

**In the Matter of**

**RANDALL STUART BATES dba  
Skamania Network and Network  
Management Group**

**Case No. 113-01**

**Final Order of Commissioner  
Jack Roberts**

**Issued March 6, 2002**

**SYNOPSIS**

Respondent Randall Stuart Bates dba Skamania Network and Network Management Group operated a business that provided Internet services to customers in Oregon and Washington, employing a 15 year old minor as a bookkeeper. Respondent failed to obtain and maintain an employment certificate, failed to maintain and preserve records of the minor's employment, failed to make available to the Commissioner records of the minor's employment, and permitted a minor to work between the hours 6 p.m. and 7 a.m., in violation of ORS 653.307(2), ORS 653.315(2), OAR 839-021-0170, and OAR 839-021-0175. Respondent was ordered to pay civil penalty wages totaling \$1,500. ORS 653.307(2); 653.315(2); 653.370; OAR 839-021-0170; 839-021-0175; 839-019-0010; 839-019-0020; 839-019-0025(1) and (2).

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 22 and 23, 2001, in the Services for Children and Families Department conference room located at 1610 9<sup>th</sup> Court, Suite 500, Hood River, Oregon.

Cynthia L. Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Randall Stuart Bates was present throughout the hearing and was represented by Daniel C. Lorenz, Attorney at Law.

The Agency called as witnesses: BOLI Compliance Specialist Margaret Trotman; Respondent's customer June Campbell; Christina Yohe's sister Erika Yohe; Christina Yohe's father Jeffrey Yohe; Respondent's former employee Jake Truelove; Christina Yohe; and, Respondent's customer Brenda Dominguez.

In addition to Respondent, Respondent called as witnesses: Respondent's wife Sundie Bates; and Respondent's friends Susana Emberg and Glen Hector.

The forum received as evidence:

a) Administrative exhibits X-1 through X-7;

b) Agency exhibits A-1 through A-11 (filed with the

Agency's case summary); A-13 through A-15;<sup>1</sup> A-16, A-18 through A-30 (submitted at hearing);

c) Respondent exhibits R-1 through R-4 (filed with Respondent's case summary) and R-5 through R-7 (submitted at hearing).

Having fully considered the entire record in this matter, the Administrative Law Judge hereby makes the following Proposed Findings of Fact (Procedural and on the Merits), Proposed Ultimate Findings of Fact, Proposed Conclusions of Law, Proposed Opinion, and Proposed Order.

#### **FINDINGS OF FACT – PROCEDURAL**

1) On October 30, 2000, the Agency issued a Notice of Intent to Assess Civil Penalties ("Notice") to Respondent. The Notice informed Respondent that the Commissioner intended to assess civil penalties against Respondent totaling \$1,500, pursuant to ORS 653.370(1), based upon multiple alleged violations resulting from Respondent's alleged employment from July to September 1999 of Christina Yohe, a minor born August 22, 1983. Respon-

dent was served with the Notice on November 2, 2000.

2) On November 15, 2000, Respondent, through counsel, filed a timely answer to the Notice that stated in its entirety:

"COMES NOW Randall Stuart Bates and requests hearing with respect to the Notice of Intent to Assess Civil Penalties dated October 30, 2000.

" 1.

"An [*sic*] answer to the notice, respondent answers as follows:

"a) In or about July, 1999, respondent did not employ Christina Yohe, and as such did not fail to maintain or preserve records regarding employment of Christina Yohe. Similarly, respondent has not failed to make any employment records available to the agency and has also not employed a minor child between the hours of 6:00 p.m. and 7:00 a.m.

"Dated this 15<sup>th</sup> day of November, 2000.

"Daniel C. Lorenz, Attorney for Respondent"

Respondent included a separate request for hearing with his answer.

3) On November 29, 2000, the Agency requested a hearing and on December 7, 2000, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9 a.m. on May 22, 2001. With the Notice of Hearing, the forum included a copy of the

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<sup>1</sup> During the hearing, only page 1 of Exhibit A-15 was admitted as evidence. Pages two and three were identified and there was testimony pertaining to the content of each document. On her own motion, the ALJ has reconsidered and reversed her previous ruling. Exhibit A-15 is hereby admitted in its entirety.

Notice of Intent to Assess Civil Penalties, a "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES" and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

4) On April 4, 2001, the forum issued a case summary order requiring the Agency and Respondent to submit case summaries that included: 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 penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by May 11, 2001, and advised them of the possible sanctions for failure to comply with the case summary order. The Agency and Respondent filed timely case summaries.

5) On May 17, 2001, the Agency filed an "addendum" and "second addendum" to the Agency's case summary.

6) At the start of 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.

7) At the start of hearing, the Agency and Respondent stipulated to the admission into the

record of Agency exhibits A-8 through A-11.

8) At the conclusion of hearing, the ALJ left the hearing record open until June 5, 2001, to allow Respondent additional time to produce documents clarifying Agency exhibits A-18 through A-21 that were previously received as evidence in the record. On June 4, 2001, Respondent's counsel sent to the Hearings Unit a letter stating in pertinent part:

"At hearing, you left the record open to allow respondent to attempt to get additional documents clarifying Exhibits 18 through 21. Unfortunately, it does not appear that we will be able, at least within any reasonable time lines, to get better copies of the reversed sides of these checks than [*sic*] what was submitted at hearing. Rather than delay the matter further, respondent is prepared to waive opportunity to get those additional records and have you proceed to issue your proposed findings and conclusions without further argument. If Ms. Domas disagrees and wants further argument, I assume she will notify us both."

9) On June 5, 2001, the Agency case presenter sent to the Hearings Unit, by facsimile transmission, a letter stating in pertinent part:

"I have received a copy of Mr. Lorenz's letter to you dated June 4, 2001. The Agency has no objection to Mr. Lorenz's

position to let the matters proceed on the evidence presented, including the admission of Agency's exhibits 18 through 21."

10) The hearing record closed on June 5, 2001.

11) The ALJ issued a proposed order on January 31, 2002 that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

#### **FINDINGS OF FACT – THE MERITS**

1) At times material herein, Respondent Randall Stuart Bates operated a business that was an Internet service provider ("ISP") located in Cascade Locks, Oregon, under the assumed business names of Skamania Network and Network Management Group.

2) At times material herein, Respondent's assumed business names were not registered in Oregon.

3) At times material herein, Respondent provided local access to the Internet via telephone lines managed through Sprint, a telephone service, as well as 24 hour technical support to the entire area served by the ISP, including Hood River and The Dalles, Oregon, and White Salmon and Stevenson, Washington. Respondent ran the business from an office located in a converted garage at his residence. To manage the business, Respondent

maintained eight computers and four phone lines that covered Skamania, Hood River, The Dalles, and White Salmon. Respondent regularly permitted local teenagers to bring their own computers or use the on-site business computers to play computer games and talk in "chat" rooms during the evening hours.

4) Respondent was not a publicly owned organization, nor was Respondent's business a religious, charitable, or educational non-profit organization.

5) During the spring and early summer of 1999, Jake Truelove provided technical support to Respondent's ISP customers. He had no set schedule, but Respondent determined the number of hours Truelove worked each day. Occasionally, Truelove worked 12 hours straight. Truelove worked about five days per week and handled 50 to 60 calls per 12-hour period. Truelove also did some bookkeeping and occasionally built and repaired computers for Respondent's ISP customers. Respondent and his wife provided Truelove some training. Truelove received compensation for his services. In early July 1999, Truelove moved to Arizona to attend school for the summer. He returned in October and performed some services for Respondent, which included answering the telephones, setting up new accounts, and installing hardware, from October until late November 1999. Truelove's birthdate is June 16, 1981.

6) During the two weeks before Truelove left for Arizona in July 1999, his girlfriend, Christina Yohe, went with him to Respondent's a few times. After Truelove left, Respondent called Yohe and asked her to work for him and offered to "set her up like Jake." Around July 9, 1999, Yohe started performing bookkeeping tasks consisting primarily of billing ISP customers, collecting on overdue customer accounts, endorsing checks and making bank deposits. Yohe also picked up the business mail and Respondent's personal mail daily from the Post Office. Yohe's work hours were flexible and she set her own schedule. In July, she usually worked from 8 or 9 a.m. until 9 or 10 p.m. four to five days per week. Some of that time was spent talking to Truelove via computer "chat room," also known as an ICQ. Yohe's birthdate is August 22, 1983.

7) Respondent billed the ISP customers monthly, quarterly, or annually for the service, depending on customer preference. Respondent's practice was to send billings by e-mail except for those customers who preferred a hard copy of their bill for their records. During times material, payments were received in care of Skamania Network, PO Box 276, Cascade Locks, Oregon.

8) Yohe worked for Respondent from July 9 until July 31, 1999, when she moved from Carson, Washington, to Vancouver, Washington. Yohe did not work for Respondent between July 31 and August 27, 1999. Sometime

around August 22, 1999, Yohe left on vacation to visit Truelove in Arizona. Around August 27, 1999, Yohe returned from Arizona and went back to work for Respondent until Respondent fired her sometime around September 17, 1999.

9) When Respondent engaged Yohe's services in July 1999, he told her she would be paid a salary of \$200 per week. By the end of July, Yohe had received three checks of \$200 each. Yohe did not receive any compensation for the work she performed for Respondent in August or September 1999. Sundie Bates, Respondent's wife, had signatory authority on an account used by the business to pay bills associated with the ISP and signed all of Yohe's checks, dated July 16, July 23, and July 31, 1999.

10) Respondent did not obtain from or maintain with the Bureau of Labor and Industries an employment certificate indicating Yohe's employment, nor did he maintain and preserve records relating to Yohe because he did not believe he employed her.

11) In July 1999, Yohe depended on others to take her to work because she was not yet old enough to obtain a driver's license. Yohe's sister, Erika, drove her to and from work two or three times per week and at other times her father or boyfriend's mother transported her to and from work. At least once, Yohe's sister drove Yohe home from work after midnight in July 1999. Respondent was aware that Yohe was not old

enough to obtain a driver's license in July 1999.

12) In November 1999, Yohe filed a wage claim with the Bureau of Labor and Industries alleging Respondent failed to pay her wages for work performed between August 28 and September 17, 1999.

13) Agency compliance specialist Trotman was assigned to investigate Yohe's wage claim and possible child labor violations. During her investigation, Trotman's only communication with Respondent was through correspondence with his counsel. At that time, Respondent denied employing Yohe, but acknowledged that she was on his premises on several occasions and that it was "entirely possible that [she] would have from time-to-time answered phones while [he or his wife] were using the restroom or had been on another phone." Respondent stated that Truelove had been coming to Respondent's "facility in early 1999 and hung out quite a bit" and that Yohe visited him frequently. According to Respondent, after Truelove left for Arizona, Yohe was "allowed to come to [Respondent's] facility to use the phones on Fridays, during which times [Respondent's] phones have 'Fridays free' under a Sprint promotional program, and Ms. Yohe could call Mr. Truelove without charge. On other days, she was able to use the computer facilities to engage in Internet chats." Respondent described his business as a "'mom and pop' Internet Service Provider (ISP) in

the Columbia Gorge" operating out of his converted garage. In correspondence, his counsel summarized Respondent's open door policy as follows:

"As [Respondent's] business has developed, he has made his facility available to computer novices who have relied on [Respondent] to assist them in repairing or upgrading their computer equipment, and to learn more about computers. As such, it is not unusual for numbers of people to drop by and 'hang out' to observe and learn."

None of Respondent's correspondence to Trotman, through his counsel, mentions another owner or partner in Respondent's business. Neither Respondent nor his attorney told Trotman at any time that there was another owner or partner involved in Skamania Network or Network Management Group.

14) During her investigation, Trotman requested that Respondent provide the Agency with the following information by January 14, 2000:

"1) Please provide copies of Christina Yohe's time records showing hours worked each day and payroll records showing gross, net, and withholdings for each pay period for the entire time she worked for you.

"2) What is your workweek for calculating overtime after 40 hours in a workweek? (For example: Sunday through Sat-

urday, Wednesday through Tuesday)

“3) Child Labor Audit for the Year of 1999: Please send the following information regarding all employees under the age of 18 years of age: names, last known addresses, telephone numbers, dates of birth, daily time records, and payroll records for each pay period in 1999.”

Respondent did not provide the requested information at any time during the investigation or up to the date of hearing.

15) Respondent’s testimony was internally inconsistent and contradicted by other credible evidence. Moreover, his demeanor was for the most part argumentative, and his answers to direct questions were evasive. Respondent’s contention at hearing that Joe Ogle owned the business operated by Respondent out of Respondent’s residence in 1999 contrasts markedly with his earlier portrayal to Trotman and conflicts with Ogle’s sworn deposition wherein Ogle states he was out of the business as Respondent’s partner entirely by December 1998. Additionally, despite Respondent’s assertion that he did not employ Christina Yohe, credible evidence shows Yohe received three checks from Respondent, each dated one week apart, that indicate the exact amount she certified on her wage claim form that she was to be paid weekly by Respondent for her services. When asked for an explanation at hearing for the three

checks that were made payable to Yohe for \$200 apiece, dated in June 1999, Respondent declined to answer replying that he would only be “making a guess.” Respondent unwittingly proffered a particular motivation for ardently denying his employer status while expounding on the financial dilemmas of operating an Internet service – he defended the use of “volunteers” from the community because, he asserted, other ISPs went under because they had to pay employees. Respondent’s testimony about his employment relationship with Christina Yohe was contrary to the evidence in the record and to his own statements and the forum discredited it in its entirety. His other testimony was believed only when other credible evidence corroborated it.

16) Sundie Bates’ testimony was internally inconsistent and reflected her bias toward her husband. With a flat affect, she minimized her role in the business by stating she did not know much about it and that she was there primarily to “be in the company of her husband.” On the other hand, she stated she signed business checks to pay bills and did some of the bookkeeping and billing tasks, and reimbursed herself for business expenses. Although she acknowledged that she asked Christina Yohe to answer telephones occasionally and to “help stamp a pile of checks,” she denied Yohe was ever an employee and emphasized that the business relied on volunteers “to lend a hand.” She further acknowledged that she signed three checks of

\$200 apiece, payable to Christina Yohe in July, but claimed to have no idea why the checks were written, simply stating that "they were just checks." Because of this contradictory testimony, the forum gave it no weight whenever it conflicted with other credible evidence in the record.

17) Christina Yohe's testimony was credible. Her demeanor was appropriate and her testimony was straightforward and without guile. She was responsive to questions put forth to her and had clear knowledge of Respondent's billing and book-keeping processes. She did not exaggerate the nature of her job duties or the time she spent doing them. The forum credits her testimony in its entirety.

18) Erika Yohe testified credibly regarding her knowledge of her sister's employment with Respondent. She did not exaggerate the number of times she supplied her sister with rides to and from work or any other facts that would have enhanced the Agency's case, despite several opportunities to do so. There was no reason not to believe her testimony in its entirety.

19) Jeffrey Yohe's testimony was generally credible, although his memory for dates was not reliable. While the forum does not doubt he provided his daughter Christina with rides to work, the forum has credited his testimony as to specific times and dates insofar as it was consistent with other credible evidence in the record.

20) Jake Truelove testified credibly about the work he performed for Respondent. He had clear knowledge of Respondent's business and held no apparent animosity toward Respondent. He readily acknowledged that Christina Yohe contacted him regularly in Arizona from Respondent's business and that they usually spent 45 minutes to an hour talking in a "chat room." While there is no evidence corroborating Truelove's statements about his compensation agreement with Respondent, there is enough to establish Truelove received compensation for the services he rendered and to overcome Respondent's denial that Truelove provided any services at all. Overall, Truelove's testimony was reliable and it has been credited whenever it conflicts with Respondent's testimony.

21) June Campbell's testimony regarding her relationship with Christina Yohe was not credible. Initially, she denied that she knew Yohe when Yohe called her from Respondent's to inquire about an overdue bill in September 1999. When she was reminded that Jeff Yohe, Christina Yohe's father, was a member of her husband's band, Campbell was equivocal about when and how she met him and was extremely reluctant to admit she was aware of the connection between Yohe and her father as early as September 1999. Later, she acknowledged that she knew Christina was Jeff Yohe's daughter in September 1999 when she talked to Christina about her bill.

She further acknowledged that Christina Yohe asked her to write a statement for the Employment Department regarding Yohe's wage claim sometime in October 1999. Yet, later in her testimony she claimed she met Christina Yohe long after her husband's band was formed in "the later part of 1999 or early 2000" and only then was she aware of the connection between Yohe and her father. Campbell's shifting testimony was given little or no weight.

22) Susana Emberg was a credible witness, though her knowledge of Respondent's day to day business activities was limited. She testified that Respondent had no employees that she knew of and that she and others volunteered their services for Respondent's business. She acknowledged, however, that her services were limited to working on a website for Respondent from her home in The Dalles, that she was not on the premises very often and that she had about one contact with Respondent per week. For those reasons, Emberg's testimony was given little, if any, weight.

23) Glen Hector's testimony was brief and unreliable. What little he purported to know about Respondent's business activities during the relevant period was contradicted by his statement that he was a truck driver, owned his own business, and was not on Respondent's business premises much during the summer and fall of 1999.

### **ULTIMATE FINDINGS OF FACT**

1) At all times material herein, Respondent Randall Stuart Bates operated an Internet provider service as a sole proprietor in Hood River, Oregon.

2) For periods between July 9 and September 17, 1999, Respondent suffered or permitted Christine Yohe, a minor, born August 22, 1983, to work for Respondent's business.

3) Respondent employed Christine Yohe without first obtaining and posting a valid employment certificate from the Bureau of Labor and Industries.

4) Respondent did not preserve and maintain records containing information and data related to Christine Yohe's employment.

5) Respondent did not make all employment records he was required to preserve and maintain available for inspection and transcription by the Commissioner or his duly authorized representative.

6) During July 1999, Respondent permitted minor Christine Yohe to work between the hours of 6 p.m. and 7 a.m.

### **CONCLUSIONS OF LAW**

1) OAR 839-021-0006 provides, in pertinent part:

"As used in ORS 653.305 to 653.360 and in OAR 839-021-0001 to 839-021-0500, unless the context requires otherwise:

" \* \* \* \* \*

“(5) ‘Employ’ shall have the same meaning as that which appears in ORS 653.010(1).

“(6) ‘Employer’ shall have the same meaning as that which appears in ORS 653.010(2).”

ORS 653.010 provides, in pertinent part:

“As used in ORS 653.010 to 653.261, unless the context requires otherwise:

“ \* \* \* \* \*

“(3) ‘Employ’ includes to suffer or permit to work; however, ‘employ’ does not include voluntary or donated services performed for no compensation or without expectation or contemplation of compensation as the adequate consideration for the services performed for a public employer \* \* \* or a religious, charitable, educational, public service or similar nonprofit corporation, organization or institution for community service, religious or humanitarian reasons or for services performed by general or public assistance recipients as part of any work training program administered under the state or federal assistance laws.

“(4) ‘Employer’ means any person who employs another person \* \* \*.”

At all times material herein, Respondent was an employer. As an Oregon employer, Respondent was subject to the provisions of ORS 653.305 to 653.370 and the administrative rules adopted thereunder.

2) ORS 653.305 provides:

“(1) The Wage and Hour Commission may at any time inquire into wages and hours or conditions of labor of minors employed in any occupation in this state and determine suitable hours and conditions of labor for such minors.

“(2) When the commission has made such determination, it may issue an obligatory order in compliance with ORS 183.310 to 183.550.

“(3) After such order is effective, no employer in the occupation affected shall employ a minor for more hours or under different conditions of labor than are specified or required by that order, but no such order nor the commission shall authorize or permit the employment of any minor for more hours per day or per week than the maximum fixed by law or at times or under conditions prohibited by law.”

ORS 653.307 provides, in pertinent part:

“(1) In accordance with the applicable provisions of ORS 183.310 to 183.550, the Wage and Hour Commission shall adopt rules governing annual

employment certificates required under this section. \* \* \*

“(2) An employer who hires minors shall apply to the Wage and Hour Commission for an annual employment certificate to employ minors. The application shall be on a form provided by the commission and shall include, but not be limited to:

“(a) The estimated or average number of minors to be employed during the year.

“(b) A description of the activities to be performed.

“(c) A description of the machinery or other equipment to be used by the minors.

“(3) Once a year, the Bureau of Labor and Industries shall provide to all employers applying for an annual employment certificate an information sheet summarizing all rules and laws governing the employment of minors.

“(4) Failure by an employer to comply with ORS 653.305 to 653.340 or with the regulations adopted by the Wage and Hour Commission pursuant to this section shall subject the employer to revocation of the right to hire minors in the future at the discretion of the Wage and Hour Commission, provided that an employer shall be granted a hearing before the Wage and Hour Commission

prior to such action being taken.”

ORS 653.310 provides:

“No child under 18 years of age shall be employed or permitted to work in any employment listed in ORS 643.320(2)<sup>2</sup> unless the person employing the child keeps on file and accessible to the school authorities of the district where the child resides, and to the police and the Wage and Hour Commission, an annual employment certificate as prescribed by the rules adopted by the commission pursuant to ORS 653.307 and keeps a complete list of all such children employed therein.”

ORS 643.370 provides, in pertinent part:

“(1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may impose upon any person who violates ORS 653.305 to 653.370 or any rule adopted by the Wage and Hour Commission thereunder, a civil penalty not to exceed \$1,000 for each violation.”

The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and

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<sup>2</sup> ORS 653.320(2) provides: “No child under 14 years of age shall be employed or permitted to work in, or in connection with, any factory, workshop, mercantile establishment, store, business office, restaurant, bakery, hotel or apartment house.

the Respondent herein. Respondent was not regulated under the Fair Labor Standards Act.

3) OAR 839-021-0006 provides, in pertinent part:

“As used in ORS 653.305 to 653.360 and in OAR 839-021-0001 to 839-021-0500, unless the context requires otherwise:

“ \* \* \* \* \*

“(5) ‘Employ’ shall have the same meaning as that which appears in ORS 653.010(1).

“(6) ‘Employer’ shall have the same meaning as that which appears in ORS 653.010(2).”

“(7) ‘Employment Certificate’ means the employment certificate issued to employers for the employment of minors pursuant to ORS 653.307, and the employment permit referred to in ORS 653.360(3).

“(8) ‘Executive Secretary’ means the Commissioner of the Bureau of Labor and Industries.

“ \* \* \* \* \*

“(10) ‘Minor’ means any person under 18 years of age.”

OAR 839-021-0220 provides, in pertinent part:

“(1) Unless otherwise provided by rule of the Commission, no minor 14 through 17 years of age shall

be employed or permitted to work unless the employer:

“(a) Verifies the minor’s age by requiring the minor to produce acceptable proof of age as prescribed by these rules; and

“(b) Complies with the provisions of this rule.

“(2) No employer shall employ a minor without having first obtained a validated employment certificate from the Bureau of Labor and Industries.

“ \* \* \* \* \*

“(8) The employer shall post the validated employment certificate in a conspicuous place where all employees can readily see it.”

In July 1999, Respondent employed Christine Yohe, a minor between 14 and 17 years of age, without first verifying her age or obtaining and posting a validated employment certificate, violating OAR 830-021-0220.

4) OAR 839-021-0170 provides:

“(1) Every employer employing minors shall maintain and preserve records containing the following information and data with respect to each minor employed:

“(a) Name in full, as used for social security record-keeping purposes and on the same record, the minor’s identifying symbol or number if such is used in

place of name on any time, work or payroll records;

“(b) Home address, including zip code;

“(c) Date of birth;

“(d) Sex and occupation in which the minor is employed (sex may be indicated by use of the prefixes Mr., Mrs., Miss or Ms.);

“(e) Time of day and day of week on which the minor’s workweek begins;

“(f) Hours worked each workday and total hours worked each workweek;

“(g) Date the minor became employed by the employer and date employment was terminated.

“\* \* \* \* \*

“(3) The records required to be maintained and preserved in section[] (1) \* \* \* of this rule are required in addition to and not in lieu of any other recordkeeping requirement contained in OAR to 839-021-0500 [sic]. However, when one record will satisfy the requirements of more than one rule, only one record shall be required.”

Respondent failed to maintain and preserve records related to minor Christina Yohe’s employment, violating OAR 839-021-0170.

5) OAR 839-021-0175 provides, in pertinent part:

“(3) All records required to be preserved and maintained by OAR 839-021-0001 to 839-021-0500 shall be made available for inspections and transcription by the Executive Secretary or duly authorized representative of the Executive Secretary.”

Respondent failed to make available to the Commissioner or his representative for inspection all employment records he was required to preserve and maintain, violating OAR 839-021-0175(3).

6) ORS 653.315(2) provides, in pertinent part:

“No child under 16 years of age shall be employed at any work before 7 a.m. or after 6 p.m., except for those:

“ \* \* \* \* \*

“(d) Employed under a special permit which may be issued by the Wage and Hour Commission, after investigation and good cause shown therefor, in suitable work which is not detrimental to the child’s physical and moral well-being. The Wage and Hour Commission or its representatives shall investigate periodically the conditions of labor for which the special permit has been issued, to determine whether or not the permit should be continued.”

OAR 839-021-0070 provides, in pertinent part:

“(1) Except as otherwise provided in this rule, employment of minors under 16 years of age shall be confined to the following periods:

“ \* \* \* \* \*

“(f) Between 7 a.m. and 6 p.m.; provided, however, that with a validated employment certificate specifying the conditions set forth in ORS 653.315(2)(d), a minor under 16 years of age may work until 7 p.m., except that during the summer (June 1 through Labor Day), the minor may work until 9:00 p.m.”

During July 1999, Respondent permitted Christine Yohe, a minor under 16 years of age, to work during the hours between 6 p.m. and 7 a.m., violating ORS 653.315(2)(d) and OAR 839-021-0070(1)(f).

7) ORS 653.370 provides, in pertinent part:

“(1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may impose upon any person who violates ORS 653.305 to 653.370 or any rule adopted by the Wage and Hour Commission thereunder, a civil penalty not to exceed \$1,000 for each violation.”

OAR 839-019-0010 provides, in pertinent part:

“The Commissioner may impose a civil penalty for

violations of any of the following statutes, administrative rules and orders:

“(1) Violation of any provision of ORS 653.305 to 653.370.

“(2) Violation of any provision of OAR 839-021-0001 to 839-021-0500.”

OAR 839-019-0020 provides, in pertinent part:

“(1) Except as provided in section (4) of this rule, when determining the amount of civil penalty to be imposed, the Commissioner shall consider the following circumstances and shall cite those the Commissioner finds applicable:

“(a) The history of the employer in taking all necessary measures to prevent or correct violations of statutes and rules;

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

“(c) The magnitude and seriousness of the violation;

“(d) The opportunity and degree of difficulty to comply;

“(e) Any other mitigating circumstances.

“(2) It shall be the responsibility of the employer to provide the Commissioner with evidence of the mitigating circumstances set out in section (1) of this rule.

“(3) In arriving at the actual amount of the civil penalty, the

Commissioner shall consider whether the minor was injured while employed in violation of the state and rules.

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“(5) Notwithstanding any other section of this rule, the Commissioner shall consider all mitigating and aggravating circumstances presented by the employer for the purpose of reducing the amount of the civil penalty to be imposed.”

OAR 839-019-0025 provides, in pertinent part:

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

“(2) When the Commissioner determines to impose a civil penalty for the employment of a minor without a valid employment certificate, the minimum civil penalty shall be as follows:

“(a) \$100 for the first offense;

“(b) \$300 for the second offense;

“(c) \$500 for the third and subsequent offenses.

“(3) The civil penalties set out in section (2) of this rule shall be in addition to any other penalty imposed by law or rule.

\*\*\*\*\*

“(5) Wilful and repeated violations of the provisions of ORS 653.305 to 653.370 or OAR 839-021-0001 to 839-021-0500 are considered to be of such seriousness and magnitude that no less than \$500 for each wilful or repeated violation will be imposed when the Commissioner determines to impose a civil penalty.”

Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries is authorized to assess a civil penalty for each violation of ORS 653.305 to 653.370 or any rule adopted by the Wage and Hour Commission thereunder. The civil penalties assessed in the Order herein are a proper exercise of that authority. ORS 653.370.

**OPINION**

A preponderance of the credible evidence on the whole record establishes that Respondent was an employer in his work relationship with Christina Yohe, a minor, and that Yohe was his employee during July and from August 28 to September 17, 1999. As Yohe’s employer, Respondent failed to obtain or post an annual employment certificate, failed to maintain and preserve requisite records pertaining to Yohe’s employment, failed to make employment records available to the Agency when requested, and permitted Yohe, who was 15 years old during July 1999, to work between the hours of 6 p.m. to 7 a.m.

Respondent claimed he failed to do all of the above because he was not an employer, did not employ Yohe, and was, therefore, not subject to the child labor laws. He claimed, alternatively, that if Yohe performed any work, she did so voluntarily. The evidence is to the contrary.

#### **RESPONDENT EMPLOYED A MINOR**

Undisputed evidence establishes that Christina Yohe was a minor during the summer and fall of 1999. Respondent acknowledges that during the same time period, he operated, from the garage of his home, a business that provided Internet services to customers in Oregon and Washington. Respondent does not dispute that Yohe was on the business premises during times material, that she assisted with the business, occasionally answered the telephones and sometimes endorsed checks on behalf of the business. Respondent maintains, however, that he did not own or control the business and, therefore, was not Yohe's employer. Respondent's contention that James Ogle owned and controlled the business as late as December 1999 was directly contradicted by credible evidence in the record that shows Ogle was Respondent's former business partner who gave up his interest in the ISP in December 1998.

ORS 653.010(3) and (4) define an employer as any person who suffers or permits another person to work. Evidence establishes

that Respondent suffered or permitted Yohe to perform work that included preparing billings, answering telephones, endorsing checks, and picking up mail for Respondent's benefit. Evidence further establishes that Respondent agreed to and did pay Yohe \$200 per week for at least three weeks of work in July 1999. There is no credible evidence in the record that establishes anyone other than Respondent suffered or permitted Yohe, a minor, to work for the business that Respondent operated out of his residence.

Respondent's claim that Yohe volunteered any services she rendered has no merit. First, credible evidence establishes that Yohe did not volunteer her services, she expected to receive an agreed upon salary of \$200 per week, and for three weeks of work in July, she received checks from Respondent totaling \$600. Second, voluntary work is that which is done without expectation of compensation and only if the entity for which the services are performed is "a public employer \* \* \* or a religious, charitable, educational, public service or similar nonprofit corporation, organization or institution for community service, religious or humanitarian reasons" or the work is part of a work training program administered under the state or federal assistance laws. ORS 653.010(3). Respondent admits he was not a public employer or a religious, charitable, or educational organization as described. There is no evidence Respondent was involved in a state or federal

public assistance program. Respondent could not therefore accept Yohe's personal services or any other individual's services as a volunteer, whether the individual is a minor or an adult.

### **RESPONDENT'S CHILD LABOR VIOLATIONS**

Respondent acknowledged and evidence confirms that Respondent failed to obtain or post an employment certificate, failed to maintain and preserve requisite records pertaining to Yohe's employment, and failed to make employment records available to the Agency when requested. Respondent's reasons for his failure to comply with the aforementioned requirements have no merit for reasons that are addressed elsewhere in this opinion.

Respondent denied employing a minor between the hours of 6 p.m. and 7 a.m. Other than Respondent's denial, there is no evidence in the record that controverts Yohe's credible testimony, which was corroborated by the equally credible testimony of her sister, Erika, that she performed work for Respondent between those hours in July 1999, when she was only 15 years old. Accordingly, the Commissioner is authorized to impose the following penalties.

### **CIVIL PENALTIES**

#### **A. Failure to obtain an annual employment certificate**

OAR 839-019-0025(2) establishes minimum penalties for employing a minor without a valid

employment certificate. For the first offense, the minimum that shall be imposed is \$100. For willful and repeated violations, "no less than \$500 \* \* \* will be imposed when the Commissioner determines to impose a civil penalty." OAR 839-019-0025(5). The Agency seeks \$500 for Respondent's failure to obtain an annual employment certificate in 1999. The Agency did not allege that the violation was willful and repeated. Nor has the Agency alleged or provided evidence of prior violations or other aggravating circumstances. Respondent, on the other hand, offered no mitigating evidence. See OAR 839-019-0020(2). The record as a whole shows, however, that Respondent knew Yohe was a minor when he permitted her to work for his business and he did not make any attempt during that time to comply with the child labor laws. Considering the circumstances set forth in OAR 839-019-0020(1), the forum finds that, despite his knowledge that a minor was performing services for his business, Respondent failed to take all necessary measures to prevent or correct child labor violations, including obtaining an employment certificate. Further, while there is no evidence Respondent has previously violated child labor laws, the violation is serious and the additional violations could have been prevented had Respondent first obtained the requisite certificate. Accordingly, the forum concludes that \$500 is an appropriate penalty.

**B. Failure to maintain and preserve records.**

The Agency seeks \$250 for Respondent's failure to maintain and preserve records regarding Christina Yohe, a minor. The maximum penalty allowed for child labor violations is \$1,000. OAR 839-019-0025(1). There is no evidence of mitigation in the record and nothing that suggests that anything less than the sanction sought by the Agency should be imposed. Accordingly, the forum imposes a \$250 civil penalty as proposed by the Agency.

**C. Failure to make employment records available.**

The Agency seeks a \$250 civil penalty for Respondent's failure to make Respondent's employment records available to the Agency when requested. Having considered the circumstances set forth in OAR 839-019-0020(1), the forum finds that Respondent had the opportunity to comply with little or no difficulty each time the Agency requested the records. Accordingly, the forum concludes \$250 is an appropriate penalty.

**D. Employing a minor under 16 years old between 6 p.m. and 7 a.m.**

Evidence shows Respondent had knowledge in July 1999 that Christina Yohe was a minor. He also knew that she was not old enough to obtain a driver's license and therefore knew when he suffered or permitted her to work after 6 p.m. and before 7 a.m. that she was under 16 years old and prohibited from working during

those hours. Had he obtained the requisite employment certificate, he might have avoided violations because he would have known that he had a number of obligations that are not required when employing older minors. Accordingly, the forum concludes \$500 is an appropriate penalty.

**ORDER**

NOW, THEREFORE, as authorized by ORS 653.370, **Randall Stuart Bates**, is hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries in the amount of ONE THOUSAND FIVE HUNDRED DOLLARS (\$1,500) as civil penalties, plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order until the date Respondent complies with the Final Order.

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In the Matter of

STATE ADJUSTMENT, INC.

Case No. 54-01

Final Order of Commissioner  
Jack Roberts

Issued March 6, 2002

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### SYNOPSIS

Where a female Complainant was employed by Respondent corporation and was sexually harassed by Respondent's corporate officer, the forum found Respondent liable for Complainant's resulting mental suffering and awarded Complainant mental suffering damages totaling \$10,000. ORS 659.030(1)(b). The forum found no basis for determining that Complainant was constructively discharged in violation of ORS 659.030(1)(a).

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The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 5, 2001, at the Salem office of the Bureau of Labor and Industries lo-

cated at 3865 Wolverine Street NE, Bldg. E-1, Salem, Oregon.

David K. Gerstenfeld, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Rhonda Shanafelt ("Complainant") was present throughout the hearing and was not represented by counsel. James J. Susee, Attorney at Law, represented State Adjustment, Inc. ("Respondent"), whose corporate officer, Chris Zurfluh, was present throughout the hearing.

In addition to Complainant, the Agency called as witnesses: Gregg Merrill, Employment Department Adjudicator; Pam Lomax, process server; Larry Lomax, process server; Juneka Torres, former Respondent employee; Joseph Tam, a BOLI senior civil rights investigator; and Jamie Bellwood, Complainant's daughter.

Respondent called as witnesses: Thomas E. Fleming, process server; Michael Knapp, Respondent's corporate attorney; Traci Coyle, Respondent's former employee; Charles Anderson, Respondent's courier service; Paul Conner, drywall finisher; and Chris ("Phil") Zurfluh, Respondent's owner.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-19;
- b) Agency exhibits A-1 through A-5 (submitted prior to

hearing); A-8 (submitted at hearing)

c) Respondent exhibits R-1 and R-3 (submitted prior to hearing).

Having fully considered the entire record in this matter, the Administrative Law Judge hereby makes the following Proposed Findings of Fact (Procedural and on the Merits), Proposed Ultimate Findings of Fact, Proposed Conclusions of Law, Proposed Opinion, and Proposed Order.

#### **FINDINGS OF FACT – PROCEDURAL**

1) On November 18, 1999, Complainant filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging she was the victim of the unlawful employment practices of Respondent. After investigation and review, the CRD issued a Notice of Substantial Evidence Determination finding substantial evidence supporting the allegations of the complaint.

2) On March 14, 2001, the Agency submitted to the forum Specific Charges alleging Respondent discriminated against Complainant by subjecting her to a course of conduct by its corporate officer, Chris Zurfluh, designed to harass, embarrass, humiliate and intimidate her which conduct was offensive and unwelcome, creating a hostile and intimidating work environment because she was female, in violation of ORS 659.030(1)(b). The Agency further alleged that Complainant was compelled to quit her

employment due to the intolerable working conditions created by Respondent, in violation of ORS 659.030(1)(a). The Agency also requested a hearing.

3) On March 14, 2001, the forum served on Respondent the Specific Charges, accompanied by the following: a) a Notice of Hearing setting forth August 28, 2001, in Salem, Oregon, as the time and place of the hearing in this matter; b) a notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

4) On March 21, 2001, Respondent, through counsel, filed a timely answer to the Specific Charges.

5) On June 18, 2001, Respondent requested that the hearing be postponed until September 5 or 6, 2001. The Agency did not oppose Respondent's motion and on June 19, 2001, the forum issued an order granting the motion and reset the hearing date for September 5, 2001.

6) On July 11, 2001, the Agency moved for a discovery order. Respondent filed no objections to the motion and on July 29, 2001, the ALJ granted the Agency's motion and ordered Respondent to produce all of the items sought to the Agency no later than July 30, 2001.

7) On July 25, 2001, 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 damage calculations (for the Agency only). The ALJ ordered the participants to submit case summaries by August 24, 2001, and notified them of the possible sanctions for failure to comply with the case summary order.

8) On August 28 and August 29, 2001, the Agency and Respondent filed their respective case summaries.

9) On August 30, 2001, the Agency filed a supplemental case summary and Respondent filed an addendum to its case summary.

10) At the start of hearing, the participants stipulated to the admission of Agency exhibits A-1 and A-2 and further stipulated that Complainant's rate of pay during her employment was \$7.00 per hour.

11) At the start of 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.

12) On January 30, 2002, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Respondent did not file exceptions to the proposed order. The Agency filed timely exceptions. The typographical error in Finding of Fact – The Merits 23 has been corrected and Finding of Fact – The Merits 19 has been adjusted to include an additional point regarding Zurfluh's credibility in response to the Agency's exceptions.

#### **FINDINGS OF FACT – THE MERITS**

1) At all times material herein, State Adjustment, Inc. ("Respondent") was engaged in the business of debt collection in Oregon and was an employer utilizing the personal services of one or more persons.

2) At all times material herein, Chris ("Phil") Zurfluh was Respondent's chief executive officer, corporate secretary, and manager of Respondent's sole office in Salem, Oregon. Prior to their divorce, Zurfluh's wife, Diane, was the only other corporate officer and shareholder. In May 1999, Zurfluh's maintenance man, Paul Conner, replaced Zurfluh's wife as president of the corporation. Conner has no financial interest in the business, but attends corporate meetings and is "as active as [Zurfluh] requires [him] to be."

3) In late March 1999, Complainant, a female, was hired by Zurfluh to perform clerical work for

Respondent. She was the only employee and Zurfluh was her immediate supervisor.

4) Complainant's duties included typing the paperwork for lawsuits and garnishments, filing, and answering the telephone. Zurfluh did not formally train Complainant for any of her job responsibilities and Complainant had no prior experience preparing garnishments or other legal documents. Someone named Nick Watts showed her how to operate the computer and Respondent's corporate attorney, Michael Knapp, showed Complainant how to fill out the preprinted garnishment forms and how to properly calculate the fees and interest. When Complainant had difficulty preparing a form, Knapp assisted her, usually by telephone. Complainant sent the garnishments that she prepared to Knapp for review and he frequently returned them to her for correction. Knapp charged Respondent for his legal assistance and each time Knapp had to handle Complainant's mistakes, it cost Respondent money. There were one to five garnishments per week during Complainant's employment.

5) Initially, Complainant worked five days per week, from 8 a.m. to 5 p.m. Her pay rate was \$7.00 per hour. Her hours were reduced after one month due to lack of work. Zurfluh was gone most of the time because of his divorce and there was no work for her to do. Zurfluh would say to

her "let's call it a day" and send her home early each day.

6) Complainant's desk was located in a small (16' by 25') outer office, approximately 10 feet from Zurfluh's desk, which was located in a smaller (12' by 12') inner office adjacent to Complainant's. The entire office space included the two offices and a small (10' by 12') file room. At all times, Complainant was within earshot of Zurfluh while he was at his desk and she overheard his telephone conversations. From the beginning of her employment, while working at her computer, Complainant regularly overheard Zurfluh using profanity and telling "dirty jokes" to people who came into the office and while on the telephone. The subject matter of his jokes primarily involved oral sex. Complainant also heard Zurfluh refer to women as "fucking bitches" and "god damn sluts." When she overheard his profanity or one of his jokes, Complainant either ignored it or walked away.

7) Shortly after Complainant began working for Respondent, Zurfluh began calling Complainant into his office regularly to talk about his divorce, his ex-wife, and other particulars about his personal life. During the first two weeks of her employment, Complainant spent much of each workday in Zurfluh's office listening to details about his divorce. Complainant did not find these conversations sexually offensive, and throughout the period that Zurfluh was preparing for his divorce, Complainant helped him

gather pertinent information to send to his attorney.

8) Zurfluh frequently invited Complainant to lunch, telling her that he did not like to go to lunch by himself. She sometimes accepted his invitations and they usually ate at the Elk's Club. She declined his invitations on occasion because she did not want to take an hour-long lunch.

9) After the first two weeks, Zurfluh began calling Complainant at home to offer her a ride to work. She rode with him about three days each week. They often stopped for donuts and occasionally Zurfluh would stop at the post office or run personal errands while on the way to work. Complainant rode the bus on the days she did not ride with Zurfluh. While riding to work, the topic of conversation was primarily his divorce and how he was going to hide his money from his ex-wife.

10) One time, after Zurfluh had dropped Complainant off at work, Complainant went into Zurfluh's office to do her filing and found his office in shambles with magazines and papers strewn on the floor. As she moved some of the papers, she came across a publication with a naked woman on the cover and kicked it under Zurfluh's desk. She later told Zurfluh what she had found and what she had done with it and he laughed and said, "well, yeah, I was here all weekend." She stumbled upon publications of the same genre in his office, always just after the weekend, three more times. Zurfluh did not leave the

magazines out in plain sight and Complainant's discovery each time was by happenstance.

11) After she was employed two weeks, Complainant began to feel "like just one of the guys." Zurfluh began talking to her freely and frequently about his lunch visits to "strip clubs," and offered Complainant details about particular "girls" and how adept certain ones were at "climbing up and down the pole." One time, he suggested to her that the problems she was having with her fiancé might be related to the fiancé's desire for someone less calm than Complainant and more like the "girls" at the strip club. Complainant told Zurfluh that she did not want to hear about it. However, Zurfluh continued thereafter to detail his experiences after each strip club excursion.

12) Zurfluh also began telling Complainant about the women he was seeing socially and describing the oral sex he was receiving from them, referring to the women as his "\$20 dates." During his conversations with Complainant, Zurfluh sometimes mentioned his ex-wife, whom he described to Complainant as having a condition called "TMJ" and due to the condition could not give him, in his words, "a blow job."

13) Complainant became increasingly uncomfortable with Zurfluh's topics of conversation. As a result, she began to distrust her fiancé and became suspicious if he came home from work more than ten minutes late, recalling that Zurfluh had said he could "get

everything taken care of" in one half hour. Complainant also tried to change her appearance by wearing longer skirts and baggy jeans because she did not want to be noticed or talked about in the same manner Zurfluh talked about other women.

14) In June 1999, Zurfluh became upset about a garnishment Complainant had prepared and called her a "god damn fucking slut." He told her that maybe she was not happy working for Respondent and said to her "maybe this is not your type of work." Complainant told Zurfluh that she was happy with the work, but also said to him, "you're right, I'll give you my notice." Zurfluh asked Complainant to run an advertisement for her job in the newspaper and thereafter interviewed a woman to replace Complainant. The woman declined Zurfluh's job offer. Complainant was, in the meantime, experiencing increased difficulties with her fiancé who was planning to move out the following month. She could not support her daughter financially without him and was having no success finding employment elsewhere. Complainant told Zurfluh that she was having problems at home, that she liked the work, and that if she could spend more time working she would stay in her job. Zurfluh agreed to remove the advertisement for Complainant's job from the newspaper and he continued to employ her. Complainant and her fiancé worked out their differences and

her fiancé did not move out in July as previously planned.

15) At the end of September 1999, Complainant quit her employment. In early December 1999, Claimant began working for Holiday Inn Express, earning \$6.75 per hour for 32 hours per week. Within three months her pay rate changed to a salary basis and she was earning more than she did while employed by Respondent.

16) Between April and September 1999, Respondent contracted with Pam and Larry Lomax, husband and wife, to serve legal papers and to help set up a computer program. Both had been process servers for many years. While working for Respondent, both were frequently in the business office at the same time as Complainant and Zurfluh. Larry Lomax was in the office at least five times per week. Pam Lomax was in the office once or twice per week, though not every week. Neither Lomax knew Complainant or Zurfluh before their business relationship. Neither Lomax has seen Complainant since her employment with Respondent ended.

17) Pam Lomax credibly testified that she heard Zurfluh "swear quite a bit" when she was present at Respondent's business office. While she could not remember specific words, she testified that he often referred to women's anatomy and that she purposely limited the number of her office visits because of Zurfluh's vulgar language. She also

credibly testified that Zurfluh made, in her presence, an untoward comment about a younger woman that he wanted to date. The comment included sexual references to the woman's body and breasts and was also made in the presence of Complainant and Zurfluh's daughter who responded by asking her father when he intended to grow up. Additionally, Lomax observed two magazines with unclad women on the covers in Zurfluh's office. The magazines had fallen out of a cabinet and Zurfluh quickly picked them up and put them away. Lomax never heard Zurfluh direct any of his profanity or sexual innuendo to Complainant. Complainant told Lomax that she was concerned about Zurfluh's conduct in the workplace, that Zurfluh talked about \$20 prostitutes, yelled at her several times, and called her incompetent and a "fucking bitch." Complainant also told Lomax that she liked her job but was concerned that she did not know how to do the work and was not being properly trained. Pam Lomax's testimony was credible in every respect. Her answers to questions were straightforward and showed no bias. The forum credits her testimony in its entirety.

