailing Practice that is in the record existed prior to July 1996, remained in effect through 1997,

and was produced by the Agency's PWR coordinator. There is no requirement for "formal adoption" of the Index.

Respondent takes exception to factual finding 31 on the ground that substantial evidence does not support the findings that "[i]n 1996 and early 1997, pursuant to then-applicable law, the Commissioner accepted USDOL findings that the majority of workers involved in heavy, highway, and commercial construction were union workers" and that "the Commissioner used local collective bargaining agreements and accompanying jurisdictional evidence to determine the appropriate classification for any given type of work." To the contrary, Grabe testified to these precise facts. The Agency's Prevailing Practice Flier also provides support for these findings.

Respondent takes exception to factual finding 34 on the ground that "[t]here was nothing in the PWR Booklet nor did Grabe testify to any 'prior precedent' of classifying the work at issue as 'boilermakers' for PWR purposes." Finding 34 has been clarified to state that, in using the PWR Booklet and prior precedent, Grabe was merely describing her general practice, not necessarily what she did to determine the PWR for standpipe erection workers in this case.

In challenging factual finding 36, Respondent asserts that there is no evidence that any boilermakers union employees have erected any standpipes in Oregon within the last 10 years. That is not correct; as set forth in factual finding 41, boilermakers have erected standpipes during the relevant time period. The remainder of Respondent's challenge to factual finding 36 amounts to a recitation of facts that either are already incorporated into the findings, or which the Forum finds have little significance. Respondent's exception to proposed factual finding 37 is misplaced, as it mischaracterizes a quote from a letter as a finding by the ALJ.

Respondent excepts to proposed factual finding 38 on the ground that the ironworkers' union representative conceded that he was unfamiliar with glass-fused-to-steel tanks and that he had no knowledge of actual practices in this state. Respondent further asserts that the union representative "conceded that union jurisdictional agreements do not govern PWR practices." The first two alleged concessions are not relevant to the material fact found in the paragraph -- the existence of a written jurisdictional agreement between the boilermakers and ironworkers that includes certain terms specified in the finding. The union representative's belief regarding the legal significance of jurisdictional agreements in relation to PWR matters simply carries no weight.

In purporting to challenge proposed factual finding 41, Respondent attacks facts that the ALJ did not find. The exception is denied.

In challenging proposed factual finding 43, Respondent asserts facts close to those found in the proposed order. The term "PWR" has been added to the finding to clarify its meaning. In challenging proposed factual finding 44, Respondent makes an assertion of fact almost identical to the facts found in proposed finding 46 (on page 21, lines 1 and 2, of the proposed order). The exception is denied because the matters Respondent wishes the Forum to assert already are contained in the order.

Finally, in part of its challenge to factual finding 46, Respondent again attacks facts that the ALJ did not find. Respondent also asserts accurately, as the ALJ found, that Respondent constructed most of the bolted-together municipal water tanks built in Oregon during the last ten years. In response to the remainder of this exception, the Forum has added the finding that Respondent built almost all of the bolted-together, *glass-fused-to-steel* municipal water tanks built in Oregon during the last decade.

Respondent's challenges to the first proposed ultimate factual finding mirror its challenges to the proposed opinion, which are addressed later in this Final Order. Respondent takes exception to the second sentence of the fifth proposed ultimate finding, stating that it amounts to "sheer speculation." To the contrary, the finding is a fair inference from factual findings 16, 19, 34, and 35.

Without elaboration, Respondent challenges the third, fourth, and fifth proposed conclusions of law on the ground that there is insufficient evidence to support them. Those exceptions are denied.

As Respondent states correctly in its first exception to the proposed opinion, "the crux of the dispute" related to whether the Commissioner properly had determined that the PWR classification for the work at issue was "boilermaker." The proposed opinion has been changed to remove the suggestion that Respondent challenged only whether the Commissioner's classification determination was *correct*, and not whether the Commissioner had, in fact, made *any* determination regarding the appropriate classification.