18) Larry Lomax credibly testified that Zurfluh used profanity in the workplace as "part of his vernacular" and that it frequently included references to female anatomy. Lomax further testified that Zurfluh regularly talked about his visits to strip clubs and women's "body parts" and did so when Complainant was present or

within earshot. During Complainant's employment, Zurfluh repeatedly asked Lomax if he thought Complainant was using drugs and appeared to want Lomax to agree that she was using drugs. Lomax could not recall if he had told Complainant about Zurfluh's questions about her possible drug use. Lomax showed no bias toward or against Zurfluh during his testimony and readily acknowledged that Zurfluh attempted to tone down his language when Pam Lomax was present out of respect for the Lomaxs' religious beliefs. The ALJ carefully observed Larry Lomax's demeanor and based on his straightforward and unbiased testimony credits his testimony in its entirety.

19) On key facts, Chris Zurfluh's testimony was internally inconsistent and conflicted notably with other credible testimony. For instance, Zurfluh initially testified emphatically that he never used profanity at all, never kept magazines with naked women on the covers in the workplace, never went to strip clubs during the lunch hour on workdays, and never solicited a prostitute. Later in his testimony, he acknowledged that he used profanity, but only outside the workplace, that he did have "Playboy or Penthouse" type magazines in the workplace on occasion, and that he did go to strip clubs during his lunch hour, but only for the "free buffet." Moreover, evidence shows Zurfluh entered a guilty plea to the crime

of prostitution on November 13, 2000.<sup>1</sup> The ALJ observed that Zurfluh's demeanor, memory, and manner of answering questions could be consistent with possible effects of a severe head injury he incurred in a 1980 automobile accident. His memory was selective, however, and he recalled events with more conviction during his direct testimony, while during cross-examination his memory lapses occurred more markedly. Finally, Pam and Larry Lomax's credible testimony contradicts Zurfluh's testimony and corroborates Complainant's allegations. At best, Zurfluh's testimony was unreliable and was believed only when corroborated by other credible testimony.

20) Tom Fleming's testimony was generally credible. Although he has worked as one of Zurfluh's process servers since 1982 and they have maintained a long-term friendship, Fleming's demeanor was direct and non-evasive. He acknowledged that Zurfluh was loud and that he used profanity in the workplace, although he did not consider Zurfluh's language vulgar. His testimony that he was present when Complainant quit her employment in September 1999 and that he overheard her tell Zurfluh she was quitting was believable. He testified that Complainant had

just hung up the telephone when Fleming arrived at the office and that she called Zurfluh a "son of a bitch" and accused him of telling Larry Lomax that she was a drug addict. According to Fleming, Complainant was very upset and told Zurfluh that she was quitting her employment and intended to sue him. Fleming's testimony is bolstered by Larry Lomax's credible statement that Zurfluh had asked him on more than one occasion about whether Complainant was using drugs. Where it differed from Complainant's testimony, the forum has relied on Fleming's version of events.

21) Michael Knapp testified in an objective and straightforward manner. He readily acknowledged that he had probably heard his client "curse" in the workplace and that Zurfluh used profanity during telephone conversations. He was aware that Pam Lomax was offended by Zurfluh's use of profanity. His testimony has been credited in its entirety.

22) Paul Conner's testimony demonstrated his bias as Zurfluh's business associate and was contradicted by other evidence. His claim that Zurfluh never used profanity was contrary to every other witness who testified, except Zurfluh, who first denied ever using profanity, and then admitted to using it but not in the workplace. Conner's assertion that Zurfluh was concerned only about Complainant's inappropriate attire, i.e., short dresses, and not her clerical work, was contradicted by his ear-

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<sup>1</sup> According to Zurfluh's sworn statement in his Petition to Plead Guilty, he offered a plainclothes police officer "\$20" after she asked him if he "wanted a date." Exhibit A-5.

lier statement to the Agency that at “corporate meetings” Zurfluh was “really upset” with Complainant’s work performance, especially the garnishments that were returned by Zurfluh’s attorney. Conner’s testimony was disingenuous and clearly calculated to enhance Respondent’s case. Except for Conner’s representation of his status in Respondent’s corporate hierarchy, which was confirmed by Zurfluh, the forum has given no weight to Conner’s testimony.

23) Charles Anderson’s testimony about his knowledge of Zurfluh’s use of profanity and Complainant’s mode of dress in the workplace, i.e., short skirts, low cut tops, and slacks, was not believable. In an earlier statement to the Agency he claimed to be at Zurfluh’s business “on almost a daily basis.” During cross-examination, he acknowledged he was not in the office much when Complainant worked there and that he did most of his work for Respondent as a process server when Zurfluh’s ex-wife was involved in the business. The forum has given no weight to Anderson’s testimony.

24) Juneka Torres testified credibly that she worked for a brief time for Respondent after Complainant left her employment and heard Zurfluh use “a lot” of profanity. She stated she was surprised at the number of times he used “fuck” as an expression and, although the profanity was never directed toward her, she was offended by it and wanted Zurfluh to

treat her “like a lady.” Torres also stated that during her employment, Zurfluh referred to Complainant as a “bitch” while complaining that Complainant had “left him.” Torres did not know Complainant and her testimony was straightforward. There is no reason not to credit her testimony in its entirety.

25) Complainant’s testimony was not altogether credible. Credible evidence corroborated some of her testimony, particularly her statements about Zurfluh’s conduct in the workplace. Other parts of her testimony, however, were inconsistent or contradicted by other evidence. She initially testified that in June 1999, Zurfluh became angry with her about a garnishment she had prepared, called her a “god damn fucking slut,” and suggested she was not suited for that type of work. She did not agree with his assessment, but agreed to place an advertisement in the newspaper for her replacement. She then testified that in September 1999, Zurfluh became upset with her about “another” garnishment she had prepared and again called her a “god damn fucking slut.” During cross-examination, while she acknowledged having a discussion with Zurfluh about her performance problems, she denied he ever mentioned garnishments to her in June 1999. She claimed to have given him two weeks notice because they were “not happy with each other” and “just couldn’t get along.” Later on redirect, she stated flatly that Zurfluh had never discussed any aspect of her work

performance with her during her employment. When she testified about her reason for leaving her employment in September 1999, Complainant stated it was the argument about the garnishment and Zurfluh's name calling that prompted her to pick up her purse and leave. Only after prompting from the Agency case presenter did she agree that Zurfluh's sexual comments influenced her decision to leave. The forum found this testimony incredible for several reasons. First, Complainant never volunteered that Zurfluh's conduct had anything to do with her quitting her employment. In fact, her emphasis each time the issue was raised was always on their disagreement about how the garnishment should have been handled. Even the name he called her at the time was not first and foremost on her mind. Second, Zurfluh's conduct during the last three months of her employment was exactly as it was during the first three months of her employment. According to her, she was quitting in June because they did not get along, but she ultimately stayed on because she convinced Zurfluh that her fiancé was moving out and she needed the money. At no time did she ever suggest that Zurfluh's sexual comments influenced her initial decision to leave, which is consistent with how she described her reason for leaving in September before she was prompted to include the discriminatory reason. Third, Fleming credibly testified that he observed Complainant on her last day of work and that she

quit after accusing Zurfluh of telling Larry Lomax that she was on drugs. For those reasons, the forum does not believe Complainant's testimony regarding her reason for leaving her employment. However, the forum does believe her testimony about Zurfluh's conduct and how it impacted her work environment because it was corroborated by the credible testimony of others.

26) The testimony of Joseph Tam and Gregg Merrill was credible.

#### **ULTIMATE FINDINGS OF FACT**

1) At times material herein, Respondent State Adjustment, Inc. was an Oregon employer with one or more employees.

2) At times material herein, Chris Zurfluh was Respondent's chief executive officer and corporate secretary.

3) Respondent employed Complainant.

4) Complainant is a female.

5) Between March and September 1999, Chris Zurfluh engaged in verbal conduct of a sexual nature directed at Complainant because of her sex.

6) Zurfluh's conduct was offensive and unwelcome to Complainant.

7) Zurfluh's conduct created an offensive work environment that was made a term or condition of Complainant's employment.

8) Complainant voluntarily terminated her employment for

reasons other than the offensive work environment created by Zurfluh.

9) Complainant suffered distress and impaired personal dignity because of Zurfluh's conduct.

### CONCLUSIONS OF LAW

1) At times material herein, Respondent corporation was an employer subject to the provisions of ORS 659.010 to ORS 659.110. ORS 659.010(6).

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter herein and the authority to eliminate the effects of any unlawful employment practices found. ORS 659.022; ORS 659.040; ORS 659.050.

3) ORS 659.030(1) states, in pertinent part:

"For the purposes of ORS 659.010 to 659.110 \* \* \* it is an unlawful employment practice:

"(a) For an employer, because of an individual's \* \* \* sex \* \* \* to refuse to hire or employ or to bar or discharge from employment such individual. \* \* \*

"(b) For an employer, because of an individual's \* \* \* sex \* \* \* to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

OAR 839-005-0030 provides in pertinent part:

"(1) Sexual harassment is unlawful discrimination on the basis of gender and includes the following types of conduct:

"(a) Unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature when such conduct is directed toward an individual because of that individual's gender.

"(A) Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or

"(B) Submission to or rejection of such conduct is used as the basis for employment decisions affecting that individual.

"(b) Any unwelcome verbal or physical conduct that is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with work performance or creating a hostile, intimidating or offensive working environment.

"(2) The standard for determining whether harassment based on an individual's gender is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable person in the circumstances of the complaining individual would so perceive it.

By subjecting Complainant to unwelcome sexual conduct directed toward Complainant because of her gender, Respondent, through its corporate officer, created a hostile, intimidating, and offensive

work environment contrary to OAR 839-005-0030, and made that environment an explicit term or condition of Complainant's employment with Respondent, in violation of ORS 659.030(1)(b). Respondent did not violate ORS 659.030(1)(a).

4) OAR 839-005-0035 states:

"Constructive discharge occurs when an individual leaves employment because of unlawful discrimination. The elements of a constructive discharge are:

"(1) The employer intentionally created or intentionally maintained discriminatory working conditions related to the individual's protected class status;

"(2) The working conditions were so intolerable that a reasonable person in the complaining individual's circumstances would have resigned because of them;

"(3) The employer desired to cause the complaining individual to leave employment as a result of those working conditions, or knew or should have known that the individual was certain, or substantially certain, to leave employment as a result of the working conditions; and

"(4) The complaining individual left employment as a result of the working conditions."

Complainant did not leave her employment as a result of dis-

criminatory working conditions. Respondent did not violate OAR 839-005-0035.

5) OAR 839-005-0030(3) states in pertinent part:

"Employer proxy: A [*sic*] employer is liable for harassment when the harasser's rank is sufficiently high that the harasser is the employer's proxy, for example, the respondent's president, owner, partner or corporate officer."

The actions, inaction, knowledge and motivations of Chris Zurfluh, Respondent's corporate officer, are properly imputed to Respondent.

### OPINION

The Agency alleges Respondent unlawfully discriminated against Complainant in the terms and conditions of her employment by subjecting her to sexual harassment by and through its corporate officer, Chris Zurfluh, and that as a result of the sexual harassment, Complainant was forced to quit her employment. The Agency seeks \$5,750 in back wages and \$15,000 in mental suffering damages.

### TERMS AND CONDITIONS OF EMPLOYMENT

In order to prevail, the Agency is required to prove the following elements:

(1) Respondent is an employer defined by statute;

(2) Complainant was employed by Respondent;

(3) Complainant is a member of a protected class;

(4) Respondent, through its proxy, engaged in conduct of a sexual nature toward Complainant because of her gender;

(5) The conduct created a hostile, intimidating, or offensive work environment;

(6) Complainant was harmed by the conduct.

OAR 839-050-0030.

There is no dispute that Respondent was an employer who employed Complainant, a female, at times material. Nor is Chris Zurfluh's status as Respondent's owner and corporate officer at issue. As Respondent's corporate officer, Zurfluh's conduct is automatically imputed to Respondent and Respondent is liable for any unlawful harassment. OAR 839-005-0030(3).

The elements in dispute are threefold: (1) whether Respondent's corporate officer engaged in unwelcome sexual conduct directed toward Complainant because of her gender; (2) whether the conduct was sufficiently pervasive or so severe as to create a hostile, intimidating, or offensive work environment; and (3) whether Complainant suffered harm as a result of the unlawful conduct.

#### **A. Unwelcome Sexual Conduct**

##### ***Sexual Conduct***

Evidence shows Zurfluh engaged in a pattern of verbal conduct that included regular re-

marks to Complainant about his sexual exploits, including accounts of his lunches at strip clubs, his "\$20 dates" with prostitutes, and "blow jobs" he claimed to receive regularly. Evidence further shows Zurfluh often referred to women as "fucking bitches" or "god damn fucking sluts" within Complainant's earshot, and at least once during her six-month employment called her a "god damn fucking slut." Moreover, due to the proximity of their respective desks, Complainant regularly overheard Zurfluh relate sexually explicit jokes, usually involving oral sex, to others over the telephone. Additionally, Complainant was required to perform some of her job duties in Zurfluh's office and several times came across publications depicting unclad women on the covers. While there is no evidence that Zurfluh intended anyone to see the publications, he was, at best, indifferent to their detection because even process server Pam Lomax observed magazines with "naked women" on the covers falling off a cabinet shelf at least once. Complainant's account of Zurfluh's conduct in the workplace was consistent with other credible witnesses who had heard Zurfluh's use of profanity and jokes demeaning to women. While most of the profanity and jokes were not specifically aimed at Complainant, they were prolific and contributed to the overall atmosphere that the forum finds was particularly offensive to women and, therefore, directed at

Complainant, his only employee, because of her gender.

### **Unwelcome**

Despite Respondent's suggestion that Complainant wore inappropriate clothing during her employment, there is no evidence that Complainant engaged in any conduct that would invite the obscenity that pervaded Complainant's work environment. There is no evidence that she used vulgar language in the workplace or initiated any sexually oriented conversations with Zurfluh or anyone else. There is evidence that Complainant told Zurfluh at least once that she was not interested in hearing about his sexual exploits. She also expressed concern to Pam Lomax about Zurfluh's language, his accounts of his "\$20 dates" with prostitutes, and his reference to her as a "fucking bitch." The forum finds there is sufficient evidence in the record to conclude that Complainant found Zurfluh's verbal conduct unwelcome.

### **B. Hostile, Intimidating, or Offensive Work Environment**

The standard for evaluating whether conduct is sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment is from the objective standpoint of a reasonable person in the Complainant's particular circumstances. OAR 839-005-0030(2). In this case, Zurfluh's conduct, while only verbal, consisted of ongoing sexual slurs and jokes, repeated remarks

to Complainant detailing his sex life, and at least one reference to Complainant as a "fucking slut" during the six months she was employed. Complainant was the only employee and a captive audience to his ongoing behavior that occurred in relatively close quarters. The forum finds Zurfluh engaged in a pattern of offensive conduct that particularly demeaned women and that from the perspective of a reasonable person in Complainant's circumstances, it was sufficiently pervasive as to create an offensive working environment.

### **C. Complainant's Harm**

Zurfluh's conduct and demeanor during Complainant's employment caused her enough discomfort that she complained to Pam Lomax about it and at least once told Zurfluh she wasn't interested in hearing about his sexual exploits. As a result of her continued exposure to Zurfluh's sexual exploits and anti-female comments during her six months of employment, Complainant found herself becoming increasingly suspicious of her fiancé's activities, attributing to him some of Zurfluh's qualities, which affected the quality of their relationship. Additionally, Complainant began to change her outward appearance by wearing baggy clothing and long dresses and skirts in order to go unnoticed because she was fearful that men would talk about her the way Zurfluh talked about other women.

This forum has continuously held that mental suffering awards

reflect the type of discriminatory conduct, the duration, severity, frequency, and pervasiveness of that conduct, the type and duration of the mental distress, and vulnerability of the victim. *In the Matter of A.L.P., Incorporated*, 15 BOLI 211 (1997), *aff'd*, *A.L.P. Inc. v. Bureau of Labor and Industries*, 161 Or App 417, 984 P2d 883 (1999). In this case, Zurfluh's offensive conduct was frequent and pervasive, but of relatively short duration. Complainant obtained a job earning more money at the Holiday Inn Express within a short period of leaving her employment and there is no evidence that she suffered any ill effects as a result of Zurfluh's conduct thereafter. Considering the duration and type of distress Complainant suffered and in the absence of any evidence that Zurfluh's conduct was based on any reason except Complainant's gender, the forum finds \$10,000 serves to eliminate the effects of Respondent's unlawful practice.

#### **CONSTRUCTIVE DISCHARGE**

Respondent is liable for a constructive discharge only if it is established that Respondent (1) intentionally created or maintained discriminatory working conditions related to Complainant's gender that were (2) so intolerable that a reasonable person in Complainant's circumstances would have resigned because of them, and (3) Respondent desired to cause Complainant to leave her employment as a result, or knew or should have known that Complainant was certain, or

substantially certain, to leave her employment as a result of the working conditions, and (4) that she left her employment as a result of the working conditions. OAR 839-005-0035. The Agency failed to establish those elements by a preponderance of the credible evidence.

Evidence shows that when Complainant agreed to leave her employment for the first time in June 1999, after three months, the agreement was mutual and for reasons other than Zurfluh's pattern of discriminatory conduct that had already developed by that time. Credible evidence suggests that Complainant's voluntary quit three months later in September 1999 was more likely than not related to Complainant's anger at Zurfluh for telling Larry Lomax that she was allegedly using drugs, rather than Zurfluh's continued conduct. From the totality of the circumstances surrounding Complainant's quit, including Complainant's own testimony, the forum concludes that Complainant did not leave her employment as a result of the discriminatory working conditions.

#### **ORDER**

NOW, THEREFORE, as authorized by ORS 659.010(2) and ORS 659.060(3), and to eliminate the effects of Respondent's violation of ORS 659.030(1)(b), and in payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **State Adjustment, Inc.** to:

1) 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 trust for Complainant Rhonda Shanafelt in the amount of TEN THOUSAND DOLLARS (\$10,000), representing compensatory damages for mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; plus,

2) Cease and desist from discriminating against any current or future employee because of the employee's gender.

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**In the Matter of**

**JERRY BENNETT & STAN  
LYNCH dba Body Worx**

**Case No. 143-01  
Final Order of Commissioner  
Jack Roberts  
Issued March 18, 2002**

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**SYNOPSIS**

Respondent Stan Lynch employed two wage claimants and failed to pay them straight time and overtime wages during December 2000 and January 2001. Re-

spondent Lynch was ordered to pay claimants a total of \$8,149 in due and unpaid wages. Respondent Lynch's failure to pay the wages was willful, and he was ordered to pay \$4800 in civil penalty wages. The forum determined that Respondent Bennett was not the claimants' employer and dismissed the charges against him. ORS 652.140(1), ORS 652.150, ORS 653.261, OAR 839-001-0470(1), OAR 839-020-0030.

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The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 20 and December 19, 2001, in the Eugene office of the Bureau of Labor and Industries, located at 1400 Executive Parkway, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Peter McSwain, an employee of the Agency. Wage claimant Luis Zapien was present on November 20 and December 19 and was not represented by counsel. Respondent Stan Lynch was present on November 20 and was not represented by counsel. Neither Respondent Lynch nor Bennett was present on December 19. Ms. Terry Rodgers, an Oregon court-certified interpreter, was present both days as the fo-

rum's Spanish-speaking interpreter.

The Agency called wage claimants Luis Zapien and Jorge Chagoya as witnesses, as well as former Wage and Hour Division ("WHD") Compliance Specialist Gerhard Taeubel.

The forum received into evidence:

a) Administrative exhibits X-1 through X-7 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-15 (submitted prior to hearing) and A-16, A-17, and A-18 (submitted at hearing);

c) The forum's exhibit ALJ-1 (submitted at hearing at the forum's request).

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 9, 2001, Claimant Jorge Chagoya filed a wage claim with the Agency alleging that Respondent Stan Lynch, dba Body Worx, had employed him and failed to pay wages earned and due to him.

2) At the time he filed his wage claim, Claimant Chagoya assigned to the Commissioner of the Bureau of Labor and Industries,

in trust for Claimant Chagoya, all wages due from Respondents.

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

4) On February 16, 2001, Claimant Luis Zapien filed a wage claim with the Agency alleging that Respondent Stan Lynch, dba Body Worx, had employed him and failed to pay wages earned and due to him.

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

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

7) On March 28, 2001, the Agency issued Order of Determination No. 01-0730 based upon the wage claims filed by Claimants Zapien and Chagoya and the Agency's investigation. The Order of Determination alleged that Respondents "Jerry Bennett and Stan Lynch dba Body Worx, Employers," operating as a partnership, owed a total of \$9,349.50 in unpaid wages<sup>1</sup> and \$5,988 in civil penalty wages,<sup>2</sup>

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<sup>1</sup> The Agency alleged that Chagoya was entitled to \$6,862.50 and Zapien was entitled to \$2,487 in unpaid wages.

<sup>2</sup> The Agency alleged that Chagoya was entitled to \$3,886 and Zapien

plus interest, and required that, within 20 days, Respondents 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.

8) On April 16, 2001, Respondent Stan Lynch filed an answer and request for hearing. The answer denied that any money was owed to the Claimants and alleged the affirmative defense that Claimants were independent contractors.

9) On October 1, 2001, the Agency filed a "BOLI Request for Hearing" with the forum.

10) On October 9, 2001, the Hearings Unit issued a Notice of Hearing to Respondents, the Agency, and the Claimants stating the time and place of the hearing as November 20, 2001, at 1400 Executive Parkway, 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. These documents were mailed to Respondents at 540 Fillmore Street, Eugene, Oregon 97402 and to Stan Lynch at 1245 Ken Ray Loop, Springfield, OR 97477. Neither of the docu-

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was entitled to \$2,102 in penalty wages.

ments addressed to 540 Fillmore Street was returned to the Hearings Unit by the U.S. Postal Service.

11) On November 2, 2001, the Agency submitted a case summary.

12) On November 13, 2001, 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); and 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 no later than November 16, 2001, ordered Respondents to additionally bring two copies of their case summary to the hearing in the event their case summary did not reach the Hearings Unit or Agency case presenter prior to the hearing; and notified the Agency and Respondent of the possible sanctions for failure to comply with the case summary order. The ALJ hand-delivered the case summary order to Respondent Stan Lynch at 540 Fillmore, Eugene, Oregon, on November 13, 2001.

13) At 4:30 p.m. on November 19, 2001, Respondent Lynch's wife telephoned the ALJ and stated that she was calling on behalf of Lynch, who had developed an abscessed tooth, and sought a postponement because of this medical condition. The ALJ in-

formed her that Lynch had three options – bring a medical release signed by a doctor or dentist to the hearing; come to the hearing and let the ALJ evaluate Lynch’s ability to participate; or simply come to the hearing and participate. The ALJ disclosed this *ex parte* communication on the record when the hearing began on November 20.

14) On November 20, 2001, at 9 a.m., Respondents did not appear for the hearing. The ALJ went on the record and announced that he would wait until 9:30 a.m., pursuant to OAR 839-050-0330, to commence the hearing and that Respondents would be in default if they did not make an appearance by that time.

15) About 9:15 a.m., Respondent Lynch appeared at the hearing and informed the ALJ he had tried to call to say he would be late, but was unable to make a connection. Lynch brought a dentist’s statement with him verifying that he had an abscessed tooth and had been given a prescription for antibiotics and pain medication. Lynch stated that he was in severe pain at that time and would like a postponement.

16) The Agency did not object to Lynch’s request for a postponement and the hearing was rescheduled for 9:30 a.m. on December 19, 2001, at the same location.

17) On November 20, 2001, the ALJ issued an interim order confirming that the hearing was reset to begin at 9:30 a.m. on De-

ember 19, 2001, at the same location. The interim order also ordered that Respondent Lynch’s case summary must be filed by 5 p.m. on December 10, 2001.

18) Respondents did not submit a case summary.

19) On December 19, 2001, Respondents did not appear at the hearing. The ALJ waited 30 minutes, until 10 a.m. When Respondents did not appear and did not notify the forum that they would not be appearing, the ALJ declared Respondents to be in default and commenced the hearing.

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

21) On February 13, 2002, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order. No exceptions were filed.

#### **FINDINGS OF FACT – THE MERITS**

1) At all times material herein, Respondent Stan Lynch (“Lynch”), an individual person, owned and operated an auto body repair and paint shop under the assumed business name of Body Worx in Eugene, Oregon. Lynch himself worked on cars at Body Worx.

2) Respondent Jerry Bennett, Lynch’s brother-in-law, was not an owner of Body Worx and did not employ either wage claimant.

3) Lynch hired Claimant Chagoya ("Chagoya") at the beginning of April 2000 to repair and paint cars and agreed to pay him \$12.00 per hour for his work. While employed by Lynch, Chagoya used his own tools.

4) Lynch paid Chagoya in full for all hours worked by Chagoya prior to December 1, 2001.

5) Chagoya worked a total of 403.5 hours for Lynch between December 1, 2000, and January 31, 2001, not including a 30-minute lunch break that he received every day. 52 of these hours were hours worked over 40 in a given work week.<sup>3</sup> Chagoya's overtime wage rate was \$18.00 per hour.

6) Between December 1, 2000, and January 31, 2001, Chagoya earned a total of \$4,218

in straight time wages, calculated at \$12.00 per hour, and \$936 in overtime wages, calculated at \$18.00 per hour, for a total of \$5,154. Lynch paid Chagoya nothing for this work.

7) Lynch fired Chagoya on January 31, 2001.

8) Lynch owes Chagoya \$5,154 in unpaid wages.

9) Civil penalty wages are computed as follows for Chagoya, in accordance with ORS 652.150 and OAR 839-001-0470(1): \$12.00 per hour x 8 hours x 30 days = \$2,880.

10) Claimant Zapien ("Zapien") applied for work with Body Worx in response to a newspaper advertisement. He was interviewed and hired by Lynch around the end of September 2000 to prepare cars for painting. Lynch agreed to pay him \$8.00 per hour for his work.

11) Zapien worked a total of 385.75 hours for Lynch between December 11, 2000, and January 31, 2001, not including a 30-minute lunch break that he received every day. 77.25 of these hours were hours worked over 40 in a given work week.<sup>4</sup> Zapien's

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<sup>3</sup> There was no evidence that Respondent had an established work week as defined in OAR 839-020-0030(2)(a) and no evidence of the exact date that Chagoya started work for Respondent Lynch. Consequently, for purposes of calculating overtime hours worked, the forum considers the work week to have begun on the day Chagoya commenced work in the pay period in question and to have ended seven consecutive days later. Because Chagoya's first work week in the wage claim period began on December 1, a Friday, the forum considers his work week to have been Friday through Thursday and has computed his overtime hours worked based on a work week beginning on Friday and ending on Thursday. See *In the Matter of Burrito Boy, Inc.*, 16 BOLI 1, 13 (1997).

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<sup>4</sup> There was no evidence that Respondent had an established work week as defined in OAR 839-020-0030(2)(a) and no evidence of the exact date that Zapien started work for Respondent Lynch. Consequently, for purposes of calculating overtime hours worked, the forum considers the work week to have begun on the day Zapien commenced work in the

overtime wage rate was \$12.00 per hour.

12) Between December 11, 2000, and January 31, 2001, Zapien earned a total of \$2,468 in straight time wages, calculated at \$8.00 per hour, and \$927 in overtime wages, calculated at \$12.00 per hour, for a total of \$3,395. Lynch paid Zapien only \$400 for his work during this period of time.

13) Lynch fired Zapien on January 31, 2001.

14) Lynch owes Zapien \$2,995 in unpaid wages.

15) Civil penalty wages are computed as follows for Zapien, in accordance with ORS 652.150 and OAR 839-001-0470(1): \$8.00 per hour x 8 hours x 30 days = \$1,920.

16) During the entire period of time Zapien and Chagoya worked for Lynch, Lynch rented the space in which he conducted the business of Body Worx. Persons who had Body Worx perform repairs on their vehicles paid Lynch directly for the work.

#### ULTIMATE FINDINGS OF FACT

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pay period in question and to have ended seven consecutive days later. Because Zapien's first work week began on December 11, a Monday, a Sunday, the forum considers his work week to have been Monday through Sunday and has computed his overtime hours worked based on a work week beginning on Monday and ending on Sunday. *See id.*

1) At all times material herein, Stan Lynch was an individual doing business under the assumed business name of Body Worx and engaged the personal services of one or more employees.

2) Jerry Bennett was not an owner of Body Worx and did not employ either claimant.

3) Jorge Chagoya was employed by Lynch at Body Worx from April 2000 until January 31, 2001, on which date Lynch fired him.

4) From December 1, 2000, to January 31, 2001, Chagoya earned \$5,154 and has not been paid any of those wages.

5) Lynch owes Chagoya \$5,154 in due and unpaid wages.

6) Lynch willfully failed to pay Chagoya \$5,154 in earned, due, and payable wages not later than the end of the first business day after Chagoya was fired, and more than 30 days have elapsed from the date Chagoya's wages were due.

7) Civil penalty wages for Chagoya, computed in accordance with ORS 652.150 and OAR 839-001-0470(1), equal \$2,880.

8) Luis Zapien was employed by Lynch at Body Worx from September 2000 until January 31, 2001, on which date Lynch fired him.

9) From December 11, 2000, to January 31, 2001, Zapien earned \$3,395 and has only been paid \$400.

10) Lynch owes Zapien \$2,995 in due and unpaid wages.

11) Lynch willfully failed to pay Zapien \$2,995 in earned, due, and payable wages not later than the end of the first business day after Zapien was fired, and more than 30 days have elapsed from the date Zapien's wages were due.

12) Civil penalty wages for Zapien, computed in accordance with ORS 652.150 and OAR 839-001-0470(1), equal \$1,920.

#### CONCLUSIONS OF LAW

1) During all times material herein, Respondent Stan Lynch was an employer doing business as Body Worx in Eugene, Oregon. Jorge Chagoya and Luis Zapien were employees subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405. During all times material herein, Lynch employed Claimants.

2) During all times material herein, Respondent Jerry Bennett did not employ claimants Chagoya and Zapien and the charges against Bennett are dismissed.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein. ORS 652.310 to 652.414.

4) At times material, ORS 652.140(1) provided:

"(1) Whenever an employer discharges an employee or where such employment is terminated by mutual agreement, all wages earned and

unpaid at the time of such discharge or termination shall become due and payable not later than the end of the first business day after the discharge or termination."

ORS 653.261(1) provides:

"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 provides, in pertinent part:

"(1) 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 \* \* \* .

"\* \* \* \* \*

"(3) Methods for determining amount of overtime payment

under different compensation agreements:

“(a) Compensation based exclusively on hourly rate of pay:

“(A) Where the employee is employed solely on the basis of a single hourly rate, the hourly rate is the “regular rate”. For hours worked in excess of forty (40) hours in a work week the employee must be paid, in addition to the straight time hourly earnings, a sum determined by multiplying one-half the hourly rate by the number of hours worked in excess of forty (40)[.]”

Respondent Lynch violated ORS 652.140(1) by failing to pay Claimants Chagoya and Zapien all unpaid wages earned from December 1, 2000, and December 11, 2000, respectively, through January 31, 2001, not later than the end of the first business day after they were discharged. Those wages total \$8,149.

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.”

OAR 839-001-0470(1) provides:

“(1) When an employer willfully fails to pay all or part of the wages due and payable to the employee upon termination of employment within the time specified in OAR 839-001-0420, 839-001-0430 and 839-001-0440, the employer shall be subject to the following penalty:

“(a) The wages of the employee shall continue from the date the wages were due and payable until the date the wages are paid or until a legal action is commenced, whichever occurs first;

“(b) The rate at which the employee’s wages shall continue shall be the employee’s hourly rate of pay times eight (8) hours for each day the wages are unpaid;

“(c) Even if the wages are unpaid for more than 30 days, the maximum penalty shall be no greater than the employee’s hourly rate of pay times 8 hours per day times 30 days.”

Respondent Lynch is liable for a total of \$4,800 in civil penalties under ORS 652.150, computed by multiplying Chagoya’s hourly rate (\$12.00 per hour) x 8 hours per

day x 30 days = \$2,880, and Zapien's hourly rate (\$8.00 per hour) x 8 hours per day x 30 days = \$1,920, for willfully failing to pay all wages or compensation to Chagoya and Zapien when due as provided in ORS 652.140(1).

6) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent Lynch to pay Claimants Chagoya and Zapien their earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

### OPINION

#### PRIMA FACIE CASE

In a default situation, the Agency need only establish a prima facie case on the record to support the allegations in its charging document. *In the Matter of Usra A. Vargas*, 22 BOLI 212, 220 (2001). To establish a prima facie case in wage claim cases, the Agency must prove: (1) that Respondent employed the wage claimants; (2) any pay rate upon which Respondent and the claimants agreed, if it exceeded the minimum wage; (3) that claimants performed work for Respondent for which they were not properly compensated; and (4) the amount and extent of work claimants performed for Respondent. *Id.*

#### A. Respondent Lynch Employed Both Claimants

In his unsworn answer, Lynch alleged that Chagoya and Zapien were not his employees, and that Chagoya was an independent contractor who had a "quasi partnership" with Zapien to repair cars at a facility leased by Lynch. This forum employs an "economic reality" test to determine if wage claimants are employees or independent contractors under Oregon's wage collection laws. That test involves consideration of five factors: the degree of control respondent had over the claimants; the extent of relative investments of the claimants and respondents; the degree to which the claimants' opportunity for profit and loss was determined by respondent; the skill and initiative required in performing the job; and the permanency of the relationship. *In the Matter of Ilya Simchuk*, 22 BOLI 186, 194-96 (2001). Where a respondent fails to appear at hearing and his total contribution to the record is a request for hearing and an answer that contains only unsworn and unsubstantiated assertions, those assertions are overcome wherever they are contradicted by other credible evidence in the record. *In the Matter of Landco Enterprises, Inc.*, 22 BOLI 62, 67 (2001).

In contrast to Lynch's unsworn assertions, both Chagoya and Zapien credibly testified that Lynch hired them, that they worked for Lynch throughout the wage claim periods, that they worked 40+

hours per week for Lynch during the wage claim period, that Lynch paid them for their work prior to the wage claim periods, and that Lynch fired them. There was no credible evidence that Chagoya and Lynch performed any other gainful work during the wage claim periods, had any investment in Lynch's business, or that they had any control over their opportunity for profit or loss. Based on their testimony about the nature of the work they performed and the lack of evidence of complaints about their work, the forum infers that Chagoya had the skills of a competent auto body repairman/painter and Zapien was an average unskilled laborer. There was no credible evidence concerning the initiative exercised by Chagoya and Zapien in performing their work.

Respondents have the burden of proving the affirmative defense that wage claimants were independent contractors, not employees. *In the Matter of Leslie Elmer DeHart*, 18 BOLI 199, 207-08 (1999). Respondent Lynch has not met that burden, and the forum concludes that Chagoya and Zapien were Lynch's employees.

The Agency also alleges that Jerry Bennett, Lynch's brother-in-law, was Lynch's partner and a co-owner of Body Worx. A partnership is never presumed and the Agency bears the burden of proof to show that Bennett was Lynch's partner and a co-employer of Chagoya and Zapien. *In the Matter of Bubbajohn How-*

*ard Washington*, 21 BOLI 91, 100 (2000). Here, there is no evidence in the record to support the Agency's partnership theory, other than a printout showing the registration of Body Worx as an assumed business name with the state of Oregon. That printout, showing a registry date of "08-30-2000," lists Jerry Bennett and Stan Lynch as registrants. The information contained on the printout, standing alone, is insufficient to overcome the credible testimony of Chagoya and Zapien that Lynch, not Bennett, was their employer, as well as statements taken by the Agency's investigator from other witnesses indicating that Lynch was the owner of the business.

**B. Both Claimants Performed Work at an Agreed Rate That Exceeded the Minimum Wage**

Chagoya and Zapien credibly testified that Lynch agreed to pay them \$12.00 and \$8.00 per hour, respectively, for their work. This evidence is sufficient to overcome the unsworn assertions in Lynch's answer that they were independent contractors who did not work for an hourly wage. *Landco*, 22 BOLI at 67.

**C. Both Claimants Performed Work For Which They Were Not Properly Compensated.**

Chagoya and Zapien credibly testified that they were not paid for work they performed in December 2000 and January 2001, and there is no evidence to the contrary,

other than Lynch's unsworn and discredited assertion that they were not his employees in that period of time.

**D. Amount and Extent of Work Claimants Performed for Respondent.**

Oregon law requires employers to maintain accurate records of the hours their employees work. *In the Matter of Sharon Kaye Price*, 21 BOLI 78, 88 (2000). Where the forum concludes that employees performed work for which they were not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours worked. *Vargas*, 22 BOLI at 220-21. In this case, Lynch produced no records showing the hours worked by Chagoya and Zapien. When an employer produces no records of hours or dates worked by wage claimants, the commissioner may rely on evidence produced by the Agency, including credible testimony by the claimants, to show the hours worked by the claimants. *Id.* In this case, the Agency produced both credible testimony and time records completed by Chagoya and Zapien. Zapien provided contemporaneous notes of his hours worked and testified credibly about the creation of those notes, and the forum has based its calculation of time and dates worked by Zapien on those notes. Those calculations are reflected in Finding of Fact 11 – The Merits. Chagoya created a calendar of hours worked at the time he filed his wage claim and testified

credibly that the hours shown on it were accurate, and the forum has based its calculation of time and dates worked by Chagoya on that calendar. Those calculations are reflected in Finding of Fact 5 – The Merits.

**WAGES DUE TO CLAIMANTS  
CHAGOYA AND ZAPIEN**

In its Order of Determination, the Agency sought \$6,862.50 in unpaid wages for Claimant Chagoya, calculated at the rate of \$15.00 per hour. Based on Chagoya's calendar showing hours worked and the rate of \$12.00 per hour, the forum has calculated that he is owed \$5,154 in unpaid wages.

In its Order of Determination, the Agency sought only \$2,487 in unpaid wages for Claimant Zapien, based on the allegation that Zapien had been paid \$910. At hearing, the Agency proved that Zapien had only been paid \$400 for work performed during the wage claim period. Where the Agency proves a wage claimant is owed wages exceeding those sought in the Order of Determination, the commissioner has the authority to award the higher amount of unpaid wages. *In the Matter of Francisco Cisneros*, 21 BOLI 190, 213 (2001), *appeal pending*. Accordingly, the forum has awarded Zapien approximately \$510 more in unpaid wages than the amount sought in the Order of Determination, for a total of \$2,995.

**PENALTY WAGES**

An award of penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

Respondent, as an employer, had a duty to know the amount of wages due to his employees. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238 (1983). Because Lynch himself worked at Body Worx, the forum concludes that he knew Chagoya's and Zapien's hours of work. There was no evidence that Lynch acted other than voluntarily or as a free agent in not paying Chagoya and Zapien for the work they performed during the wage claim periods. Therefore, both wage claimants are entitled to penalty wages.

Lynch fired both wage claimants on January 31, 2001, and their wages became due on February 1, 2001. More than 30 days have expired since that date. Penalty wages are therefore assessed and calculated pursuant to ORS 652.150 and OAR 839-001-0470(1). Claimant Chagoya is entitled to \$2,880 in penalty wages (\$12.00 per hour x 8 hours per day x 30 days = \$2,880), and Claimant Zapien is entitled to

\$1,920 in penalty wages (\$8.00 per hour x 8 hours per day x 30 days = \$1,920).

**ORDER**

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages and civil penalty wages owed as a result of his violations of ORS 652.140 and OAR 839-020-0030, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent Stan Lynch to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries in trust for Claimant Jorge Chagoya in the amount of EIGHT THOUSAND THIRTY FOUR DOLLARS (\$8,034.00), less appropriate lawful deductions, representing \$5,154.00 in gross, earned, unpaid, due, and payable wages and \$2,880.00 in penalty wages, plus interest at the legal rate on the sum of \$5,154.00 from March 1, 2001, until paid and interest at the legal rate on the sum of \$2,880.00 from April 1, 2001, until paid.

A certified check payable to the Bureau of Labor and Industries in trust for Claimant Luis Zapien in the amount of FOUR THOUSAND NINE HUNDRED AND FIFTEEN DOLLARS (\$4,915.00), less appropriate lawful deductions, representing \$2,995.00 in

gross, earned, unpaid, due, and payable wages and \$1,920.00 in penalty wages, plus interest at the legal rate on the sum of \$2,995.00 from March 1, 2001, until paid and interest at the legal rate on the sum of \$1,920.00 from April 1, 2001, until paid.

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**In the Matter of**

**ARNOLD J. MITRE dba Mitre  
Trucking**

**Case No. 13-02  
Final Order of Commissioner  
Jack Roberts  
Issued March 18, 2002**

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**SYNOPSIS**

Respondent failed to pay Claimant all wages earned and due after Claimant quit his employment, in violation of ORS 652.140(2). Respondent unlawfully withheld Claimant's wages as reimbursement for damages caused by Claimant to Respondent's property. Respondent's failure to pay the wages was willful and Respondent was ordered to pay civil penalty wages, pursuant to ORS 652.150. ORS 652.140; ORS 652.150.

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The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 11, 2002, in the hearing room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Cynthia Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Ronald Olson ("Claimant") was present throughout the hearing and was not represented by counsel. Arnold J. Mitre ("Respondent") was present throughout the hearing and was not represented by counsel.

The Agency called Claimant and Irene Zentner, BOLI Wage and Hour Compliance Specialist, as its witnesses.

Respondent Arnold J. Mitre called no witnesses, but testified on his own behalf.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-24;
- b) Agency exhibits A-1 through A-7 (filed with the Agency's case summary) and A-8 (submitted at hearing).

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Find-

ings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

**FINDINGS OF FACT –  
PROCEDURAL**

1) On December 5, 2000, Claimant filed a wage claim form stating Respondent had employed him from November 8 to November 17, 2000, and failed to pay him the agreed upon rate of \$800 per week for all hours worked. Additionally, Claimant alleged he was not paid for one day of training.

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

3) On February 23, 2001, the Agency issued an Order of Determination, numbered 00-5299. The Agency alleged Respondent had employed Claimant during the period November 8 to November 17, 2000, at the rate of \$800 per five day workweek for six days of work, no part of which was paid. The Agency also alleged Respondent's failure to pay all of Claimant's wages when due was willful and Respondent, therefore, was liable to Claimant for \$4,800 as penalty wages, plus interest. The Order of Determination gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) The Agency issued a Notice of Intent to Issue Final Order by Default on March 26, 2001, requiring Respondent to file an Answer and Request for Hearing no later than April 5, 2001, or be held in default. On March 30, 2001, Respondent filed an answer stating in its entirety:

"To Labor Commission:

"This is the second letter that I have answered saying that I wanted a hearing on this labor dispute with Mr. Olson. The reason I held his check is because the 2<sup>nd</sup> day that he worked he tore the curtain on a trailer by not watching what he was doing and it was not my trailer. He agreed to pay for the repair on it and then he backed out of it and that is why I held this check. He lied to the Labor Commission about his wages. He agreed to \$700 a week and he was to pay his own tax. He said to you that I owed him \$1,060 and that is not true. I have people that were there when I told him what I paid a week for five days a week and no weekends. So, yes I would like to have a hearing on this matter and get it over with.

"Thank you,

"Arnold J. Mitre"

5) On October 25, 2001, the Agency requested a hearing. On November 7, 2001, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:00 a.m. on December 18, 2001. With the Notice of

Hearing, the forum included a copy of the Order of Determination, a "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES" and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440. The Notice of Hearing and accompanying documents were mailed to Arnold J. Mitre at 418 Hilda Street, #12, Oregon City, Oregon 97045.

6) On November 14, 2001, the forum issued a case summary order requiring the Agency and Respondent to submit case summaries that included: 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 statement of any agreed or stipulated facts; and any wage and penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by December 7, 2001, and advised them of the possible sanctions for failure to comply with the case summary order.

7) On November 16, 2001, the Agency requested that the case summary due date be extended to December 10, 2001. Respondent did not respond within the time allowed under OAR 839-050-0030(1), and on November 26, 2001, the forum granted the Agency's request.

8) On November 29, 2001, the Agency moved for a discovery order that required Respondent to produce five categories of docu-

ments. The Agency included a copy of its informal discovery request, marked as "Agency Exhibit A," which was mailed to Respondent on November 13, 2001. The Agency also provided a statement indicating the relevance of the documents requested. Respondent filed no response to the Agency's motion. On January 17, 2002, the forum issued an interim order that granted the Agency's motion and required Respondent to produce all of the requested documents to the Agency no later than Wednesday, January 23, 2002. The interim order was personally served on Respondent at 418 Hilda Street, #12, Oregon City, Oregon, on January 17, 2002.

9) On November 29, 2001, Respondent submitted a written request for a postponement of the scheduled hearing that stated, in its entirety:

"To the Bureau of Labor

"Case # 13-02

"I would like a postponement on this case for a later date. I am going to be out of the country as of 11-28-01 to 1-18-02. I had this planned as of Oct. 2001 as I have things to attend to for my wife & her family & we have to drive as she does not like to fly (and I have to get some papers together). Olson never did turn any log sheets to me & I don't have any records other than that. Arnold J. Mitre"

Included with Respondent's letter was the Agency's original letter to

Respondent dated November 13, 2001, requesting discovery of certain documents.<sup>1</sup> The letter, with the attachment, was postmarked November 28, 2001.

10) On November 30, 2001, the forum issued an order requiring the Agency to respond to Respondent's request for postponement either by facsimile transmission or by regular mail by 4:00 p.m., Wednesday, December 5, 2001. The Agency filed its objections to Respondent's request for postponement on December 3, 2001.

11) On December 10, 2001, the Agency requested a second extension of time for filing case summaries and requested that the parties be allowed to file their case summaries by facsimile transmission. The Agency also requested a ruling on Respondent's motion for postponement.

12) On December 11, 2001, the Agency requested a postponement of the hearing due to an increased workload brought on by a longer than usual hearing and because another hearing was continued to the same week as the scheduled hearing.

13) On December 13, 2001, the forum denied Respondent's

request for a postponement because it was untimely and failed to show good cause. On the same date, the forum granted the Agency's request for a postponement because "both participants [had] expressed a desire to postpone the hearing and [the forum found] that the interests of justice [would] best be served" to change the hearing date. The hearing was rescheduled to commence January 29, 2002. The forum's rulings on the Agency's and Respondent's requests for postponement were personally served on Respondent at 418 Hilda Street, #12, Oregon City, Oregon, on December 15, 2001.

14) On December 17, 2001, the Agency requested the hearing date be reset to either February 8 or February 11, 2002, because the Agency case presenter had previously scheduled a vacation during the last two weeks of January. The forum issued an amended ruling on December 18, 2001, and granted the Agency's request for a continuance and the hearing was rescheduled to commence on February 11, 2002. The time for submitting case summaries was extended to February 1, 2002. The amended ruling was personally served on Respondent at 418 Hilda Street, #12, Oregon City, Oregon, on December 22, 2001.

15) The Agency filed its case summary, with its attached exhibits, on January 31, 2002. Respondent did not file a case summary.

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<sup>1</sup> The Agency's original letter to Respondent, dated November 13, 2001, was erroneously designated as an attachment to the Agency's Motion for Discovery Order and marked as Administrative Exhibit X-7, when, in fact, it was an attachment to Respondent's request for postponement.

16) At the start of 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.

17) The ALJ issued a proposed order on February 21, 2002 that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

#### **FINDINGS OF FACT – THE MERITS**

1) During all times material herein, Respondent Arnold J. Mitre did business in Oregon using the assumed business name, Mitre Trucking.

2) Sometime in early November 2000, Claimant met with Respondent at Tachoe's (phonetic) Restaurant and Bar in Oregon City, Oregon, and accepted Respondent's offer to drive a tractor-trailer ("truck") round-trip daily from Portland, Oregon to Tacoma, Washington. Respondent owned the tractor and the trailer belonged to a Tacoma company called Doable (phonetic) Products.

3) Respondent agreed to pay Claimant \$800 per week for work performed Monday through Friday. Claimant understood that the flat rate was to cover all of the hours necessary to perform the work in a five-day period, regardless of the number. The agreement between them was not in writing.

4) Before he started the job, Claimant asked Respondent if he could ride along with him for a day in order to "learn the ropes" and "learn how to tarp a load." Respondent agreed and on November 8, 2000, Claimant rode with Respondent for the full 10-hour trip. During that trip, Claimant drove the empty truck to Tacoma and helped strap down at least one load. At the time, Claimant did not expect to get paid for riding along with Respondent.

5) Claimant worked November 13, 14, 15, 16, and 17, 2000.

6) Respondent kept the truck near a Jubitz truck stop on Vancouver Avenue in Portland. Claimant reported to the site daily and drove the truck to Tacoma to pick up lumber products for delivery to Home Depot and Home Base stores in Washington. Claimant's route varied each day and on at least one day his route was primarily in Oregon.

7) On Claimant's first day of work, while trying to pass two other trucks, Claimant drove too close to one and ripped the "curtain" on the trailer he was pulling. Respondent believed that the company that owned the trailer would charge him for the damage. Respondent told Claimant he would seek an estimate of the damages from the company and that he expected Claimant to pay for any amounts for which Respondent was held responsible. Claimant did not pay for the damage to the trailer. Subsequently, Claimant decided that the job was

not working out and quit on November 17, 2000.

8) Claimant's last day of work was November 17, 2000.

9) A few days after he quit, Claimant went to Respondent's residence to inquire about his paycheck. Respondent told Claimant that after he determined the damage amount on the trailer, the pay issue would be resolved. Respondent expected to have an estimate within two weeks. Respondent later contacted Claimant and told him that he was going to "charge" Claimant for the training day.

10) For the one week he worked, Claimant maintained a "Driver's Daily Log" that shows he recorded 51¾ hours worked. Claimant did not record the 10 hours he rode with and performed work for Respondent on November 8, 2000.

11) Between November 8 and November 17, 2000, Claimant earned \$960, calculated by dividing Claimant's weekly wage rate of \$800 by five days to determine the daily rate, which equals \$160. Complainant worked six days, multiplied by \$160, earning a total of \$960.

12) Claimant did not sign any document that authorized Respondent to withhold his wages.

13) Respondent admits he paid no compensation for Claimant's personal services rendered to Respondent.

14) The Agency calculated civil penalty wages of \$4,800.

That amount was erroneously calculated by using Claimant's daily rate of \$160 and multiplying it by 30 days. When computed in accordance with ORS 652.150 and OAR 839-001-0470(2), the result is as follows: \$960 (total wages earned) divided by 61¾ (total hours worked) equals an average hourly rate of \$15.55. This figure is multiplied by 8 (hours per day) and then by 30 (the maximum number of days for which civil penalties continue to accrue) for a total of \$3,732, which is the amount this forum awards Claimant as civil penalty wages.

15) Claimant's testimony was credible. His responses to questions were straightforward and consistent with his statements on his wage claim form. He did not attempt to embellish the facts surrounding the circumstances of his employment with Respondent and readily acknowledged that he damaged the trailer he was hauling on his first day of work. The forum has credited his testimony in its entirety.

16) Zentner testified in an objective, straightforward manner. With the exception of her testimony pertaining to her computation of civil penalty wages, her testimony has been credited in its entirety.

17) The forum did not believe Respondent's testimony that he promised to pay Claimant \$700 per week rather than the \$800 claimed by Claimant. Respondent's credibility was affected by his prehearing representation to the forum on November 28, 2001,

that he was going to be "out of the country" from November 28 until January 18, 2002, and that he therefore required a postponement of the hearing scheduled for December 18, 2001. Evidence in the record places Respondent at 418 Hilda Street, #12, Oregon City, Oregon, on December 15 and 22, 2001, and on January 17, 2002. Moreover, the Agency submitted evidence that Respondent's wife, Evelin, signed for a certified letter from Claimant on December 13, 2001, after Respondent had testified that he returned to Oregon, accompanied by his wife, Evelin, on December 15 or December 18, 2001. Respondent's statements at hearing regarding his whereabouts during the time he previously claimed to be out of the country shifted notably when challenged by the Agency. Consequently, his testimony was not believed unless it was corroborated by credible evidence.

#### **ULTIMATE FINDINGS OF FACT**

1) During all times material herein Arnold J. Mitre was a person who engaged the personal services of one or more employees in the State of Oregon.

2) Respondent employed Claimant from November 8 through November 17, 2000.

3) Respondent agreed to pay Claimant \$800 per five-day work-week, regardless of the number of hours worked.

4) Claimant worked 61¾ hours between November 8 and 17, 2000. Claimant's hourly wage

rate for the purpose of calculating civil penalty wages is \$15.55 per hour.

5) Between November 8 and 17, 2000, Claimant earned a total of \$960 in wages during his employment with Respondent

6) Claimant quit his employment with Respondent on November 17, 2000, without giving Respondent notice of his intention to quit.

7) Respondent withheld Claimant's wages based on damages Claimant caused to Respondent's truck.

8) Respondent had no written authorization to withhold Claimant's wages.

9) Civil penalty wages, computed in accordance with ORS 652.150 and OAR 839-001-0470, equal \$3,732.

#### **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.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414.

3) ORS 652.140(2) provides in part:

"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 violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid within five days, excluding Saturdays, Sundays and holidays, after Claimant quit his employment without notice.

4) 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."

OAR 839-001-0470 provides:

"(1) When an employer willfully fails to pay all or part of the wages due and payable to the employee upon termination of employment within the time specified in OAR 839-001-0420, 839-001-0430 and 839-001-0440, the employer shall be subject to the following penalty:

"(a) The wages of the employee shall continue from the date the wages were due and payable until the date the wages are paid or until a legal action is commenced, whichever occurs first;

"(b) The rate at which the employee's wages shall continue shall be the employee's hourly rate of pay times eight (8) hours for each day the wages are unpaid;

"(c) Even if the wages are unpaid for more than 30 days, the maximum penalty shall be no greater than the employee's hourly rate of pay times 8 hours per day times 30 days.

"(2) The wages of an employee that are computed at a rate other than an hourly rate shall be reduced to an hourly rate for penalty computation purposes by dividing the total wages earned while employed or the total wages earned in the last 30 days of employment, whichever is less, by the total number of hours worked

during the corresponding time period.”

Respondent is liable for \$3,732 in civil penalties under ORS 652.150 and OAR 839-001-0470 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(2).

5) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant his earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

### OPINION

#### AGENCY'S PRIMA FACIE CASE

In this case, the Agency was required to prove: 1) that Respondent employed Claimant; 2) Respondent agreed to pay Claimant \$800 per week; 3) Claimant performed work for which he was not properly compensated; and 4) that Claimant's work time included one additional day of compensable training. See *In the Matter of Barbara Coleman*, 19 BOLI 230 (2000). Respondent admits he employed Claimant for one week and did not pay him any wages. Respondent also admits that during the week prior to Claimant beginning work, Claimant rode along with Respondent one day for training purposes. In dispute are the amount Respondent agreed to pay Claimant and the compensability of Claimant's

one-day training. Also at issue is whether Respondent was permitted by law to withhold Claimant's paycheck as payment for damages Claimant caused to property for which Respondent was responsible.

#### AGREED UPON RATE

In this case there is no written employment agreement specifying the wage rate. Respondent does not dispute that he agreed to compensate Claimant at a weekly rate for any and all hours worked. The dispute amounts to a \$100 difference in their understanding of the agreement and its resolution rests on credibility. Claimant credibly testified that he was promised \$800 per week for his services as a truck driver. Respondent's testimony that the wage agreement was for \$700 per week is tainted by his previous misrepresentation to the forum when he initially requested a postponement of the hearing and his subsequent contradictory testimony at hearing. Consequently, absent credible evidence to the contrary, the forum relies on Claimant's representation that the wage agreement was for \$800 per week.

#### WORK TIME

With certain exceptions that do not apply here, training time is compensable work time. See OAR 839-020-0044; *In the Matter of Frances Bristow*, 16 BOLI 28 (1997), citing *In the Matter of Dan's Ukiah Service*, 8 BOLI 96, 106 (1989). In this case, Claimant, at his own request, received

training for one day with Respondent's full acquiescence. The training was directly related to his job duties and during the training Claimant performed productive work for Respondent. Under those circumstances, Claimant's one day of training is compensable at the agreed upon wage rate which, in this case, computes to \$160 per day.<sup>2</sup>

#### UNAUTHORIZED DEDUCTIONS

Respondent's defense that he withheld Claimant's paycheck in order to recover damages he thought were owed has no merit. Claimant admits he caused some damage to the trailer he was hauling on the first day of his employment. Even if Respondent's claim was supported by proof of actual damages, ORS 652.610, concerning deductions from wages, precludes Respondent from withholding Claimant's wages except in certain circumstances that do not apply here. ORS 652.610 "require[s] that an employer pay an employe the wages that are due and seek to resolve any claims the employer may have against the employe by other means." *In the Matter of Ken Taylor*, 11 BOLI 139 (1992), quoting *Garvin v. Timber Cutters, Inc.*, 61 Or App 497, 658 P2d 1164, 1166 (1983). Respondent had no legal basis for withholding

Claimant's paycheck and owes Claimant \$960 in unpaid wages sought in the Order of Determination.

#### CIVIL PENALTIES

An award of penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent, as an employer, had a duty to know the amount of wages due to his employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238 (1983). Respondent admits he intentionally withheld Claimant's final paycheck to cover amounts Respondent believed were owed for property damage caused by Claimant. There is no evidence that Respondent acted other than voluntarily or as a free agent. The forum concludes that Respondent acted willfully and assesses penalty wages in the amount of \$3,732. This figure is computed in accordance with ORS 652.150 and OAR 839-001-0470.

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<sup>2</sup> Cf. *In the Matter of Box/Office Delivery*, 12 BOLI 141, 148 (1994) (finding that nothing in the facts of the case or in the law justified paying the claimant less than the agreed upon rate while in training).

**ORDER**

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, Respondent **Arnold J. Mitre** is hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Ronald Olson, in the amount of FOUR THOUSAND SIX HUNDRED AND NINETY TWO DOLLARS (\$4,692), less appropriate lawful deductions, representing \$960 in gross earned, unpaid, due and payable wages and \$3,732 in penalty wages, plus interest at the legal rate on the sum of \$960 from December 1, 2000, until paid and interest at the legal rate on the sum of \$3,732 from January 1, 2000, until paid.

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**In the Matter of**

**DUANE KNOWLDEN**

**Case No. 152-01**  
**Final Order of Commissioner**  
**Jack Roberts**  
**Issued March 21, 2002**

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**SYNOPSIS**

Respondent willfully failed to pay five employees all wages they earned. The Commissioner ordered Respondent to pay the employees their unpaid wages plus civil penalty wages. ORS 652.140, ORS 652.150, ORS 653.025, ORS 653.055, OAR 839-001-0470, OAR 839-020-0010.

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The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 29, 2002, in Hearings Room 1004, Portland State Office Building, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter David K. Gerstenfeld, an employee of the Agency. Wage claimants Vernon Gonzales, Robert Zbinden, and John DeZell were present throughout the hearing and not represented by counsel. Respondent Duane Knowlden did not appear at the hearing and no one appeared on his behalf.

In addition to claimants Gonzales, Zbinden, and DeZell, the Agency called as witnesses: Anthony Saa, another wage claimant; and Kathleen Johnson, Agency compliance specialist.

The forum received into evidence:

a) Administrative exhibits X-1 through X-9 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-21 (submitted prior to hearing).

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

**FINDINGS OF FACT –  
PROCEDURAL**

1) On November 29, 2000, Claimant Zbinden filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him.

2) On December 5, 2000, Claimants Gonzales and Newman filed wage claims with the Agency alleging that Respondent had employed them and failed to pay wages earned and due to them.

3) On January 16, 2001, Claimant DeZell filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him.

4) On February 9, 2001, Claimant Saa filed a wage claim with the Agency alleging that Respondent had employed him and

failed to pay wages earned and due to him.

5) At the time they filed their wage claims, Claimants assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimants, all wages due from Respondent.

6) Claimants brought their wage claims within the statute of limitations.

7) On March 16, 2001, the Agency issued Order of Determination No. 00-5220 based upon the wage claim filed by the claimants and the Agency's investigation. The Order of Determination alleged that Respondents "Duane Knowlden individually and Spotless Theatre Cleaning Co., an Arizona corporation," owed a total of \$1,961.00<sup>1</sup> in unpaid wages and \$8,040.00<sup>2</sup> in civil penalty wages, plus interest, and required that, within 20 days, Respondents 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.

8) Respondents were served by certified mail on March 19, 2001.

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<sup>1</sup> The Order of Determination sought \$52.00 for DeZell, \$189.50 for Gonzales, \$913.50 for Newman, \$520.00 for Saa, and \$286.00 for Zbinden.

<sup>2</sup> The Order of Determination sought \$1,560.00 for DeZell, Saa, and Zbinden, and \$1,680.00 for Gonzales and Newman.

9) On April 6, 2001, Respondent Duane Knowlden filed an answer and request for hearing. His answer acknowledged "We may owe [Gonzales] a total of 30 hours" and alleged the following defenses:

- a) Claimant DeZell was never employed by Respondents;
- b) Claimant Gonzales was paid \$234.00 in gross wages;
- c) Claimant Newman's last day of employment was October 21, 2000, and he was paid \$222.00 in gross wages;
- d) Claimant Saa was hired on October 24, 2000, and was paid \$97.50 gross wages;
- e) Claimant Zbinden only worked November 6 and 7, 2000, and was paid \$65.00 gross wages.

10) On June 21, 2001, 2000, the Agency filed a "BOLI Request for Hearing" with the forum.

11) On July 11, 2001, the Hearings Unit issued a Notice of Hearing to Respondents, the Agency, and the Claimants stating the time and place of the hearing as January 29, 2002, at the Portland State Office Building, 800 NE Oregon Street, 10<sup>th</sup> Floor Hearings Room, Portland, 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 fo-

rum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

12) On September 7, 2001, the Agency notified the forum that a Final Order by Default had been issued against Spotless Theatre Cleaning Co. by the Agency based on its failure to file an answer and request for hearing, and the hearing would only involve Duane Knowlden (hereinafter "Respondent").

13) On September 7, 2001, the Agency filed a motion for a discovery order seeking nine categories of documents and responses to four written interrogatories. The Agency provided a statement describing the relevancy of the documents and responses sought, as well as documentation that the same documents and information sought had been requested on an informal basis and not provided.

14) On September 11, 2001, the forum issued an interim order notifying Respondent that he must respond to the Agency's motion within seven days after service, pursuant to OAR 839-050-0150.

15) On September 18, 2001, the Agency filed a motion to amend the Order of Determination to correct the wages sought for Claimant Gonzales from \$189.50 to \$249 and to correct the starting date for when those wages were earned from October 16, 2000, to October 5, 2000.

16) On September 21, 2001, the forum granted the Agency's motion for a discovery order, hav-

ing received no objections from Respondent.

17) On October 1, 2001, the forum granted the Agency's motion to amend.

18) On October 1, 2001, 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); and 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 no later than January 18, 2002, and notified them of the possible sanctions for failure to comply with the case summary order. In addition, the forum enclosed a form designed to assist unrepresented respondents in filing a case summary.

19) The Agency filed its case summary, with attached exhibits, on January 18, 2002.

20) On January 29, 2002, at 10 a.m., Respondent did not appear for the hearing. The ALJ went on the record and announced that he would wait until 10:30 a.m., pursuant to OAR 839-050-0330, to commence the hearing and that Respondent would be in default if he did not make an appearance by that time.

21) At 10:30 a.m., Respondent had not appeared at the hearing. Pursuant to OAR 839-050-0330, the ALJ declared Re-

spondent to be in default. The ALJ then explained the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing.

22) The evidentiary record of the hearing closed on January 29, 2002.

23) On February 25, 2002, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order. No exceptions were filed.

#### **FINDINGS OF FACT – THE MERITS**

1) During all times material herein, Respondent Duane Knowlden owned and operated Spotless Theatre Cleaning Company, a business that contracted to clean some movie theaters in Portland, Oregon, for Regal Cinemas.

2) Claimant Gonzales was employed by Respondent from October 16-28, 2000. He worked a total of 69 hours at the agreed rate of \$7.00 per hour. Respondent did not pay him at all for 30 hours that he worked and paid him only \$6.00 per hour for another 39 hours that he worked. He earned a total of \$483.00 and has been paid \$234.00 in gross wages, leaving \$249.00 in unpaid wages. There was no evidence as to the reason why Gonzales left Respondent's employment.

3) Oregon's minimum wage rate in 2000 was \$6.50 per hour.

4) Claimant Saa was employed by Respondent during October 2000 at the rate of \$6.50 per hour. He was not able to testify with any specificity about the total number of hours he worked. Consequently, the forum has only credited him with having worked the 35 hours that he documented on a timecard signed by his supervisor and an additional 15 hours for which Respondent paid him for his work. He is owed \$227.50 in unpaid wages for the 35 hours of documented work. Saa quit Respondent's employment.

5) Claimant Zbinden was employed by Respondent from November 6-20, 2000, at the wage rate of \$6.50 per hour. He contemporaneously documented having worked 54 hours in total, earning \$351.00. He has been paid only \$65.00 in gross wages and is owed \$286.00 in unpaid wages. He was discharged by Respondent.

6) Claimant Zbinden was sick on November 21, 2000, and unable to work for Respondent. He asked Michael Stevens, his immediate supervisor at Respondent's job site, if John DeZell, who lived at Zbinden's residence, could work for him. Stevens approved this arrangement. Claimant DeZell worked eight hours for Respondent on November 21, 2000, with Stevens' knowledge. Claimant DeZell has been paid nothing for his work and is owed \$52.00 in unpaid wages.

7) Claimant Newman was employed by Respondent in Oc-

tober 2000, at the wage rate of \$6.50 per hour. In his wage claim, he claimed that Respondent owed him \$1,119.50 in unpaid wages. However, Newman did not testify at the hearing in support of his wage claim. There was credible testimony that he was employed by Respondent, a fact which Respondent also admitted. However, there was no evidence, other than a timecard filled out by Newman, without a supervisor's signature, to support his claim for the amount of wages claimed or his alleged wage rate of \$7.00 per hour.<sup>3</sup> Consequently, the forum has relied on the facts admitted by Respondent in computing his unpaid wages. Those admitted facts are that he worked at least 37 hours and was paid \$204.02 in gross wages, computed at the wage rate of \$6.00 per hour. He has not been paid the remaining \$18.50 in gross wages that would bring his wage rate to \$6.50 per hour<sup>4</sup> and is owed \$18.50 in un-

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<sup>3</sup> See, e.g., *In the Matter of Catalog-finder, Inc.*, 18 BOLI 242, 263-64 (1999) ("[t]his forum has universally relied on credible testimony and documentation from claimants or witnesses to the claimants' employment to establish the nature and extent of work performed by claimants in wage claim cases.")

<sup>4</sup> Although the Agency alleged Newman worked at the agreed rate of \$7.00 per hour, no reliable testimony was presented to support that figure. Consequently, the forum has calculated his unpaid wages and penalty wages at the statutory minimum wage of \$6.50 per hour.

paid wages. Newman was discharged by Respondent.

8) Civil penalty wages for Claimants Saa, Zbinden, DeZell, and Newman, computed in accordance with ORS 652.150 and OAR 839-001-0470 (\$6.50 per hour x 8 = \$52.00 x 30 days), equal \$1560.00.

9) Civil penalty wages for Claimant Gonzales, computed in accordance with ORS 652.150 and OAR 839-001-0470 (\$7.00 per hour x 8 = \$56.00 x 30 days), equal \$1680.00.

#### **ULTIMATE FINDINGS OF FACT**

1) Respondent Duane Knowlden at all times material herein owned and operated Spotless Theatre Cleaning Co., a business that engaged the personal services of one or more employees in Portland, Oregon.

2) Respondent suffered or permitted Claimants Saa, Zbinden, DeZell, and Newman to work for him in October and November 2000.

3) Oregon's minimum wage rate in 2000 was \$6.50 per hour.

4) Respondent engaged the personal services of Claimant Gonzales to perform work for him in October 2000.

5) Claimant Gonzales was employed by Respondent from October 16-28, 2000. He worked a total of 69 hours at the agreed rate of \$7.00 per hour. Respondent did not pay him at all for 30 hours that he worked and paid him only \$6.00 per hour for an-

other 39 hours that he worked. He earned a total of \$483.00 and has been paid \$234.00 in gross wages, leaving \$249.00 in unpaid wages.

6) Claimant Saa was employed by Respondent during October 2000 at the rate of \$6.50 per hour. He was only paid for 15 out of 50 hours that he worked and is owed \$227.50 in unpaid wages.

7) Claimant Zbinden was employed by Respondent from November 6-20, 2000, at the wage rate of \$6.50 per hour. He worked 54 hours in total, earning \$351.00. He has been paid only \$65.00 in gross wages and is owed \$286.00 in unpaid wages.

8) Claimant DeZell worked eight hours for Respondent on November 21, 2000, and has been paid nothing for his work. He is owed \$52.00 in unpaid wages, calculated at the wage rate of \$6.50 per hour.

9) Claimant Newman was employed by Respondent in October 2000, at the wage rate of \$6.50 per hour. He worked at least 37 hours and was paid \$204.02 in gross wages, computed at the wage rate of \$6.00 per hour. He is owed \$18.50 in unpaid wages.

10) Respondent's failure to pay Claimants' wages was willful and more than 30 days have passed since Claimants' wages became due.

11) Civil penalty wages for Claimants Saa, Zbinden, DeZell,

and Newman, computed in accordance with ORS 652.150 and OAR 839-001-0470 (\$6.50 per hour x 8 = \$52.00 x 30 days), equal \$1560.00.

12) Civil penalty wages for Claimant Gonzales, computed in accordance with ORS 652.150 and OAR 839-001-0470 (\$7.00 per hour x 8 = \$56.00 x 30 days), equal \$1680.00.

#### CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimants Saa, Zbinden, DeZell, and Newman were employees subject to the provisions of 652.310 to 652.405 and ORS 653.010 to ORS 653.055. During all times material herein, Respondent was the employer of Claimant Gonzales and Claimant Gonzales was Respondent's employee. ORS 652.310.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414, ORS 653.055(3).

3) ORS 653.025 provides, in pertinent part:

"\* \* \*[F]or each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages computed at a rate lower than:

"\* \* \* \* \*

"(3) For calendar years after December 31, 1998, \$6.50. \* \*

\*)"

Respondent was required to pay Claimants at least \$6.50 per hour for each hour they performed work for Respondent. Respondent owes Claimant Saa \$227.50, Claimant Zbinden \$286.00, Claimant DeZell \$52.00, Claimant Newman \$18.50, and Claimant Gonzales \$249.00.

4) At times material, ORS 652.140(1) and (2) provided:

"(1) Whenever an employer discharges an employee or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge or termination shall become due and payable not later than the end of the first business day after the discharge or termination.

"(2) 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 schedule payday after the employee has quit, whichever event first occurs."

Respondent violated ORS 652.140(1) by failing to pay Claimants Newman and Zbinden all wages earned and unpaid by the end of the first business day after their discharge. Respondent violated ORS 652.140(2) by failing to pay Claimants Saa, Gonzales, and DeZell all wages earned and unpaid within five days, excluding Saturdays, Sundays and holidays, after they quit.

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.”

OAR 839-001-0470(1) provides:

“(1) When an employer willfully fails to pay all or part of the wages due and payable to the employee upon termination of employment within the time specified in OAR 839-001-0420, 839-001-0430 and 839-

001-0440, the employer shall be subject to the following penalty:

“(a) The wages of the employee shall continue from the date the wages were due and payable until the date the wages are paid or until a legal action is commenced, whichever occurs first;

“(b) The rate at which the employee’s wages shall continue shall be the employee’s hourly rate of pay times eight (8) hours for each day the wages are unpaid;

“(c) Even if the wages are unpaid for more than 30 days, the maximum penalty shall be no greater than the employee’s hourly rate of pay times 8 hours per day times 30 days.”

Respondent is liable for \$1,560.00 in civil penalty wages under ORS 652.150 to Claimants Newman and Zbinden, computed by multiplying their hourly rate (\$6.50 per hour) x 8 hours per day x 30 days = \$1,560.00, for willfully failing to pay all wages or compensation to them when due as provided in ORS 652.140(1). Respondent is liable for \$1,560.00 in civil penalty wages under ORS 652.150 to Claimants Saa and DeZell, computed by multiplying their hourly rate (\$6.50 per hour) x 8 hours per day x 30 days = \$1,560.00, for willfully failing to pay all wages or compensation to them when due as provided in ORS 652.140(2). Respondent is liable for \$1,680.00 in civil penalty wages under ORS 652.150 to Claimant Gonzales,

computed by multiplying his hourly rate (\$7.00 per hour) x 8 hours per day x 30 days = \$1,680.00, for willfully failing to pay all wages or compensation to them when due as provided in ORS 652.140(2).

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay claimants their earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

### OPINION

#### DEFAULT

Respondent failed to appear at hearing and the forum held him in default pursuant to OAR 839-050-0330. When a respondent defaults, the Agency must establish a prima facie case to support the allegations of the charging document. *In the Matter of Usra Vargas, 22 BOLI 212, 220 (2001)*. To establish a prima facie case supporting the wage claims in this case, the Agency must prove: 1) that Respondent employed Claimants; 2) any pay rate upon which Respondent and Claimants agreed, if it exceeded the minimum wage; 3) that Claimants performed work for Respondent for which they were not properly compensated; and 4) the amount and extent of work Claimants performed for Respondent. *Id.* at 220.

#### A. Respondent Employed Claimants.

Respondent admitted employing all of the Claimants except for DeZell. The credible testimony of DeZell and corroborating testimony of Zbinden was sufficient to establish that DeZell worked for Respondent for one day, with the knowledge and approval of Respondent's agent.

#### B. Claimants' Wage Rate.

The evidence is undisputed that three of the Claimants were hired at Oregon's minimum wage rate of \$6.50 per hour. The Agency alleged that claimant Newman and Gonzales were hired at the agreed rate of \$7.00 per hour, but provided no sworn testimony, affidavits, business records, or other reliable evidence that established Newman's rate. Consequently, the forum has computed Newman's unpaid wages at the minimum wage rate.<sup>5</sup> Gonzales, on the other hand, testified credibly that Respondent agreed to pay him \$7.00 per hour as a supervisory employee, and the forum has calculated his unpaid wages at that rate.

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<sup>5</sup> See *In the Matter of Jo-EI, Inc., 22 BOLI 1, 7 (2001)* (where there is no agreed upon rate of pay, an employer is required to pay at least the minimum wage.)

**C. Claimants Performed Work for Which They Were Not Properly Compensated.**

**1. Claimants Newman and Gonzales.**

Respondent admitted that Newman worked 37 hours and that he was paid only \$6.00 per hour, \$.50 less than Oregon's minimum wage, for those hours. Respondent also admitted that Gonzales worked 69 hours and was only paid \$6.00 per hour for 39 of those hours and nothing for the remaining 30 hours.

**2. Claimant Saa.**

Saa credibly testified that he worked 35 hours for which he was not paid; this figure was also supported by a contemporaneous timecard that was signed by his supervisor.

**3. Claimant Zbinden.**

Like Saa, Zbinden credibly testified that he worked 44 hours for which he was not paid; this figure was also supported by his contemporaneous notes.

**4. Claimant DeZell.**

DeZell credibly testified that he worked one eight-hour shift for Respondent, and Respondent admitted having paid DeZell nothing, claiming that DeZell never worked for Respondent.

**D. The Amount and Extent of Work Claimants Performed for Respondent.**

In his answer, Respondent provided some records of the

hours claimants worked and the pay they received, and the forum relied on those records to determine the amount of work performed by Gonzales and Newman because they were more reliable than evidence provided by the Agency. Based on those records, the forum concluded that Gonzales worked 69 hours and Newman worked 37 hours.

The forum has relied on the testimony of Saa, where it was supported by a contemporaneous timecard, to determine that Saa worked 50 hours in total for Respondent. Likewise, the forum has relied on the credible testimony of Zbinden and DeZell, supported by Zbinden's contemporaneous time record, to determine that Zbinden worked 54 hours. Finally, the forum has relied on the credible testimony of Zbinden and DeZell to determine that DeZell worked 8 hours.

**RESPONDENT MUST PAY PENALTY WAGES TO ALL CLAIMANTS**

The forum may award penalty wages where a respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission "willfully" if he or she acts (or fails to act) intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

Respondent admitted not paying the minimum wage to Gonzales and Newman, and there was no evidence to show that Respondent acted other than intentionally and as a free agent in underpaying Gonzales and Newman.

Respondent denied having employed DeZell, but the credible testimony of DeZell and Zbinden established that Respondent employed DeZell with the knowledge and acquiescence of the Respondent's job site supervisor. Respondent, as an employer, had a duty to maintain an accurate record of DeZell's hours. *In the Matter of Norma Amezola*, 18 BOLI 209, 218 (1999). Respondent also had a duty to know the amount of wages due his employees. *Vargas*, at 222. Accordingly, the forum concludes that Respondent acted intentionally and as a free agent in employing DeZell, then failing to pay him.

Respondent does not contest that he employed Zbinden and Saa, only the number of hours that they worked. The forum has discredited Respondent's version of their hours worked and credited Zbinden and Saa with having worked 44 and 35 hours, respectively, for which they were not paid. There is no evidence that Respondent acted other than intentionally and as a free agent in not paying Zbinden and Saa for all of their hours worked.

Based on the foregoing, the forum concludes that Respondent acted willfully and assesses penalty wages in the amount of

\$1,560.00 for Saa, Zbinden, Newman, and DeZell, and penalty wages in the amount of \$1,680.00 for Gonzales.

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages and civil penalty wages he owes as a result of his violations of ORS 652.140(1) and (2), the Commissioner of the Bureau of Labor and Industries hereby orders **Duane Knowlden** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

- (1) A certified check payable to the Bureau of Labor and Industries in trust for Vernon Gonzales in the amount of ONE THOUSAND NINE HUNDRED AND TWENTY NINE DOLLARS (\$1,929.00), less appropriate lawful deductions, representing \$249.00 in gross earned, unpaid, due, and payable wages and \$1,680.00 in penalty wages, plus interest at the legal rate on the sum of \$249.00 from December 1, 2000, until paid, and interest at the legal rate on the sum of \$1,680.00 from January 1, 2001, until paid.
- (2) A certified check payable to the Bureau of Labor and Industries in trust for John DeZell in the amount of ONE THOUSAND SIX HUNDRED AND TWELVE DOLLARS (\$1,612.00), less appropriate lawful deductions, representing

\$52.00 in gross earned, unpaid, due, and payable wages and \$1,560.00 in penalty wages, plus interest at the legal rate on the sum of \$52.00 from December 1, 2000, until paid, and interest at the legal rate on the sum of \$1,560.00 from January 1, 2001, until paid.

(3) A certified check payable to the Bureau of Labor and Industries in trust for Anthony Saa in the amount of ONE THOUSAND SEVEN HUNDRED AND EIGHT SEVEN DOLLARS AND FIFTY CENTS (\$1,787.50) less appropriate lawful deductions, representing \$227.50 in gross earned, unpaid, due, and payable wages and \$1,560.00 in penalty wages, plus interest at the legal rate on the sum of \$227.50 from December 1, 2000, until paid, and interest at the legal rate on the sum of \$1,560.00 from January 1, 2001, until paid.

(4) A certified check payable to the Bureau of Labor and Industries in trust for Robert Zbinden in the amount of ONE THOUSAND EIGHT HUNDRED AND FORTY SIX DOLLARS (\$1,846.00) less appropriate lawful deductions, representing \$286.00 in gross earned, unpaid, due, and payable wages and \$1,560.00 in penalty wages, plus interest at the legal rate on the sum of \$286.00 from December 1, 2000, until paid, and interest at the legal rate on the sum of \$1,560.00

from January 1, 2001, until paid.

(5) A certified check payable to the Bureau of Labor and Industries in trust for Michael Newman in the amount of ONE THOUSAND FIVE HUNDRED SEVENTY EIGHT DOLLARS AND FIFTY CENTS (\$1,578.50) less appropriate lawful deductions, representing \$18.50 in gross earned, unpaid, due, and payable wages and \$1,560.00 in penalty wages, plus interest at the legal rate on the sum of \$18.50 from December 1, 2000, until paid, and interest at the legal rate on the sum of \$1,560.00 from January 1, 2001, until paid.

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**In the Matter of**

**STATE ADJUSTMENT, INC.**

**Case No. 54-01**

**Amended Final Order of Commissioner Jack Roberts**

**Issued March 21, 2002**

Ed.: The final order in this case was initially issued on March 6, 2002, and published at 23 BOLI 19. The commissioner later determined that there had been an omission in the Final Order. On March 21, 2002, the commissioner issued an amended order identical to the original order except that one Procedural Finding

of Fact was added and a paragraph was added to the Order awarding interest to the Complainant. The editors have decided only to publish the additional Procedural Findings of Fact and the revised Order in its entirety rather than reprinting the entire final order. The final order should be cited as: 23 BOLI 19, as amended, 23 BOLI 67 (2002). Persons wishing a complete copy of the amended final order should contact the Hearings Unit of the Bureau of Labor and Industries.

The added Procedural Finding of Fact is:

“13) On March 6, 2002, the final order issued with an omission in the Order section. The final order is hereby amended to include a provision ordering interest at the legal rate on the compensatory damages awarded herein from the date of the amended final order until Respondent complies herewith.”

The revised Order is:

**“ORDER**

NOW, THEREFORE, as authorized by ORS 659.010(2) and ORS 659.060(3), and to eliminate the effects of Respondent's violation of ORS 659.030(1)(b), and in payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **State Adjustment, Inc.** to:

“1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Ore-

gon 97232-2162, a certified check payable to the Bureau of Labor and Industries in trust for Complainant Rhonda Shanafelt in the amount of:

“a) TEN THOUSAND DOLLARS (\$10,000), representing compensatory damages for mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; plus

“b) Interest at the legal rate on the sum of \$10,000 from the date of the Amended Final Order until Respondent complies herewith; plus,

“2) Cease and desist from discriminating against any current or future employee because of the employee's gender.”

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**In the Matter of**

**HEIKO THANHEISER dba The Fire Protection**

**Case No. 07-02**

**Final Order of Commissioner Jack Roberts**

**Issued March 28, 2002**

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**SYNOPSIS**

Respondent willfully failed to pay a wage claimant earned wages. The Commissioner ordered Respondent to pay the claimant \$9,012.25 in unpaid wages, plus

\$3,876 in civil penalty wages. ORS 652.140, ORS 652.150, ORS 653.025, OAR 839-001-0470, OAR 839-020-0010.

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The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 20, 2002, in the 10<sup>th</sup> floor hearing room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David K. Gerstenfeld, an employee of the Agency. Wage claimant Salem El-Dousoky ("Claimant") was present throughout the hearing and was not represented by counsel. Respondent Heiko Thanheiser was present during the hearing and was not represented by counsel.

In addition to the Claimant, the Agency called Gerhard Tæubel, former Wage & Hour Division Compliance Specialist, as a witness.

Respondent called himself as a witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-9 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-6, A-8, A-9, A-11 (submitted prior to hearing) and A-12 and A-13 (submitted at hearing).

c) Respondent exhibits R-1 and R-2 (submitted at hearing).

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

#### **FINDINGS OF FACT – PROCEDURAL**

1) On February 13, 2001, 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 June 18, 2001, the Agency served Order of Determination No. 01-0753 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 \$9,012.25 in unpaid wages and \$3,786 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 June 6, 2001, Respondent, through counsel Sona Jean Joiner, filed an answer and request for hearing. Respondent's answer denied all the substantive allegations in the Order of Determination and affirmatively alleged that Claimant was a subcontractor and was never an employee of Respondent and that Respondent owed no money to Claimant.

6) On September 13, 2001, the Agency filed a "BOLI Request for Hearing" with the forum.

7) On December 7, 2000, the Hearings Unit issued a Notice of Hearing to Respondent, Respondent's counsel, the Agency, and the Claimant stating the time and place of the hearing as February 20, 2002, at 10 a.m. in the 10<sup>th</sup> floor Hearings Room, State Office Building, 800 NE Oregon Street, Portland, 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 December 4, 2001, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as wit-

nesses; 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 February 8, 2002, and notified them of the possible sanctions for failure to comply with the case summary order.

9) On January 15, 2002, the Agency moved for a discovery order requiring Respondent to produce documents related to Claimant's relationship to Respondent, payments made by Respondent to Claimant, work performed by Claimant for Respondent, as well as other documents related to Respondent's affirmative defenses. The Agency provided documentation that the documents requested had previously been sought by informal request in September and early December 2001 and represented that the documents had not yet been provided. In addition, the Agency also provided a statement indicating the relevancy of all documents sought.

10) On January 22, 2002, the ALJ issued an interim order stating that, pursuant to OAR 839-050-0150, Respondent had seven days after service of the Agency's motion to file a written response.

11) On February 6, 2002, the Agency sent a letter to the ALJ

inquiring about the status of the Agency's motion. The Agency also indicated its understanding that Sona Joiner was no longer representing Respondent.

12) On February 6, 2002, the ALJ issued an interim order granting the Agency's motion for discovery order in its entirety. The ALJ required Respondent to provide the requested documents to the Agency no later than 5 p.m. on February 11, 2002. The interim order was sent by first class mail to Joiner and Respondent, and Respondent received it.

13) On February 8, 2002, the Agency filed its case summary, with attached exhibits.

14) On February 13, 2002, the forum received a letter from Sona Joiner stating that Respondent had fired her in December 2001 after she "told him for the umpteenth time that we needed to produce documents, and that I needed his assistance." Joiner stated she was formally withdrawing from the case.

15) 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.

16) Respondent filed a case summary at 9:20 a.m. on the morning of the hearing. The case summary listed eight witnesses that Respondent intended to call. Two exhibits, R-1 and R-2, were attached to it. At the same time,

Respondent also filed a document entitled "Response to Agency's Motion to Discovery Order." Attached to this document were a number of documents that Respondent represented were responsive to the ALJ's discovery order. Respondent stated at hearing that his attorney had all his paperwork and that he was unable to provide these documents sooner because he had no access to his paperwork until February 17, 2002, when he picked them up at Joiner's house.

The forum received these documents as administrative exhibits and later received Exhibits R-1 and R-2 when Respondent offered them and the Agency did not object. During the presentation of his case, Respondent sought to call the eight witnesses listed in his case summary to testify on his behalf. The Agency objected on the basis of untimely submission of Respondent's case summary and the forum sustained the Agency's objection. Respondent also attempted to offer all of the documents accompanying his "Response to Agency's Motion for Discovery Order" into evidence. The Agency objected on the basis of timeliness and the forum sustained the Agency's objection. These rulings are discussed with more particularity in the Opinion.

17) The evidentiary record of the hearing closed on February 20, 2002.

18) On February 25, 2002, the ALJ issued a proposed order that notified the participants that they were entitled to file excep-

tions to the proposed order. No exceptions were filed.

#### **FINDINGS OF FACT – THE MERITS**

1) At all times material herein, Respondent was a sole proprietorship doing business in Oregon under the assumed business name of The Fire Protection.

2) Respondent, a contractor licensed with the Construction Contractors Board, hired Claimant on October 16, 2000. Respondent agreed to pay Claimant the salary of \$2,800 per month, which equals a weekly pay rate of \$646.15. Respondent hired Claimant for an indefinite period of time.

3) Claimant had been a contractor prior to his employment with Respondent, but his license and insurance coverage had lapsed when he went to work for Respondent.

4) Claimant performed various jobs while working for Respondent, including cleaning restaurant hoods and vents, installing exhaust pipe for a chimney and fireplace, refilling fire extinguishers at businesses, and cleaning and organizing Respondent's shop. Claimant had never done any of these jobs before.

5) Respondent and Claimant worked together in cleaning restaurant hoods and vents. They used Respondent's pressure washer to do the cleaning.

6) Respondent accompanied Claimant on jobs to refill fire extinguishers and showed Claimant

how to do the job. They used Respondent's equipment to refill the fire extinguishers.

7) Respondent showed Claimant how to install the exhaust pipe for the chimney, then Claimant worked by himself. Claimant phoned Respondent for advice on this job whenever he needed it, and Respondent sometimes came out to help him.

8) Respondent, not Claimant, submitted the bids on all of the jobs that Claimant worked on while employed by Respondent.

9) When Respondent and Claimant worked at separate locations, Respondent told Claimant where to go and what to do. Sometimes Claimant picked up materials from suppliers. When Claimant paid for them from his own pocket, Respondent reimbursed him. At other times, Claimant charged supplies on Respondent's account.

10) Sometimes Claimant drove his own van while working for Respondent. On those occasions, he put two magnetic signs on his van. These magnetic signs were given to him by Respondent and bore Respondent's logo.

11) Respondent gave Claimant a yellow baseball hat with Respondent's logo and the words "The Fire Protection" printed in red on it to wear while working for Respondent.

12) Respondent never instructed Claimant to submit an invoice in order to be paid for his work.

13) Between October 16, 2000, and January 27, 2001, Respondent was Claimant's only employer.

14) Claimant worked an average of 40 hours per week during his employment with Respondent. He was employed through January 27, 2001, on which date he voluntarily quit without prior notice. Claimant worked 15 weeks in total for Respondent.

15) Respondent paid Claimant a total of \$680 for his work.

16) Claimant earned \$9,692.25 during his employment with Respondent. Respondent owes him \$9,012.25 in unpaid, due and owing wages.

17) Civil penalty wages, computed in accordance with ORS 652.150 and OAR 839-001-0470 [\$16.15 per hour (Claimant's hourly rate: \$646.15 per week ÷ 40 = \$16.15) x 8 hours = \$129.20 x 30 days], equal \$3,876.

18) Considering what was at risk, Respondent exhibited indifference during a critical part of the proceedings, appearing to be asleep during most of Claimant's testimony. He blamed Joiner, his attorney, for his failure to timely file a case summary and timely respond to the Agency's discovery request, claiming he couldn't get his papers until February 17, even though he had fired his attorney six weeks earlier. When cross-examined, he testified he'd been convicted of only one felony -- for DUI -- 10 years ago. When the Agency produced documentation that Respondent had been con-

victed of two additional felonies for driving while suspended in 1996 and 1999, he claimed he didn't realize they were convictions and blamed both on poor legal representation. The forum has believed Respondent's testimony only where it was supported by other credible evidence.

19) Claimant answered all questions directly and without hesitation. His testimony was internally consistent and consistent with prior statements made to the Agency while filing his wage claim. In marked contrast to Respondent, he exhibited a serious attitude throughout the proceeding. The forum has credited Claimant's testimony in its entirety and believed Claimant wherever his testimony conflicted with Respondent's testimony.

#### **ULTIMATE FINDINGS OF FACT**

1) Respondent Heiko Thanheiser at all times material herein owned and operated The Fire Protection, a business that engaged the personal services of one or more employees in Oregon.

2) Respondent engaged the personal services of Claimant to perform work for him between October 16, 2000, and January 27, 2001, at the agreed rate of \$2,800 per month.

3) Claimant worked a total of 15 weeks for Respondent and earned \$9,692.25 in wages.

4) Claimant has only been paid \$680, leaving \$9,012.25 in unpaid wages due and owing.

5) Respondent's failure to pay Claimant was willful, and more than 30 days have passed since Claimant's wages became due.

6) Civil penalty wages for Claimant, computed in accordance with ORS 652.150 and OAR 839-001-0470, equal \$3,876.

### CONCLUSIONS OF LAW

1) During all times material herein, Respondent was the employer of Claimant and Claimant was Respondent's employee. ORS 652.310.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414.

3) At times material, ORS 652.140 (2) provided:

"(2) 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 schedule payday after the employee has quit, whichever event first occurs."

Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid payable within five days, excluding Saturdays, Sundays and holidays, after January 27, 2001, the date Claimant quit.

4) 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."

OAR 839-001-0470(1) provides:

"(1) When an employer willfully fails to pay all or part of the wages due and payable to the employee upon termination of employment within the time specified in OAR 839-001-0420, 839-001-0430 and 839-001-0440, the employer shall be subject to the following penalty:

"(a) The wages of the employee shall continue from the

date the wages were due and payable until the date the wages are paid or until a legal action is commenced, whichever occurs first;

“(b) The rate at which the employee’s wages shall continue shall be the employee’s hourly rate of pay times eight (8) hours for each day the wages are unpaid;

“(c) Even if the wages are unpaid for more than 30 days, the maximum penalty shall be no greater than the employee’s hourly rate of pay times 8 hours per day times 30 days.”

Respondent is liable for \$3,876 civil penalty wages to Claimant, computed at the rate of \$16.15 per hour x 8 hours x 30 days.

5) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant his earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

### OPINION

#### PRIMA FACIE CASE

To establish a prima facie case supporting the wage claims in this case, the Agency must prove: 1) that Respondent employed Claimant; 2) any pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) that Claimant performed work for Respondent

for which he was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. *In the Matter of Jo-EI, Inc.*, 22 BOLI 1, 7 (2001).

#### RESPONDENT EMPLOYED CLAIMANT

Under ORS 652.310, an employer is “any person who in [Oregon] \* \* \* engages personal services of one or more employees.” An employee is “any individual who otherwise than as copartner of the employer or as an independent contractor renders personal services wholly or partly in [Oregon] to an employer who pays or agrees to pay such individual at a fixed rate.”

In his answer, Respondent alleged that Claimant was an independent contractor. This is an affirmative defense that Respondent has the burden of proving. *In the Matter of Leslie Elmer DeHart*, 18 BOLI 199, 206-07 (1999). This forum uses an “economic reality” test to determine whether a wage claimant is an employee or independent contractor under Oregon’s wage collection laws. *In the Matter of Ann L. Swanger*, 19 BOLI 42, 53 (1999). The focal point of the test is “whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which [he] renders [his] services.” *Id.* The forum considers five factors to gauge the degree of the worker’s economic dependency, with no single factor being determinative: (1) the degree of control exercised by the

alleged employer; (2) the extent of the relative investments of the worker and alleged employer; (3) the degree to which the worker's opportunity for profit and loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship. *Id.*

In this case, the facts show that Respondent directed Claimant's work and supplied all of the equipment necessary to perform the work; Claimant had no investment in Respondent's business; Claimant had no opportunity to earn a profit or suffer a loss, as Respondent agreed to pay him a specific wage; Respondent trained Claimant to perform all the jobs Claimant performed for Respondent; Claimant was hired for an indefinite period of time; and no one else employed Claimant while he worked for Respondent. All these factors point the forum to the conclusion that Claimant was Respondent's employee, not an independent contractor.