In its second exception to the proposed opinion, Respondent questions the relevance of the decision in *State ex rel Roberts v. Miller*, 50 Or App 423, 623 P2d 1081 (1981). According to Respondent, *Miller* is inapposite because it dealt with the prevailing wage rates, not prevailing classification practices. The distinction between the cases has no legal significance. *Miller* stands for the proposition that an employer cannot collaterally challenge the Commissioner's determination of prevailing practices once it has agreed to abide by the PWR laws. It does not matter whether the challenged practice relates to wages or to trade classification.

In its third exception to the proposed opinion, Respondent challenges the burden of proof assigned to the Agency in this case. The opinion contains an adequate discussion of how the Agency met its burden, and the exception is denied.

Finally, Respondent incorporates its objections to the proposed factual findings and conclusions. Those exceptions have been dealt with earlier in this opinion.

ORDER

NOW, THEREFORE, as authorized by ORS 279.370, and as payment of the civil penalty for its violations of ORS 279.350 and 279.354, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Northwest Permastore Systems, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the Bureau of Labor and Industries in the amount of TWO THOUSAND FIVE HUNDRED TWENTY-FOUR DOLLARS AND TWENTY-NINE CENTS (\$2524.29), plus any interest thereon that accrues at the legal rate between a date ten days after the issuance of the February 3, 1999, Final Order and the date Respondent complies with the Final Order on Reconsideration.

¹ A standpipe is a water tank with a height greater than its diameter. Throughout this order, the terms "standpipe" and "tank" are used interchangeably.

² Pender testified credibly that a USDOL inspector decided in 1993 that Respondent's tank erection workers on a City of Drain project should have been paid as ironworkers. The record includes no evidence of whether that finding was ever finalized or incorporated into any sort of binding legal determination. The Forum has, therefore, given no weight to the testimony on this point in determining whether Respondent paid the correct PWR to its tank erection workers on this project.

³ At least one other AO Smith dealer apparently had settled a disputed with the USDOL by agreeing to compensate its employees using this system. That agreement applied to work performed in some state other than Oregon.

⁴ Respondent's job number for this project was 9610, which is the project designation most commonly used on the employees' timesheets. Another worker, Dornhecker, also may have performed tank erection work on the project, but was not identified in the Agency's Amended Notice of Intent.

⁵ See Factual Finding No. 34, *infra*, for further discussion of the Index of Prevailing Practice.

⁶ At the time of hearing, Grabe had been the Agency's PWR lead worker since January 1997 and had been a compliance specialist for about nine years.

⁷ PWRs now are based on state surveys, but the first rate book incorporating the results of a state survey was not published until February 1997.

⁸ Pender testified credibly that no other AO Smith dealers pay boilermaker wages to their workers.

⁹ In 1997, the legislature made significant amendments to ORS 279.348(1), requiring the Commissioner to "rely on an independent wage survey to be conducted once each year" in determining the prevailing rate of wage. See 1997 Or Laws Ch. 810, sec. 1. Those amendments are not relevant to this matter, which involves wages paid prior to their effective date.

¹⁰ The legislature also amended this statute in 1997. 1997 Or Laws Ch. 810, sec. 2.

¹¹ Respondent's sixth affirmative defense is similar, except that it incorrectly attempts to place the burden of proving the prevailing practice on the Commissioner. If Respondent may pursue this argument at all in this forum, it has the burden of proving that the Commissioner's determination of prevailing practice was incorrect.

¹² Because *former* ORS 279.348 explicitly permitted the Commissioner to rely on union jurisdictional practices, Respondent's argument is misplaced as a matter of law. See also ORS 279.350(2); *Miller*.

¹³ Worker classifications necessarily are somewhat general. As Grabe testified, the Commissioner has not established a separate classification for workers who install oak doors using pneumatic nail guns and 8-pound nails -- those workers are classified as carpenters.

¹⁴ \$23.57/hour plus \$8.76/hour fringe benefit for straight time; \$35.36/hour plus \$8.76/hour fringe benefit for overtime.