#### **AGREED PAY RATE**

Claimant credibly testified that Respondent agreed to pay him \$2800 per month for his work, plus \$200 for vehicle and gas expense. The forum adopts \$2800 per month, the amount sought by the Agency, as Claimant's agreed wage rate.

#### **CLAIMANT PERFORMED WORK FOR RESPONDENT FOR WHICH HE WAS NOT PROPERLY COMPENSATED**

Claimant credibly testified that he was paid only \$680 for his 15 weeks of employment with Respondent. His earnings during that time, calculated at the agreed rate of \$2800 per month, amounted to \$9,692.25, establishing that he was not paid for a substantial portion of his work.

#### **THE AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT**

Claimant did not maintain a record of his work hours, but credibly testified that he worked an average of 40 hours per week for Respondent during his 15 weeks of employment with Respondent. Respondent provided no records to rebut this testimony.

ORS 653.045 requires an employer to keep and maintain proper records of wages, hours and other conditions and practices of employment. Where the forum concludes an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. *In the Matter of Diran Barber*, 16 BOLI 190 (1997), quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946).

Where the employer produces no records, the Commissioner may rely on evidence produced by the Agency to show the amount

and extent of the employee's work as a matter of just and reasonable inference and then may award damages to the employee, even though the result be only approximate. *In the Matter of Usra A. Vargas*, 22 BOLI 212, 221 (2001). This forum will accept testimony of a claimant as sufficient evidence to prove work was performed and from which to draw an inference of the extent of that work - where that testimony is credible. *In the Matter of Graciela Vargas*, 16 BOLI 246, 254 (1998). In this case, Claimant's testimony that he worked an average of 40 hours per week for Respondent over a period of 15 weeks was credible, and the forum bases its award of back wages on those figures.

#### **RESPONDENT WITNESSES AND EXHIBITS**

The ALJ issued an interim order on December 4, 2001, requiring the Agency and Respondent to submit case summaries no later than February 8, 2002. On February 6, the ALJ issued a discovery order requiring Respondent to provide the Agency with a number of documents sought by the Agency witnesses. Forty minutes prior to the start of hearing, Respondent hand-delivered a case summary and documents responsive to the discovery order to the forum and the Agency case presenter. Respondent then sought to include the documents responsive to the discovery order as exhibits to his case summary. After the Agency rested its case, Respondent

sought to call eight witnesses listed on his case summary and to offer into evidence all documents produced to the Agency just prior to hearing. Respondent blamed his former attorney, whom he had fired six weeks earlier, for his failure to provide these documents in a timely manner. The Agency objected to the witnesses and documents, and the ALJ sustained the objection. In the presentation of his case, Respondent explained the significance of the documents and the testimony the witnesses would provide, if given an opportunity to testify. The ALJ's ruling is sustained.

OAR 839-050-0210 provides:

"The administrative law judge may refuse to admit evidence that has not been disclosed in response to a case summary order, unless the participant that failed to provide the evidence offers a satisfactory reason for having failed to do so or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.415(10)."

Respondent's reason for not timely filing a case summary was that he was unable to obtain the documents from his attorney, whom he had fired six weeks earlier, until three days before the hearing. This does not meet the "satisfactory reason" standard for two reasons. First, based on Respondent's lack of credibility, the forum did not believe this excuse. Second, this is not a situation where Respondent's counsel voluntarily withdrew, then left

Respondent high and dry. According to Respondent's counsel, Respondent fired her when she attempted to get him to cooperate in the discovery process. At the point where Respondent decided to represent himself, he became responsible for complying with the forum's discovery orders, including the case summary order. Having made the decision to represent himself at hearing, the responsibility to comply with the forum's discovery orders must rest squarely on his own shoulders.

A "full and fair inquiry" is an inquiry that is both full *and* fair. In this case, as in any other case, it can be argued that the hearing is not "full" unless every piece of evidence relevant to the charges and answer offered by the Agency and Respondent are admitted into the record. However, it is hardly fair to allow a participant to provide witness names and exhibits to support its case in chief for the first time at hearing, where the forum ordered them to be produced earlier, and the other participant has had no prior opportunity to interview the witnesses or investigate the veracity of the exhibits. See, e.g., *In the Matter of Martin's Mercantile*, 12 BOLI 262, 264-65 (1994). The forum concludes that the ALJ's exclusion of Respondent's witnesses and exhibits produced for the first time at the start of hearing did not violate Respondent's right to a full and fair hearing.

#### CIVIL PENALTY WAGES

The forum may award penalty wages where a respondent's fail-

ure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission "willfully" if he or she acts (or fails to act) intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

Claimant earned almost \$10,000 while working for Respondent at the agreed rate of \$2800 per month, and Respondent only paid him \$680. Respondent denied having employed Claimant, but all credible evidence in the record points to the contrary. There was no evidence to show that Respondent acted other than intentionally and as a free agent in underpaying Claimant.

Based on the foregoing, the forum concludes that Respondent acted willfully and assesses penalty wages in the amount of \$3,876.

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages and civil penalty wages he owes as a result of his violation of ORS 652.140 and (2), the Commissioner of the Bureau of Labor and Industries hereby orders **Heiko Thanheiser** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Salem M. El-Dousoky in the amount of TWELVE THOUSAND EIGHT HUNDRED AND EIGHTY EIGHT DOLLARS AND TWENTY FIVE CENTS (\$12,888.25), less appropriate lawful deductions, representing \$9,012.25 in gross earned, unpaid, due, and payable wages and \$3,876 in penalty wages, plus interest at the legal rate on the sum of \$9,012.25 from March 1, 2001, until paid, and interest at the legal rate on the sum of \$3,786 from April 1, 2001, until paid.

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**In the Matter of**

**TRIPLE A CONSTRUCTION,  
LLC**

**Case No. 57-01**

**Final Order of Commissioner  
Jack Roberts**

**Issued April 24, 2002**

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**SYNOPSIS**

Respondent employed Claimants as laborers at the rate of \$9.00 per hour. Claimants were not independent contractors as claimed by Respondent, but employees who were entitled to the agreed upon rate for all hours worked.

Respondent kept no records of the hours Claimants worked and the forum awarded Claimants \$2,884.50 in unpaid wages based on Claimants' unrefuted testimony concerning their rate of pay and the amount and extent of work they performed. Respondent's failure to pay was willful and the forum ordered Respondent to pay \$4,320 in civil penalty wages in addition to the unpaid wages. ORS 652.140; ORS 652.150; ORS 653.010; ORS 653.261.

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The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 13, 2001, in the Bureau of Labor and Industries conference room located at 3865 Wolverine Street NE, Bldg. E-1, Salem, Oregon.

Cynthia Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Gary Lynn Smith ("Claimant Smith") and David Lee Toquero ("Claimant Toquero") were present throughout the hearing and were not represented by counsel. Michael T. Morris was present throughout the hearing as the authorized representative for Triple A Construction, LLC ("Respondent").

In addition to the Claimants, the Agency called as witnesses: Tamara Roth (telephonic witness),

employee of a business located next door to Respondent; Newell Enos, compliance specialist, BOLI Wage and Hour Division; Fred Toquero, Claimant Toquero's brother; Steve Campbell, former Respondent employee; and, John Weaver (telephonic witness), contractor.

Respondent called as witnesses: Leroy Kammerer, Santiam Auto co-owner; and Kimberly Morris, Michael T. Morris' wife.

The forum received as evidence:

a) Administrative exhibits X-1 through X-27;

b) Agency exhibits A-1 through A-15 (filed with the Agency's case summary);

c) Respondent exhibits R-4, R-5, R-6 (filed with Respondent's case summary).

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 May 17, 2000, Claimant Smith filed a wage claim form in which he stated Respondent had employed him from April 16 to April 27, 2000, and failed to pay him the agreed upon rate of \$9.00 per hour for all hours worked.

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

3) On May 17, 2000, Claimant Toquero filed a wage claim form in which he stated Respondent had employed him from April 16 to April 27, 2000, and failed to pay him the agreed upon rate of \$9.00 per hour for all hours worked.

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

5) On November 13, 2000, the Agency served Respondent with Order of Determination No. 00-1958. The Agency alleged Respondent had employed Claimant Smith and Claimant Toquero ("Claimants") during the period April 16 to April 27, 2000, at the rate of \$9.00 per hour, and that each Claimant had worked a total of 133.5 hours, 53.5 of which were hours worked in excess of 40 in a given work week. The Agency concluded Respondent owed each Claimant \$1,442.25 in wages, plus interest. The Agency also alleged Respondent's failure to pay was willful and Respondent, therefore, was liable to each Claimant for \$2,160.00 as penalty wages, plus interest. The Order of Determination gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a

court of law. Order of Determination No. 00-1958 was served on "Michael T. Morris, Manager, Triple A Construction," in person at 489 E. Ellendale Ave., Dallas, Oregon, at 5:15 p.m., by R. Alexander, Deputy Sheriff, Polk County, Oregon.

6) On December 7, 2000, the Agency issued a Notice of Intent to Issue Final Order by Default to "Michael T. Morris, Manager, 489 Ellendale Avenue, Dallas, OR 97338." Respondent was advised it had until December 18, 2000, to file an answer and request for hearing or court trial or the Agency would issue a final order by default. On December 14, 2000, Michael T. Morris sent a letter to the Agency, with a copy to R. Kevin Hendrick, Attorney at Law, stating in pertinent part:

"Please be advised that at no time was I served with the Order of Determination in case number 00-1958. Specifically, at no time was I served via Personal Service, Substituted Service, Office Service and/or by any other reasonable means as required by Oregon Rules of Civil Procedure (Please see ORCP 7). Please mail to me a true and accurate copy of the Order of Determination in case #00-1958 and an Acceptance of Service. My mailing address is 489 E. Ellendale Ave. Dallas, OR 97338. Upon receipt of these documents, I will sign the Acceptance of Service and mail it back to you within three business days.

"Thank you for your anticipated cooperation in this matter.

"Sincerely, Michael T. Morris"

7) On December 15, 2000, the Agency issued an Extension of Time Allowed for Response to Order of Determination No. 00-1958 allowing Respondent an additional 20 days, until December 28, 2000, to file its response because "It is necessary for the above-named Respondent to retain counsel to adequately prepare and file said Answer and Request for Hearing per telephone conversation on December 15, 2000."

8) On December 28, 2000, Respondent filed an answer and request for hearing. Respondent designated Michael T. Morris as its duly authorized representative. In its answer, Respondent denied the allegations contained in paragraphs two through four of the Order of Determination and alleged as affirmative defenses:

"At all material times herein, Claimants represented themselves as independent contractors.

"At all material times herein, Claimants represented themselves to have the proper authority and appropriate licensing and documentation as required by the Construction Contractors Board and the State of Oregon.

"At all material times herein, Claimants interacted with Triple A Construction LLC, on the basis of the above representations.

“At all material times herein, the services rendered by Claimants for Triple A Construction LLC were rendered on the basis of the above representations.

“At all material times herein, it was reasonable for Triple A Construction LLC, to rely on the above representations that were made by claimants.”

9) On January 30, 2001, the Agency requested a hearing. On February 16, 2001, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:00 a.m. on June 13, 2001. With the Notice of Hearing, the forum included a copy of the Order of Determination, a “SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES,” and a copy of the forum’s contested case hearings rules, OAR 839-050-0000 to 839-050-0440. The Notice of Hearing was mailed to Michael T. Morris, Manager, Triple A Construction, 489 E. Elendale Ave., Dallas, Oregon.

10) On April 30, 2001, the forum issued a case summary order requiring the Agency and Respondent to submit case summaries that included: 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 their case summaries by June 1, 2001, and advised them of the possible sanctions for failure to comply with the case summary order.

11) On May 3, 2001, the Hearings Unit received a letter from attorney, R. Kevin Hendrick, that stated in pertinent part:

“Enclosed is the Interim Order – Case Summaries previously sent to my office. Please be advised that I am not now, nor have I ever been the attorney of record for Triple A Construction.”

12) On May 4, 2001, the forum issued an amended case summary order that provided Respondent’s authorized representative with a form to use to prepare the case summary.

13) On May 29, 2001, the Agency moved for a discovery order that required Respondent to produce five categories of documents. By order dated May 29, 2001, Respondent was given until June 5, 2001, to respond to the Agency’s motion for discovery order. Respondent filed no response to the Agency’s motion. On June 8, 2001, the forum issued an interim order that granted the Agency’s motion and required Respondent to produce all of the requested documents to the Agency no later than June 12, 2001.

14) On May 31, 2001, the Agency filed a case summary. On June 5, 2001, the Agency filed an addendum to its case summary,

notifying the forum that one of its witnesses would be testifying by telephone and naming an additional telephone witness who was "inadvertently left off of the witness list."

15) On June 5, 2001, the Agency case presenter, Cynthia Domas, sent the forum a letter that stated in pertinent part:

"Enclosed is the Case Summary for Respondent in the above matter. The document was left on my desk on May 31, 2001. I was out of the office that day and did not return until just before 8 p.m. After seeing the document, I wrote a letter to Mr. Morris explaining that the document had not been correctly filed. A copy of that letter is attached.

"Today I received a phone call from Kim Morris. She indicated that she brought the document into the Salem office in an effort to be sure that it was timely filed. However, she did not have the documentation with her that stated where the document should be filed. I explained to Ms. Morris that in the future Respondent must file all documents with the Hearings Unit as stated in the Notice of Hearing. I further indicated the Respondent was required to provide the Agency with copies of any documents that Respondent filed with the Hearings Unit."

16) On June 5, 2001, the Hearings Unit received Respondent's case summary.

17) By letter dated June 11, 2001, Respondent requested that the Agency "show good cause for telephone testimony, or that [Tamara Roth and Anna Blythe] not testify in this matter." At the hearing, the ALJ permitted telephone testimony from two Agency witnesses pursuant to OAR 839-050-0250(11).

18) On June 12, 2001, Respondent submitted a response to the discovery order issued on June 8, 2001.

19) At the start of hearing, Respondent's authorized representative, Michael T. Morris, stated that he did not receive a "couple of notices" or a copy of the administrative contested case hearing rules that were included in the Notice of Hearing. The ALJ provided Morris with additional copies of the Notice of Contested Case Rights and Procedures and the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440, and granted Morris time to peruse them prior to hearing. Respondent's representative had no questions about the Notice of Contested Case Rights and Procedures.

20) At the start of hearing, Respondent and the Agency verbally stipulated that the wage claimants were on the premises of Santiam Auto car lot located at 3650 Portland Road, Salem, Oregon, between April 16 and April 27, 2000.

21) At the start of hearing, the ALJ verbally advised the Agency and Respondent of the is-

sues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

22) Respondent's authorized representative, Michael T. Morris, was advised during the hearing that any statements he made that were not sworn and subject to the Agency's cross-examination would not be considered as evidence in the record. Morris declined the opportunity to give testimony during the hearing.

23) The proposed order was issued and mailed on April 4, 2002, to all persons indicated on the face of the mailing certificate attached to the proposed order. The participants were notified in the proposed order that they were entitled to file exceptions to the proposed order within ten days of its issuance. To be accepted as timely filed, exceptions, if any, needed to be filed with the Hearings Unit and postmarked no later than April 15, 2002.

OAR 839-050-0380(4) provides:

"Participants must file any exceptions within ten days of the date of issuance of the Proposed Order. Exceptions must be filed with the administrative law judge through the hearings unit. Pursuant to OAR 839-050-0050, participants may request an extension of time to file exceptions."

Under OAR 839-050-0050(2),

"[w]here a participant requires additional time to submit any

document, a written request for such extension must be filed with and received by the hearings unit no later than the date set for filing of the document in question, except that the administrative law judge has discretion to permit a participant to make a verbal motion for an extension of time. Where the administrative law judge allows a participant to make a verbal motion for extension of time, the administrative law judge shall promptly notify the other participants of the motion and give them an opportunity to respond, either verbally or in writing. \* \* \*."

Respondent did not request an extension of time to file exceptions to the proposed order, either verbally or in writing. The Hearings Unit received Respondent's exceptions to the proposed order on April 18, 2002, contained in an envelope postmarked April 17, 2002.

The forum finds that Respondent's exceptions to the proposed order were not timely filed and therefore are not considered in this Order.

24) Respondent included in its exceptions requests to disqualify the administrative law judge and dismiss the case, or, in the alternative, reopen the record "so that Respondent can rebutt [sic] the proposed order and enter additional evidence in order to get a fair hearing." Respondent's requests (hereinafter "motions"), are addressed below.

## **RULINGS ON RESPONDENT'S POST-HEARING MOTIONS**

### **MOTION TO DISQUALIFY ALJ**

Respondent asserts that the ALJ "was prejudiced against Respondent at the hearing and \* \* \* biased for the claimants without fair cause." OAR 839-050-0160 provides, in pertinent part:

"1) \* \* \* Any party to any contested case may claim that the person designated as administrative law judge is prejudiced against any party or counsel or the interest of any party or counsel appearing in such case. Such prejudice shall be established by a motion supported by an affidavit establishing that the designated administrative law judge is prejudiced against the party or counsel, or against the interest of the party or counsel, such that the party or counsel cannot, or believes that he or she cannot, have a fair and impartial hearing before the administrative law judge, and that it is made in good faith and not for the purpose of delay. Grounds upon which a motion may be made, or upon which the administrative law judge may determine that disqualification is necessary, include but are not limited to a family relationship with the complainant or claimant or with any party or counsel, or a financial interest in the property or business of any of those individuals. The fact that the administrative law judge is an employee of the Oregon Bu-

reau of Labor and Industries is not a ground for disqualification of the administrative law judge.

"(2) The motion and affidavit must be filed together within 14 days after service of the notice of hearing. No motion to disqualify an administrative law judge may be made after the administrative law judge has ruled upon any motion, other than a motion to extend time in the case, or after the hearing has commenced, whichever is earlier."

Under the hearing rules, Respondent's bare allegation of prejudice is not timely raised and is therefore denied.

### **MOTION TO DISMISS**

Respondent requests the case "be completely dismissed because of the ALJ prejudice and lack of any real and sufficient evidence on the part of the claimants and false evidence/testimony given in the claimants' case." Respondent's opportunity to comment on the evidence in the record expired on April 15, 2002. Respondent's motion is therefore denied as untimely.

### **MOTION TO REOPEN CON- TESTED CASE RECORD**

Respondent requests that the record be reopened pursuant to OAR 839-050-0410 to allow Respondent the opportunity to "rebut" the proposed order and "enter additional evidence." Respondent had ample opportunity to present testimonial and docu-

mentary evidence at the hearing and Respondent's opportunity to refute the proposed order has expired. OAR 839-050-0410 provides, in pertinent part:

"[t]he administrative law judge shall reopen the record where he or she determines additional evidence is necessary to fully and fairly adjudicate the case. In making this determination, the administrative law judge shall consider whether the evidence suggested for consideration could have been gathered prior to the hearing."

Respondent made no showing that it has received new evidence that was previously unavailable. Having been presented with no additional evidence at all to consider, the forum finds there is no reason to reopen the record in this matter. Respondent's motion to reopen the contested case record is denied.

#### **FINDINGS OF FACT – THE MERITS**

1) At all times material herein, Respondent Triple A Construction LLC was an Oregon limited liability company that performed construction work in Oregon, and employed one or more individuals in Oregon.

2) At all times material herein, Michael T. Morris was Respondent's owner and manager.

3) Sometime in early April 2000, Morris went to Claimant Toquero's home and asked if Toquero and Claimant Smith were interested in working on a remodel-

ing job he had lined up. Both had worked for Morris previously on a "per job basis" and agreed to work on the remodel job for \$9.00 per hour.

4) Claimants started work on the remodel on April 16, 2000, at Santiam Auto located in Salem, Oregon. The remodel consisted of removing the roof from a one story building and adding a second story. Claimants were hired to tear off the roof and rafters, put in a floor, and do the framework for the second story. Except for occasionally going to pick up materials, Morris was on the job site with Claimants most days.

5) Morris had previously employed Claimants to do framing work sometime in 1998, for which he paid them \$8.00 per hour. At that time, Respondent required Claimants to sign drug and alcohol and attendance policies and to fill out time sheets. On the Santiam Auto remodel, Respondent did not require Claimants to sign company policies or fill out time sheets.

6) While working on the Santiam Auto car lot remodel, Morris told Claimants when to come to work and what to do each day. Morris supplied the necessary tools and equipment to do the job, including nail guns, hammers, saws, tape measures, and power tools.

7) At the time of hearing, Claimants had never attended a trade school or taken any classes in construction. Nether Claimant had a CCB license and Respon-

dent did not ask them to produce such a license.

8) On or about April 21, 2000, while working on the second story, Claimant Toquero slipped on a rafter and fell part way through the ceiling of the first story. He told Morris that his only injury was to his pride. He did not seek medical treatment after the fall while he was working for Respondent.

9) From about April 24 through 27, 2000, subcontractor, John Weaver, poured concrete for Respondent on the Santiam Auto car lot remodel. Weaver and his employee, Fred Toquero, observed Claimants and Morris working on the job site each of those days. During that time, there was a disagreement between Claimants and Morris about whether Claimants were to install skylights. Morris instructed Claimants to install them and Claimants maintained that installing skylights was not part of the original deal between them. On April 27, 2000, Claimants left the job site after working three and one-half hours. Morris told Weaver he was not going to pay Claimants for their work because they did not complete the job.

10) On or about May 1, 2000, Claimant Toquero filed a complaint with the Oregon Occupational Safety and Health Division ("OR-OSHA") alleging Respondent required Claimants to work on a second story addition without fall protection. After an inspection on June 1, 2000, OR-OSHA notified Claimant Toquero of its finding that it was "unable to

substantiate a violation concerning the complaint on the truss and sheathing work. The company was cited for another fall protection issue."

11) Sometime in April 2000, Steven Campbell observed Claimants working on the Santiam Auto remodel. Around the time Claimants quit working for Respondent, Campbell stopped to ask Morris if he had any work available. Morris put Campbell to work finishing the job Claimants started. Morris told Campbell he would be paid \$7.00 per hour and instructed him to show up at 9 a.m. each day. Morris opened the gate for Campbell each day. Campbell's work day usually ended at 5 p.m., sometimes 7 p.m. Respondent determined the number of hours Campbell worked and provided all of the tools Campbell used on the job. While employed, Campbell was present during an OR-OSHA inspection concerning fall protection issues. Campbell had been working on the second floor of the remodel while there were no barriers on the windows. After the inspection, Respondent told Campbell to sign up with "Brown and Dutton," a temporary service, for "insurance purposes." After he signed up, Campbell's pay rate did not change and he was paid directly by the service instead of Respondent. Campbell worked for Respondent until the remodel was completed about two months later.

12) When they filed their wage claims, Claimants recorded the days and hours they worked

between April 16 and April 27, 2000, on calendars provided by the Agency. The specific days and number of hours noted on each calendar were identical. When he filled out the Agency's form calendar, Claimant Toquero used a personal calendar that contained his handwritten entries between April 16 and April 27, 2000. Each entry showed a time period worked with the total number of hours recorded each day, e.g., on Sunday, April 16, he recorded:

"12-9

"9 hours

"Start job/car lot remodel."

On five of the days, April 18, April 20 through April 22, and April 26, the total number of hours do not correspond with the time period recorded, e.g., on Tuesday, April 18, he recorded:

"7-8:30

"13 hours"

Most of the entries designate a 7 or 8 a.m. start time and a 9 or 9:30 p.m. end time.

13) Claimants' testimony was generally credible and Respondent did not rebut their claims pertaining to the hours they worked or their pay rate in any way. Absent evidence to the contrary, the forum accepts Claimants' testimony regarding the hours they worked and the amount Respondent agreed to pay them when they were hired.

14) Based on the hours they reported to the Agency, Claimants

each worked, on the Santiam Auto remodel, 9 hours on April 16; 12.5 hours on April 17; 13 hours (39 hours total) April 18 – 20; 12.5 hours on April 21; 13 hours on April 22; 5 hours on April 23; 13 hours (39 hours total) April 24 – 26; and, 3.5 hours on April 27, for a total of 133.5 hours. Of the hours worked, 53.5 hours were in excess of 40 hours per week.

15) Claimants voluntarily quit working for Respondent after they left work on April 27, 2000.

16) At the time Claimants left their employment, they were each owed \$1,442.25 in unpaid wages (80 hours x \$9.00 per hour; 53.5 hours x \$13.50 per hour).

17) Kimberly Morris testified credibly despite her bias as Michael T. Morris' wife. She acknowledged that, although Claimants had been on the payroll during years past, Respondent did not consider Claimants "employees" in April 2000. She did not deny that Claimants performed work for Respondent between April 16 and April 27, 2000, or that they were not paid for any work they performed. The forum believed her statement that Claimants were not given any company policies to sign in 2000.

18) Steven Campbell's testimony was credible in all respects. He readily acknowledged that he knew David Toquero, but did not demonstrate any bias toward Claimants or Respondent. His testimony was forthright and the forum credits his testimony in its entirety.

19) Leroy Kammerer's testimony that the gates at Santiam Auto open every day at 10 a.m. and close every evening at 7 p.m., and that he and his partner have the only keys to the gates, was not altogether believable. First, it was contradicted by Campbell's credible testimony that Morris opened the gates to let Campbell in every day at 9 a.m. Moreover, Claimant Toquero also testified that Morris was the one who opened the gates in the morning at 9 a.m. to let Claimants in every day. Kammerer also acknowledged that, as owner of Santiam Auto, he was aware of Claimants' presence during the car lot remodel, which is contrary to his statement to the Agency during its investigation that he had no knowledge of either Claimant. His testimony was further offset by Kimberly Morris' credible testimony that Kammerer currently employs Michael T. Morris at Santiam Auto. The forum disregarded Kammerer's testimony unless it was corroborated by other credible testimony.

20) The testimony of Tamara Roth, Newell Enos, Fred Toquero and John Weaver was credible.

21) Respondent's owner and authorized representative, Michael T. Morris, did not testify at the hearing.

#### **ULTIMATE FINDINGS OF FACT**

1) At all times material herein, Respondent conducted a business in the state of Oregon and engaged the personal services of

one or more employees in the operation of that business.

2) The actions, inaction, knowledge and motivations of Michael T. Morris, Respondent's owner and manager, are properly imputed to Respondent.

3) Respondent employed Claimants between April 16 and April 27, 2000.

4) Respondent and Claimants agreed Claimants would be paid \$9.00 per hour.

5) Claimants quit their employment on April 27, 2000, without notice to Respondent.

6) Claimants each worked 133.5 hours between April 16 and April 27, 2000, 53.5 of which were in excess of 40 hours per week. For all of these hours, each Claimant earned a total of \$1,442.25. Respondent paid Claimants nothing and therefore owed Claimants \$2,884.50 in earned and unpaid compensation on the day their employment terminated.

7) Respondent owes Claimant Toquero \$1,442.25 for wages earned and Claimant Smith \$1,442.25 for wages earned.

8) Respondent willfully failed to pay Claimants the \$2,884.50 in earned, due and payable wages no later than May 2, 2000, the fifth business day after Claimants quit their employment without notice to Respondent. Respondent has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.

9) Civil penalty wages, computed pursuant to ORS 652.150, equal \$2,160 for each Claimant, for a total of \$4,320.

### CONCLUSIONS OF LAW

1) ORS 653.010 provides, in pertinent part:

“(3) ‘Employ’ includes to suffer or permit to work; \* \* \*.”

“(4) ‘Employer’ means any person who employs another person \* \* \*.”

ORS 652.310 provides, in pertinent part:

“(1) ‘Employer’ means any person who in this state, directly or through an agent, engages personal services of one or more employees \* \* \*.”

“(2) ‘Employee’ means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled.”

During all times material herein, Respondent was an employer and Claimants were Respondent’s employees subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.414, and 653.010 to 653.261.

2) The Commissioner of the Bureau of Labor and Industries

has jurisdiction over the subject matter and the Respondent herein.

3) ORS 653.261(1) provides:

“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, minimum meal periods and rest periods, and 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 that except in circumstances not relevant here:

“ \* \* \* 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 653.281(1).”

Respondent failed to pay Claimants at the overtime rate, in violation of OAR 839-020-0030(1).

4) 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 violated ORS 652.140(2) by failing to pay Claimants all wages earned and unpaid within five days, excluding Saturdays, Sundays and holidays, after Claimants quit their employment on April 27, 2000, without at least 48 hours’ notice to Respondent.

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; pro-

vided, 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 is liable for \$4,320 in civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimants when due as provided in ORS 652.140(2).

6) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimants their earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

#### OPINION

In order to prevail in this matter, the Agency was required to prove: 1) that Respondent employed Claimants; 2) Respondent agreed to pay Claimants \$9.00 per hour; 3) that Claimants performed work for which they were not properly compensated; and 4) the amount and extent of work Claimants performed for Respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230, 263, 264 (2000). In its answer, Respondent disputed all of these elements and characterized Claimants as independent contractors who

“represented themselves to have the proper authority and appropriate licensing and documentation as required by the Construction Contractors Board (“CCB”) and the State of Oregon.” The Agency established, however, by a preponderance of the evidence, that Respondent employed Claimants and willfully failed to pay them all wages earned when due.

#### **RESPONDENT EMPLOYED CLAIMANTS**

There is no dispute that Claimants rendered services for Respondent on a remodeling project that took place on the premises of Santiam Auto between April 16 and April 27, 2000. In order to determine whether they were employees or independent contractors under Oregon’s minimum wage and wage collection laws, the forum relies on an “economic reality” test. See *In the Matter of Ann L. Swanger*, 19 BOLI 42, 53 (1999); *In the Matter of Frances Bristow*, 16 BOLI 28, 37 (1997). The test, derived from one used by the federal courts when applying the Fair Labor Standards Act, helps to determine “whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which [he or she] renders [his or her] services.” *In the Matter of Geoffrey Enterprises, Inc.*, 15 BOLI 148, 164 (1996) (relying on *Circle C Investments, Inc.*, 998 F2d 324 (5<sup>th</sup> Cir 1993)). Having considered the following test criteria, the forum finds that the record establishes Claimants

were economically dependent upon Respondent’s business.

#### **A. The degree of control the alleged employer has over a worker.**

There is sufficient evidence to find that Respondent had total control over when and how long Claimants worked and how they were to accomplish the tasks they were assigned. Despite evidence that Respondent hired Claimants on a per job basis, Claimants had no control over how they approached each assigned project. The forum finds they were hired as day laborers to perform work in accordance with Respondent’s instructions and, as such, were working at the direction of Respondent.

#### **B. The extent of the relative investments of the worker and alleged employer.**

Claimants invested only their time in the remodeling project. Respondent supplied all of the tools and equipment used for the remodel. Claimants may have brought their own hammer or tape measure to use on the job site, but evidence shows and the forum finds that Claimants were dependent on the equipment Respondent provided to get the job done and could not have performed the remodeling work without the tools and equipment provided by Respondent.

**C. The degree to which the worker's opportunity for profit and loss is determined by the alleged employer.**

In this case, Respondent determined and exclusively controlled the amount of Claimants' hourly rate and the forum can conclude from that fact that Claimants were "wage earners toiling for a living, [rather] than independent entrepreneurs seeking a return on their risky capital investments." See *Reich v. Circle C. Investments, Inc.*, 998 F2d 324, at 328 (5<sup>th</sup> Cir 1993), citing *Brock v. Mr. W. Fireworks, Inc.*, 814 F2d 1042 at 1051 (5<sup>th</sup> Cir), cert. denied, 484 US 924 (1987). Respondent produced no evidence that Claimants were independent contractors who were risking a loss of money if the project fell through or was not completed.

**D. The skill and initiative required in performing the job.**

Claimants had the skills necessary to wield hammers and saws and had previous experience working for Respondent on similar jobs. Neither had attended any trade schools or taken any classes in construction. Neither had a CCB license nor is there any evidence in the record that Respondent required them to have such a license. The forum concludes that Claimants possessed no special skills or talents that would have made them likely to be independent contractors while working for Respondent.

**E. The permanency of the relationship.**

Independent contractors are generally engaged to perform a specific project for a limited period. In this case, Claimants were hired for a short term remodeling project that did not require them to possess a high degree of initiative, judgment, or foresight to perform a specific task. Instead, they were hired as laborers for a limited period to do a variety of tasks that did not require any special skills. The impermanence of a particular job alone does not create an independent contractor relationship.

The forum is obliged to look at the totality of the circumstances when determining whether a worker is an independent contractor. In this case, the evidence as a whole reveals the actual relationship between Claimants and Respondent and the forum finds the Claimants were Respondent's employees for the duration of the Santiam Auto remodeling job.

**AGREED UPON RATE**

There is no evidence that contradicts Claimants' testimony that Respondent agreed to pay Claimants \$9.00 per hour for their services. Respondent's principal was present at the hearing and had ample opportunity to dispute Claimants' contention and did not. The forum therefore accepts the testimony that Respondent and Claimants agreed to the \$9.00 per hour rate.

## WORK PERFORMED

Claimants testified and Respondent does not dispute that Claimants performed work for which they were not paid. Respondent's only argument is that they were not employees, but independent contractors. The forum rejects that argument and finds that Claimants performed work for Respondent as its employees and were not paid for their work.

## AMOUNT AND EXTENT OF WORK PERFORMED

ORS 653.045 requires Respondent to keep and maintain proper records of wages, hours and other conditions and practices of employment. Where the forum concludes an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. Where, as in this case, the employer produces no records, the Commissioner may rely on evidence produced by the Agency from which "a just and reasonable inference may be drawn." *In the Matter of Majestic Construction*, 19 BOLI 59, 58 (1999). A claimant's credible testimony may be sufficient evidence. *In the Matter of Graciela Vargas*, 16 BOLI 246 (1998).

Here, Respondent kept no record of the days or hours Claimants worked. Claimant Toquero kept a contemporaneous record of the hours both Claimants worked between April 16 and

April 27, 2000. Despite the opportunity to do so, Respondent produced no evidence to "negative the reasonableness of the inference to be drawn from the [Claimants'] evidence." *Id.* at 255, quoting *Mt. Clemens Pottery Co.*, 328 US at 687-88. The forum concludes, therefore, that Claimants performed work for which they were improperly compensated and the forum may rely on the evidence Claimants produced showing the hours they worked as a matter of just and reasonable inference. Claimants' testimony establishes that they each worked a total of 133.5 hours for Respondent, 53.5 of which were hours worked in excess of 40 per week. For all of these hours, Claimants each earned a total of \$1,442.25, based on the agreed upon rate of \$9.00 per hour. Respondent paid none of the wages earned and due. Respondent owes each Claimant \$1,442.25, for a total of \$2,884.50 in unpaid wages.

## CIVIL PENALTIES

An award of penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent, as an employer, had a duty to know the amount of wages due to his employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907

(1950); *In the Matter of Jack Coke*, 3 BOLI 238 (1983).

Respondent did not dispute that Claimants performed work for him. Respondent denied, however, that he "employed" Claimants. The facts and law prove otherwise. Respondent's failure to apprehend the correct application of the law and Respondent's actions based on this incorrect application do not exempt Respondent from a determination that he willfully failed to pay wages earned and due. *In the Matter of Locating, Inc.*, 14 BOLI 97 (1994), *aff'd without opinion, Locating, Inc. v. Deforest*, 139 Or App 600, 911 P2d 1289 (1996); *In the Matter of Mario Pedroza*, 13 BOLI 220 (1994). Respondent does not deny that Claimants were not paid for services performed and the evidence shows Respondent intentionally withheld wages because of a perception that the work Claimants were performing was not completed. Based on those facts, the forum infers Respondent voluntarily and as a free agent failed to pay Claimants all of the wages earned between April 16 and April 27, 2000. Respondent acted willfully and is liable for penalty wages under ORS 652.150.

Penalty wages, therefore, are assessed and calculated in accordance with ORS 652.150 in the amount of \$4,320. This figure is computed by multiplying \$9.00 per hour by 8 hours per day multiplied by 30 days for each Claimant.

See ORS 652.150 and OAR 839-001-0470.

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, Respondent **Triple A Construction, LLC** is hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for David L. Toquero, in the amount of THREE THOUSAND SIX HUNDRED AND TWO DOLLARS AND TWENTY FIVE CENTS (\$3,602.25), less appropriate lawful deductions, representing \$1,442.25 in gross earned, unpaid, due and payable wages and \$2,160 in penalty wages, plus interest at the legal rate on the sum of \$1,442.25 from May 2, 2000, until paid and interest at the legal rate on the sum of \$2,160 from June 2, 2000, until paid.

A certified check payable to the Bureau of Labor and Industries, in trust for Gary L. Smith, in the amount of THREE THOUSAND SIX HUNDRED AND TWO DOLLARS AND TWENTY FIVE CENTS (\$3,602.25), less appropriate lawful deductions, representing \$1,442.25 in gross earned, unpaid, due and payable wages and \$2,160 in penalty wages, plus interest at

the legal rate on the sum of \$1,442.25 from May 2, 2000, until paid and interest at the legal rate on the sum of \$2,160 from June 2, 2000, until paid.

\$10,000 in damages for emotional distress. *Former* ORS 659.550; ORS 659A.850; *former* OAR 839-010-0100; *former* OAR 839-010-0110.

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**In the Matter of**

**HERMISTON ASSISTED LIVING,  
INC.,**

**dba Meadowbrook Place**

**Case Nos. 87-01 and 88-01**

**Final Order of Commissioner  
Jack Roberts**

**Issued May 2, 2002**

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**SYNOPSIS**

The Agency alleged that Respondent suspended and discharged husband and wife complainants in violation of Oregon's whistleblower law based on the wife's good faith report of criminal activity and Respondent's perception that the husband had reported criminal activity. The Commissioner found that Respondent's belief that both complainants had reported wrongdoing which, if proven, would constitute criminal activity, was a substantial factor in Respondent's decision to suspend and discharge complainants. The Commissioner awarded \$2,413.80 and \$30,763.03 in back pay to complainants, and \$5,000 and

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 evidentiary portion of the hearing was held on November 6-7, 2001, at the office of the Oregon Employment Department, Baker City, Oregon. Closing arguments were made by teleconference on November 16, 2001.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Peter McSwain, an employee of the Agency. Complainant Bruce Hahn ("Hahn") was present throughout the hearing. Complainant Sue Bentley ("Bentley") was only present on November 6. Neither Bentley nor Hahn was represented by counsel. Respondent was represented by attorney Darryl D. Walker.

The Agency called as witnesses, in addition to the Complainants: Cheryl Krantz, Respondent's former employee; and Bryan Woolard, Hahn's current supervisor.

Respondent called as witnesses: Gayle Gazley, executive director at Meadowbrook Place;

Suzanne Bender, Gazley's administrative assistant; Ron Semingson, director of operations for Greenbriar Corporation, Respondent's parent corporation; and Tony Constantine, Hahn's former employer.

The forum received into evidence:

a) Administrative exhibits X-1 through X-34;

b) Agency exhibits A-1 through A-39 (submitted prior to hearing);

c) Respondent exhibits R-1 through R-28 (submitted prior to hearing), and R-29 through R-37 (submitted at hearing).

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

#### **FINDINGS OF FACT – PROCEDURAL**

1) On December 9, 1999, Complainant Bentley filed a verified complaint with the Agency's Civil Rights Division alleging that she was the victim of the unlawful employment practices of Respondent. On September 28, 2000, the Division amended her complaint to include the correct name of Respondent. After investigation, the Agency found substantial evidence of an unlawful employment practice and issued an

Administrative Determination on October 31, 2000.

2) On January 24, 2000, Complainant Hahn filed a verified complaint with the Agency's Civil Rights Division alleging that he was the victim of the unlawful employment practices of Respondent. On September 28, 2000, the Division amended his complaint to include the correct name of Respondent. After investigation, the Agency found substantial evidence of an unlawful employment practice and issued an Administrative Determination on October 31, 2000.

3) On June 28, 2001, the Agency issued Specific Charges alleging that Respondent discriminated against Complainants by discharging them based on Bentley's good faith report to Respondent's corporate headquarters that Julie Jones, a co-worker, had falsified her time cards, and Respondent's perception that Hahn had participated in making the report. The Agency alleged that these actions violated ORS 659.550. The Agency sought damages in the amount of \$3,050 and \$32,127 in wage loss, and \$5,000 and \$10,000 for emotional stress for Bentley and Hahn, respectively.

4) On July 2, 2001, the forum served on Respondent the Specific Charges, accompanied by the following: a) a Notice of Hearing setting forth August 28, 2001, in Baker City, Oregon, as the time and place of the hearing in this matter; b) a Summary of Contested Case Rights and

Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

5) On July 18, 2001, Respondent, through attorney David S. Jones of Dallas, Texas, filed an answer to the Specific Charges.

6) On July 30, 2001, the forum ordered the Agency and Respondent each to submit a case summary including: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; a brief statement of the elements of the claim and any damage calculations (for the Agency only); and a brief statement of any defenses to the claim (for Respondent only). The forum ordered the participants to submit case summaries by August 17, 2001, and notified them of the possible sanctions for failure to comply with the case summary order.

7) On July 30, 2001, the forum issued an interim order that required Respondent to file, no later than August 8, 2001, one of the following: 1) a petition for David S. Jones to appear on behalf of Respondent as counsel *pro hac vice* in accordance with the requirements of ORS 9.241 and UTCR 3.170; (2) a notice of appearance by Oregon counsel as "counsel" is defined in OAR 839-050-0020(8); or, (3) a letter from Respondent

authorizing an officer or regular employee of Respondent to appear on behalf of Respondent as provided in OAR 839-050-0110(2) & (3). The order stated that Respondent would be subject to default if it did not take one of these actions.

8) On August 8, 2001, David S. Jones filed a petition to appear as counsel *pro hac vice* on Respondent's behalf and stated that he would be assisted in the proceeding by the Oregon law firm of Bullard Smith.

9) On August 9, 2001, the forum issued an interim order granting Jones's motion to appear as counsel *pro hac vice*. In the same order, the ALJ noted his *ex parte* phone conversation with Jones in which the ALJ notified Jones that his motion had been granted.

10) On August 14, 2001, the Agency moved to amend the Specific Charges to correct a clerical error, clarify allegations, and lower its claim for back pay damages for Complainant Hahn.

11) On August 16, 2001, the Agency filed its case summary.

12) During a pre-hearing conference held on August 16, 2001, Respondent's counsel Jones moved for a postponement. The Agency did not object, and the ALJ granted the motion, resetting the hearing for November 6, 2001, and the due date for case summaries to October 19, 2001.

13) On October 19, 2001, Respondent requested an exten-

sion of time to file its case summary until October 30, 2001. The Agency did not oppose the motion and the forum granted it.

14) On October 29, 2001, Respondent, through counsel Darryl D. Walker of Bullard Smith, filed its case summary.

15) At the commencement of the hearing, 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.

16) Prior to opening statements, the Agency provided the forum with a legal memorandum from the attorney general's office interpreting Oregon's whistleblower statute. Respondent did not object and it was received as an administrative exhibit.

17) Prior to Woolard's testimony, Mr. McSwain disclosed that Hahn had discussed portions of Constantine's testimony with Woolard. Mr. Walker objected to any testimony from Woolard responding to testimony of Constantine that Hahn had discussed with him. At the time of the objection, the ALJ postponed his ruling until the proposed order. This issue was rendered moot when the ALJ granted the Agency's and Respondent's motions to strike all of Woolard's testimony concerning Woolard's employment with Constantine.

18) The evidentiary portion of the hearing concluded at 5:20 p.m. on November 7, and closing arguments were set for November

16, 2001, at 9:30 a.m., by teleconference.

19) On November 12, 2001, Respondent filed a motion requesting that it be allowed to call Gayle Gazley as a rebuttal witness, with her testimony limited to the scope of testimony given by Cheryl Krantz during Krantz' rebuttal testimony on the Agency's behalf. Respondent based its motion on the provisions of OAR 839-050-0250(7) and "as a matter of fundamental fairness."

20) On November 14, 2001, the forum issued an interim order denying Respondent's motion. The order included the following language:

"The forum's administrative rule provides that 'participants may present rebuttal evidence.' Properly interpreted, the rule means that a respondent has the opportunity to present evidence to rebut the Agency's case-in-chief. It does not extend to giving a respondent the opportunity to present evidence to rebut evidence presented by the Agency in rebuttal of respondent's evidence. As the Agency bears the burden of proof, the Agency is entitled to the last word in the case. This interpretation does not prevent the forum from conducting a full and fair inquiry. Respondent's request is **DENIED.**"

21) On November 16, the hearing reconvened and Respondent and the Agency made their closing arguments by teleconfer-

ence. At the conclusion of closing arguments, the ALJ granted Respondent's request to submit a legal brief on the Agency's prima facie case, burden of proof, and the necessity that the Respondent knew or believed that Complainants had made a complaint, and set a filing deadline of November 25, 2001. The Agency requested an opportunity to respond to Respondent's brief and to discuss the case of *Jensen v. Medley*, 170 Or App 42 (2000), which Respondent argued as controlling the outcome of this case. The ALJ granted the Agency's request and set a filing deadline of December 10, 2001.

22) Respondent timely filed its legal brief on November 21, 2001.

23) On December 10, 2001, the Agency's counsel, assistant attorney general Stephanie Andrus, requested an extension of time until December 17, 2001, in which to file the Agency's post-hearing brief. Respondent did not object to the request and the ALJ granted it.

24) The Agency timely filed its post-hearing brief, through assistant attorney general Stephanie Andrus, on December 17, 2001. On January 24, 2002, the ALJ observed that Andrus had not signed and dated the Agency's brief and mailed a copy of the brief to her, along with an interim order instructing her to sign and date it, and file it with the ALJ no later than February 4, 2002.

25) On January 28, 2001, Andrus filed a signed and dated copy of the Agency's post-hearing brief.

26) On March 29, 2002, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order within ten days of its issuance.

27) On April 5, 2002, Respondent filed an unopposed motion to extend the time in which to file exceptions to April 18, 2002.

28) On April 9, 2002, the ALJ issued an interim order extending the time in which to file exceptions to April 18, 2002. No exceptions were filed.

#### **FINDINGS OF FACT – THE MERITS**

#### **PARTICIPANTS AND WITNESSES**

1) At all times material herein, Respondent was an Oregon corporation that owned and operated an assisted living facility in Baker City, Oregon, doing business under the assumed business name of Meadowbrook Place, and employed one or more persons. At all times material herein, Respondent was owned by Greenbriar Corporation, a Texas-based corporation that operated a number of assisted living facilities.

2) Complainant Sue Bentley was hired by Respondent in February 1995 and worked as a caregiver until her discharge on October 22, 1999.

3) Complainant Bruce Hahn was hired as a temporary mainte-

nance employee on May 27, 1999, to replace Rudy Martinez, Respondent's permanent maintenance worker who had to take leave for health reasons. Hahn performed maintenance work until his discharge on October 20, 1999.

4) Bentley and Hahn had lived together for 20 years at the time of hearing and consider themselves to be husband and wife. Gazley was aware of this relationship.

5) Gayle Gazley started work for Respondent in 1988 and became Respondent's executive director in 1992.

6) Ron Semingson became director of operations for Greenbriar in 1996 and, at the time of hearing, supervised the operations of 14 retirement and assisted living facilities. Semingson has been Gazley's direct supervisor since 1996.

7) Suzanne Bender is Gazley's daughter and Julie Jones's sister. She was hired as Gazley's administrative assistant in 1994. Gazley has been her direct supervisor since that time.

8) Julie Jones is Gazley's daughter and Bender's sister. She was hired by Respondent in 1996 and became Respondent's head housekeeper in August 1999. Jones was no longer employed by Respondent at the time of hearing.

9) Cheryl Krantz was residential care manager and nurse supervisor for Respondent in 1999

and left Respondent's employment in May 2000. She was Bentley's immediate supervisor.

#### **COMPLAINANT BENTLEY'S EMPLOYMENT BEFORE OCTOBER 19, 1999**

10) On March 16, 1998, Respondent gave Bentley a performance appraisal that evaluated Bentley as "above average." Bentley was a good employee and a hard worker while she worked for Respondent and, prior to October 19, 1999, was never issued any warnings or subjected to any disciplinary action.

11) In early August 1999, the position of head housekeeper came open at Respondent's facility. Bentley considered applying but chose not to because she was informed that the job was only 35 hours per week, fewer hours than Bentley currently worked.

12) Julie Jones applied for and was given the position of head housekeeper, effective August 6, 1999. Because there were some undone chores at Respondent's facility and some extra money in Respondent's housekeeping budget, Gazley asked Semingson if Jones could work up to 40 hours a week to complete those chores. Semingson approved the request. Three weeks later, Gazley got Semingson's approval to use Jones to transport Respondent's residents and Jones's position was budgeted for 40 hours per week. Gazley then began using Jones to transport residents, get prescriptions, and go to the bank. None of Jones's

co-workers were aware of these added job duties.

**COMPLAINANT HAHN'S EMPLOYMENT BEFORE OCTOBER 19, 1999**

13) Gazley hired Hahn as a temporary maintenance employee on May 27, 1999, at the pay rate of \$10.40 per hour, to work 40 hours per week. His duties included lawn care, sprinkler system care, plumbing, electrical, pruning trees, maintaining park benches, general landscaping, and interior and exterior building repairs. Hahn was hired to replace Martinez, Respondent's former maintenance employee, who was absent on medical leave. When Gazley hired Hahn, she anticipated that his employment would only be temporary, until such time as Rudy could resume his job duties.

14) When Hahn was hired, Respondent's grounds were in poor condition and repairs had not been kept up on the exterior and interior of Respondent's building. Hahn corrected the problems with the grounds and made needed repairs on Respondent's building, except for siding that had fallen off and continued to fall off after he repaired it.

15) Hahn had problems getting Respondent's sprinklers to work properly and had to have Tony's Tree Service come out several times to help him adjust the system before it began to work properly.

16) Shortly after Hahn was hired, he used the "F word" in

front of a co-worker. Gazley counseled Hahn about his language. Hahn apologized to his co-worker. Gazley did not document this incident.

17) During the summer of 1999, Hahn used cut-up old t-shirts as a sweatband while working outside in hot weather. On one or more occasions he wore a sweatband and smoked cigarettes while mowing Respondent's lawn, using Respondent's riding mower. He also wore clothes with holes in them. Semingson observed him on one of these occasions. Gazley also observed him on at least one of these occasions.

18) In or around August 1999, Gazley told Hahn that several residents had asked what Hahn was wearing around his head, that they didn't think it looked good, and she didn't want him to wear it any more. Gazley also counseled Hahn not to smoke while working. Hahn said he wouldn't do it any more.

19) At some point, Bender filled out a "Complaint Resolution" form stating that residents and staff had complained about Hahn's appearance "off & on since temp. hire./again on 8/19/99," noting "management observed [this behavior]." Bender dated it "8/19/99" and Gazley signed it. "Verbal Warning" is handwritten on the form's upper left-hand corner. Hahn was not informed at any time during his employment that Gazley's counseling had been documented as a "verbal warning."

20) No more complaints were made about Hahn's appearance after August 19, 1999.

21) On or about August 18, 1999, Gazley asked Hahn to level the public bathroom so that a contractor could install new linoleum. Around this same time, Lonnie Yarbrough, a Greenbriar employee who oversaw Greenbriar's building and maintenance projects, had instructed Gazley to have Hahn do everything he could within his ability or job description so that Respondent could save money on facility maintenance costs. Hahn told Gazley that the contractor's bid should have included leveling the floor. Gazley told Hahn to do as he was told and Hahn explained that, based on his construction work experience, the contractor should do that job. Gazley told Hahn that she would find someone else to do the job if he didn't want to do it, at which point Hahn agreed to level the floor. Hahn subsequently leveled out the floor.

22) At some point subsequent to the floor leveling incident, Bender filled out an "Employee Disciplinary Report" ("EDR") that was signed by Gazley and dated "8/18/99." On it, she wrote that the reason for completing the EDR was "Employee arguing with manager about tasks needing to be completed." She indicated on the EDR that it was a "written warning" and dated it 8/18/99. She did not ask Hahn or a witness to sign it in the spaces provided for the signatures of the "employee" or a "witness," even

though Respondent's personnel policy requires that the employee or a witness sign and date written warnings. This EDR was never shown to Hahn, nor was he informed he had received a written warning at any time during his employment.

23) Bender also filled out a "Complaint Resolution" form documenting the floor-leveling incident. She dated it "8/18/99" and Gazley signed it. This form was never shown to Hahn during his employment.

24) Subsequent to the floor-leveling incident, Gazley told Hahn that Rudy would not be returning and asked Hahn if he wanted to be a permanent fulltime employee. Gazley also told Hahn he was doing better work than Rudy. Gazley told Hahn he would have to take and pass a drug test before he could be hired as a permanent fulltime employee, which Hahn did. Hahn then became a probationary, permanent fulltime employee and Gazley completed paperwork showing that Hahn became a fulltime employee effective September 13, 1999. On that date, Hahn began a 90-day probationary period. He continued to receive \$10.40 per hour and to work 40 hours per week.

25) On or about October 11, 1999, some drains in Respondent's building began to overflow and Respondent had to call a plumber. Hahn showed the plumber the problem and went home. Shortly thereafter, one of Respondent's employees called

Hahn and told him that the plumber had left and the drains were still overflowing. Hahn tried unsuccessfully to call Gazley, then tried to reach Bender and was only able to leave a voice mail message. Knowing that Bender sometimes didn't answer the phone when she was home, Hahn left a message in which he told Bender to "pick up the damn phone." The next day, Gazley called Hahn into her office and told him that swearing at her daughter was unacceptable. Subsequently, Bender completed an EDR regarding the incident that she characterized, with Gazley's signed approval, as a "verbal warning."<sup>1</sup> Bender and Gazley both dated their signatures "10/12/99." Hahn was not shown or asked to sign the EDR.

#### **JULIE JONES'S TIMECARDS**

26) In 1999, Respondent used a time clock and time cards to keep track of the time worked by its hourly employees. The time clock and time cards were located in a public area in the employee break room. All staff could see each other's timecards, and members of the public could see them if they went through the break room to use the restroom.

27) Employees were expected to use Respondent's time clock to punch in and out when they arrived at and left work. Respondent's corporate policy requires that employees punch out for a 30 minute lunch break, and an employee's failure to do so is grounds for counseling.

28) Except for two occasions, Jones did not use the time clock to punch in and out from the time she became head housekeeper until sometime in October 1999, but instead handwrote the time she arrived and left. Jones did not punch or write in a 30-minute lunch break on any of her time cards that were faxed to Greenbriar.

29) Not long after Jones was promoted to head housekeeper, Bentley was told by another caregiver that "everybody" noticed that Jones was being paid for eight hours work a day but didn't have to work eight hours a day. Bentley and several other caregivers began inspecting Jones's timecards.

30) Bentley, Alice Cole, Sandy Gorts, Shannon Skeels, and Cheryl Krantz subsequently observed and copied Jones's timecards from late August 1999 until early October 1999. During this time, with limited exceptions, Jones reported her hours worked as "7:00" to "3:30" each day, for a total of "8" hours. Bentley and the others observed that Jones was absent from Respondent's premises on a number of occasions between 7 a.m. and 3:30 p.m. On some of these occasions, Jones

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<sup>1</sup> On the EDR, the box next to "written warning" is also checked, but crossed out, with a note on the EDR stating it is a "verbal warning." Bender testified that she had no recollection of why the checked box next to "written warning" was crossed out.

transported residents, went to the bank, or picked up prescriptions from a pharmacy at Gazley's instruction. Bentley and her co-workers had no knowledge of what Jones was doing when she was absent from Respondent's premises during her scheduled work shift.

31) Bentley believed that Jones should be at work for the hours she wrote on her timecard and didn't like the fact that it looked like Jones was getting paid for hours she didn't work. Bentley believed that if she and her co-workers had to stay on Respondent's premises and work 40 hours to be paid for 40 hours, Jones should have to do the same.

32) Bentley decided to report the discrepancies on Jones's timecards. She decided not to report them to Gazley or Bender because they were members of Jones's family.

33) Bentley called Greenbriar's corporate headquarters in Texas and spoke to a male employee. Bentley said there was a discrepancy in Jones's timecards and Jones was getting paid for hours she didn't work. The male employee wanted to know Bentley's name and she said she wasn't comfortable giving it.

34) About two weeks later, Gazley passed out some Greenbriar letters to residents that had Greenbriar's phone number on it. Alice Cole told Bentley that she called that number and spoke with Toni Ruden, the owner's personal

assistant. Toni asked Cole to please fax Jones's time cards to her.

35) Bentley and Krantz handwrote notes on the copies of Jones's timecards noting discrepancies they and others had observed, as well as notes about Bender and Gazley.

36) In August, September, and October 1999, Bentley, Krantz, and Alice Cole all faxed copies of Jones's timecards containing these handwritten notes to Ruden. During this time, at least ten employees, including Krantz's nursing staff and employees of other departments, complained to Krantz that Gazley's family did not have to work their full eight hour shifts in order to get paid for eight hours a day.

37) Examples of the handwritten notes on the timecards, some of which had the author's initials, included the following:

"Never here until 7:15 am. SB"

"Not here, called in sick."

"Was yard sailing [sic] all morning from 9-12 w/Gayle. SS"

"Left at 11:00 a.m. SS. AC"

"Wasn't here – in Sumpter"

"Left at 2:15. SB"

"She is here at 3:00 when day-shift leaves."

"Suzanne left at 3:00."

"Suzanne left 2:30."

"7:20. 10:00 to LaGrand (sic) w/Gayle. Never came back."

"Out sick."

"She hasn't clocked on all week. These are her hours according to other employee."

"Gayle is selling the living rm. furniture. Some of it has gone to the Nursing Home. Staff was told \$75 a chair.

"Suzanne has carpet in the garage that came in the wrong color & they are taking it to her house."

38) By October 1999, Krantz's staff had become so upset by their perception that Jones was collecting pay for hours she had not worked that a number of them told Krantz they were prepared to walk off the job. In response, Krantz called Greenbriar's corporate office and asked that an investigation be conducted. Krantz also faxed some more of Jones's timecards to Ruden. Krantz did not complain to Gazley because Jones is Gazley's daughter.

39) On or about October 19, 1999, Gazley received a phone call at home from an employee at Hermiston Assisted Living, who reported that Bentley and Cole had been faxing Jones's timecards, with notes written on them, to Greenbriar. Gazley told Bender this. They were both "totally shocked." Gazley then called Semingson, who looked into the matter and called Gazley back, reporting that this had been going on for "about a month." Semingson told Gazley that some of Respondent's employees were claiming that Jones had reported

hours worked on her timecards and had been paid for hours that she had not actually worked. Two of Jones's timecards that had been faxed to Greenbriar were then faxed to Gazley.

40) Jones's alleged timecard falsification, if proven, would constitute a Class A misdemeanor under ORS 165.080 that makes falsification of business records a crime.

41) On October 19, 1999, Hahn and Bentley were having lunch with two female co-workers in Respondent's activities room when Gazley entered and said she wanted Hahn and Bentley in her office at 3 p.m. One co-worker commented "she knows" and she and Bentley told Hahn what they'd been doing with Jones's timecards. The other co-worker said that Bentley was going to be fired. Hahn commented that if Bentley got fired over that, if everything Bentley had done was true about Jones, "Susan is going to be one rich bitch." This was the first time Hahn heard anything about Jones's timecards being faxed to Greenbriar.

#### **BENTLEY AND HAHN'S SUSPENSION AND DISCHARGE**

42) On October 19, 1999, Gazley called Hahn into her office and took one of Jones's timecards that had been faxed to Greenbriar, set it in front of him, and asked him if he knew what it was. Hahn denied any knowledge of it and Gazley called Hahn "a liar." Gazley told Hahn he was suspended for three days, and that

would give her time to prove that he had been involved with Jones's timecards.

43) When Hahn walked out of Gazley's office, Gazley called Bentley into the office. Gazley angrily showed Bentley a copy of one of Jones's faxed timecards and asked Bentley if she knew anything about it. Bentley said that she had copied and faxed it to Greenbriar. Gazley asked if it was Bentley's handwriting on the timecards; Bentley acknowledged that it was. Gazley asked if it was only Bentley's handwriting; Bentley refused to answer. Gazley told Bentley she thought Hahn's handwriting was on it; Bentley told Gazley that Hahn's handwriting wasn't on it. Gazley then told Bentley she was suspended for three days so that Gazley could "investigate" the matter. During the same meeting, Gazley also called Bentley a "backstabber."

44) Bentley did not report Jones's timecards to anyone else, including any law enforcement agencies.

45) Neither Bentley, Gazley, nor Semingson thought that falsification of employee timecards was a crime in Oregon.

46) After suspending Hahn and Bentley, Bender filled out an EDR for Hahn and Gazley signed and dated it "10/19/99." The EDR stated that Hahn was being placed on "Disciplinary Suspension." The reason she gave for her action was:

"Report of employees who were taking copies of another

employee's time cards and sending false statements of operation to the corporate office. Suspension investigating reports of above claim."

47) Subsequently, one of Respondent's employees told Gazley that Hahn had stated if Bentley was fired because of Jones's timecards, Bentley would be "one rich bitch." Gazley then called Semingson and recommended that Hahn be discharged, and Semingson concurred.

48) Bender or Gazley completed a "Complaint Resolution" form with regard to Hahn that was signed by Gazley and dated "10/20/99." Handwritten on the form are the following statements:

"Employee was overheard telling residents that this building was not being ran right and that Sue Bentley was going to see to it personally that it was corrected. Also stated that Sue was going to be one rich bitch when this was all over.

"This was reported to us by Alice Street, another Meadowbrook employee who heard him saying this.

"Employee already on a three day suspension, has been warned repeatedly about his severe insubordination, will talk to regional director about termination during this trial period."

Next to her signature, Gazley noted that Semingson had verbally approved Hahn's termination.

49) On the morning of October 20, Bentley and Hahn visited an attorney to find out what their rights were related to their employment with Respondent.

50) On October 22, 1999, Gazley called Bentley and Hahn on the phone. Gazley said she wanted to meet with them at her office. They went to her office, where they met individually with Gazley and Bender, Hahn first. Bender gave Hahn his check and told him he was terminated. Gazley told Bentley that "for the act of insubordination" she was giving Bentley an evening shift that paid \$.20 per hour less than the day shift she currently worked, that Bentley could start on the Saturday evening shift instead of day shift, that Bentley might get worked back into her regular rotation, and that Bentley "could drop all this foolishness and we could get on with it." Bentley told Gazley "No ma'am, my attorney says I do not have to drop this to keep my job." There was no discussion of what Bentley and her attorney might be thinking of doing and Bentley did not tell Gazley that she was going to sue Respondent.

51) At the time of this conversation, Bentley had spoken with a BOLI representative and BOLI had sent her "paperwork." Bentley did not convey this to Gazley and did not threaten to file a complaint with BOLI in her conversation with Gazley.

52) In Bentley's presence, Gazley unsuccessfully tried to contact Semingson by telephone.

After Bentley left her office, Semingson called Gazley back. Gazley told Semingson that Bentley had stated she would sue Greenbriar. Semingson instructed Gazley to phone Lewis Cole, Greenbriar's corporate counsel. Gazley phoned Cole and told him that Bentley had stated she would sue Greenbriar. Lewis asked what kind of lawsuit Bentley was going to file, and Gazley said she didn't know. Lewis then told Gazley that if Bentley was going to sue Respondent, she couldn't be in the building and should be terminated immediately. Gazley then called Bentley back and fired her. As Bentley left, Hahn demanded that Gazley give them a copy of their personnel records, and Gazley refused.

53) Bender completed an "Employee Separation Report" for Hahn. On it she handwrote that Hahn was discharged because of:

"Insubordination during trial period. Verbal warnings of rude and inappropriate language. Ignored explanation of how to complete tasks by management. Frequent complaints by residents and staff on language and personal appearance."

Bender signed the Report and dated it October 20, 1999.

54) Bender completed an "Employee Separation Report" for Bentley. On it, she handwrote that Bentley was discharged because of:

"Contact with corporate office with false statements of opera-

tion. Stated she doesn't like decisions administrator is making, wants to see a change. Threatening to sue facility. Facility received complaints of abusive verbal behavior towards residents."

Bender signed the Report and dated it October 22, 1999.

55) The following week, Gazley held a staff meeting and told employees that Jones's and Bender's timecards were being watched. There was no more talk about their timecards after that.

**COMPLAINANT BENTLEY'S  
WAGE LOSS AND EMOTIONAL  
DISTRESS**

56) Bentley earned \$7.45 per hour and worked an average of 72 hours every two weeks at the time of her discharge. Bentley was unemployed for approximately nine weeks following her October 19 suspension.

57) Bentley sought work at the Oregon Employment Department the day of her termination and continued to visit the Employment Department every other day for the purpose of seeking work until she found work on December 20, 1999, at Taco Time, where she has been continuously employed through the dates of hearing. She was hired at Taco Time as evening supervisor at a salary of \$1300 per month.

58) Bentley would have earned \$2,413.80 in gross wages, had she continued to work for Respondent from October 20 through December 19, 1999.

59) After her termination, Bentley had no other income until she obtained the job at Taco Time. She had little savings at that time and bills to pay. When she was fired, she felt some panic because bills were due and she had no money coming in to pay them with. She believed she would get unemployment benefits, with which she thought she could make her house payment and meet most of the bills, but knew it would be hard to pay for groceries. Bentley filed for unemployment benefits, but had to go through two hearings to receive them and did not know for certain until February 4, 2000, that she would not have to pay back benefits she had already received. During this time, Bentley felt very stressed out because of her termination. She slammed doors, broke some glassware, and lost sleep between October 22 and December 20, 1999. During this same period of time, she had difficulty concentrating and had less energy. She had nightmares about being thrown out of her house because she couldn't pay the bills and having to live in her car or on the streets.

60) Bentley did not seek medical assistance for the stress she experienced after being discharged by Respondent because she had no health insurance and no money to pay for a doctor or psychiatrist.

61) Bentley and Hahn's relationship suffered after October 22, 1999, and they didn't get along as well, in part because of Hahn's

remarks to acquaintances and friends that Bentley had lost him his job.

**COMPLAINANT HAHN'S WAGE  
LOSS AND EMOTIONAL DIS-  
TRESS**

62) Hahn was unemployed and having financial difficulties at the time Respondent hired him and had previously experienced an extreme amount of trouble keeping jobs.

63) After his discharge, Hahn first visited the Employment Department in Baker City to seek work on October 25, 1999, the Monday after his termination. Hahn then sought work through the Employment Department with Bentley several times a week until Bentley started work at Taco Time. After that, Hahn visited the Employment Department on a weekly basis to seek work. Hahn also applied for work that he was qualified for at a number of different establishments until May 2000.

64) Hahn found another job in May 2000 at Tony's Tree Service. He worked 20-25 hours per week for three weeks, then began working 40 hours per week. He earned \$7.50 per hour during his employment at Tony's until July 28, 2000, when he was laid off. Hahn earned \$2,349.36 in gross wages while employed at Tony's.

65) When Hahn was fired, he didn't know where he would find his next job. He stopped paying his personal bills entirely. After he was fired, his sleep was "crummy" for awhile. In Hahn's

words, he "didn't know whether to be angry or just to buckle down and just move forward as fast as I could." His moods "wanted to go wild" and fluctuated considerably. Unlike before his discharge, his appetite was "hit and miss." He had to "force" himself "to keep moving." He considered taking his clothes and leaving Bentley, imagining things might be better that way. As time went on and he didn't get a job, he "felt pretty crummy." He held Bentley responsible for the loss of his job, and they "fought a lot" as a result.

66) Hahn stopped worrying when he got the job at Tony's. He began worrying again after he was laid off from Tony's.

67) In 2000, Hahn earned another \$304.50 while working at C.C.P.D., Inc., \$275.11 while working for Greg Brinton Construction, and \$160 through self-employment by cutting up deer.

68) Between gainful employment in 2000 and obtaining his next regular work at Rick's Tree Service, Hahn sought work at gas stations, as a dishwasher, doing yard work, as a fast food cook, and driving a cab.

69) Prior to 1993, Hahn had worked primarily in the construction field. In 1993, he was involved in a car accident. Since that time, he has had physical limitations that prevent him performing many of the construction jobs he could perform before the accident. For example, he cannot carry heavy timbers or swing a framing hammer on a continuous

basis. He cannot “mechanic” any longer. He can prune bushes and do landscaping, use a shovel, carry an aluminum step ladder, and can carry 2” x 4” and 2” x 6” lumber for half a day.

70) In February or March 2001 Hahn started work for Rick’s Tree Service & Landscaping. His starting wage was \$7.00 per hour. In June or July he got a raise to \$7.50 per hour. In August he got a raise to \$8.00 per hour. Throughout this time, he worked 40 hours per week or more. His work performance was satisfactory. He was laid off in mid-October 2001.

71) In all, Hahn earned \$13,748.97 in gross wages<sup>2</sup> between his discharge from Respondent’s employment and November 6, 2001, the date of hearing. Hahn would have earned

\$44,512 gross wages<sup>3</sup> had he not been discharged by Respondent, making his total wage loss \$30,763.03.

72) Hahn didn’t see a medical professional for any of the problems he experienced after being fired from Respondent because he had no money.

#### **RESPONDENT’S PERSONNEL POLICY**

73) Respondent’s written personnel policy in effect during Bentley’s and Hahn’s employment contained the following language regarding “Disciplinary Actions:”

##### “3.3.1. Recording Disciplinary Action

“The Employee Disciplinary Report (EDR) form is used to record disciplinary actions. \* \*  
\* The original of this report will be filed in the employee’s personnel record. A copy will be retained by the employee’s supervisor, and *a copy will be given to the employee.*

“The EDR will indicate whether the action taken is a verbal warning, written warning, disciplinary suspension, or administrative suspension (recommendation for termination). Verbal warning does not require the employee’s signature. *All other actions on this form require the employee’s signature. If the employee re-*

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<sup>2</sup> This figure was arrived at by adding together the wages reported on Hahn’s 2000 W-2s, the \$160 he earned in 2000 cutting up deer, and his 2001 earnings at Rick’s Tree Service. The figures from 2001 are only approximate and are based on Hahn’s testimony, as there was no evidence of the exact date Hahn started work at Rick’s, or the exact dates he received raises. His 2001 earnings at Rick’s Tree Service were calculated by multiplying 17 weeks (February 7 to June 4) x 40 x \$7.00 per hour = \$4,760; multiplying 9 weeks (June 5 to August 6) x 40 x \$7.50 per hour (\$2,700); and multiplying 10 weeks (August 7 through October 15) x 40 x \$8.00 per hour (\$3,200).

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<sup>3</sup> This figure was arrived at by multiplying 106 weeks x 40 hours x \$10.40 per hour.

*fuses to sign, another member of management will be required to sign as a witness to the presentation of the warning.* (Emphasis added)

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“3.3.3. Verbal Warning

“Verbal warning is the mildest form of discipline. It is a written record of a verbal counseling, which serves as evidence that an issue has been discussed with an employee. It is not punitive, and therefore, does not require an employee’s signature.

“3.3.4. Written Warnings

“Written warnings are given for serious misconduct or poor performance. They are also given when an employee fails to take required corrective action after receiving a verbal warning. Only one written warning may be administered at a time. If multiple offenses have occurred, they may be cited in a single warning.

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“3.3.5. Disciplinary Suspension Without Pay

“The suspension may be administered for a very serious problem of misconduct or poor performance. Usually a suspension is administered when prior warning has not resulted in corrective action, or as an alternative to termination. The length of the suspension may vary on an individual basis.

“3.3.7. Termination

“\* \* \* employment at Greenbriar Corporation is ‘at will’ and is subject to termination when the Company in its sole discretion concludes that it is warranted. Termination may occur in situations including but not limited to the following:

“3.3.7.1. Training Period

“The 90 day training period is provided as an opportunity to ‘try out’ an employee’s skills, attitude, and job performance. If, for any reason, it is believed that the new employee is not suited to the job, termination during this period is appropriate, either with or without prior warnings.

“3.3.7.2. Progressive Discipline

“If an employee has been issued two written warnings, and within a twelve month period a third written warning is required, termination is appropriate.

“3.3.7.3 Gross Misconduct/Performance Deficiency

“A. Dishonesty

“(1) Falsifying any business record or document of employer \* \* \*.

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“(4) Other forms of dishonest conduct.

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“4. PROCEDURES

“Disciplinary actions will be recorded on the EDR (from

Appendix A). The original must be placed in the employee personnel file after all required signatures are secured. Relevant facts must be recorded and verbiage should be free of emotion. The supervisor will retain the original and give a copy to the employee."

"Proper documentation is critical. \* \* \*

"THIS IS A LEGAL DOCUMENT. FAILURE TO CHECK THE CORRECT ACTION, FAILURE TO PROPERLY DESCRIBE THE FACTS, FAILURE TO GET REQUIRED SIGNATURES, OR FAILURE TO DATE THE SIGNATURES MAY RENDER THE DOCUMENT INVALID."

74) Respondent's written personnel policy in effect during Bentley and Hahn's employment contained the following language regarding "TIME CARDS:"

"All employees must punch in and out on their own time cards. Failure to punch in or out, or make corrections or changes, requires the card to be initialed by your supervisor on your next scheduled work day. If you are negligent in the handling of your time card or, if under any circumstances, you punch a time card for another employee, this will constitute grounds for disciplinary action.  
\* \* \*

## COMPARATORS

75) Gazley put a "disciplinary note" in Alice Cole's personnel file for faxing Jones's timecards to Greenbriar. Cole did not threaten to sue Respondent. Cole is still employed by Respondent and has been promoted.

76) On December 30, 1999, Krantz testified at a hearing held to determine Bentley's eligibility for unemployment benefits based on her discharge from Respondent. Krantz testified that several of Respondent's employees had come to her and complained about Jones's timecards and that she had called Greenbriar's corporate office and asked for an investigation. On January 3, 2000, Gazley called Krantz into her office and angrily said she wanted a list of the persons who had complained about Jones. Krantz refused to divulge their names.

77) In November 1999, Krantz and Gazley had decided to hire a new nurse to work eight hours a month. Two weeks after January 3, Krantz's work schedule was cut from three days a week to two days a week, and a new nurse was hired to work 8 hours a week.

78) Between January 1998 and February 2000, four persons besides Hahn were involuntarily terminated by Respondent during their first 90 days and trial period of employment. Two were terminated for "Failure to meet standards during eval. Period." One was terminated for "Failure to

meet standards during eval. Period/Disqualifying Criminal Record.” The fourth was terminated because of “Failed Drug Test.”

### CREDIBILITY FINDINGS

79) Sue Bentley responded directly to questions on direct and cross-examination, exhibited a forthright demeanor throughout her testimony, and gave internally consistent testimony. The forum has credited Bentley’s testimony in its entirety.

80) Bruce Hahn’s demeanor varied during his testimony. Initially, he appeared very tense, and he avoided any eye contact with the ALJ. During direct examination, the hearing adjourned for lunch and Hahn was noticeably more relaxed afterwards. He became perceptibly nervous again during cross-examination when he was asked questions about his interview with Agency investigator Susan Moxley. Some of his answers were nonresponsive and he had to be instructed to listen more carefully and answer questions directly. Hahn’s testimony also indicated a strong personal animus against Gazley. Hahn’s testimony was inconsistent with more credible evidence on at least two issues. First, he testified that he was hired as a permanent employee in August 1999, whereas Respondent’s documentation shows he was hired as a permanent employee on 9/13/99.<sup>4</sup>

Second, Hahn testified he started work for Tony’s Tree Service in March or April 2000, whereas Constantine credibly testified that Hahn was hired in May 2000, a date consistent with Hahn’s total earnings at Tony’s. Hahn’s testimony was also internally inconsistent on at least two issues. On direct, Hahn testified that he did no work in 2000 except for those jobs represented on his W-2s; and on cross he admitted that he earned another \$160 cutting up deer. He testified that he can no longer do concrete work due to physical limitations caused by a 1993 auto accident, but later acknowledged that he poured concrete for a week for Brinton Construction in 2001 as a laborer. On the other hand, he volunteered on direct that Gazley had warned him early in his employment for using the “F word” in front of a co-worker, an incident that was undocumented by Respondent. He also acknowledged that the incidents documented by Bender for which he was disciplined took place. This tended to enhance Hahn’s credibility concerning his evaluation of his own job performance. The forum finds that Hahn’s testimony concerning his employment with Respondent was credible and has believed Hahn

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plinary documents concerning Hahn were created, the forum does not question that Respondent made Hahn a probationary permanent employee on September 13, 1999, for the reason that there is no apparent motivation for Respondent to give this document a false date.

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<sup>4</sup> Although the forum questions the dates that Respondent’s other disci-

wherever his testimony conflicted with that of Gazley and Bender except for the date he was hired as a permanent employee.

81) Cheryl Krantz had a potential bias based on her belief that Gazley retaliated against her by cutting her hours, but this did not detract from her credibility. Her testimony was internally consistent and was not impeached on cross-examination or by other, more credible evidence. The forum has credited her testimony in its entirety.

82) Bryan Woolard was a credible witness. His testimony was brief, to the point, and he was not impeached on cross-examination. As noted earlier, his testimony concerning his employment with Tony Constantine was stricken.

83) Tony Constantine was a neutral witness with no apparent self-interest. He responded directly to questions in a forthright manner. The forum has credited his testimony in its entirety.

84) Semingson's testimony was credible except for testimony that he and Gazley had multiple conversations between September 13 and "1-2 weeks" before Hahn's termination on October 20, 1999, regarding Hahn's insubordination and Hahn's abilities that was leading them both to conclude that Hahn wouldn't make it past his 90 day probationary period. There was no credible evidence of any incidents of insubordination or poor performance by Hahn in this pe-

riod of time, except for Hahn's "pick up the damned phone" comment, which occurred only eight days before Hahn's suspension and nine days before his termination. Significantly, Semingson's testimony differed from Gazley's unequivocal testimony that she and Semingson had decided to discharge Hahn before October 20. As a result, the forum has believed neither Semingson nor Gazley on this point.

85) Suzanne Bender's demeanor was impressive; her testimony was not. She had significant financial and familial biases in this matter that were reflected in several ways in her testimony, as discussed below. She had a further motivation to color her testimony in that Jones's timecards that were faxed to Greenbriar also alleged that she had committed improprieties. At the time of hearing she had worked for Respondent for seven years and was second in command at Meadowbrook. Gazley, Respondent's executive director, is her mother, and Julie Jones, the person whose activities Bentley reported, was her sister.

Bender exaggerated her testimony on a critical issue. Bender testified on direct that she and Gazley had discussions between September 13 and October 19, 1999, in which "it was clear" that Hahn would be terminated in his trial period based his continuing performance problems after he became a fulltime employee on September 13. She testified that those problems included insubor-

dination "over and over," lack of willingness to do jobs, complaints about his job performance by others, and his inability to transport patients because of his appearance and complaints about him calling patients "honey" and "sweetie." On cross, she was unable to recall any specific incidents or resident complaints except that Hahn ruined molding in October. Although Bender's testimony and acts made it clear to the forum that she knew how to document performance problems, there is no documentation of a molding incident or any other performance problem by Hahn, leading the forum to doubt that the incident ever occurred. And Jones had begun transporting patients long before September 13, partly as a benefit to give her additional hours. When the ALJ and Respondent's counsel asked Bender how long before Hahn's discharge she and Gazley had their discussion where it was made clear that Hahn would be let go, Bender was unable to give a time. Finally, Krantz credibly testified that it was common practice among Respondent's staff to call residents "honey" and "sweetie." As a result, the forum has entirely discredited Bender's testimony that she and Gazley had decided to terminate Hahn before October 19.

Bender testified that Hahn was not fired for the timecard issue. However, this testimony was directly contradicted by a document she created, the disciplinary suspension EDR she wrote immediately before Hahn's dis-

charge stating that Hahn was suspended based on that very timecard issue.

Besides her untruths, Bender's memory was also defective. Bender's testimony was at odds with that of the credible testimony of Gazley, Bentley, and Hahn with regard to the two separate meetings in which Hahn and Bentley were suspended, then terminated. In contrast, Bender, who was present at the meetings, testified there was only one meeting. This further detracts from her testimony.

In conclusion, the forum has only credited Bender's testimony where it was corroborated by other credible evidence. The forum has also believed Bentley and Hahn's testimony over that of Bender's, with one exception. That exception is Hahn's date of hire as a fulltime employee.

86) Gayle Gazley had the same financial and familial biases in this matter as Bender. At the time of hearing she had been Respondent's executive director for nine years, and Bender and Jones were her daughters. Like Bender, she had a further motivation to color her testimony in that Jones's timecards that were faxed to Greenbriar also alleged that she had committed improprieties.

On direct, Gazley's demeanor was convincingly forthright. This changed dramatically on cross when she was asked questions about the accusations made against Jones, when she became rattled and extremely defensive.

At one point, she inexplicably claimed that she was “deaf.” As cross-examination continued, her answers became increasingly nonresponsive. She was given several opportunities to acknowledge that a reason for saving Hahn’s disciplinary write-ups could be that they might be needed as a basis for future disciplinary action, and inexplicably refused to acknowledge this obvious truth.<sup>5</sup>

Gazley’s testimony that she and Semingson had already decided to let Hahn go before the timecard incident arose differed substantially from Semingson’s testimony that he and Gazley were coming to the conclusion that Hahn would not make it past his 90 day probationary period. As noted earlier, the forum has believed neither Semingson nor Gazley on this point

The forum views Gazley’s untrue statement to Semingson and Cole that Bentley threatened to sue Greenbriar as evidence of her willingness to distort the truth in order to further her own agenda.

Gazley’s claim that “curiosity” was her only motivation in trying to find out who had complained about Jones’s timecards was disingenuous in the extreme and also contradicted Krantz’ credible tes-

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<sup>5</sup> Respondent uses a system of progressive discipline, which relies in part on prior disciplinary write-ups to support disciplinary actions, and Gazley herself claimed that Hahn’s write-ups supported her decision to terminate Hahn.

timony, further eroding Gazley’s credibility.<sup>6</sup>

In conclusion, the forum has disbelieved Gazley’s testimony wherever it conflicted with other credible evidence. In some cases, the forum did not believe her uncontradicted testimony. The forum has also believed Bentley and Hahn’s testimony wherever it conflicted with Gazley’s, with one exception. That exception is Hahn’s date of hire as a fulltime employee.

#### **ULTIMATE FINDINGS OF FACT**

1) At all times material herein, Respondent was an employer in the state of Oregon that employed one or more persons.

2) Gayle Gazley was Respondent’s executive director

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<sup>6</sup> Her pertinent testimony on this issue was as follows:

Q: “So you attempted to get a list of the people who were involved in this, is that correct?”

A: “I didn’t attempt to get lists; I just wanted to know who was involved. I wasn’t trying to figure out what the reasoning was. I didn’t understand.”

Q: “Well, for what purpose were you trying to figure out who was involved?”

A: “Because I just wanted to know.”

Q: “Just curiosity?”

A: “Yeah.”

throughout Complainants' employment with Respondent. Suzanne Bender, her daughter, was Respondent's assistant director throughout Complainants' employment with Respondent.

3) Complainant Bentley was employed by Respondent from February 1995 until her discharge on October 22, 1999. She was a satisfactory employee and hard worker throughout her employment with Respondent.

4) Complainant Hahn was employed by Respondent from May 27, 1999, until his discharge on October 20, 1999. He was hired as a temporary employee and became a permanent fulltime employee on September 13, 1999, at Gazley's invitation. Prior to September 13, Hahn was warned on several occasions for performance-related issues. After September 13, Hahn received only one warning, a verbal warning on October 11 for leaving an inappropriate voice mail message for Suzanne Bender, Gazley's other daughter who was also Respondent's assistant administrator.

5) At the time of hearing, Bentley and Hahn had lived together for 20 years and considered themselves to be married. Gazley was aware of their relationship.

6) On August 9, 1999, Gazley promoted her daughter, Julie Jones, to the position of head housekeeper.

7) In August, September, and early October 1999, numerous

staff members, including Bentley and Alice Cole, observed that Jones was not at work on Respondent's premises during some of the hours she handwrote on her timecard as having worked. Bentley, Cole, and Cheryl Krantz, their supervisor, began copying Jones's timecards and writing notes on the copies that pointed out discrepancies between the hours Jones reported and the hours she was actually on Respondent's premises. Bentley, Cole, and Krantz all faxed different copies to Respondent's corporate headquarters at different times.

8) By October 19, 1999, a number of Respondent's employees had become so upset about their perception that Jones was reporting and being paid for hours that she had not worked that they were ready to walk off the job.

9) Jones's alleged timecard falsification, if proven, would constitute a Class A misdemeanor under ORS 165.080 that makes falsification of business records a crime.

10) On or about October 19, 1999, an employee at Hermiston Assisted Living reported to Gazley that Bentley and Cole had faxed copies of Jones's timecards, with notes on them describing how Jones had falsified her timecards, to Respondent's corporate headquarters. Gazley verified this with Semingson, her corporate supervisor, then instructed Bentley and Hahn to come to her office.

11) Gazley asked Hahn if he knew about the timecards and Hahn denied it. Gazley told him he was a liar and that he was suspended for three days, which would give her time to prove he had been involved with the timecards. Bender completed a report placing Hahn on "Disciplinary Suspension" based on Gazley's belief that Hahn had been involved in copying and writing notes on Jones's timecards and faxing them to corporate headquarters.

12) Gazley asked Bentley if she knew about the timecards. Bentley admitted writing notes on some of them and faxing them to the corporate office. Gazley asked Bentley who else was involved, and Bentley refused to tell her. Gazley called Bentley a "backstabber" and suspended her for three days so she could "investigate" the matter.

13) Later on October 19 or 20, Gazley learned that Hahn had stated if Bentley was fired because of Jones's timecards, Bentley would be "one rich bitch." Gazley phoned Semingson and recommended that Hahn be discharged. Semingson agreed.

14) On October 22, 1999, Gazley called Hahn and Bentley into her office. Gazley told Hahn he was fired and gave him his final paycheck. Gazley told Bentley that she was being transferred to a lesser paying job on swing shift because of her insubordination, and told Bentley she "could drop all this foolishness." Bentley, who had seen an attorney on October

20, told Gazley that her attorney said she did "not have to drop this to keep my job." Bentley did not tell Gazley that she planned to sue Respondent.

15) Gazley then called Semingson and Lewis Cole, Respondent's corporate counsel, and advised them that Bentley had threatened to sue Respondent. Cole advised her to immediately discharge Bentley. Gazley then told Bentley that she was discharged.

16) Gazley suspended, demoted, and discharged Bentley for the reason that Bentley reported to Respondent's corporate headquarters that Jones was falsifying her timecards.

17) Gazley suspended and discharged Hahn for the reason that she believed Hahn had reported to Respondent's corporate headquarters that Jones was falsifying her timecards.

18) Bentley diligently sought work after her discharge and began a higher paying job on December 20, 1999. She would have earned an additional \$2,413.80 in gross wages, had she continued to work for Respondent from October 20 through December 19, 1999.

19) Hahn diligently sought work after his discharge, but did not find another job until May 2000, and has not yet found subsequent equivalent employment. As of the first day of hearing, his total wage loss amounted to \$30,763.03.

20) Bentley experienced substantial emotional distress as a result of her discharge from Respondent's employment.

21) Hahn experienced substantial emotional distress as a result of his discharge from Respondent's employment.

### CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and 659.550.

2) The actions, inactions, statements, and motivations of Gayle Gazley are properly imputed to Respondent.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659.550.

4) *Former* ORS 659.550(1)<sup>7</sup> provided, in pertinent part:

"It is an unlawful employment practice for an employer to discharge, demote, suspend or in any manner discriminate or retaliate against an employee with regard to promotion, compensation or other terms, conditions or privileges of employment for the reason that the employee has in good faith reported criminal activity by any person, has in good faith caused a complainant's infor-

mation or complaint to be filed against any person, has in good faith cooperated with any law enforcement agency conducting a criminal investigation, has in good faith brought a civil proceeding against an employer or has testified in good faith at a civil proceeding or criminal trial."

*Former* OAR 839-010-0100(1) provided:

"(1) ORS 659.550 prohibits any employer with one or more employees in Oregon from discriminating or retaliating against an employee because the employee has:

"(a) In good faith reported criminal activity to a law enforcement agency; or

"(b) Caused in good faith a complainant's information or complaint to be filed against any person; or

"(c) Cooperated in good faith with a law enforcement agency criminal investigation; or

"(d) Brought in good faith a civil proceeding against the employee's current employer; or

"(e) Testified in good faith at a civil proceeding or criminal trial."

*Former* OAR 839-010-0110 provided:

"(1) To be protected by this section, the criminal activity reported must be a violation, misdemeanor or felony either in the jurisdiction in which the

<sup>7</sup> Subsequently renumbered as ORS 659A.230(1).

act occurred or in which it was reported.

“(2) The criminal activity must be reported to a police agency or prosecutor.

“(3) The employer must know a complaint was made or believe that a complaint was made.”

Respondent's suspension, demotion, and discharge of Bentley violated *former* ORS 659.550(1). Respondent's suspension and discharge of Hahn violated *former* ORS 659.550(1).

5) Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award Complainants lost wages resulting from Respondent's unlawful employment practices and to award money damages for emotional distress sustained and to protect the rights of Complainant and others similarly situated. The sum of money awarded and the other actions required of Respondent in the Order below are an appropriate exercise of that authority.

## OPINION

### THE AGENCY'S PRIMA FACIE CASE

The Agency's prima facie case with regard to Bentley consists of the following elements:

(1) Respondent is an employer as defined by statute;

(2) Bentley was employed by Respondent;

(3) Bentley in good faith reported criminal activity by Julie Jones;

(4) Respondent suspended, then discharged Bentley;

(5) Respondent suspended, then discharged Bentley for the reason that Bentley in good faith reported criminal activity by Julie Jones.

The Agency's prima facie case with regard to Hahn consists of the following elements:

(1) Respondent is an employer as defined by statute;

(2) Hahn was employed by Respondent;

(3) Someone reported criminal activity by Julie Jones;

(4) Respondent suspended, then discharged Hahn;

(5) Respondent suspended, then discharged Bentley for the reason that it believed that Hahn reported criminal activity by Julie Jones.

#### A. Employer/Employee Relationship

There is no dispute that Respondent was an employer that employed at least one person and that Bentley and Hahn were employed by Respondent.

#### B. Did Bentley In Good Faith Report Criminal Activity?

This element of the Agency's prima facie case contains three in-

terrelated requirements. First, a complainant must make a report. Second, the report must concern criminal activity. Third, the criminal activity must be reported in good faith. All three requirements must be satisfied in order for a complainant to prevail.

1. Bentley made a "report" within the meaning of ORS 659.550.

There is no dispute that Bentley's act of faxing Jones's timecards to Respondent's corporate headquarters, with handwritten notes accusing Jones of falsifying her timecards, constituted a "report[]." However, Respondent contends that Bentley did not meet the reporting requirement of ORS 659.550 because BOLI's administrative rules in effect at the time, *former* OAR 839-010-0100(1)(a) and OAR 839-010-0110(2), required that the report must be made "to a law enforcement agency," including "a police agency or prosecutor."

The forum begins its evaluation of Respondent's argument by examining the pertinent statutory language. Where statutory interpretation is required, the forum must attempt to discern the legislature's intent. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993). To do that, the forum first examines the text and context of the statute. *Id.* The text of the statutory provision itself is the starting point for interpretation and the best evidence of the legislature's intent. *Id.* Also relevant is the context of the statutory provi-

sion, which includes other provisions of the same statute and other related statutes. *Id.* at 611. If the legislature's intent is clear from the text and context of the statutory provision, further inquiry is unnecessary. *Id.*

The term in question is contained in a phrase that reads "for the reason that the employee has in good faith *reported* criminal activity by any person." (Emphasis added) There is no language in ORS 659.550 that defines the term "reported" and no language in ORS 659.550 or anywhere else in ORS chapter 659 that modifies the term by stating *to whom* the activity must be reported. A natural reading of the plain words of this statute, without question, yields a single and unambiguous meaning.<sup>8</sup> So long as criminal activity is *reported*, it does not matter to whom the report is made. Respondent would have the forum interpret the phrase by inserting the same words used by the Agency in its administrative rule in effect at the time of Respondent's alleged violation after "person," making the aforementioned phrase read:

"for the reason that the employee has in good faith reported criminal activity by any person to a law enforcement agency, *including a police agency or prosecutor.*"

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<sup>8</sup> See *Young v. State of Oregon*, 161 Or App 32, 36 (1999), *rev den* 329 Or 447 (1999).

ORS 174.010 mandates that the judge is “not to insert what has been omitted, or omit what has been inserted.” Consequently, the forum is not free to insert the terms urged by Respondent and adopt Respondent’s interpretation of the whistleblower reporting requirement for criminal activity.

Regarding BOLI’s administrative rules, although ORS 651.060(4) gave the commissioner the authority to adopt administrative rules interpreting former ORS 659.550, it did not give the commissioner the authority to adopt rules inconsistent with that or any other statute. See *Schoen v. University of Oregon*, 21 Or App 494, 499 (1975). Consequently, this forum finds that the provisions of OAR 839-010-0100(1)(a) and OAR 839-010-0110(2) in effect at the time of Bentley and Hahn’s discharge impermissibly restricted the scope of the statute and, as a result, were invalid.

Based on the above, the forum concludes that Bentley met the statutory requirement of having “reported” by faxing Jones’s timecards, with handwritten notes accusing Jones of falsifying her timecards, to Respondent’s corporate headquarters.

## 2. Bentley reported “criminal activity.”

In this case, the forum only need determine if the activity reported by Bentley was “criminal.” The specific activity reported was falsification of an employee’s timecards. The forum relies on

ORS 161.515, ORS 165.075 and ORS 165.080 to resolve this issue.

ORS 161.515 provides:

“(1) A crime is an offense for which a sentence of imprisonment is authorized.

“(2) A crime is either a felony or a misdemeanor.”

ORS 165.075 provides, in pertinent part:

“As used in chapter 743, Oregon Laws 1971, unless the context requires otherwise:

“\* \* \* \* \*

“(2) “Business records” means any writing or article kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activities.

“(3) “Enterprise” means any private entity of one or more persons, corporate or otherwise, engaged in business, commercial, professional, charitable, political, industrial or organized fraternal activity.”

ORS 165.080 provides:

“(1) A person commits the crime of falsifying business records if, with intent to defraud, the person:

“(a) Makes or causes a false entry in the business records of an enterprise; or

“(b) Alters, erases, obliterates, deletes, removes or destroys a true entry in the

business records of an enterprise; or

“(c) Fails to make a true entry in the business records of an enterprise in violation of a known duty imposed upon the person by law or by the nature of the position of the person; or

“(d) Prevents the making of a true entry or causes the omission thereof in the business records of an enterprise.

”(2) Falsifying business records is a Class A misdemeanor.”

An employee’s timecards fit within the definition of “Business records” under ORS 165.075(2), and an employee’s act of writing down hours not worked on a timecard, for the purpose of establishing the wages an employee is entitled to be paid, fits within the definition of ORS 165.080(1)(a). BOLI’s administrative rules in effect at that time required that “the criminal activity reported must be a violation, misdemeanor, or felony either in the jurisdiction in which the act occurred or in which it was reported.” *Former OAR 839-010-0110(1)*. Jones’s alleged acts, if proven, constitute a Class A misdemeanor, and the forum concludes that Bentley reported “criminal activity” within the meaning of ORS 659.550.

3. Bentley’s report of criminal activity was in “good faith.”

To determine whether or not Bentley acted in “good faith,” the

forum must examine the reasons that prompted her report, including her beliefs about the nature of Jones’s activity. Respondent argues that “good faith” in this case requires proof that Bentley acted without an ulterior motive and reasonably believed that Jones was engaged in criminal activity at the time Bentley made her report. The Agency argues that because the activity reported was criminal activity, if proven, Bentley’s statutory “good faith” obligation was simply that she reasonably believed, at the time of reporting, that Jones had falsified her timecards.

Neither ORS 659.550 nor the Agency’s administrative rules define “good faith.” There is no Oregon case law in which the court’s holding hinged on the correct definition of “good faith” in the context of reporting criminal activity. *Jensen v. Medley*, 170 Or App 42 (2000), is the only reported case that provides any guidance. In *Jensen*, the court held that the following jury instruction, “viewed as a whole, accurately informed the jury about the ‘good faith’ requirement” in ORS 659.550.

“ \* \* \* Definition of good faith [i]n the whistleblower statute. To be protected against discharge under the whistleblower statute, the employee must make a [report of] criminal activity in good faith. For purposes of this statute, *good faith means that plaintiff, acted out of good faith concerning the criminal activity rather than out of malice, spite, jealousy,*

or personal gain; two, had reasonable cause in reporting her employer or supervisor's suspected violation of criminal law." (Emphasis in original)

*Id.* at 53, 54.

Respondent argues that the forum should adopt the italicized language as the "good faith" test under ORS 659.550(1). The forum disagrees for two primary reasons. First, the court did not hold that the italicized language was the test for "good faith" under ORS 659.550(1), only that it "properly focused the jury's attention on whether plaintiff had the requisite 'good faith' at the time she [blew the whistle]." *Id.* at 54. Consequently, the definition of "good faith" contained in the jury instruction is not binding on the forum. Second, "malice, spite, jealousy, or personal gain" are all ulterior motives that tend to negate reasonable cause, rather than co-exist as separate elements. The dictionary definition of "malice" and the definition given to "malice" by Oregon appellate courts in another context support this conclusion. *Webster's* defines "malice" as: "1. A desire to harm others or to see others suffer. 2. Law. Intent, without just cause or reason, to commit an unlawful act injurious to another or others." *Webster's II New College Dictionary*, 662 (1985). In cases involving punitive damages, Oregon courts have held that "malice" means "the intentional doing of a wrongful act, *without just cause or excuse* and with intentional disregard of the social consequences."

*Blades v. White Motor Credit Corporation*, 90 Or App 125, 130 (1988) (citing *Friendship Auto v. Bank of Willamette Valley*, 300 Or 522, 535 (1986); *McElwain v. Georgia-Pacific*, 245 Or 247 249 (1966); *Andor v. United Air Lines*, 303 Or 505, 513 (1987)) (Emphasis added).

Based on the above, the forum concludes that the "good faith" requirement in ORS 659.550 does not require the absence of ulterior motives on the whistleblower's part, but only a belief that is reasonable. However, evidence of ulterior motives on the part of the whistleblower may shed light on whether the whistleblower in fact had a belief that was "reasonable."

In this case, there was undisputed testimony that Bentley and a number of other employees believed, at the time of Bentley's report, that Jones was falsifying the hours worked written on her timecards. This belief was based on undisputed facts that Jones was gone from Respondent's premises during some of the hours that she reported as having worked, that Gazley did not inform persons on her staff that she had assigned duties to Jones that took Jones off the premises, and that Jones handwrote all the hours on her timecards instead of using the standard procedure of using Respondent's timeclock. Bentley was aware of all of these facts. The belief was strong enough that a number of Complainant's co-workers were prepared to walk off the job in protest if Krantz, their

supervisor, did not take action to deal with the situation. Under these circumstances, the forum concludes that Bentley had a reasonable belief, at the time she made her report, that Jones was falsifying her timecard.

A key question remains – *what* is it that the whistleblower must reasonably believe? In formulating an answer, the forum bears in mind that *former* ORS 659.550 was a remedial statute, and remedial statutes are to be construed broadly so as to effectuate the purposes of the statute. See *In the Matter of Earth Science Technology, Inc.*, 14 BOLI 115, 125 (1995), *aff'd without opinion*, *Earth Science Technology, Inc. v. Bureau of Labor and Industries*, 141 Or App 439, 917 P2d 1077 (1996). The purpose of the language of *former* ORS 659.550 under scrutiny here was to prevent retaliation against employees who report criminal activity. That purpose would be defeated if an employee who reported criminal activity, reasonably believing that the activity reported had taken place, could be discharged without consequence to his or her employer. In addition, the public interest is furthered by preventing retaliation by an employer against an employee who reports wrongdoing that is criminal activity, if proven, or who reports wrongdoing that the employee reasonably believes to be criminal activity. *Id.*

As applied to this case, the “good faith” requirement for reporting criminal activity under *former* ORS 659.550 is met when

a whistleblower has a reasonable belief that the wrongdoing reported has occurred, and the wrongdoing reported, if proven, constitutes criminal activity. Bentley meets those criteria and thereby satisfies the “good faith” requirement.

### **BENTLEY WAS SUSPENDED, THEN DISCHARGED FOR REPORTING THAT JONES HAD FALSIFIED HER TIMECARDS**

The Agency alleges that Bentley was suspended, then discharged because she reported to Respondent’s corporate headquarters that Jones had falsified her timecards. Respondent’s position is that Bentley was discharged because she threatened to sue Respondent.

As background, there is no credible evidence that Bentley had any performance problems or was ever disciplined for any reason during her employment with Respondent prior to October 19, 1999. To the contrary, Respondent regarded her as a good employee and hard worker.

#### **A. Bentley’s Suspension.**

Just prior to meeting with Bentley on October 19, 1999, another employee reported to Gazley that Bentley had been faxing Jones’s timecards, with notes written on them, to corporate headquarters. Gazley confirmed this with Semington, who added that some employees at Meadowbrook were claiming that Jones had reported hours on her timecards and had been paid for hours she had not

actually worked. Semingson also faxed two of Jones's timecards to Gazley. Against this backdrop, Gazley called Hahn and Bentley into her office to confront them with this information. In the meeting, Gazley angrily showed Bentley one of Jones's faxed timecards and asked Bentley what she knew about it. Bentley acknowledged she had copied it and sent it to corporate headquarters, then refused to tell Gazley if other co-workers had also written on the timecards. Bentley also denied that Hahn's handwriting was on the timecard. Gazley called Bentley a "backstabber" and told Bentley she was suspended for three days so Gazley could "investigate" the matter.<sup>9</sup> This version of events is corroborated in part by the "10/19/99" EDR signed by Gazley. Bentley's involvement and knowledge concerning Jones's faxed timecards was the only subject discussed in that meeting, and her confession of involvement was the event that immediately precipitated her suspension. Coupled with Bentley's work performance prior to her confession and Gazley's angry demeanor during her meeting with Bentley, these facts lead the forum to conclude that Bentley's report of discrepancies in Jones's timecards to corporate headquarters was a

substantial factor<sup>10</sup> in Gazley's decision to suspend Bentley. This suspension violated *former* ORS 659.550(1).

#### **B. Bentley's Termination**

On October 20, the day after their suspension, Bentley and Hahn visited an attorney to obtain advice about their employment rights with Respondent. On October 22, they met separately with Gazley. Gazley told Bentley that "for the act of insubordination" she was giving Bentley an evening shift that paid \$.20 per hour less than the day shift she currently worked, that Bentley could start on the Saturday evening shift instead of day shift, that Bentley might get worked back into her regular rotation, and that Bentley "could drop all this foolishness and we could get on with it." Bentley's response was "No ma'am, my attorney says I do not have to drop this to keep my job." There was no discussion of what Bentley and her attorney might be thinking of doing and Bentley did not tell Gazley that she was going to sue Respondent. Subsequently, Gazley called Semingson and told him untruthfully that Gazley had threatened to sue Respondent. Semingson referred Gazley to Respondent's corporate counsel, who instructed Gazley

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<sup>9</sup> As an aside, Gazley did not complete an EDR to document Bentley's suspension, an action that was required by Respondent's personnel policy. See Finding of Fact 73 – The Merits, *supra*.

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<sup>10</sup> See *McPhail v. Milwaukie Lumber Co.*, 165 Or App 596, 603 (2000) ("It is sufficient in Oregon for the [complainant] to show that the unlawful motive was a substantial and impermissible factor in the discharge decision.")

that if Bentley was going to sue Respondent, she couldn't be in the building and should be terminated immediately. Gazley then fired Bentley. In short, Gazley lied to Semingson and Cole, then discharged Bentley based on Cole's reaction to that lie. Bentley's "Employee Separation Report" completes the picture. It gives four reasons for Bentley's termination,<sup>11</sup> not one of which is supported by any credible evidence.

Gazley's retaliatory animus is apparent. She was angry that Bentley had reported discrepancies in her daughter's timecards to corporate headquarters and initially suspended Bentley for this action. When Bentley indicated her unwillingness to drop the issue, Gazley retaliated by falsely telling Semingson and Cole that Bentley had threatened to sue Respondent. Not surprisingly, Cole told Gazley to fire Bentley, a decision that coincided with Gazley's own desire to further retaliate against Bentley. Further evidence of this retaliatory animus is: (1) Gazley's discharge of Hahn, and (2) credible testimony by Krantz that in January 2000, after Krantz had testified at an unemployment hearing that several of Respondent's employees had come to her and complained about Jones's timecards, Gazley called Krantz into her office and angrily demanded a list of the per-

sons who had complained about Jones.<sup>12</sup>

Respondent argues that its failure to fire Alice Cole, who also participated in reporting Jones's timecards to corporate headquarters, shows Gazley lacked a retaliatory motive. This evidence, while relevant, does not outweigh the already discussed credible evidence establishing Gazley's retaliatory motive towards Bentley. Respondent also argues that Cole made the decision to discharge Bentley, and Cole lacked a retaliatory motive. That argument lacks merit for the reason that Gazley's unlawful motivations and actions are properly imputed to Respondent.

In summary, the Agency established, by a preponderance of evidence, that Bentley's report of discrepancies in Jones's timecards to corporate headquarters was a substantial factor in Gazley's decisions to demote and discharge Bentley. Respondent's

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<sup>12</sup> An example of Respondent's corporate attitude towards "whistleblowers" was expressed by Gazley in the following exchange between the Agency case presenter and Gazley during cross-examination:

Q: "Can you tell me what, at the time that this termination of Miss Bentley and termination of Mr. Hahn and the non-termination of Miss Cole occurred, what, if any, would have been your policy about whether or not people who report wrongdoing within the company should be punished?"

A: "They'd probably just, well, be counseled (pause) is our policy."

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<sup>11</sup> See Finding of Fact 54 – The Merits, *supra*.

actions in demoting and discharging Bentley constitute violations of *former* ORS 659.550(1).

**HAHN WAS SUSPENDED AND DISCHARGED BASED ON GAZLEY'S BELIEF THAT HE HAD REPORTED THAT JONES HAD FALSIFIED HER TIMECARDS**

The Agency alleges that Hahn was suspended, then discharged because Gazley believed that he, like Bentley, had reported to Respondent's corporate headquarters that Jones had falsified her timecards. Respondent's position, expressed in the EDR completed by Bender and signed by Gazley, is that Hahn was suspended to allow Gazley time to investigate reports that "employees \* \* \* were taking copies of another employee's timecards and sending false statements of operation to the corporate office." Respondent contends that Hahn was discharged based on his poor work performance.

**A. Hahn's Suspension.**

The historical setting for Gazley's October 19, 1999, meeting with Hahn was set out earlier in this Opinion in the section entitled "Bentley's Suspension." When Gazley called Hahn into her office, she took one of Jones's faxed timecards, set it in front of him, and asked him if he knew what it was. Hahn denied any knowledge of it and Gazley called him a liar. Gazley then told Hahn he was suspended for three days, and that would give her time to prove his involvement with Jones's timecards. This is con-

firmed in the EDR documenting Hahn's suspension that Bender wrote and Gazley signed.<sup>13</sup> This exchange, along with the comments Gazley made to Bentley on the same day concerning Hahn's culpability, leaves the forum with no doubt that Gazley believed Hahn had been involved in reporting that Jones had falsified her timecards. Like Bentley, Hahn's involvement and knowledge concerning Jones's faxed timecards was the only subject discussed in the meeting, and his suspension immediately followed that discussion. Under these circumstances, the forum concludes that Gazley's belief that Hahn had been involved in reporting Jones's timecard discrepancies to corporate headquarters was a substantial factor in Gazley's decision to suspend Hahn. This suspension violated *former* ORS 659.550(1).

**B. Hahn's Discharge.**

Hahn was discharged on October 20, 1999, but not informed of his discharge until October 22. Respondent advanced a number of reasons to justify Hahn's discharge and contends that it had already made the decision to discharge Hahn before October 19, and that Jones's timecards played no role in Respondent's decision to discharge Hahn. Those reasons are summarized in two documents created by Respondent at the time of Hahn's discharge.

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<sup>13</sup> See Finding of Fact 46 – The Merits, *supra*.

The first document, a Complaint Resolution form dated "10/20/99," contains the following statements:

"Employee was overheard telling residents that this building was not being ran right and that Sue Bentley was going to see to it personally that it was corrected. Also stated that Sue was going to be one rich bitch when this was all over.

"This was reported to us by Alice Street, another Meadowbrook employee who heard him saying this.

"Employee already on a three day suspension, has been warned repeatedly about his severe insubordination, will talk to regional director about termination during this trial period."

The second document, Hahn's "Employee Separation Report" dated October 20, 1999, states:

"Insubordination during trial period. Verbal warnings of rude and inappropriate language. Ignored explanation of how to complete tasks by management. Frequent complaints by residents and staff on language and personal appearance."

For several reasons, the forum finds that these statements are not credible.

First, the testimony of Gazley and Bender was not believable, and Semingson was not credible regarding Respondent's pre-October 19 deliberations concern-

ing Hahn's discharge.<sup>14</sup> Their stories did not match and are all undermined by Gazley's statement on the October 20 "Complaint Resolution" form – "will talk to regional manager about termination during this trial period." Why would Gazley need to discuss Hahn's discharge with Semingson if that decision had already been made? Also, Respondent offered no reasonable explanation for not firing him earlier.

Second, Gazley's statements to Hahn at the time she suspended him and her retaliatory behavior towards Bentley and Krantz demonstrate a retaliatory motive towards Hahn because of his perceived report of Jones's timecards.

Third, the timing of Hahn's discharge, coming the day after he was suspended because Bentley perceived he had been involved in reporting Jones's timecards, is inherently suspect. Bender said it best when she testified that the decision to fire Hahn had nothing to do with Jones's timecards. In her words, "it was horrible timing."

Fourth, there was no credible evidence to support the statement in the 10/20/99 "Complaint Resolution" form that Hahn "was overheard telling residents that this building \* \* \* it was corrected." Hahn admitted making the "rich bitch" remark, although not in the same context recorded by Gazley.

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<sup>14</sup> See Findings of Fact 84-86 – The Merits, *supra*.

If these statements had actually been made as recorded, Respondent could have called Alice Street as a witness. She was not called, leaving Gazley's statements without any credible support.

Fifth, the forum is under no illusion that Hahn was a model employee. However, that does not invalidate his complaint. See, e.g., *In the Matter of Snyder Roofing & Sheet Metal, Inc.*, 11 BOLI 61, 82 (1992) ("It is not a prerequisite to statutory protection against discrimination that a complainant be a superior, error-free worker.") With one exception, based on Respondent's own documentation, Hahn's only performance problems occurred *before* Respondent hired him as a permanent, fulltime, probationary employee on September 13, 1999. The paperwork generated by Respondent to document Hahn's pre-September 13 performance shows that Respondent knew how to document performance problems. Despite testimony by Gazley and Bender about Hahn's continued unsatisfactory performance after September 13, Respondent failed to document any of it except for the "pick up the damned phone" incident on October 12 that resulted in a verbal warning.<sup>15</sup> On the other hand, Hahn admitted the October 12 and pre-September 13 incidents and credibly denied other performance problems after

September 13. The absence of any post-September 13 documentation except for the "damned phone" incident leads the forum to conclude that Hahn had no other performance problems after September 13.

Based on all of the above, the forum concludes that Respondent's proffered reasons for discharging Hahn were untrue and merely a pretext for the actual reason Hahn was discharged – because Gazley believed he had reported to corporate headquarters that Jones had falsified her timecards.

**HAHN'S SUSPENSION AND DISCHARGE VIOLATED FORMER ORS 659.550(1).**

Since Hahn did not actually report Jones's timecards falsification, he fits under the category of perceived whistleblower. *Former* OAR 839-010-0110(3) provided protection for perceived whistleblowers in the following language:

"[To be protected] [t]he employer must know that a complaint was made or believe that a complaint was made."

The "complaint" described is the whistleblower's report of "criminal activity." In this case, Gazley believed that both Bentley and Hahn had made a report that Jones had falsified her timecards. The action reported, if proven, constitutes "criminal activity." Gazley discharged Hahn on her belief that he had reported Jones's activity to Respondent's corporate headquarters. In doing so, Gazley

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<sup>15</sup> See Finding of Fact 25 – The Merits, *supra*.

caused Respondent to violate former ORS 659.550.

## DAMAGES SUFFERED BY BENTLEY AND HAHN

### A. Back Pay

The purpose of a back pay award is to compensate a complainant for the loss of wages and benefits the complainant would have received but for the respondent's unlawful discrimination. See, e.g., *In the Matter of ARG Enterprises, Inc.*, 19 BOLI 116, 136 (2000). Where a respondent commits an unlawful employment practice by discharging a complainant, the forum is authorized to award the complainant back pay for the hours the employee would have worked absent the discrimination. *In the Matter of Bob G. Mitchell*, 19 BOLI 162, 188 (2000). A complainant's right to back wages is cut off when her or she obtains replacement employment for a similar duration and with similar hours and hourly wages as respondent's job. *In the Matter of H.R. Satterfield*, 22 BOLI 198, 210-11 (2001). A complainant who seeks back pay is required to mitigate damages by using reasonable diligence in finding other suitable employment. See, e.g., *In the Matter of Servend International, Inc.*, 21 BOLI 1, 30 (2000), *appeal pending*.

#### 1. Bentley.

Bentley earned \$7.45 per hour and worked an average of 72 hours every two weeks at the time of her suspension. She was unemployed for nine weeks following her October 19 suspension. The

Agency presented undisputed, credible evidence that Bentley diligently sought work during those nine weeks. During that time, she would have earned \$2,413.80 in gross wages, had she continued to work for Respondent (\$7.45 per hour x nine weeks x 36 hours = \$2,413.80). On December 20, 1999, she obtained replacement fulltime work at Taco Time that paid \$1300 per month, wages equal to or greater than those she earned while employed by Respondent. Consequently, her back wages are cut off as of December 20, 1999. She is entitled to an award of back pay in the amount of \$2,413.80.

#### 2. Hahn.

Hahn earned \$10.40 per hour and was working 40 hours per week at the time of his discharge. As of September 19, 1999, his employment status changed from that of a temporary employee to a probationary, permanent fulltime employee. Like Bentley, his entitlement to back pay also began on October 19, 1999, the date of his suspension. The Agency established, through Hahn's credible testimony, that Hahn began searching for replacement work on October 25, 1999, and exercised reasonable diligence in his job search by applying for work that he was qualified for at a number of different businesses up to May 2000. In May 2000, he was hired at Tony's Tree Service, where he was paid \$7.50 per hour until his layoff on July 28, 2000, working 20-25 hours per week to

begin with, and later working 40 hours per week. Later in that year, he obtained temporary, short-term work at C.C.P.D., Inc. and Greg Brinton Construction, and earned another \$160 through self-employment by cutting up deer. His next significant employment was at Rick's Tree Service, where he worked from February or March 2001 until shortly before the hearing, when he was laid off. He worked 40 hours per week and earned wages ranging from \$7.00 to \$8.00 per hour. Again, the Agency established through Hahn's credible testimony that Hahn exercised reasonable diligence in seeking work in the period of time extending from his layoff from Tony's Tree Service and his date of hire at Rick's Tree Service.

At the time of the hearing, Hahn had not yet obtained work similar to Respondent's employment in duration and hourly wage. Therefore, he is entitled to back wages extending from October 19, 1999, to November 6, 2001, the date the hearing commenced, less interim earnings. See, e.g., *Earth Science Technology, Inc.*, 14 BOLI at 125 (duration of a back pay award extends only up to the date of the hearing). In all, Hahn earned a total of \$13,748.97 in gross wages between October 19 and November 6, 2001, the date the hearing commenced. Had he continued to work for Respondent, he would have earned gross wages of \$44,512. The difference between the two figures is \$30,763.03, and Hahn is entitled

to an award of back pay in that amount.

#### **B. Emotional Distress.**

In determining damages for emotional distress, the commissioner considers a number of things, including the type of the discriminatory conduct, and the duration, frequency, and pervasiveness of that conduct. The amount awarded depends on the facts presented by each complainant. *In the Matter of Barrett Business Services, Inc.*, 22 BOLI 77, 96 (2001). A complainant's testimony about the effects of a respondent's conduct, if believed, is sufficient to support a claim for mental suffering damages. *Id.* at 96.

##### 1. Bentley.

The Agency sought \$5,000 in emotional distress damages for Bentley and made its case for those damages through her credible testimony. That testimony established that she experienced panic and serious stress between October 19 and December 20, 1999 as a direct result of her suspension and discharge from Respondent's employment. The primary reason for her panic and stress was that she had no income and little savings with which to meet her financial obligations. She had nightmares about being thrown out of her house because she couldn't pay the bills and having to live in her car or on the streets. Before finding replacement employment at Taco Time, she slammed doors, broke some glassware, and lost sleep. She

had difficulty concentrating and had less energy than usual. In addition, her relationship with Hahn suffered, in part because of Hahn's remarks to acquaintances and friends that Bentley had lost him his job. Under these circumstances, the forum has no difficulty in justifying an award of \$5,000 for emotional distress damages and would award more if not limited by the pleadings. See, e.g., *In the Matter of Kenneth Williams*, 14 BOLI 16, 26 (1995) (forum may not award damages greater than those sought by the agency in Specific Charges or subsequent amendments).

## 2. Hahn.

The Agency sought \$10,000 in emotional distress damages for Hahn and made its case for those damages through his credible testimony. That testimony established that after his suspension and discharge, he worried, stopped paying his personal bills, experienced unstable moods, suffered loss of appetite, had "crummy" sleep, felt generally "crummy," considered leaving Bentley, and argued with her a lot. He stopped worrying when he was hired at Tony's Tree Service, but began worrying again after he was laid off from Tony's. Based on the type, effects, and duration of Hahn's emotional distress, the forum awards \$10,000, the amount sought by the Agency, to compensate Hahn for the emotional distress he experienced as a re-

sult of Respondent's unlawful employment practices.<sup>16</sup>

## ORDER

NOW, THEREFORE, as authorized by ORS 659.010(2) and ORS 659.060(3), and to eliminate the effects of Respondent's violation of ORS 659.484(1) and ORS 659.492(1), and in payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Hermiston Assisted Living, Inc.** to:

- 1) 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 trust for Complainant Sue Bentley in the amount of:
  - a) FIVE THOUSAND DOLLARS (\$5,000.00), representing compensatory damages for mental suffering

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<sup>16</sup> Compare *In the Matter of Vision Graphics and Publishing, Inc.*, 16 BOLI 16, 27-28 (1997) (whistleblowing complainant who was unlawfully discharged and experienced emotional distress similar to Hahn's for a two to three month period awarded \$20,000 in mental suffering damages).

suffered by Sue Bentley as a result of Respondent's unlawful practices found herein, plus

b) TWO THOUSAND FOUR HUNDRED THIRTEEN DOLLARS AND EIGHT CENTS (\$2,413.80), less lawful deductions, representing wages lost by Sue Bentley between October 20 and December 20, 1999, as a result of Respondent's unlawful practices found herein, plus

c) Interest at the legal rate on the sum of \$2,413.80 from December 20, 1999, until paid, plus

d) Interest at the legal rate on the sum of \$5,000 from the date of the Final Order until Respondent complies herewith.

2) 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 trust for Complainant Bruce Hahn in the amount of:

a) TEN THOUSAND DOLLARS (\$10,000.00), representing compensatory damages for mental suffering suffered by Bruce Hahn as a result of Respondent's unlawful practices found herein, plus

b) THIRTY THOUSAND SEVEN HUNDRED SIXTY-THREE DOLLARS AND THREE CENTS (\$30,763.03), less lawful deductions, repre-

senting wages lost by Bruce Hahn between October 20, 1999, and November 6, 2001, as a result of Respondent's unlawful practices found herein, plus

c) Interest at the legal rate on the sum of \$30,763.03 from November 6, 2001, until paid, plus

d) Interest at the legal rate on the sum of \$10,000 from the date of the Final Order until Respondent complies herewith.

3) Cease and desist from discriminating against any employee based upon the employee's good faith reporting of criminal activity by any person.

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**In the Matter of**

**G & G Gutters, Inc.**

**Case No. 04-02**

**Final Order of Commissioner**

**Jack Roberts**

**Issued May 28, 2002**

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**SYNOPSIS**

Respondent failed to pay two Claimants all wages earned and due after termination, in violation of ORS 652.140(1) and (2). Respondent's failure to pay the wages was willful and Respondent

was ordered to pay civil penalty wages to both claimants, pursuant ORS 652.150, ORS 652.140(2), ORS 652.150, ORS 653.025; OAR 839-001-0470(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 April 23, 2002, in the 10<sup>th</sup> floor hearing room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Peter McSwain, an employee of the Agency. Wage claimants Chris Jones and Michael Quigley ("Claimants") were present throughout the hearing and were not represented by counsel. Respondent did not make an appearance at the hearing and was found in default.

In addition to the Claimants, the Agency called Kathleen Johnson, Wage & Hour Division Compliance Specialist, as a witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-8 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-17 (submitted prior to

hearing), and A-18 (submitted at hearing).

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

#### **FINDINGS OF FACT – PROCEDURAL**

1) On January 4, 2001, Claimant Chris L. Jones filed a wage claim with the Agency alleging 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 Jones assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant Jones, all wages due from Respondent.

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

4) On or about January 25, 2001, Claimant Michael J. Quigley filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him.

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

6) Claimant Quigley brought his wage claim within the statute

of limitations. 7) On June 15, 2001, the Agency issued Order of Determination No. 01-0048 based upon the wage claims filed by Claimants Jones and Quigley and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of \$14,198.99 in unpaid wages<sup>1</sup> and \$8,296.80 in civil penalty wages,<sup>2</sup> 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.

8) On July 12, 2001, the Agency sent Respondent a letter stating its intent to issue a Final Order by Default if the Agency did not receive an answer and request for hearing or court trial by July 23, 2001.

9) On July 13, 2001, Respondent filed an answer and request for hearing through counsel Michael D. O'Brien. The answer denied that any money was owed to the Claimants.

10) On January 25, 2002, the Agency filed a "BOLI Request for Hearing" with the forum.

11) On February 5, 2002, the Hearings Unit issued a Notice of Hearing to Respondent, the

Agency, and the Claimants stating the time and place of the hearing as April 23, 2002, in the 10<sup>th</sup> floor hearings room in the Portland State Office Building, located at 800 N.E. Oregon, Portland, 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.

12) On November 13, 2001, 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 and wage calculations (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); and a statement of any agreed or stipulated facts. The forum ordered the participants to submit case summaries no later than April 12, 2002.

13) On March 29, 2002, the Agency submitted its case summary.

14) On April 12, 2002, the ALJ held a brief pre-hearing conference with McSwain and O'Brien. During the conference, O'Brien moved to withdraw as Respondent's counsel and the ALJ granted his motion. O'Brien stated that Curtis Gibson, Re-

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<sup>1</sup> The Agency alleged that Jones was entitled to \$6,048.99 and Quigley was entitled to \$8,150 in unpaid wages.

<sup>2</sup> The Agency alleged that Jones was entitled to \$4,144.80 and Quigley was entitled to \$4,152 in penalty wages.

spondent's president, desired to represent Respondent in the capacity of authorized representative.

15) On April 16, 2002, the ALJ issued an interim order to the Agency and Curtis Gibson stating that G &G Gutters, Inc., as a corporation, must be represented by an authorized representative or attorney. The ALJ instructed Gibson to fax written authorization for him to appear as Respondent's authorized representative directly to the ALJ and mail the original to the Hearings Unit. The ALJ amended the case summary to delete the requirements that Respondent submit "a brief statement of any defenses to the claim" and "a statement of any agreed or stipulated facts." The ALJ also sent a copy of the original case summary order to Gibson, along with a form designed to assist unrepresented Respondents in filing a case summary. The ALJ faxed his interim order to Gibson and McSwain.

16) At 10 a.m. on April 23, 2002, the time scheduled for hearing, Respondent had not made an appearance. Subsequently, no one appeared on behalf of Respondent and no one contacted the Hearings Unit to state that Respondent would be late or would not appear. At 10:30, the ALJ declared Respondent to be in default and commenced the hearing.

17) At the start of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency of the issues to be ad-

dressed, the matters to be proved, and the procedures governing the conduct of the hearing.

18) On May 1, 2002, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

#### **FINDINGS OF FACT – THE MERITS**

1) During all times material herein, Respondent G & G Gutters, Inc. was an Oregon corporation that engaged the personal services of one or more employees in Oregon.

2) Claimant Quigley ("Quigley") was employed by Respondent from May 15, 2000, through January 18, 2001.

3) In June and July 2000, Quigley supervised jobs for Respondent. Quigley and Curtis Gibson, Respondent's corporate president, agreed that Quigley would be paid \$3000 per month, plus a bonus when each job was completed. Respondent paid him \$750 less than he earned in both June and July, resulting in \$1500 in wages owed to Quigley.

4) In August 2000, Quigley began working as an estimator and salesperson for Respondent. Gibson and Quigley agreed that Quigley would be paid \$2,000 per month, plus a 10% commission on total sales, for working fulltime for Respondent.

5) Shortly after Quigley became an estimator/salesperson,

Gibson told Quigley that he was unable to accurately calculate his commissions because of problems with Respondent's computer. Gibson agreed to pay Quigley \$3,000 per month, with \$1,000 of that amount to be considered an advance on commissions, until such time as Respondent's computer problems were fixed and he could accurately calculate Quigley's commissions.

6) In August, September, October, November, December 2000, Quigley earned commissions based on his total sales that exceeded \$1,000 each month. In January 2001, Quigley earned commissions based on his total sales that exceeded \$250 per week.<sup>3</sup>

7) Based on a salary of \$3,000 per month, Respondent underpaid Quigley by \$6,650 between August 2000 and January 18, 2001.

8) Between June 2000 and January 18, 2001, Quigley routinely worked 40 or more hours per week for Respondent.

9) A few days before January 18, 2001, Gibson promised Quigley that he would give him a check for several thousand dollars on

January 18, 2001. Gibson did not pay Quigley the promised amount of January 18, 2001, and Quigley quit Respondent's employment that same day.

10) Respondent has not paid any wages to Quigley since January 18, 2001, and owes Quigley a total of \$8,150 in unpaid wages.

11) Quigley worked a total of 174 hours between December 19, 2000, and January 18, 2001, earning a total of \$3,000 in wages. His average hourly wage was \$17.24 ( $\$3,000 \div 174$ ).

12) Civil penalty wages for Quigley, computed in accordance with ORS 652.150 and OAR 839-001-0470 ( $\$17.24$  per hour x 8 hours x 30 days), equal \$4,138.

13) Claimant Jones ("Jones") was employed by Respondent from October 2 until December 21, 2000. His primary duties included installing, repairing, and cleaning gutters and downspouts. He also did some sales and estimating for Respondent when there weren't enough jobs to keep him busy.

14) When Jones was hired, Quinn Kline, Respondent's general manager, told him he would be paid the following rates:

- a) 45¢ per linear foot for all gutter and downspout installed, to be split equally between all employees working on the project;
- b) 25% of the total cost of any job cleaning gutters and downspouts, to be split equally

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<sup>3</sup> Respondent did not provide Quigley with a record of his total sales; however, Quigley's credible testimony convinced the forum that he earned commissions exceeding \$1,000 per month between August and December 2000, and commissions exceeding \$250 per week between January 1 and 18, 2001.

between all employees working on the project;

c) \$15 per hour for time spent performing repairs, small cleaning jobs, or while waiting for materials.

15) Subsequently, Gibson and Kline told Jones he would be paid a 10% commission on all jobs that he obtained for Respondent.

16) Throughout his employment, Jones maintained a contemporaneous record of the types of work he performed each day and computed the amount he earned each day and wrote those numbers of work tickets that he gave to Gibson.

17) Jones worked approximately eight hours per day throughout his employment with Respondent.

18) Gibson never questioned the accuracy of the figures that Jones wrote on his work tickets.

19) On December 22, 2000, Jones told Gibson that he wouldn't install any gutters that day unless he was paid, and Gibson told Jones it would probably be best for him to find work elsewhere. Jones believed he had been fired and did no more work for Respondent.

20) Jones earned a total of \$7,570.68 during his employment with Respondent. This includes eight days when he worked eight hours, with Respondent's knowledge, doing work other than installation of gutters and down-

spouts, repairs, or cleaning gutters and downspouts. Those eight days were October 30, November 27 and 29, and December 4, 5, 12, 18, and 20, 2000. The forum has computed Jones's wages on each of those days as \$54, based on the state minimum wage (\$6.50 per hour x 8 hours).<sup>4</sup> It also includes October 31, a date on which Jones credibly testified that he obtained \$890 in job orders for Respondent, earning a 10% commission of \$89. The forum relied on Jones's contemporaneous records to determine the rest of Jones's total earnings.

21) Jones was paid a total of \$2,921.72 in gross wages for his work for Respondent, leaving a total of \$4,648.96 in unpaid, due and owing wages.

22) Jones worked a total of 152 hours between November 22 and December 21, 2002, earning a total of \$2,107.12 in wages. His average hourly wage was \$13.86 ( $\$2,107.12 \div 152$ ).

23) Civil penalty wages for Jones, computed in accordance with ORS 652.150 and OAR 839-001-0470 (\$13.86 per hour x 8 hours x 30 days), equal \$3,326.

24) Quigley and Jones were both articulate witnesses who had a clear recollection of the circum-

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<sup>4</sup> Where there is no agreed rate of pay, an employer is required to pay at least the state minimum wage, which was \$6.50 per hour in 2000. See, e.g., *In the Matter of Jo-El, Inc.*, 22 BOLI 1, 7 (2001).

stances of their employment with Respondent and the forum found their testimony credible in its entirety. In addition, the forum found the written records created by Quigley and Jones to be an accurate record of the hours they worked, the types and amounts of work they performed, and the amounts they earned and were paid.

25) Johnson was a credible witness.

#### **ULTIMATE FINDINGS OF FACT**

1) Respondent G & G Gutters, Inc. at all times material herein operated a business that engaged the personal services of one or more employees in Oregon.

2) Oregon's minimum wage rate in 2000 was \$6.50 per hour.

3) Respondent engaged the personal services of Claimant Quigley to perform work for it between May 15, 2000 and January 18, 2001.

4) Respondent agreed to pay Quigley \$3,000 per month for his work in June and July, and \$2,000 per month, plus a 10% commission on total sales, during the remainder of his employment. Between August 1 and December 31, 2000, Quigley's commissions exceeded \$1,000 per month. Between January 1 and January 18, 2001, Quigley's commissions exceeded \$250 per week. Based on a salary of \$3,000 per month, Respondent underpaid Quigley by \$8,150 between June 2000 and January 18, 2001 and owes Quig-

ley \$8,150 in due and unpaid wages.<sup>5</sup>

5) Quigley quit Respondent's employment without prior notice on January 18, 2001.

6) Respondent engaged the personal services of Claimant Jones to perform work for it between October 2 and December 21, 2000. Respondent suffered or permitted Jones to work for it during that time period.

7) Respondent agreed to pay Jones several different rates of pay, depending on the job he was performing. Between October 2 and December 21, 2000, Jones earned \$7,570.68 and was paid only \$2,921.72. Respondent

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<sup>5</sup> Quigley's credible testimony convinced the forum that he earned more than \$1,000 per month in commissions from August through December 2000 and more than \$250 per week from January 1 through January 18, 2001. Quigley testified that he calculated his unpaid wages of \$8,150 based on a salary of \$3,000 per month, a lesser amount than he actually earned. The reason for this was because Respondent never provided him with a list of his total sales so that he could calculate the amount of commission he earned with any specificity, other than it exceeded \$1,000 per month from August through December 2000 and \$250 per week from January 1 through January 18, 2001. Although \$3,000 per month is not the exact sum that Quigley earned, the forum has adopted it because of the Agency's reliance on it and because it is less than the amount actually earned.

owes Jones \$4,648.96 in due and unpaid wages.

8) Respondent fired Jones on December 22, 2000.

9) Respondent's failure to pay Claimants' wages was willful and more than 30 days have passed since Claimants' wages became due.

10) Civil penalty wages for Quigley, computed in accordance with ORS 652.150 and OAR 839-001-0470 (\$17.24 per hour x 8 hours x 30 days), equal \$4,138.

11) Civil penalty wages for Jones, computed in accordance with ORS 652.150 and OAR 839-001-0470 (\$13.86 per hour x 8 hours x 30 days), equal \$3,326.

#### CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimants were employees subject to the provisions of 652.310 to 652.405 and ORS 653.010 to ORS 653.055. During all times material herein, Respondent was the employer of Claimants and Claimants were Respondent's employees. ORS 652.310.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414, ORS 653.055(3).

3) ORS 653.025 provides, in pertinent part:

"\* \* \*[F]or each hour of work time that the employee is gainfully employed, no employer

shall employ or agree to employ any employee at wages computed at a rate lower than:

"\* \* \* \* \*

"(3) For calendar years after December 31, 1998, \$6.50. \* \* \*"

Respondent was required to pay Claimant Jones at least \$6.50 per hour for each hour he performed work for Respondent other than at an agreed rate. Respondent owes Jones \$432 in wages for the work he performed on October 30, November 27 and 29, and December 4, 5, 12, 18, and 20, 2000.

4) At times material, ORS 652.140(1) and (2) provided:

"(1) Whenever an employer discharges an employee or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge or termination shall become due and payable not later than the end of the first business day after the discharge or termination.

"(2) 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 pay-

able within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly schedule payday after the employee has quit, whichever event first occurs.”

Respondent violated ORS 652.140(1) by failing to pay Claimant Jones all wages earned and unpaid by the end of the first business day after their discharge. Respondent violated ORS 652.140(2) by failing to pay Claimant Quigley all wages earned and unpaid within five days, excluding Saturdays, Sundays and holidays, after they quit. Respondent owes Jones a total of \$4,648.96 in due and unpaid wages, including those wages computed at the state minimum wage rate.<sup>6</sup> Respondent owes Quigley a total of \$8,150 in due and unpaid wages.

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.”

OAR 839-001-0470(1) provides:

“(1) When an employer willfully fails to pay all or part of the wages due and payable to the employee upon termination of employment within the time specified in OAR 839-001-0420, 839-001-0430 and 839-001-0440, the employer shall be subject to the following penalty:

“(a) The wages of the employee shall continue from the date the wages were due and payable until the date the wages are paid or until a legal action is commenced, whichever occurs first;

“(b) The rate at which the employee’s wages shall continue shall be the employee’s hourly rate of pay times eight (8) hours for each day the wages are unpaid;

“(c) Even if the wages are unpaid for more than 30 days, the maximum penalty shall be no greater than the employee’s hourly rate of pay times 8 hours per day times 30 days.

”(2) The wages of an employee that are computed at a rate other than an hourly rate shall be reduced to an hourly rate for penalty computation purposes by dividing the total

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<sup>6</sup> See Conclusion of Law 3, *supra*.

wages earned while employed or the total wages earned in the last 30 days of employment, whichever is less, by the total number of hours worked during the corresponding time period.”

Respondent is liable for \$4,138 in civil penalty wages under ORS 652.150 to Claimant Quigley. Respondent is liable for \$3,326 in civil penalty wages to Claimant Jones.

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay claimants their earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

## OPINION

### DEFAULT

Respondent failed to appear at hearing and the forum held Respondent in default pursuant to OAR 839-050-0330. When a respondent defaults, the Agency must establish a prima facie case to support the allegations of the charging document. *In the Matter of Usra Vargas, 22 BOLI 212, 220 (2001)*. To establish a prima facie case supporting the wage claims in this case, the Agency must prove: 1) that Respondent employed Claimants; 2) any pay rate upon which Respondent and Claimants agreed, if it exceeded

the minimum wage; 3) that Claimants performed work for Respondent for which they were not properly compensated; and 4) the amount and extent of work Claimants performed for Respondent. *Id.* at 220.

### A Respondent Employed Claimants.

In its answer, Respondent admitted employing both Claimants.

### B Claimants' Wage Rate.

#### 1. Claimant Quigley.

Quigley had two different agreed wage rates during the wage claim period. In June and July, Respondent's president Gibson agreed to pay him \$3,000 per month, plus a bonus for completed jobs. In August, when he became a salesperson/estimator, Gibson agreed to pay him a base salary of \$2,000 per month, plus a 10% commission on all sales. Shortly thereafter, when Gibson claimed an inability to accurately track Quigley's sales and thereby accurately compute his commissions, Gibson agreed to pay him \$3,000 per month, with \$1,000 of that amount constituting an advance against earned commissions.

#### 2. Claimant Jones.

Claimant Jones had several different wage rates during his employment with Respondent. First, Respondent agreed to pay him 45¢ per installed linear foot of gutter and downspout, to be split equally between all employees working on the project. Second, Respondent agreed to pay him

25% of the total cost of any job cleaning gutters and downspouts, to be split equally between all employees working on the project. Third, Respondent agreed to pay him \$15 per hour for time spent performing repairs, small cleaning jobs, or while waiting for materials. Fourth, Respondent agreed to pay him a 10% commission on all jobs that he obtained for Respondent. Fifth, Claimant was entitled to the state minimum wage of \$6.50 per hour for all time worked at other than an agreed rate. *In the Matter of Ann L. Swanger*, 19 BOLI 42, 56 (1999). This includes days when he performed other work for Respondent, including unsuccessful sales solicitation, or days on which he earned commissions but has no record or memory of the specific amount.

**C Claimants Performed Work for Which They Were Not Properly Compensated.**

Although Respondent never calculated or paid Quigley's commissions, Quigley credibly testified that they amounted to more than \$1,000 per month from August through December 2000, and more than \$250 per week in January 2001. He was also entitled to a salary of \$3,000 per month in June and July 2000 and a base salary of \$2,000 per month from August until he left Respondent's employment in January 2001. He testified credibly that he worked fulltime during this time period, thereby earning his agreed salary, and that he was paid considerably less than the amount he

earned. This testimony establishes the third element of the Agency's prima facie case with regard to Quigley.

As for Jones, his credible testimony and contemporaneous records of the work he performed, amounts he earned, and the amount he was paid established that he performed work for which he was not paid by Respondent.

**D The Amount and Extent of Work Claimants Performed for Respondent.**

When the forum concludes that an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. Where the employer produces no records, as happened in this case, the commissioner may rely on evidence produced by the agency "to show the amount and extent of the employee's work as a matter of just and reasonable inference and then may award damages to the employee, even though the result be only approximate." See, e.g., *In the Matter of Ilya Simchuk*, 22 BOLI 186, 196 (2001), quoting *Anderson v. Mt. Clemens Pottery Co.*, 3289 US 680 (1946).

Respondent defaulted and did not present any evidence at hearing. As a result, the forum has relied on the credible testimony and reliable contemporaneous records created by Quigley and Jones to determine the amount and extent of work they performed

for Respondent. Quigley's testimony and records show that he performed work entitling him to roughly \$20,250 in wages, and that Respondent underpaid him by \$8,150. Jones's testimony and records show that he performed work entitling him to \$7,570.68 in wages, and that Respondent only paid him \$2,921.72, underpaying him by \$4,648.96.

**RESPONDENT MUST PAY PENALTY WAGES TO BOTH CLAIMANTS**

The forum may award penalty wages where a respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission "willfully" if he or she acts (or fails to act) intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

Both claimants credibly testified to their wage agreements with Respondent and that Respondent's president was aware of the amount and extent of the work they performed. There is no evidence to show that Respondent acted other than intentionally and as a free agent in underpaying Quigley and Jones.

Based on the foregoing, the forum concludes that Respondent acted willfully and assesses penalty wages in the amount of \$8,150 in gross earned, unpaid, due, and

\$4,138 for Quigley and \$3,326 for Jones.

**ORDER**

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages and civil penalty wages it owes as a result of its violations of ORS 652.140(1) and (2), the Commissioner of the Bureau of Labor and Industries hereby orders **G & G Gutters, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Chris L. Jones in the amount of SEVEN THOUSAND NINE HUNDRED SEVENTY FOUR DOLLARS AND NINETY SIX CENTS (\$7,974.96), less appropriate lawful deductions, representing \$4,648.96 in gross earned, unpaid, due, and payable wages and \$3,326 in penalty wages, plus interest at the legal rate on the sum of \$4,648.96 from January 1, 2001, until paid, and interest at the legal rate on the sum of \$3,326 from February 1, 2001, until paid.

(2) A certified check payable to the Bureau of Labor and Industries in trust for Michael J. Quigley in the amount of TWELVE THOUSAND TWO HUNDRED AND EIGHTY EIGHT DOLLARS (\$12,288), less appropriate lawful deductions, representing \$8,150 in gross earned, unpaid, due, and payable wages and \$4,138 in penalty wages, plus interest at

the legal rate on the sum of \$8,150 from February 1, 2001, until paid, and interest at the legal rate on the sum of \$4,138 from March 1, 2001, until paid.

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**In the Matter of**

**MICHAEL D. CHENEY and Persogenics Corporation,**

**Case No. 37-02**

**Final Order of Commissioner  
Jack Roberts**

**Issued June 17, 2002**

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**SYNOPSIS**

The Agency sought unpaid wages and penalty wages for a claimant who filed a wage claim with the Idaho Department of Labor, which issued a Determination in claimant's favor and obtained a judgment, then assigned the case to BOLI under an interstate agreement for reciprocal enforcement and collection of wage claims. The Commissioner dismissed the complaint based on the doctrine of claim preclusion and instructed the Agency to use the same means of enforcing the wage claim that it would use to enforce a judgment on a wage claim originating with the Agency where a Final Order had been issued. ORS 652.140, ORS 652.150, ORS 652.420, ORS 652.425, ORS 652.435.

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The above-entitled case was set 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 Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David K. Gerstenfeld, case presenter and an employee of the Agency. Respondents were represented by Michael D. Cheney, who represented himself and acted as authorized representative for Persogenics Corporation.

The forum received into evidence:

a) Administrative exhibits X-1 through X-7.

Having fully considered the entire record in this matter, I, Jack Roberts, 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 October 3, 2001, the Agency issued Order of Determination No. 01-2198 in which it alleged that Carlee S. Ackerman ("Claimant") was owed \$3750 in unpaid wages and \$750 in penalty wages based on her employment with Respondents between November 20 and December 29, 2000.

2) On November 8, 2001, Respondents filed an answer and request for hearing.

3) On March 21, 2002, the Hearings Unit issued a Notice of Hearing to Respondents and the Agency stating the time and place of the hearing as June 4, 2002, at 10 a.m. at the Hearings Room, 10<sup>th</sup> Floor, State Office Building, 800 NE Oregon Street, Portland, 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.

4) On April 30, 2002, the Agency filed a motion for summary judgment through its legal counsel, Stephanie Andrus, Assistant Attorney General, asserting that Claimant's wage claim had already been adjudicated in Idaho and that the Agency was entitled to prevail as a matter of law based on claim preclusion. The Agency also requested a ruling that "BOLI can enforce [the Idaho Department of Labor's] final Determinations without having to go through a contested case process."

5) On May 22, 2002, the ALJ issued an interim order granting the Agency's motion for summary judgment, ruling in pertinent part as follows:

**"INTRODUCTION**

"This is a wage claim case in which the Agency seeks \$3,750 in unpaid wages and

penalty wages in the amount of \$750 on behalf of Carlee Ackerman, the wage claimant. On April 30, 2002, the Agency filed a motion for summary judgment as to the full amount of unpaid wages and penalty wages. The Agency contends it is entitled to summary judgment based on the doctrine of claim preclusion. Respondents have not filed a responsive pleading.

**"SUMMARY JUDGMENT  
BASED ON CLAIM PRECLUSION**

"A motion for summary judgment may be granted on the basis of claim preclusion. *OAR 839-050-0150(4)(A)*. Claim preclusion is a doctrine that bars litigation of a claim based on the same factual transaction as was or could have been litigated between the parties in a prior proceeding that has reached a final determination. *Drews v. EBI Companies*, 310 Or 134, 142-43 (1990). Where applicable, claim preclusion bars a respondent from using defenses that it may have interposed in a prior proceeding involving the same facts at issue in the prior proceeding. *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 257 (1999). Claim preclusion applies to administrative proceedings. *Drews* at 142.

"For claim preclusion to apply, the following elements must exist: (1) There must have been a prior adjudication involving the same parties based

on the same factual transaction at issue in the subsequent action or proceeding in which the doctrine of claim preclusion is invoked; (2) The opportunity to litigate the issue, whether or not it was used, must have been present in the former adjudication; and (3) A final determination must have been reached in the prior adjudication. *Drews* at 140.

#### **“THE PERTINENT FACTS IN THIS CASE**

“The Agency submitted an affidavit and six exhibits in support of its motion. Respondent did not file a response. The Agency’s affidavit and exhibits establish the following pertinent facts:

“(1) On February 20, 2001, the Idaho Department of Labor (“IDOL”) received a ‘Statement of Claim’ from Carlee Ackerman (“Claimant”) stating she had been employed by Michael D. Cheney and Persogenics Corporation (‘Respondents’), located at 14138 SE Rolling Meadows Court, Portland, OR 97236; that she was paid a salary of \$36,000 per year based on an eight hour day, five day workweek; that she earned \$3750 in wages from November 20 to December 29, 2000; and that Respondents had not paid those wages to her.

“(2) The IDOL sent a copy of the claim to Respondents and telephoned Respondents on February 20, 2001, leaving a

voice mail message of the claim. As of March 19, 2001, Respondents did not respond.

“(3) The IDOL investigated Claimant’s wage claim and, on March 19, 2001, it issued a Determination and Demand for Payment (‘Determination’) pursuant to Idaho Code Section 45-617(4).<sup>1</sup> The Determination found that Claimant was owed \$3750 in unpaid wages, and that Claimant’s wages were ‘withheld willfully, arbitrarily, and without just cause,’ entitling her to penalty wages of \$750, the maximum amount available under Idaho Code Section 45-607.<sup>2</sup>

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<sup>1</sup> IDOL’s Determination is similar to the Order of Determination issued by BOLI in this case pursuant to ORS 652.332, which becomes final if the employer fails “to pay the amount specified in the order of determination or to request a trial in a court of law within the time specified, and upon failure of [the employer] to request a contested case hearing within the time specified[.]” Idaho Code 45-617(4) provides that “If an appeal is not timely filed, the amount awarded by a final determination shall become immediately due and payable to [IDOL].”

<sup>2</sup> ORS 652.150 also provides for penalty wages where an employer “willfully” fails to pay a former employee wages owed in a maximum amount of 30 days pay computed at eight hours per day. Under Oregon law, Claimant would have been entitled to a significantly larger amount in penalty wages.

“(4) The IDOL’s Determination provided notice that Respondents had 14 days from the Date of Mailing to appeal the Determination and that Respondents had until April 3, 2001, in which to file a written appeal. The Determination notified Respondents that if an appeal was not filed, the Determination would be enforced pursuant to Idaho Code Sections 45-608, 45-620, and 45-621.<sup>3</sup> Under Idaho Code 45-617(7), an employer who appeals a Determination issued by the IDOL must be afforded ‘reasonable opportunity for a fair hearing.’

“(5) Respondents did not file a written appeal, and the IDOL’s Determination became final on April 3, 2001.

“(6) Pursuant to Idaho Code 45-620, the IDOL filed a notice of lien with the Idaho Secretary of State on April 4, 2001, based on the IDOL’s Determination of Claimant’s wage claim. Idaho Code 45-620 provides that ‘[s]uch lien may be enforced by the director or by any sheriff of the various counties in the same manner as a judgment of the district court duly docketed and the amount secured by the lien shall bear interest at the rate of the state statutory legal limit on

judgments.’ Once this notice of lien was filed, the IDOL’s Determination became fully enforceable under Idaho law with the same force and effect as a final court judgment in Idaho.

“(7) As of March 12, 2002, Respondents had not paid any amounts towards satisfying the IDOL’s Determination and the full amount (\$3,750 in unpaid wages and \$750 in penalty wages) remained due and owing.

“(8) The IDOL and BOLI have entered into an agreement for the reciprocal enforcement and collection of wage claims. Under that agreement, BOLI may accept from the IDOL ‘assignments of claims for wages, penalties \* \* \* and of judgments obtained by the Director whenever the Director is of the opinion that the employer or former employer has removed himself/herself/itself from the State of Idaho and that said employer or assets belonging to said employer can be located in the State of Oregon.’

“(9) On April 30, 2001, the IDOL assigned Claimant’s wage claim to BOLI ‘for collection as provided by law.’

**“CLAIM PRECLUSION APPLIED TO THE FACTS**

**“A. Prior adjudication involving the same parties.**

“There must have been a prior adjudication of Claimant’s wage claim involving the same

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<sup>3</sup> These provisions authorize the IDOL to file a lien and to collect on that lien when the IDOL has issued a Determination and it becomes final by virtue of the employer’s failure to appeal.

parties for claim preclusion to apply. Here, the BOLI seeks judgment on the same wage claim that Claimant filed with the IDOL and that the IDOL assigned to BOLI based on an agreement for reciprocal enforcement and collection of wage claims. That claim for wages and penalty wages was previously adjudicated by the IDOL through its investigation and issuance of a Determination. The parties were Respondents and the IDOL, which has now assigned its claim to BOLI. For claim preclusion purposes, when BOLI acts on an assigned wage claim, it stands in the same position as the wage claim assignor. *In the Matter of Staff, Inc.*, 16 BOLI 97, 120-21 (1997). This satisfies the first requirement of claim preclusion.

**“B. Opportunity to litigate allegations in Claimant’s wage claim.”**

“The second requirement of claim preclusion is that Respondents must have had the opportunity to litigate Claimant’s wage claim, whether or not Respondents took that opportunity, in the former adjudication. After Respondents failed to respond during the IDOL’s initial investigation, the IDOL issued a Determination. Under Idaho Code 45-617(6), Respondents had an opportunity to request a hearing to challenge the IDOL’s Determination. Had Respon-

dents requested a hearing, they would have been afforded ‘reasonable opportunity for a fair hearing’ under Idaho Code 45-617(7). At hearing, Respondents would have had opportunity to subpoena witnesses to testify at a hearing presided over by an appeals examiner and to cross examine any witnesses called to testify by the IDOL and to present argument on any issue. The hearing would have been on the record, and Respondents would have had a further opportunity to seek judicial review of the appeals examiner’s decision had they desired. In conclusion, Respondents had the opportunity to litigate Claimant’s wage claim, but failed to take advantage of that opportunity, satisfying the second requirement of claim preclusion.

**“C. Final determination.”**

“The third requirement of claim preclusion is that a final determination must have been reached in the prior adjudication. When Respondents failed to challenge the IDOL’s Determination, it became final under Idaho law, with no further right of appeal. This satisfies the third requirement of claim preclusion.

**“CONCLUSION**

“The Agency is **GRANTED** summary judgment as to the total amount of unpaid wages due and owing (\$3,750) and total amount of penalty wages

sought (\$750). The hearing set for June 4, 2002, is canceled. (Emphasis in original)

"Pursuant to OAR 839-050-150(4)(b), this portion of the interim order ruling on the Agency's motion for summary judgment will become part of a Proposed Order that will be issued by the undersigned ALJ.

**"AGENCY'S REQUEST FOR RULING THAT AGENCY CAN ENFORCE IDOL'S FINAL DETERMINATIONS WITHOUT HAVING TO GO THROUGH CONTESTED CASE PROCESS.**

"The Agency additionally seeks a specific ruling that 'Respondents are not entitled to re-litigate the merits of this wage claim dispute and that BOLI can enforce IDOL's final Determinations without having to go through a contested case process.' The Agency's request is in the nature of a request for a declaratory ruling relating to BOLI's authority to collect on an Idaho judgment lien in the state of Oregon outside of the contested case process. The forum declines to rule on the Agency's request because it relates to filing the IDOL's lien for Claimant's unpaid wages and penalty wages in Oregon courts and the question of whether or not the IDOL's lien has the legal effect of a judgment, an issue this forum lacks the jurisdiction to consider."

The ALJ's award of summary judgment to the Agency based on claim preclusion was in error and is reversed. Claim preclusion applies to this proceeding, but in a manner contrary to that urged by the Agency. In its motion for summary judgment, the Agency established that the factual transaction at issue in Agency's Order of Determination had already been litigated in Idaho and a final judgment obtained. Where there is an opportunity to litigate the subject in question and a final judgment obtained, as in this case, neither party may later litigate the subject. *Drews v. EBI Companies*, 310 Or 134, 140 (1990). Therefore, the Agency, as well as Respondents, is foreclosed from relitigating the factual circumstances originally alleged in the IDOL's Determination and subsequently re-alleged in the Agency's Order of Determination.

The remainder of the ruling is confirmed.

6) The ALJ issued a proposed order on May 28, 2001, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On May 29, 2002, the Agency filed exceptions to the portions of the proposed order that denied Respondents' liability for interest on the unpaid wages and penalty wages. Inasmuch as this Final Order dismisses the Agency's Order of Determination, the Agency's exceptions are also denied.

**FINDINGS OF FACT – THE MERITS**

1) From November 20 to December 29, 2000, Respondents were employers located in Oregon that employed Claimant in the State of Idaho.

2) Claimant worked as a salesperson for Respondents. Respondents agreed to pay Claimant \$36,000 per year on the basis of working an eight hour day, five days per week.

3) Claimant earned \$3750 between November 20 and December 29, 2000.

4) Claimant voluntarily left Respondents' employment on January 4, 2001. She requested her wages on January 2, 2001.

5) Respondents' next regularly scheduled payday after Claimant's separation was January 15, 2001.

6) Respondents have not paid Claimant for any of the work she performed between November 20 and December 29, 2000. Respondents' failure to pay Claimant's wages was willful.

7) Under Idaho Code 45-607, Claimant is entitled to a maximum of \$750 in penalty wages.

8) The Idaho Department of Labor ("IDOL") investigated Claimant's wage claim and issued a Determination on March 19, 2001, that Respondents owed Claimant \$3,750 in unpaid wages and \$750 in penalty wages, and that Claimant's wages were withheld willfully. When Respondents did not appeal IDOL's Determination, the Determination became final by act of law and was registered as a lien in Idaho.

9) The IDOL and BOLI have entered into an agreement for the reciprocal enforcement and collection of wage claims. Under that agreement, BOLI may accept assignments of wage claims from the IDOL.

10) On April 30, 2001, the IDOL assigned Claimant's wage claim to BOLI for collection.

#### **ULTIMATE FINDINGS OF FACT**

1) From November 20 to December 29, 2000, Respondents were employers located in Oregon that employed Claimant in the State of Idaho.

2) Respondents agreed to pay Claimant \$36,000 per year for her work.

3) Respondents willfully failed to pay Claimant for work she performed between November 20 and December 29, 2000. Claimant earned \$3,750 during that time period.

4) Under Idaho law, Claimant is entitled to \$750 in penalty wages.

5) The IDOL investigated Claimant's wage claim and issued a Determination on March 19, 2001, concluding that Respondents owed Claimant \$3,750 in unpaid wages and \$750 in penalty wages, and that Claimant's wages were withheld willfully. When Respondents did not appeal IDOL's Determination, the Determination became final by act of law and was registered as a lien in Idaho. (Exhibit X-3)

6) The IDOL transferred Claimant's wage claim to BOLI under a reciprocal agreement that gives BOLI the authority to enforce Claimant's wage claim.

#### CONCLUSIONS OF LAW

1) ORS 652.420 provides:

"(1) As used in ORS 652.420 to 652.445:

"(a) 'Labor bureau' includes any agency, bureau, commission, board or officer in another state which performs functions substantially corresponding to those of the Commissioner of the Bureau of Labor and Industries.

"(b) 'Commissioner' means the Commissioner of the Bureau of Labor and Industries.

"(2) The definitions of ORS 652.310 and 652.320 shall apply to ORS 652.420 to 652.445, but nothing contained in those sections shall be construed to preclude reciprocal enforcement of wage claims under ORS 652.420 to 652.445, where the services of the employee were rendered in another state."

ORS 652.425 provides:

"The Commissioner of the Bureau of Labor and Industries may enter into agreements with the corresponding labor bureau of another state for the reciprocal enforcement and collection of wage claims, if the other state has a reciprocal statute similar to ORS 652.420 to 652.445 or otherwise au-

thorizes the reciprocal enforcement and collection of wage claims in a manner substantially similar to ORS 652.420 to 652.445."

ORS 652.435 provides:

"Whenever a labor bureau in another state, which has entered into a reciprocal agreement under ORS 652.425 with the Commissioner of the Bureau of Labor and Industries and the agreement is in effect at the time, takes an assignment of a wage claim from an employee residing in the other state for services rendered in the other state to an employer or former employer who has removed to Oregon, the Commissioner of the Bureau of Labor and Industries may take an assignment of the wage claim from such labor bureau and enforce the collection thereof as provided in the applicable provisions of ORS 652.330 to 652.414."

Idaho Code 45-601 provides, in pertinent part:

"(1) 'Claimant' means an employee who filed a wage claim with the department in accordance with this chapter and as the director may prescribe.

"(2) 'Department' means the department of labor.

"(3) 'Director' means the director of the department of labor."

“(4) ‘Employee’ means any person suffered or permitted to work by an employer.

“(5) ‘Employer’ means any individual \* \* \* corporation \* \* \* employing any person.”

“(6) ‘Wage claim’ means an employee’s claim against an employer for compensation for the employee’s own personal services, and includes any wages, penalties, or damages provided by law to employees with a claim for unpaid wages.

“(7) ‘Wages’ means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece or commission basis.”

The Commissioner of BOLI is authorized to enter into a reciprocal agreement with the IDOL for the enforcement of wage claims. By virtue of that agreement, the Commissioner has the authority to enforce collection of Claimant’s wage claim that was assigned to the Commissioner. However, the Commissioner is precluded from enforcing collection of Claimant’s wage claim through a contested case proceeding.

2) Under the facts and circumstances of this record, and according to the law applicable in this matter, the wage claim and Order of Determination No. 01-2198 issued against Respondents are hereby dismissed.

#### OPINION

§1 of the U.S. Constitution.  
*United Farm Workers of Ameri-*

Pursuant to an agreement between Oregon and Washington for the reciprocal enforcement of wage claims, Claimant’s wage claim was assigned to BOLI for collection after the IDOL investigated the claim and issued a Determination that became final upon Respondents’ failure to file an appeal. The Agency issued an Order of Determination alleging the same facts as were alleged in the IDOL’s Determination and Respondents filed an answer and request for hearing. The Agency filed a motion for summary judgment based on the doctrine of claim preclusion that was granted, and the ALJ issued a proposed order awarding Claimant the same wages that were awarded in the IDOL’s Determination. However, as explained at the conclusion of Finding of Fact 5 – Procedural, the proposed order misapplied the doctrine of claim preclusion. When properly applied, the doctrine of claim preclusion precludes the Agency from relitigating Claimant’s wage claim in a BOLI contested case hearing. As a result, the forum must dismiss the Agency’s claim.

When an administrative agency acts in a judicial capacity, as the IDOL did in reaching its conclusion regarding wages and penalties Respondents owed Claimant, its judgments are entitled to recognition and enforcement pursuant to the full faith and credit clause of Art. IV,

*cav. Arizona Agricultural  
Employment Relations Board, 669*

F. 2d 1249, 1255 (9<sup>th</sup> Cir. 1982). Since the IDOL's lien has the same effect as a judgment, the Agency should use the same means of enforcing the wage claim assigned to it by the IDOL that the Agency would use to enforce a judgment on a wage claim originating with the Agency where a Final Order had been issued.

In this case, the Agency has thus far eschewed enforcement of the Idaho judgment lien in favor of establishing, for a second time, the Respondents' liability to the claimant. This is not only unnecessary, but also contrary to the doctrine of claim preclusion as explained in *Drews v. EBI, supra*, which teaches that once a matter is brought to final judicial resolution, that matter is not to be litigated again.

The fact that the prior litigation was in a sister state does not change the result. Rather than require re-litigation in violation of the doctrine of claim preclusion, the prior litigation—and the resultant judgment—simply affords the Agency the opportunity to enforce that judgment in Oregon. For the process of enforcement, it should look not to a new administrative proceeding but, in accordance with the full faith and credit principles of the U.S. Constitution, to Oregon law regarding enforcement of sister-state judgments. See, e.g., ORS 24.105 *et seq.*

#### ORDER

NOW, THEREFORE, the Commissioner of the Bureau of

Labor and Industries hereby orders that Order of Determination No. 01-2198 against Michael D. Cheney and Persogenics Corporation is hereby dismissed.

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#### In the Matter of

#### LABOR READY NORTHWEST, INC.,

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

**Final Order of Commissioner  
Jack Roberts**

**Issued June 17, 2002**

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#### SYNOPSIS

Respondent was a subcontractor on three public works projects by providing workers to perform manual labor for other contractors on the three projects. On two of the projects, Respondent paid six workers less than the applicable prevailing wage rate, committing six violations of ORS 279.350(1). Respondent failed to post the prevailing wage rate on two of the projects, in violation of ORS 279.350(4). Respondent filed payroll reports on all three projects that either lacked certified statements, misclassified workers, misstated hours worked, or were untimely, committing eight violations of ORS 279.354 and OAR 839-016-0010. Finally, Respondent failed to timely provide documents requested by the Wage and Hour Division that were

necessary to determine if the prevailing wage rate was paid on one of the projects, committing one violation of ORS 279.355 and OAR 839-016-0030. Respondent's violations of ORS 279.350(1) on two of the projects were intentional, and the Commissioner placed Respondent on the list of contractors or subcontractors ineligible to receive any contract or subcontract for public works for concurrent periods of two and three years. The Commissioner also assessed \$58,500 in civil penalties. ORS 279.334(1)(a), ORS 279.348(3) and (5), ORS 279.350(1), ORS 279.350(4), *former* ORS 279.354, ORS 279.355(2), ORS 279.361(1), ORS 279.370(1); OAR 839-016-0004(16) and (17), *former* OAR 839-016-0010, OAR 839-016-0030(1) and (2), OAR 839-016-0033(1), OAR 839-016-0035(1), OAR 839-016-0050(2), OAR 839-016-0085(1) and (4), OAR 839-016-0090, OAR 839-016-0500, OAR 839-016-0520, OAR 839-016-0530, OAR 839-016-0540.

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

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

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

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

The forum received into evidence:

a) Administrative exhibits XA-1 through XA-8<sup>1</sup> (generated in case no. 122-01 prior to case consolidation); XB-1 through XB-4<sup>2</sup> (generated in case no. 149-01 prior to case consolidation); and X-1 through X-6 (generated subsequent to the consolidation of cases 122-01 and 149-01 and prior to hearing);

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

<sup>2</sup> *Id.*

b) Agency exhibits A-1 through A-53 and A-62 through A-64 (submitted prior to hearing); and A-66 through A-69 (submitted at hearing);

c) Respondent exhibits R-1, R-10, R-12 through R-14, and R-17 (submitted prior to hearing).

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

a) Between approximately May 8 and June 9, 2000, Respondent provided manual labor as a subcontractor on the Cornelius Public Works Facility – Phase I Project (the “Cornelius Project”), a public works project subject to regulation under Oregon’s prevailing wage rate laws and intentionally failed to pay \$971.90 in prevailing wages to eight employees – Joseph Baker, Catherine Clayton, Chris Francis, Jason Henry, Renaldo Ramirez, Alfredo Rodriguez, Miguel Silva, and David Snyder, in violation of ORS

279.350 and OAR 839-016-0035. The Agency sought a \$24,000 penalty for these eight alleged violations.

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

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

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

wage rate on the Cornelius Project.

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

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

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

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

5) On February 28, 2001, the Agency filed a motion to consolidate the hearings in case number 31-01 and the Agency's case against Respondent involving the Cornelius Project. On April 2, 2001, the ALJ heard oral argu-

ments from Respondent and the Agency regarding the Agency's motion to consolidate. That same day, the ALJ issued an interim order denying the Agency's motion. In pertinent part, the order stated:

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

time for the participants or the forum.”

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

7) On April 12, 2001, the Hearings Unit served Respondent with: a) a Notice of Hearing in case number 122-01 involving the Cornelius Project that set the hearing for September 17, 2001; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent.

8) On April 20, 2001, the Agency issued another Notice of Intent to Place on List of Ineligibles and to Assess Civil Penalties in the amount of \$24,000 in which it made the following charges against Respondent:

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

b) Respondent did not file certified payroll reports regarding

the work performed by its employee on the Central Project until January 18, 2001, in violation of ORS 279.354 and OAR 839-016-0010. The Agency sought a \$4,000 penalty for this alleged violation.

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

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

of ORS 279.354 and OAR 839-016-0010.” The Agency sought a \$5,000 penalty for this alleged violation.

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

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

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

9) The Notice of Intent instructed Respondent that it was required to make a written request for a contested case hearing

within 20 days of the date on which it received the Notice, if Respondent wished to exercise its right to a hearing.

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

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

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

13) On June 4, 2001, the ALJ ordered the Agency and Respondent each to submit a case summary regarding case number 122-01 that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; a brief statement of the elements of the claim and any civil penalty calculations (for the Agency only); and a brief statement of any defenses to the claim (for Respondent only). The ALJ ordered the participants to submit their case summaries by September 7, 2001, and notified them of the possible sanctions for failure to comply with the case summary order.

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

taining the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent.

15) On July 31, 2001, the Agency filed a motion to amend its Notice in case number 122-01<sup>3</sup> to allege fifteen specific violations that were only alluded to in the paragraphs in both Notices listing "Aggravating Factors." Four of the allegations were already litigated in case number 31-01.<sup>4</sup> Five of the allegations were identical to the five violations alleged contained in the Agency's Notice in case number 149-01.<sup>5</sup> The remaining six were as follows:<sup>6</sup>

"8. At times material, Respondent often required its employees to report to work at Respondent's office, then drive to a particular location to per-

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<sup>3</sup> At hearing, in response to the ALJ's inquiry, the Agency and Respondent agreed that the alleged violations listed in the Agency's motion to amend applied to case number 149-01 as well as case number 122-01.

<sup>4</sup> These allegations were spelled out in paragraphs 11-14. Case number 31-01 was heard on June 19-20 and August 8, 2001, and the Commissioner issued a Final Order on December 13, 2001. That Final Order was offered and received as Exhibit A-64.

<sup>5</sup> See Finding of Fact 8 – The Merits, *supra*.

<sup>6</sup> The allegations are referred to by the same numbers in the Agency's motion to amend.

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

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

"10. Respondent filed certified payroll records for employees' work on an Oregon prevailing wage rate project (Southern Oregon University Center for the Visual Arts) in or about late 1999. The certified statements did not meet all the requirements of ORS 297.354(1).<sup>7</sup>

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<sup>7</sup> At hearing, the Agency moved to correct the statutory citation to 279.354(1). Respondent did not object and the ALJ granted the motion.

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

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

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

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

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

17) On August 15, 2001, the ALJ conducted a prehearing conference to discuss the Agency's motion to amend and Respondent's objections. On August 17, 2001, the ALJ held another prehearing conference to discuss

possible consolidation of case numbers 122-01 and 149-01.

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

19) On August 17, 2001, the ALJ issued an interim order in which he granted the Agency's motion to amend, consolidated case numbers 122-01 and 149-01 for hearing and rescheduled the hearing to begin on January 15, 2002, and set a case summary due date of December 21, 2001. In addition, the order stated that the allegations previously litigated in case number 31-01 would not be relitigated, but the ALJ would take official notice of the Commissioner's Final Order in that case. The order also repeated the Agency's stipulation that, should the Commissioner's Final Order resulting from case numbers 122-01 and 149-01 order debarment of Respondent pursuant to ORS 279.361, any debarment periods imposed on Respondent would run concurrently.

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

21) On January 9, 2002, Respondent's counsel filed a letter stating that Tim Adams, Labor Ready's general counsel, who was listed by Respondent as a witness on Respondent's case summary, was unable to attend the hearing and that Respondent would be represented at the hearing by "Corporate Counsel Aaron

Roblan.” The letter also stated that it was Respondent’s intent to have Roblan testify in place of Adams. Respondent faxed this letter to case presenter Gerstenfeld on the afternoon of January 9, 2002.

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

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

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

proved, and the procedures governing the conduct of the hearing.

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

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

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

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

29) During the hearing, the Agency offered exhibits A-54 through A-61 and A-72 and A-73. Respondent objected to A-54, A-55, and A-56 on the basis of relevancy, lack of foundation, and hearsay, to A-57 through A-61 on the basis of relevancy, and to A-72 and A-73 on the basis of relevancy. When the Agency offered A-72 and A-73 in rebuttal, Respondent objected on the basis

that they did not rebut any evidence in Respondent's case. The ALJ reserved ruling on Respondent's objections until the proposed order. Respondent's objections are sustained, for reasons set out in the opinion. Those rulings are confirmed.

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

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

32) On May 8, 2002, Respondent filed exceptions to the

proposed order. Those exceptions are discussed in the Opinion.

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

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

#### **FINDINGS OF FACT – THE MERITS**

1) On December 18, 1998, Respondent Labor Ready Northwest, Inc. ("LRNWI") registered as a corporation with the Oregon Secretary of State, Corporation Division. Its principal place of business was listed as "1015 A St., Tacoma, WA 98402, with a mailing address of "PO Box 2910, Tacoma, WA 98401." At all times material herein, LRNWI was registered as a corporation with the Oregon Secretary of State, Corporation Division. As of January 16, 2002, LRNWI's president was listed as "Timothy J. Adams." Beginning on September 3, 1999, and at all times material since, Respondent was registered with

the Oregon Secretary of State, Corporation Division as the registrant for the assumed business name "Labor Ready." The principal place of business for "Labor Ready" ("LR") was listed as "1016 S. 28<sup>th</sup> St., Tacoma, WA 98409" and the authorized representative was listed at the same address.

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

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

The commissioner imposed civil penalties totaling \$13,000 for these violations.

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

\$34,000 in civil penalties. Respondent has appealed the Final Order to the Oregon Court of Appeals and that appeal is currently pending.

### **THE CORNELIUS PROJECT**

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

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

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

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

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

gave them to I-5's foreman, telling him the rates needed to be posted. Shields was not aware of anyone from Respondent going to the job site before July 6 to post the prevailing wage rates. Shields did not know if the I-5 foreman posted the prevailing wage rates, and if so, where they were posted, or if they were kept posted.

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

11) During his investigation, Wells received twelve payroll reports<sup>8</sup> from Respondent reflecting work performed by Respondent's employees on the Cornelius Project. Six of these were Respondent's original reports. The other six were corrected versions of the six original reports. All twelve lacked the statement of

certification required by former ORS 279.354.<sup>9</sup>

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

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

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

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

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<sup>8</sup> Throughout this Final Order, the forum uses the term "payroll report" to refer to documents submitted by Respondent to meet the requirements of ORS 279.354(1), but which lack the certification required by following language in that statute: "\* \* \* which certificate and statement shall be verified by the oath of the contractor or the contractor's surety or subcontractor that the contractor or subcontractor has read such statement and certificate and knows the contents thereof and that the same is true to the contractor or subcontractor's knowledge."

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<sup>9</sup> See *id.*

12, 2000, work on the Cornelius Project.

16) On November 21, 2000, Respondent created a work ticket seeking "back pay on ticket 54272" from I-5 for 5.25 hours of work that Rodriguez, Clayton, and Ramirez each performed on June 12, 2000. Handwritten on the work ticket are the words "Back pay on ticket 54272-1128 Date 6/12/00 got paid \$6.50 & was prevailing wage." On November 24, 2000, Respondent created a billing detail for an invoice to I-5 regarding "BACK PAY" that sought \$111.67 additional pay each for Clayton, Ramirez, and Rodriguez based on 5.25 hours work performed by each of them at the "bill rate" of \$21.27 per hour.

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

18) On August 18, 2000, Respondent completed a payroll report for work done by its employees on the Cornelius Project for the week ending June 30, 2000. The report states that

Faried Hawash and Chris Francis both worked 6 hours of straight time on June 28, 2000, as "laborers" at the wage rate of \$31.26 per hour.

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

20) An itemized statement of deductions created by Respondent for Chris Francis shows that Respondent issued a check to Francis on June 28, 2000, for 6 hours worked on June 28, 2000, doing "CARPENTRY - INSTALLATION - CABINETWORK" for I-5. Francis was paid gross wages of \$60, computed at \$10 per hour. A second itemized statement of deductions created by Respondent for Francis shows that he received a check on July 6, 2000, for 6 hours worked on July 6, 2000, doing "CARPENTRY - NOC" for I-5. Again, he was paid gross wages of \$60, computed at \$10 per hour.

21) An itemized statement of deductions created by Respondent for Faried Hawash shows that Respondent issued a check on June 29, 2000, to Hawash for 6 hours work doing "CARPENTRY -

INSTALLATION - CABINET-WORK" for I-5. He was paid gross wages of \$54, computed at \$9 per hour.

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

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

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

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

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

27) On November 21, 2000, Respondent completed a second payroll report for work done by its employees on the Cornelius Project for the week ending July 21, 2000. It was identical to the first report except that it was denoted "Payroll No. 6"<sup>10</sup> and was completed by Ivy Finnegan, an "Administrative Assistant."<sup>11</sup>

28) On August 25, 2000, Respondent completed a payroll report for work done by its employees on the Cornelius Project for the week ending August 11, 2000. The report states that Chris Francis worked as a "laborer" for 4

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<sup>10</sup> The original payroll report was denoted "Payroll No. 5."

<sup>11</sup> Sherry Johnson, another "Administrative Assistant," completed the first report.

hours of straight time on August 7, 8.5 hours of straight time on August 8, and 8 hours of straight time on August 11, earning gross wages of \$640.83, computed at \$31.26 per hour.

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

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

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

32) On November 21, 2000, Respondent completed a second payroll report for work done by its employees on the Cornelius Project for the week ending August 18, 2000. The word "CORREC-

TION" is stamped on the report. The report shows that Chris Francis worked as a "laborer" for 8 hours of straight time on Saturday, August 12, earning gross wages of \$250.08 computed at \$31.26 per hour.

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

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

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

36) Each payroll report submitted by Respondent on the Cornelius Project was accompanied by a "Statement of Compliance" that was signed by one of Respondent's administrative assistants and contained the following language:<sup>12</sup>

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

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<sup>12</sup> The cited text reproduces the language, but not the specific format of the Statement of Compliance.

"I, (name of signatory party), (title of signatory party)<sup>13</sup> do hereby state (1) That I pay or supervise the payment of the persons employed by (Contractor or subcontractor)<sup>14</sup> on the (Building or work)<sup>15</sup>: that during the payroll period commencing on the \_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, and ending the day of \_\_\_\_\_, \_\_\_\_\_, on said project have been paid the full weekly wages earned, that no rebates have been or will be made either directly or indirectly to or on behalf of said (Contractor or subcontractor)<sup>16</sup> from the full weekly wages earned by any person and that no deductions have been made either directly or indirectly from the full wages earned by any person, other than permissible deductions as defined in Regulations, Part 3 (29 CFR Subtitle A), issued by the Secretary of Labor under the Copeland Act, as amended \* \* \* and described below:

"(2) That any payrolls otherwise under this contract required to be submitted for the above period are correct and complete; that the wage rates for laborers or mechanics

contained therein are not less than the applicable wage rates contained in any wage determination incorporated into the contract; that the classifications set forth therein for each laborer or mechanic conform with the work performed.

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

"(4) That:

"(a) Where fringe benefits are paid to approved plans, funds, or programs, [i]n addition to the basic hourly wage rates paid to each laborer or mechanic listed in the above referenced payroll, payments of fringe benefits as listed in the contract have been or will be made to appropriate programs for the benefit of such employees, except as noted in Section 4(c) below.

"(b) Where fringe benefits are paid in cash, [e]ach laborer or mechanic listed in the above referenced payroll has been paid as indicated on the payroll, an amount not less than the sum of the applicable basic hourly wage rate plus the

<sup>13</sup> Each was filled in with the words "Administrative Assistant."

<sup>14</sup> Each was filled in with the words "Labor Ready Northwest, Inc."

<sup>15</sup> Each was filled in with the words "Public Works Bldg"

<sup>16</sup> Each was filled in with the words "Labor Ready Northwest, Inc."

amount of the required fringe benefits as listed in the contract, except as noted in Section 4(c) below.

“(c) Exceptions

“Exception ( <i>Craft</i> )	Explaination
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“5. Remarks

“6. Name	Title	Signature
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“The willful falsification of any of the above statements may subject the contractor or subcontractor to civil or criminal prosecution. See Section 1001 of Title 18 and Section 3729 of Title 31 of the United States Code.

“DD FORM 879, APR 1998 (EG)  
\* \* \*”

37) BOLI has created a form called a “WH-38” that contractors and subcontractors may use to comply with the wage certification statement required by ORS 279.354. The certified statement accompanying the sample of Form WH-38 disseminated by BOLI with its prevailing wage rate booklet containing prevailing wage rates effective July 1, 1999, contains the following language:

“CERTIFIED STATEMENT

“I, (*Name of signatory party*)(*title*) do hereby state:

“(1) That I pay or supervise the payment of the persons employed by; (*contractor, subcontractor or surety*) on the (*building or work*)[;] that during the payroll period commencing

on the \_\_\_\_ day of \_\_\_\_\_, 19\_\_, and ending the \_\_\_\_ day of \_\_\_\_\_, 19\_\_ all persons employed on said project have been paid the full weekly wages earned, that no rebates have been or will be made either directly or indirectly to or on behalf of said \_\_\_\_\_ from the full weekly wages earned by any persons, and that no deductions have been made either directly or indirectly from the full wages earned by any person, other than permissible deductions as specified in ORS 652.610, and described as follows:

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

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

and Training, United States Department of Labor.

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

"(name and title) (signature)"

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

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

40) In the same letter, Finnegan provided computer

printouts containing the following information concerning Respondent's Cornelius Project employees:

**Catherine Clayton:** worked 5.25 hours on 6/12/00. Paid \$34.13<sup>17</sup> on 6/12/00 (@ \$6.50 per hour) and \$110.72 (@ \$21.09 per hour) on 11/21/00.

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

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

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

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

**Chris Francis:** worked 6 hours on 6/28/00. Paid \$60 (@ \$10 per hour). Paid \$131.16 (@ \$21.86 per hour)

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<sup>17</sup> All payments represent gross wages.

“back wages” on 7/6/00. Worked 4 hours on 7/15/00, 8 hours on 7/17/00, 8 hours on 7/18/00, 9 hours on 7/19/00, 4 hours on 8/9/00, 8.5 hours on 8/10/00, 8 hours on 8/11/00, and 8 hours on 8/12/00 (all @ \$31.26 per hour).

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

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

### THE CENTRAL PROJECT

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

44) On Saturday, September 2, 2000, Respondent dispatched Aaron Wadsworth to perform work for Andersen

Woodworks at Central High School.<sup>18</sup> Wadsworth worked 8.5 hours for Andersen on the Central Project on September 2 and was paid \$57.38 in gross wages, computed at \$6.75 per hour.

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

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

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<sup>18</sup> The words “High School” appear in the “Other” box of Respondent’s September 2, 2000, work ticket reflecting Wadsworth’s work.

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

48) On January 4, 2001, Laing telephoned Salazar and told her that Wadsworth's correct classification was Carpenter, Group 1, and that Respondent must pay Wadsworth overtime for all 8.5 hours that he worked because September 2 was a Saturday. Laing told Salazar that the correct rate was \$43.83 per hour. That same day, Salazar caused a check to be issued to Wadsworth in the amount of \$194.50 (\$315.58 gross pay less deductions). This was the total amount due to Wadsworth.

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

### THE BEAVER ACRES PROJECT

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

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

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

"In addition, if you paid fringes to a third party trust, plan, fund,

or program (such as vacation, holiday, medical, pension, etc.), please provide the hourly fringe rate paid to each program and copies of the monthly statements and copies (front and back) of canceled checks showing payments to the fund.

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

"\* \* \* \* \*

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

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

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

a) A report for April 22-28 2000, for laborers from Respondent's Tigard location lists the wage rate of all 24 workers as \$6.50 per hour of straight time work. "HORIZON RES-

TORATION SYSTEMS" is typed on the first line of the report. A handwritten notation on top of the report reads "ST rate 27.59 OT 37.64." After each worker's name is a typed figure in a box showing gross wages calculated at \$6.50 per hour,<sup>19</sup> which has been crossed out. In the same box, a handwritten figure appears that is much higher and appears to be the result of multiplying the hours worked by \$27.59 per hour.<sup>20</sup> Respondent's typed entries show that Cheri Lagasse worked 10.5 hours of straight time on April 28, 2000, and was paid \$172.25 for 26.5 hours of straight time work. Handwritten figures in the same boxes show that she was paid for 24 straight time hours and 2.5 overtime hours, with gross wages of \$756.16. Six workers have \$2.00 deducted from their pay with the notation "equip." This report is not accompanied by a statement of certification. (Exhibit A-33, pp. 10-13)

b) A second report for April 22-28, 2000 for laborers from Respondent's Tigard location that has "CORRECTION" marked on it. With one exception, all workers listed are the same. The added worker is

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<sup>19</sup> For example, Arturo Perez's gross wages for 8 hours equal \$52.00.

<sup>20</sup> For example, Arturo Perez's handwritten gross wages are \$220.72 (8.0 x \$27.59).

Kerry Lee, who is shown as working 8 hours straight time and 5 hours overtime on April 28, 2000, earning gross wages of \$400.92. Lee and all others on the list are described as "laborers" at the rate of pay of \$27.59 per hour straight time and \$34.64 overtime. The handwritten gross wages on the original report are typed in this report. Cheri Lagasse is shown as having worked 8.0 hours of straight time and 2.5 hours of overtime on April 28. A Statement of Compliance dated "2000/8/9" accompanied this report. It contains a statement above the certificate preparer's signature that reads: "I have read this Certified Statement, know the contents thereof, and it is true to my knowledge." (Exhibit A-33, pp. 5-9)

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

d) A second report for April 29-May 5, 2000, for workers from Respondent's Tigard location dated 8/9/2000 with "CORRECTION" marked on it that lists David Batson as a "laborer with a wage rate of \$37.64 per hour for 8.5 hours

of overtime worked on Saturday, April 29, 2000, with gross wages of \$319.94. A Statement of Compliance dated "2000/8/9" accompanied this report. It contains a statement above the certificate preparer's signature that reads: "I have read this Certified Statement, know the contents thereof, and it is true to my knowledge." (Exhibit A-33, pp. 1-2)

e) A report for May 6-12, 2000, for laborers from Respondent's Tigard location that lists 25 workers, all classed as "laborers" whose wage rate was \$21.09 per hour straight time and \$31.64 per hour overtime. The report states all 25 performed work only on May 11. The report shows the following number of straight time hours worked by workers: Henry Nono – 16.0, James Wagner – 24.0, Donald Buck – 27.5, David Lagasse – 30.0, Cheri Lagasse – 24.0, Ryan Bruno – 14.0, Vernon Ahlgren - - 30.0, Charles Penn -- 22.0, Dale Saffel -- 16.0. The report also shows that all 25 workers were paid \$21.09 per hour for their work.<sup>21</sup> "HORIZON RESTORATION SYSTEMS" is printed across the top of the first page of the report. "CORRECTION FOR ELEM. PW" is typewritten under the box entitled "PROJECT AND LOCATION," and "Back paid for W/E 4/28 is handwritten in

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<sup>21</sup> For example, Dale Saffel's gross wages were \$337.44 (16.0 x \$21.09).

that same box.” “NOT A PAY-ROLL” is typed in the box entitled “PROJECT OR CONTRACT NO.” This report is not accompanied by a statement of certification. (Exhibit A-33, pp. 14-17)

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

“Thank you for providing copies of certified payroll reports on the above prevailing wage project as requested. However, also requested were any and all time records and payroll records for all employees who performed work on this project. These are still needed. Please ensure you provide this information from all Labor Ready branches that provided workers for this project. The time records should include copies of work tickets for each person who worked on this project, for each day worked. If you have any questions about the type of records being requested, please contact me at the telephone number shown at the bottom of this letter.

“While it appears most workers listed on the certified payroll reports were paid correctly, I have some concerns about the records, and it does appear one person may be due overtime wages. First, Kerry Lee does not appear on the first two version[s] of the certified payroll report, i.e., on the one

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

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

“Beaverton School District provided the Bureau with copies of certified payroll, and actually provided more reports than Labor Ready did. Labor Ready provided reports from the Tigard branch only, from

April 22 to May 5. However, the School District provided reports from the Tigard branch through May 19, and from the Parkrose branch for work from April 29 to May 19.

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

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

"For several employees, there is a \$2.00 deduction shown on the certified payroll report, with the hand-written notation of "equip." Please explain what this deduction is for. ORS 652.610 requires that any deductions from an employee's pay must be for the employee's benefit, and must be authorized in writing by the employee. Please provide copies of the written authorizations for the seven employees with the equipment deductions. If this is an unauthorized de-

duction, it is possible the amount deducted will need to be refunded to the employees.

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

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

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

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

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

a) Payroll report for April 22-28, 2000 for "Group 1" laborers from Respondent's Tigard location on the Beaver Acres Project. "CORRECTION" is stamped on this document. This was accompanied by a statement of compliance with form language identical to that on statements of compliance submitted with payroll reports by Respondent for the Cornelius Project. This report shows that Kerry Lee worked 12.0 hours of straight time and 1.0 hour of overtime on April 28 and was paid gross wages of \$368.72. (Exhibit A36, pp.8-13)

b) Payroll report for April 29-May 5, 2000, for "Group 1" laborers from Respondent's Parkrose location. "CORRECTION" is stamped on this document. This was accompanied by a statement of compliance with form language

identical to that on statements of compliance submitted with payroll reports by Respondent for the Cornelius Project. (Exhibit A-36, pp. 1,3)

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

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

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

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

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

amounts (i.e., workers on prevailing wage jobs).

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

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

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

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

“You must still provide documentation that has been requested twice before. This is the third and final request for this documentation. Please provide any and all daily time records (or ‘wage tickets,’ if this is the Labor Ready term for time records) and payroll

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

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

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

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

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

"Please explain why Labor Ready did not provide the Bureau all certified payroll reports for this project, as originally re-

quested. Even with the amended certified payroll you provided with your letter, there are at least two certified payroll reports missing. \* \* \*

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

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

"Most importantly, the certifying statement on the State's form is missing from Labor Ready's form. You must include the sentence, 'I have read this certified statement, know the contents thereof and it is true to my knowledge.' Without this statement, this report is incomplete and is not 'certified.' I am enclosing a copy of Oregon's WH-38 form, along with instructions for completing the form. While

you do not have to use this exact form, OAR 839-016-0010 requires that when using a different form, it must contain all of the information required on the WH-38.

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

“\* \* \* \* \*

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

“The final issue deals with Daniel Mark and Daryl Single. The information I have indicates these employees worked on this project. Your response

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

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

(Emphasis in original)

With her letter, Wooley enclosed a copy of BOLI’s form WH-38 and a

two-page instruction sheet describing how to complete the WH-38.

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

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

62) Some time later,<sup>22</sup> Wooley received two more certified payroll reports from Respondent. The reports were dated "2000-11-3" are summarized as follows:

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

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

The certified statements accompanying these payroll reports are identical to the statements submitted accompanying Respondent's Cornelius Project payroll reports with one significant exception. Above the signature of the individual preparing it appears the typed statement "I have read this Certified Statement, know the

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<sup>22</sup> Wooley did not testify as to the date these certified payroll reports were received, and they do not have a BOLI date stamp on them showing the date they were received.

contents thereof, and it is true to my knowledge.”

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

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

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

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

“\* \* \* \* \*

“When we spoke on Thursday, I mentioned that while I had received some of the requested documentation, Labor Ready had not responded to any of the questions I asked in my letter of October 13, 2000. At this point, rather than provide individual answers to all those questions, I think it would be more beneficial to simply ask for an answer to one question, which is why there continue to be errors on the certified payroll reports.

“\* \* \* \* \*

“Please provide the requested documentation (proof of payments to workers) and an

answer to the question of certified payroll report errors by no later than February 7, 2001. Failure to respond may negatively impact the administrative action currently underway.”

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

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

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

69) During her investigation, Wooley never made any verbal statements to any representative of Respondent that she would

recommend the assessment of civil penalties if Respondent did not timely submit requested records.

### **RESPONDENT'S GENERAL BUSINESS PRACTICES**

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

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

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

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

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

"(A) *Payment of prevailing wages to workers.* Prevailing wages are usually (but not always) much higher than competitive wages, and they vary from region to region.

Prevailing wages may also include daily or weekend overtime obligations which are different from general state law. A statement of the prevailing wage for each job category in a particular region may be obtained from the federal or state (as applicable) Department of Labor.

"\* \* \* \* \*

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

### **MITIGATION**

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

75) Since the Beaver Acres Project, Rischman has created an audit team in her department that conducts daily reviews of two reports. The first is a prevailing wage rate "possibilities" account for Respondent's jobs that were new the prior day that and not marked as prevailing wage rate jobs, but which contain one of 25

keywords, such as “high,” “school,” and “airport” that indicate a possible prevailing wage rate job. The second is when a branch office flags a job as a prevailing wage rate job, Respondent’s computer system prompts the branch employee to send a prevailing wage rate sheet to corporate headquarters in Tacoma. Upon receipt of the rate sheet, one of Rischman’s subordinates will review it and ascertain that all rates have been correctly paid. Rischman receives an automatic e-mail if this isn’t done.

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

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

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

#### **AGGRAVATION**

79) On January 26, 2000, Tyrone B. Jones, a BOLI Wage & Hour Division compliance specialist, sent a letter to Timothy J. Adams at Labor Ready’s corporate office, 1016 S. 28<sup>th</sup> Street, Tacoma, WA 98409. The letter informed Adams that payroll records

provided by LRI for the Southern Oregon University Center For The Visual Arts project contained incorrect trade classifications for LRI’s workers and that LRI had not provided a certified statement that met the requirements of ORS 279.354. On February 1, 2000, LRI provided payroll records for the Southern Oregon project that listed the classification of LRI’s sole employee on the job as “laborer” and included a statement of certification containing the following language:

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

The original payroll reports were not offered as evidence.

80) The Agency offered no evidence in support of its allegation contained in its motion to amend the Notice of Intent that Respondent failed to pay its employees at least the statutory minimum wage of \$6.50 per hour for time spent travelling between Respondent’s office and the work location where the employees worked for Respondent’s clients and back again.<sup>23</sup>

#### **CREDIBILITY FINDINGS**

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

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<sup>23</sup> See Finding of Fact 15 – Procedural, *supra*.

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

#### **ULTIMATE FINDINGS OF FACT**

##### **CORNELIUS PROJECT**

1) On December 20, 1999, a contract for the Cornelius Project, a public works project in Hillsboro, Oregon, was awarded to I-5 Excavating, Inc. ("I-5"). The Project was first advertised for bid on November 8, 1999, and its contract was for the amount of \$1,666,600.

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

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

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

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

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

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

8) Francis was initially paid \$10 per hour for his June 28, 2000, work on the Cornelius Project. Francis was paid \$31.26 per hour for his carpenter work on the Cornelius Project in July and August 2000.

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

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

rected report, filed on November 21, 2000, also lacked a statement of certification.

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

12) On August 18, 2000, Respondent filed a payroll report for the week ending July 7, 2000, for work on the Cornelius Project. This report lacked the statement of certification required by ORS 279.354 and OAR 839-016-0010 and stated that Baker worked 15 hours of straight time as a "laborer" on July 6. Respondent's corrected report, filed on November 21, 2000, also lacked a statement of certification and stated that Baker had not worked at all on July 6.

13) On August 18, 2000, Respondent filed a payroll report for the week ending July 21, 2000, for work on the Cornelius Project. This report lacked the statement of certification required by ORS 279.354 and OAR 839-016-0010 and stated that Francis worked as a "laborer" for 4 hours of straight

time on Saturday, July 15, and 9 hours of straight time on July 19. Respondent's corrected report, filed on November 21, 2000, was identical, except for the payroll number, to the first report, and also lacked a statement of certification.

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

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

16) Respondent did not post or keep posted the applicable pre-

vailing wage rates while its worker performed work on the Cornelius Project.

#### **CENTRAL PROJECT**

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

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

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

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

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

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

#### **BEAVER ACRES PROJECT**

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

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

25) On August 4, 2000, Susan Wooley, a compliance specialist employed by the Wage & Hour Division of BOLI, sent a letter to Respondent in which she

requested, among other items, "any and all time records, payroll records, and certified payroll records for all employees who performed work on the project." Wooley requested these records because she was unable to determine if Respondent had paid the prevailing rate of wage to its employees on the Beaver Acres Project without them. Wooley requested that these records be provided to her no later than August 21, 2000.

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

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

28) On October 3, 2000, Wooley received a new set of documents from Baldwin that consisted of corrected payroll reports for the Beaver Acres job. This set

of reports lacked the statement of certification quoted in Ultimate Finding of Fact 23. One of the reports showed that a worker had worked 12 hours of straight time and one hour of overtime on a single weekday.

29) After reviewing Respondent's October 3 submissions, Wooley was still unable to determine if Respondent's workers had been paid the prevailing wage rate. On October 13, 2000, she sent a third letter to Respondent that again requested time records Respondent's workers had worked and payroll records documenting the pay that Respondent's workers had actually received. Wooley also requested copies of all canceled checks issued to Respondent's workers on the Beaver Acres Project and other information concerning the workers. Wooley requested that this documentation be provided no later than October 25, 2000, and stated that she would subpoena the records if they were not provided by that date and "take further action as allowed by the prevailing wage rate laws."

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

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

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

### CONCLUSIONS OF LAW

1) ORS 279.348(3) provides:

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

OAR 839-016-0004(17) provides:

"Public work', 'public works' or public works project' includes but is not limited to roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or

painting of which is carried on or contracted for by any public agency the primary purpose of which is to serve the public interest regardless of whether title thereof is in a public agency but does not include the reconstruction or renovation of privately owned property which is leased by a public agency."

ORS 279.348(5) provides:

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

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

2) ORS 279.350(1) provides, in pertinent part:

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

OAR 839-016-0035(1) provides:

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

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

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

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

\*\*\*\*\*

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

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

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

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

“(A) On Saturdays;

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

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

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

3) Former ORS 279.354 provided, in pertinent part:

“(1) The contractor or the contractor’s surety and every subcontractor or the subcontractor’s surety shall file certified statements with the public contracting agency in writing in form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying the hourly rate of wage paid each worker which the contractor or the subcon-

tractor has employed upon such public work, and further certifying that no worker employed upon such public work has been paid less than the prevailing rate of wage or less than the minimum hourly rate of wage specified in the contract, which certificate and statement shall be verified by the oath of the contractor or the contractor's surety or subcontractor or the subcontractor's surety that the contractor or subcontractor has read such statement and certificate and knows the contents thereof and that the same is true to the contractor or subcontractor's knowledge. The certified statements shall set out accurately and completely the payroll records for the prior week including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid.

"(2) Each certified statement required by subsection (1) of this section shall be delivered or mailed by the contractor or subcontractor to the public contracting agency. Certified statements shall be submitted as follows:

"(a) For any project 90 days or less from the date of award of the contract to the date of completion of work under the contract, the statements shall be submitted once before the first payment and once before

final payment is made of any sum due on account of a contract for a public work.

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

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

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

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

"(3) When submitting the weekly payroll on a form other than Form WH-38, the contractor or subcontractor shall

attach the certified statement contained on Form WH-38 to the payroll forms submitted.

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

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

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

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

"(a) For any public works project of 90 days or less from

the date of award of the contract to the date of completion of work under the contract, the form shall be submitted once within 15 days of the date the subcontractor first began work on the project and once before the contractor makes its final inspection of the work performed by the subcontractor;

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

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

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

Respondent filed several payroll reports for work performed by its employee on the Beaver Acres Project that did not meet the requirements of ORS 279.354 and

OAR 839-016-0010, constituting one violation of ORS 279.354 and OAR 839-016-0010.<sup>24</sup>

4) ORS 279.350(4) provides:

“Every contractor or subcontractor engaged on a project for which there is a contract for a public work shall keep the prevailing wage rates for that project posted in a conspicuous and accessible place in or about the project. Contractors and subcontractors shall be furnished copies of these wage rates by the commissioner without charge.”

OAR 839-016-0033(1) provides:

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

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

5) ORS 279.355(2) provides:

“Every contractor or subcontractor performing work on public works shall make available to the commissioner for inspection during normal business hours and, upon request made a reasonable time in ad-

vance, any payroll or other records in the possession or under the control of the contractor or subcontractor that are deemed necessary by the commissioner to determine if the prevailing rate of wage is actually being paid by such contractor or subcontractor to workers upon public works.”

OAR 839-016-0030 provides, in pertinent part:

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

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

Respondent committed one violation of ORS 279.355 and OAR 839-016-0030(2) by failing to make records necessary to determine if the prevailing wage rate was paid to its employees on the

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<sup>24</sup> The forum finds one violation because the Agency only alleged one violation.

Beaver Acres Project at the time requested by a representative of the Wage and Hour Division.

6) ORS 279.370 provides, in pertinent part:

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

OAR 839-016-0500 provides:

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

OAR 839-016-0520 provides:

"(1) The commissioner shall consider the following mitigating and aggravating circumstances when determin-

ing the amount of any civil penalty to be assessed against a contractor, subcontractor or contracting agency and shall cite those the commissioner finds to be applicable:

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

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

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

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

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

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

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

"(4) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the contractor, subcontractor or contracting agency for the purpose of re-

ducing the amount of the civil penalty to be assessed."

OAR 839-016-0530 provides, in pertinent part:

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

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

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

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

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

"\* \* \* \* \*

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

OAR 839-016-0540 provides, in pertinent part:

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

all the facts and on any mitigating and aggravating circumstances.

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

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

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

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

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

"\* \* \* \* \*

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

"(6) The civil penalties set out in this rule shall be in addition to any other penalty

assessed or imposed by law or rule.”

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

7) ORS 279.361(1) provides:

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

tion and the period of time for which they are ineligible. A copy of the list shall be published, furnished upon request and made available to contracting agencies.”

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

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

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

“\* \* \* \* \*

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

“\* \* \* \* \*

“(4) The Wage and Hour Division shall maintain a written list of the names of those contractors, subcontractors and other persons who are ineligible to receive public works contracts

and subcontracts. The list shall contain the name of contractors, subcontractors and other persons, and the name of any firms, corporations, partnerships or associations in which the contractor, subcontractor or other persons have a financial interest. Except as provided in OAR 839-016-0095, such names will remain on the list for a period of three (3) years from the date such names were first published on the list.”

Respondent intentionally failed to pay the prevailing wage rate to five employees for their work on the Cornelius Project and one employee on the Central Project. Respondent intentionally failed to post the prevailing wage rates for both the Cornelius and Central Projects. As a result, the Commissioner must place Respondent on the List of Ineligibles for a period not to exceed three years. The Commissioner’s decision to place Respondent on that list for three years based on Respondent’s five violations of ORS 279.350(1) and single violation of ORS 279.350(4) related to the Cornelius Project, and two years based on Respondent’s single violation of ORS 279.350(1) and single violation of ORS 279.350(4) related to the Central Project, with these periods of time to run concurrently, is an appropriate exercise of his discretion.

## OPINION

### RULINGS RESERVED FOR PROPOSED ORDER

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

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

In its exceptions, the Agency acknowledged that Exhibits A-54 to A-56 did not establish a “prior violation” within the meaning of OAR 839-016-0520(1)(b), but argued that they were relevant to show “[t]he actions of the \* \* \* subcontractor \* \* \* in responding to previous violations of statutes and rules” under OAR 839-016-0520(1)(a). The forum disagrees. This rule is intended to penalize contractors and subcontractors for actions taken after an actual de-

termination that a previous violation occurred.<sup>25</sup> It does not apply to actions taken before such a determination has been made. This rule is in contrast to the “prior violation” rule, which turns on the date the action constituting the violation occurred, not the date the action was determined to be a violation. In this case, December 13, 2001, the date the Final Order in Case No. 31-01 issued, was the first date on which Respondent was determined to have committed a violation. Respondent’s “actions” with regard to Alder took place in May 2001, and cannot be evaluated as responding to a subsequent determination. The Agency’s exception is DENIED.

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

These exhibits documented a wage claim filed by Roger Shurtz on February 9, 1999, alleging he had been employed by “Labor Ready” and was still owed \$282 for work performed between August 21 and December 3, 1998, that BOLI sent a demand letter to “Labor Ready, Inc.,” and that BOLI received a check from “Labor Ready” in the amount of \$282 made out to Roger Shurtz. These exhibits were also offered as evidence that Respondent had previously violated statutes and rules, constituting an aggravating

circumstance under OAR 839-016-0520(1)(b). Evidence produced by the Agency shows that Respondent was not registered to do business in Oregon until December 18, 1998, and there is no evidence that Shurtz was employed by Respondent LRNWI, as opposed to LRI, which was registered to do business in Oregon at that time. Respondent’s objection to these exhibits on the basis of relevance is sustained because the Agency did not establish that Shurtz’s claim was against Respondent.

**C. Exhibits 72 and 73.**

These exhibits consist of documents that the Agency downloaded from the Internet between the first and second day of hearing. They were offered in rebuttal to show that the operations of LRNWI and LRI were sufficiently intertwined so that LRI’s prior violations should be imputed to LRNWI for the purpose of assessing civil penalties. However, although these documents supported the allegations in the Agency’s amended Notice of Intent, they did not rebut any evidence presented by Respondent and were irrelevant for that purpose. Respondent’s relevancy objection to Exhibits A-72 and A-73 is sustained.

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<sup>25</sup> Examples of a “determination” that would establish the existence of a “prior violation” include a Commissioner’s Final Order, an admission of liability by a respondent, or a previous adjudication in another forum of the alleged “prior violation.”

**RESPONDENT’S MOTION TO  
DISMISS THE AGENCY’S**

**CHARGE THAT RESPONDENT FAILED TO POST THE APPLICABLE PREVAILING WAGE RATES ON THE CORNELIUS AND CENTRAL PROJECTS**

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

after the Agency had rested its case. The Agency filed exceptions to the ALJ's conclusions, arguing that it had presented a prima facie case in its case in chief and that evidence presented after the Agency had rested its case must be considered in a review of Respondent's motion to dismiss. The Agency cited Oregon appellate court decisions in support of both points.

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

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

The Agency established the following relevant facts in its case in chief. First, Respondent did not begin paying the prevailing wage rate until July 6, 2000, well after its employees began working on the Cornelius Project. Second, Respondent underpaid its worker

on the Central Project until the Agency notified Respondent that the Central Project was a prevailing wage rate job. Third, Timothy Adams, Respondent's general counsel and executive vice president, previously testified on June 19, 2001, a year after Respondent employed workers on the Cornelius and Central Projects, that the posting of prevailing wage rates on job sites by Respondent where Respondent has workers "is not part of our compliance process."<sup>26</sup> As the Agency correctly points out, proof includes both facts and inferences. *In the Matter of City of Umatilla*, 9 BOLI 91, 104 (1990), *affirmed without opinion*, *City of Umatilla v. Bureau of Labor and Industries*, 110 Or App 151 (1991); *Arkad Enterprises v. Bureau of Labor and Industries*, 107 Or App 384, 386-87 (1991), (quoting *City of Portland v. Bureau of Labor and Industries*, 298 Or 104, 118 (1984)). A reasonable inference can be drawn from these facts that Respondent did not post the applicable prevailing wage rates on the Cornelius or Central Projects. Consequently, the forum confirms the ALJ's original ruling at hearing to deny Respondent's motion to dismiss the Agency's posting allegations and reverses the ALJ's contrary ruling in the proposed order.

The forum also reverses the ALJ's ruling in the proposed order that evidence presented after the Agency rested its case and Respondent's motion to dismiss was

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

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

ORS 279.350(4) requires all subcontractors who employ workers on a public works project to "keep the prevailing wage rates for that project posted in a conspicuous and accessible place in or about the project."

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

Respondent's branch manager credibly testified that on July 6 she took a copy of the applicable prevailing wage rates to that project, but only gave them to the prime contractor's foreman and asked him to post them. She took no ac-

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<sup>26</sup> *Id.*, at 283, fn. 18.

tion to ascertain that they had actually been posted or that they were kept posted. Assuming *arguendo* that the prime contractor's foreman posted the rates given to him by Respondent's branch manager, this still does not meet the statutory posting requirement. See *In the Matter of Labor Ready Northwest, Inc.*, 22 BOLI 245, 281-82 (2001), *appeal pending*. Respondent's branch manager further testified that she did not believe the Cornelius Project was a public works project until July 6, and Respondent presented no other evidence that it had taken any action to post the rates prior to July 6. It is undisputed that Respondent did not pay its workers on the project the prevailing wage rate before that date. Based on Shields' testimony that she did not believe the Cornelius Project was a public works project before July 6 and her attempted posting that date, the forum infers that Respondent did not post the prevailing wage rates for that project before July 6, constituting a violation of ORS 279.350(4).

1. Aggravating circumstances.

The violation is a serious one that requires placement on the Commissioner's List of Ineligibles if the Commissioner finds that the violation was intentional. The magnitude is substantial because Respondent did not provide its workers with any way of finding out they were being underpaid and six workers were initially paid less than the prevailing wage rate. There was no evidence that Respondent made any inquiry as to

whether the job was a public works when taking the job order. Respondent also failed to take adequate steps to post once it learned the Cornelius Project was a public works. In addition, Respondent previously violated the same statute on the New Bend Middle School Project.

2. Mitigating circumstances.

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

3. Amount of civil penalty.

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

**B. The Central Project.**

In contrast to the Cornelius Project, where Respondent employed workers for several months, Respondent only employed one worker for one day on the Central Project. The Agency presented evidence that Respondent initially paid its worker \$6.75 per hour, as opposed to the prevailing wage rate of \$43.83 per hour, and that Respondent sent a

check for the difference to BOLI four months later when BOLI informed Respondent's Salem branch office that the Central Project was a public works. Based on Rischman's testimony, Respondent's statements in its training manual, and Respondent's prompt payment of wages owed in the Cornelius and Central Projects when Respondent learned those projects were public works, the forum concludes that Respondent has a corporate policy of paying its workers the prevailing wage rate on public works where Respondent is aware that the job is a public works. Since Respondent did not initially pay its worker the prevailing wage rate in this case, the forum infers that Respondent did not know the Central Project was a public works until so notified by BOLI. Lacking knowledge that the Central Project was a public works, Respondent would have had no reason to post, and there was no evidence presented that Respondent did post. From this evidence, the forum concludes that Respondent did not post the Central Project and violated ORS 279.350(4).

1. Aggravating circumstances.

Respondent's violation is a serious one that requires placement on the Commissioner's List of Ineligibles if the Commissioner finds that the violation was intentional. The magnitude is substantial because Respondent did not provide its worker with any way of finding out he was being underpaid and Respondent initially paid him less than the prevailing wage rate.

There was no evidence that Respondent made any inquiry as to whether the job was a public works when taking the job order, even though the evidence indicates Respondent knew the job was at a high school. In addition, Respondent previously violated the same statute twice on the New Bend Middle School and Cornelius Projects.

2. Mitigating circumstances.

There are no mitigating circumstances.

3. Amount of civil penalty.

The Agency sought a \$5,000 civil penalty for Respondent's violation. This is Respondent's third violation, and the forum finds that a \$5,000 civil penalty is appropriate.

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

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

BOLI 151, 169-70 (2000). In this case, elements (1) and (2) are undisputed on both the Cornelius and Central Projects.

**A. The Cornelius Project.**

The Agency alleged that Respondent failed to pay the prevailing wage rate to eight workers – Joseph Baker, Catherine Clayton, Chris Francis, Jason Henry, Renaldo Ramirez, Alfredo Rodriguez, Miguel Silva, and David Snyder -- on the Cornelius Project. The evidence shows that Respondent employed both laborers and carpenters on the Cornelius Project, and that the applicable prevailing wage rate, including fringe benefits, was \$27.59 per hour for laborers and \$31.86 per hour for carpenters. Respondent's records show that that six workers – Clayton, Ramirez, Rodriguez, Baker, Francis, and Faried Hawash -- were initially paid less than the prevailing wage rate. There is no evidence that Henry or Silva worked on the Cornelius Project or that Snyder was underpaid. With one exception, Respondent subsequently issued back pay checks to all six workers, bringing their wages up to the prevailing wage rate. That exception is Francis, who received a check for back pay, but was still owed \$34.50 in unpaid wages at the time of hearing. Although Respondent's subsequent payment of back wages may be considered as a mitigating factor,<sup>27</sup> it is not a

defense to the alleged violation. See *In the Matter of Loren Malcolm*, 6 BOLI 1, 11 (1986). The forum does not consider Respondent's failure to pay Hawash the prevailing wage rate a violation for the reason that Hawash's name was not included in the Agency's list of eight underpaid workers in its Notice of Intent, and the Notice was not amended to include it. The forum finds that Respondent committed five violations of ORS 279.350(1) by failing to pay Clayton, Ramirez, Rodriguez, Baker, and Francis the prevailing wage rate when their wages were initially paid.

1. Aggravating circumstances.

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

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

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<sup>27</sup> See *In the Matter of Labor Ready Northwest, Inc.*, 22 BOLI 245, 286 (2001), *appeal pending*.

Giving Respondent the benefit of the doubt, Respondent's violation stemmed from its initial lack of knowledge that the Cornelius Project was a public works project. Although Respondent's branch manager testified that no one from I-5 informed Respondent that the Cornelius Project was a public works project, there was no evidence presented that anyone from Respondent inquired if the job was a public works project prior to July 6, over three weeks after Respondent first sent workers to that project. This violation might have been avoided altogether if Respondent had simply made that inquiry when taking I-5's job order or had sent someone to visit the job site. However, Shields testified that she had received no training about prevailing wage rate jobs prior to the Cornelius Project. If she had received this training, she might have been aware of Respondent's corporate advice to "not rely on the customer to advise you as to whether a job is prevailing wage."<sup>28</sup>

This violation is a serious one that requires debarment if the Commissioner finds that the violation was intentional. The magnitude is substantial because it resulted in the underpayment of six workers, three of whom -- Rodriguez, Clayton, and Ramirez -- did not receive their full pay until November 21, 2000, five months after their pay was due, and a fourth -- Francis -- who was still

owed wages at the time of the hearing. This occurred despite Respondent acquiring actual knowledge on July 6, 2000, that the Cornelius Project was a prevailing wage rate job.

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

### 2. Mitigating circumstances.

There are two circumstances that mitigate Respondent's five violations to a limited degree. First, Respondent eventually paid full back pay to five workers and all but \$34.50 in back pay to a sixth. Second, Respondent's prevailing wage unit manager has created an audit team in her department that conducts daily reviews of two reports in an attempt to minimize the possibility that Respondent has unknowingly sent workers to prevailing wage rate jobs.<sup>29</sup>

### 3. Amount of civil penalty.

The Agency alleged that Respondent's violations were "second repeated" violations and sought \$3,000 in civil penalties for each alleged violation, for a total of \$24,000. The forum has found five violations. OAR 839-016-0540(2) defines "repeated violations" as "violations of a provision of law or rule which has been vio-

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<sup>28</sup> See Finding of Fact 73 -- The Merits, *supra*.

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<sup>29</sup> See Finding of Fact 75 -- The Merits, *supra*.

lated on more than one project within two years of the date of the most recent violation.” Here, Respondent’s only prior violation occurred at the New Bend Middle School project and is reflected in the Commissioner’s final order in case number 31-01. Consequently, Respondent’s five Cornelius Project violations are properly classified as “first repeated” violations. OAR 839-016-0540 provides that the *minimum* civil penalty for a first repeated violation is “[t]wo times the amount of the unpaid wages or \$3,000, whichever is less[.]”

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

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

The Agency alleged that Respondent failed to pay the prevailing wage rate to one worker, Aaron Wadsworth, who was employed by Respondent as a carpenter and laborer on the Central Project. The evidence shows that Respondent employed Wadsworth on that project for 8.5 hours on one day. That day was September 2, 2000, a Saturday. Credible evidence established that Wadsworth performed work fitting into the classifications of both carpenter and laborer. The Agency established that Wadsworth was entitled to be paid a carpenter’s wage, the higher rate, because

there was no way to determine how many hours he worked in each classification. The applicable prevailing wage rate on the Central project for carpenters was \$23.94 per hour plus \$7.92 per hour in fringe benefits, with an overtime rate totaling \$43.83 per hour. Instead, Respondent paid Wadsworth \$6.75 per hour. Four months later, Respondent issued a back pay check to Wadsworth, bringing his wages up to the prevailing wage rate. Again, although Respondent’s subsequent payment of back wages may be considered as a mitigating factor,<sup>30</sup> it is not a defense to the alleged violation. *Loren Malcolm*, 6 BOLI at 11. The forum finds that Respondent committed one violation of ORS 279.350(1) by failing to pay Wadsworth the prevailing wage rate when his wages were initially paid.

##### 1. Aggravating circumstances.

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

The evidence indicates that Respondent’s problem was caused by its apparent ignorance that the Central Project was a public works project. Again, there was no evidence presented that

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<sup>30</sup> See *id.*

Respondent's branch manager inquired of Andersen Woodworks, the employer to whom it dispatched Wadsworth, if the job was a prevailing wage rate job. Respondent's violation might have been avoided altogether if its representative had simply made that inquiry when taking the job order or had sent someone to visit the job site.

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

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

### 2. Mitigating circumstances.

There are two circumstances that mitigate Respondent's single violation to a limited degree. First, Respondent sent the Agency a check for the full amount of back pay owed to its worker, Wadsworth, shortly after the Agency notified Respondent of the under-

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

### 3. Amount of civil penalty.

The Agency alleged that Respondent's violation was a "second and subsequent repeated" violation and sought \$5,000 in civil penalties for the alleged violation. OAR 839-016-0540(2) defines "repeated violations" as "violations of a provision of law or rule which has been violated on more than one project within two years of the date of the most recent violation." Here, Respondent had two violations within two years of September 2, 2000. First, the New Bend Middle School Project violation that is reflected in the final order in case number 31-01. Second, Respondent's violations at the Cornelius Project. Consequently, Respondent's Central project violation is properly classified as a "second and subsequent repeated" violation. OAR 839-016-0540 provides that the *minimum* civil penalty for a second and subsequent repeated violation is "[t]hree times the amount of the unpaid wages or \$5,000, whichever is less[.]"

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

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

*Former* ORS 279.3454 required contractors and subcontractors on public works projects to file certified statements, in writing, “in form prescribed by the Commissioner of the Bureau of Labor and Industries.” The certification was to be “verified by the oath of the \* \* \* subcontractor \* \* \* that the \* \* \* subcontractor has read such statement and certificate and knows the contents thereof and that the same is true to the \* \* \* subcontractor’s knowledge.” It also contained the requirement that the certified statements “set out accurately and completely the payroll records for the prior week including the name and address of each worker, the worker’s correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid.” *Former* OAR 839-016-0010 implemented this statute by creating a form, the “WH-38,” for contractors and subcontractors to use in complying with *former* ORS 279.354. The rule allowed contractors and subcontractors to use their own form, so long as it contained “all the elements of Form WH-38.” The rule further required that “the certified statement contained on Form WH-38” must be attached to “payroll forms submitted” if the contractor or subcontractor used their own payroll form. In addition,

both the statute and rule established deadlines for submitting the forms.

**A. The Cornelius Project.**

The Agency alleged that Respondent filed six payroll reports “that were inaccurate and/or incomplete by, among other deficiencies, falsely certifying that all wages earned had been paid, in listing improper pay rates and in failing to show overtime wages earned.” An inspection of Respondent’s original payroll reports and comparison with subsequent corrected payroll reports and payroll records reveals a number of deficiencies. First, all six payroll reports lacked the certification language required by ORS 279.354 and contained on the Agency’s WH-38. That language reads “I have read this certified statement, know the contents thereof and it is true to my knowledge.” Respondent argues that the language printed under the signatory’s name on its “Statement of Compliance” accompanying its payroll reports – “The willful falsification of any of the above statements may subject the contractor or subcontractor to civil or criminal prosecution” – is the “functional equivalent” of the language contained on the Agency’s WH-38. Respondent misses the mark. The language on the WH-38 is an affirmative oath that mirrors the statute; the language on Respondent’s form merely states the consequences of willfully providing false information. Second, none of the payroll reports list the location of the pro-

ject – they merely state “PUBLIC WORKS BUILDING.” Third, five of Respondent’s payroll reports incorrectly classify Joseph Baker, Faried Hawash, or Joseph Baker as “laborers” instead of “carpenters.” Fourth, Respondent’s payroll report for the week ending July 7, 2000, incorrectly reported that Baker had worked 15 hours straight time<sup>31</sup> on July 6. Sixth, Respondent’s payroll report for the week ending July 21, 2000, reported that Francis had worked 4 hours straight time on Saturday, July 15, and 9 hours of straight time on July 19.<sup>32</sup> Seventh, based on Respondent’s corrected report, Respondent’s payroll report for the week ending August 11, 2000, reported Francis had worked days that he had not worked and did not report days that he did work.

1. Aggravating circumstances.

First, it should have been simple for Respondent to comply with *former* ORS 279.354 and *former* OAR 839-016-0010. The statute and rule are very specific about the information required, and the BOLI provides a specific form that contractors or subcontractors may use to comply with the law. Instead, Respondent opted to use its own form, which was fine so long as it contained all the elements of the Agency’s form,

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<sup>31</sup> ORS 279.334(1)(a) provides that all time worked on Saturdays and in excess of eight hours from Monday through Friday must be paid at the overtime rate.

<sup>32</sup> *Id.*

including a certified statement. Respondent’s form did not contain all the required elements, and even Respondent’s corrected submissions lacked the required certified statement. Respondent’s original submissions also incorrectly reported the classification of workers and hours worked. If Respondent had original time records that were correct and had taken care to determine the type of work its workers were performing, these inaccuracies would not have occurred.

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

Third, Respondent was on notice and had knowledge that its practices regarding certified payroll reports required by *former* ORS 279.354 were defective. All of Respondent’s reports are prepared by staff employed by Respondent’s corporate parent in Tacoma, Washington. That corporate parent was notified by the Agency on January 26, 2000, that its certified payroll reports must contain the following language: “I have read this certified statement, know the contents thereof and it is true to my knowledge.” There was no evidence that Respondent has modified its forms to meet that requirement.

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

### 2. Mitigating circumstances.

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

### 3. Amount of civil penalty.

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

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

The Agency's sole allegation concerning Respondent's payroll report submitted for the Central Project is that it was untimely filed.

The evidence does not clearly establish the starting and completion date of the project, or whether the project took more or less than 90 days to complete. Either way, under OAR 839-016-0010(5), Respondent was required to submit its payroll and certified statement "within 15 days of the date [Respondent] first began work on the project[.]" Respondent's employee, Wadsworth, worked on September 2, 2000. This made Respondent's reports due on September 17, 2000. Respondent did not complete its report to the Agency until January 18, 2001. This constitutes one violation of ORS 279.354 and OAR 839-016-0010(5).

### 1. Aggravating circumstances.

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

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

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

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

### 2. Mitigating circumstances.

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

### 3. Amount of civil penalty.

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

### C. The Beaver Acres Project.

Respondent's payroll reports for the Beaver Acres Project provide a textbook example of why accurate reports are important and how inaccurate payroll reports make it nearly impossible for the

Agency to determine if the prevailing wage rate has been paid.

The Agency alleged that Respondent filed payroll reports "that were inaccurate and/or incomplete by, among other deficiencies: not being properly certified; inaccurately listing pay rates and amounts; not including the group, where appropriate, for the classification of work its employees performed and omitting required general information about the project." Respondent filed several original payroll reports and two versions of corrected payroll reports for the Beaver Acres Project. The original and second corrected payroll reports all lack an appropriate statement of certification. The originals do not specify the "group" classification for Respondent's workers<sup>33</sup> and state the name, but not the location of the project. Among other things, the payroll reports also report some overtime hours as straight time hours and contain multiple entries for the same category, e.g. gross wages, for a large number of workers. They also fail to break out fringe benefits from hourly wages.

#### 1. Aggravating circumstances.

With one exception, the same aggravating circumstances apply

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<sup>33</sup> The payroll reports state that each worker was a "laborer." BOLI's "Prevailing Wage Rate" book effective July 1, 1999, describes five different groups of laborers, differentiated by type of work performed, with each group entitled to a different rate of pay.

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

### 2. Mitigating circumstances.

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

### 3. Amount of civil penalty.

In its charging document, the Agency alleged a single violation of *former* ORS 279.354 and *former* OAR 839-016-0010 by Respondent on the Beaver Acres

Project and sought a \$5,000 civil penalty. Considering all of the aggravating and mitigating circumstances, \$5,000 is an appropriate civil penalty.

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

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

straight time hours, listed some incorrect hourly wages, and had multiple entries in the gross wages and deductions column.

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

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

Sometime between October 13 and October 26, 2000, Respondent's prevailing wage unit manager became involved and requested copies of canceled

checks issued to Respondent's workers on the Beaver Acres Project. After several more exchanges with Rischman, Wooley finally obtained the records she needed to determine that Respondent's employees all been paid the prevailing wage rate. This was sometime between January 29 and February 7, 2001.

An objective determination of whether workers have been paid the prevailing rate of wage requires documentation in the form of time and payroll records, and a comparison of those records. This is precisely what Wooley requested in her letter dated August 4, 2000. OAR 839-016-0030 provides that such records must be made available "within 24 hours of a request from a representative of the Wage and Hour Division or at such later date as may be specified by the Division." The "later date" specified by Wooley was August 21, 2000.

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

Some months later, after several more letters and phone calls,

Wooley eventually received sufficient records to be able to determine that Respondent had in fact paid the prevailing wage rate to its employees on the Beaver Acres Project.

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

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

#### **A. Aggravating circumstances.**

There are several aggravating circumstances present. First and most important, Respondent's lack of cooperation. It took Respondent five months to comply with Wooley's initial request for payroll and time records, whereas it should have been relatively simple to comply with Wooley's

straightforward request to provide those records within two weeks. Instead, Wooley had to make multiple requests. There was no evidence that Respondent even attempted to provide any records other than payroll reports prior to late October 2000 when Rischman became involved. The seriousness of the violation was considerable because the Agency was unable to perform its statutorily mandated duty of determining that workers have been paid the prevailing wage rate without obtaining these records. The magnitude was high because of the number of workers involved in the audit.

#### **B. Mitigating circumstances.**

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

#### **C. Amount of civil penalty.**

The Agency sought a civil penalty of \$5,000 in its charging document. Based on all the aggravating and mitigating circumstances, a civil penalty of \$2,500 is appropriate.<sup>34</sup>

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<sup>34</sup> Compare *In the Matter of William George Allmendinger*, 21 BOLI 151,

## PLACEMENT ON THE LIST OF INELIGIBLES

The Agency seeks to debar Respondent for two concurrent three year periods on the basis of its intentional failure to pay the applicable prevailing wage rate to workers on the Cornelius and Central Projects and its intentional failure to post the prevailing wage rates on the same projects. The forum has determined that Respondent failed to pay the applicable prevailing wage rate to workers on the Cornelius and Central Projects and that Respondent failed to post the applicable prevailing wage rates while its workers were employed on Central and Cornelius Projects. Two questions remain. First, if Respondent is subject to debarment. Second, if Respondent is subject to debarment, the appropriate period of debarment.

### A. Liability of Respondent.

ORS 279.361 provides that when a subcontractor intentionally fails or refuses to pay the applicable prevailing wage rates, the subcontractor and any firm in which the subcontractor has a financial interest shall be placed on

the list of persons ineligible to receive contracts or subcontracts for public works for a period not to exceed three years. The forum has already concluded that Respondent failed to pay the applicable prevailing wage rates on the Cornelius and Central Projects. The question now before the forum is whether those failures were "intentional." If so, Respondent must be placed on the List of Ineligibles.

In the context of a prevailing wage rate debarment, this forum considers "intentional" as being synonymous with "willful." *In the Matter of Loren Malcom*, 6 BOLI 1, 9-10 (1986). In *Malcom*, the forum also adopted the Oregon Supreme Court's interpretation of "willful" set out in *Sabin v. Willamette Western Corporation*, 276 Or 1083 (1976). "Willful," the court said, "amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent." *Id.* at 1093. In its closing argument, Respondent argued for a different standard of liability, contending that Respondent's subjective motivation, as determined by its conduct, should be considered as an element in determining whether a violation is "intentional." Respondent further argued that *Sabin* should be distinguished from this and other prevailing wage rate cases because it dealt with penalty wages, not a three-year debarment, which is a higher and greater penalty than penalty wages. The forum rejects this invitation to abandon

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171-72 (2000) (\$3,500 civil penalty assessed for violation of ORS 279.355 where respondent failed to provide records and also failed to pay prevailing wage rate to two workers); and *In the Matter of Johnson Builders, Inc.*, 21 BOLI 103, 129 (2000) (\$5,000 civil penalty assessed where respondent failed to provide records and also failed to pay prevailing wage rate to eight workers).

its long-standing reliance on the *Sabin* standard.

On both the Cornelius and Central Projects, Respondent's failure to pay and post the applicable prevailing wage rates occurred because Respondent's branch offices that took the job orders and sent workers out were unaware that the projects its workers were sent to were public works projects. Respondent was aware of the wages it paid that were less than the applicable prevailing wage rate, intended to pay its workers those wages, and was under no restrictions that would have prevented it from paying the applicable prevailing wage rate. Similarly, Respondent was aware it did not post the applicable prevailing wage rates, intended not to post those rates, and was under no restrictions that would have prevented it from posting the applicable prevailing wage rates. Consequently, the forum must debar Respondent for a period of time not to exceed three years for each project.

#### **B. Length of debarment.**

ORS 279.361 provides that debarment shall be for "a period not to exceed three years." Although that statute and the Agency's administrative rules interpreting it do not explicitly authorize the forum to consider mitigating factors in determining the length of a debarment, the commissioner has held that mitigating factors may be considered in determining whether the debarment of a contractor or subcontractor should last less

than the entire three-year period allowed by law. See *In the Matter of Larson Construction Co., Inc.*, 22 BOLI 118, 165 (2001); *In the Matter of Keith Testerman*, 20 BOLI 112, 129 (2000); *In the Matter of Southern Oregon Flagging, Inc.*, 18 BOLI 138, 169 (1999); *In the Matter of Intermountain Plastics*, 7 BOLI 142, 160 (1988).<sup>35</sup> Aggravating factors may also be considered. See, e.g., *Testerman* at 129. The aggravating circumstances considered may include those set out in OAR 839-016-0520(1).

On the Cornelius Project, the forum considers as aggravating factors the facts that Respondent: (1) failed to exercise reasonable diligence to determine that it was sending workers to a public works subject to the prevailing wage rate; (2) underpaid six workers and took four months *after* it learned its workers were entitled to the prevailing wage rate to issue back pay checks to three of those workers and still had not paid one worker in full at the time of the hearing; (3) had a prior violation on the New Bend Middle School Project where it misclassified eight workers and initially failed to pay them the applicable prevailing wage rate; (4) committed six violations of ORS 279.354 on the Cornelius Project; (5)

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<sup>35</sup> Compare *In the Matter of Larson Construction Co., Inc.*, 17 BOLI 54, 76 (1998), where the commissioner held that mitigating factors may not be considered in the "initial determination of whether to debar a subcontractor."

committed one violation of ORS 279.354 and one violation of ORS 279.355 on the Beaver Acres Project; and (6) failed, despite a prior warning, to correct the certification statement attached to its payroll report.

On the Central Project, the forum considers as aggravating factors the facts that Respondent (1) failed to exercise reasonable diligence to determine that it was sending workers to a public works subject to the prevailing wage rate; (2) initially underpaid one worker and did not pay that worker the difference between his initial wages and the prevailing wage rate he was entitled to until five months later, when BOLI notified Respondent of the underpayment; (3) had two prior violations (the New Bend Middle School Project and the Cornelius Project) where it initially failed to pay its workers the applicable prevailing wage rate; (4) committed one violation of ORS 279.354 on the Central Project; (5) committed six violations of ORS 279.354 on the Cornelius Project; (6) committed one violation of ORS 279.354 and one violation of ORS 279.355 on the Beaver Acres Project; and (7) has failed, despite a prior warning, to correct the certification statement attached to its payroll report.

In mitigation, the forum considers that Respondent's conduct disclosed no basis to conclude that Respondent failed to pay the prevailing wage rate for work performed on the Cornelius and Central Projects after it acquired

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

Under the circumstances, the forum finds that three years is an appropriate period of debarment for Respondent's intentional violations of ORS 279.350(1) on the Cornelius Project and two years is an appropriate period of debarment for Respondent's intentional violation of ORS 279.350(1) on the Central Project.

#### **RESPONDENT'S REMAINING EXCEPTIONS**

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

Respondent excepted to the finding that Timothy Adams agreed that Respondent had violated Oregon's prevailing wage rate law with respect to wage claimant Norm Nicholas, on the basis that the Agency failed to prove that Nicholas's wage claim

was against Respondent. The forum has reviewed Michael Wells's testimony and Exhibits A-47 to A-53 and concurs with Respondent that the Agency did not meet its burden of proof in establishing that Respondent, not Labor Ready, Inc., was Nicholas's employer. Respondent's exception is GRANTED and Proposed Finding of Fact 79 – The Merits has been deleted.

**B. Exception 2.**

Respondent excepted to the language contained in Proposed Finding of Fact 82 – The Merits that concluded that Rischman's testimony relating to the withholding of \$34.50 in wages to Chris Francis was not credible. This finding is supported by substantial evidence in the record and is DENIED.

**C. Exception 3.**

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

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

Respondent excepted to the conclusion that Respondent intentionally failed to pay the prevailing wage rate on the Cornelius and Central projects. Respondent's exception is based on its contention that the forum wrongfully

applied the *Sabin* "willful" standard in determining that Respondent's violations were "intentional." Respondent's exception is DENIED for reasons already stated in the Proposed Opinion and adopted in this Opinion of this Final Order.

**E. Exceptions 5 and 11.**

Respondent excepted to the ALJ's use of prior violations on the New Bend Middle School project, Case No. 31-01, as an aggravating factor in determining Respondent's period of debarments. Respondent's argument is based on the fact that Case No. 31-01 is presently on appeal to the Oregon Court of Appeals. This argument lacks merit and is DENIED.

**F. Exceptions 6 and 12.**

Respondent excepted to the ALJ's use of Respondent's violations of ORS 279.354 on the Cornelius and Central Projects as aggravating factors in determining Respondent's period of debarments. Respondent's argument is that violations of ORS 279.354 are not aggravating factors "because it is impossible to have a correct certified payroll statement where there is an underlying failure to pay the prevailing wage rate \* \* \* A failure to correctly certify a payroll statement automatically occurs in every instance of a failure to pay the applicable prevailing wage. Thus, this is not an aggravating factor; it is the same factor." Respondent's argument is misplaced. Failure to properly certify and failure to pay

the applicable prevailing wage rate, though one may flow from the other, constitute violations of two distinct statutes.<sup>36</sup> For that reason, Respondent's ORS 279.354 violations are properly considered aggravating factors.

**G. Exceptions 7 and 13.**

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

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<sup>36</sup> The forum notes that on the Beaver Acres project, Respondent apparently paid the prevailing wage rate to all its workers, yet still violated ORS 279.354 by inaccurately completing the reports and not completing an appropriate statement of certification. Respondent's problem on the Central Project was that it did not initially pay the prevailing wage rate and untimely filed its payroll statement. On the Cornelius Project, all six of Respondent's payroll reports lacked an appropriate certification statement, a violation of the statute and administrative rule that would have existed even if Respondent had paid the prevailing wage rate.

**H. Exceptions 8 and 14.**

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

**I. Exceptions 9 and 15.**

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

**J. Exception 10.**

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

**K. Exception 16.**

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

**L. Exceptions 17 and 18.**

Respondent excepts to the length of debarments imposed in the Proposed Order on both the Cornelius and Central Projects on the grounds that they are "grossly excessive, not supported by the evidence, and an abuse of discretion by the forum/Commissioner." Both periods of debarment are within the discretionary authority of the Commissioner and the length of the debarments are supported by substantial evidence in the record. Respondent's exception is DENIED.

**ORDER**

NOW, THEREFORE, as authorized by ORS 279.361, the Commissioner of the Bureau of Labor and Industries hereby orders that Respondent **Labor Ready Northwest, Inc.** or any firm, corporation, partnership, or association in which it has a financial interest shall be ineligible to receive any contract or subcontract for public works for concurrent periods of two years (based on its intentional violations of ORS 279.350(1) and ORS 279.350(4) on the Central Project) and three years (based on its intentional violations of ORS periods of ineligibility imposed by this Order shall be suspended until the period of ineligibility from the Commissioner's Final Order in

279.350(1) and ORS 279.350(4) on the Cornelius Project) from the date of publication of their names on the list of those ineligible to receive such contracts maintained and published by the Commissioner of the Bureau of Labor and Industries (hereafter, the List of Ineligibles, L.I.). These concurrent periods of ineligibility shall run consecutively to any other period of ineligibility imposed as a result of a separate proceeding by the Commissioner of the Bureau of Labor and Industries against Respondent.

If Respondent's name has already been published on the List of Ineligibles at the time the Commissioner places Respondent on the L.I. based on this Order, the two and three year concurrent periods of ineligibility imposed by this Order shall be added to the already published period of ineligibility and shall begin to run on the date the already published period of ineligibility expires.

If Respondent's name is published on the L.I. as a result of a final order in Case No. 31-01, currently on appeal before the Oregon Court of Appeals, and the publication occurs after Respondent's name has been published on L.I. as a result of this Order but before the periods of ineligibility imposed by this Order have expired, the running of time for the

Case No. 31-01 has expired, at which time the periods of ineligibility imposed by this Order shall continue.

If Respondent's name is published on the L.I. as a result of a final order in Case No. 31-01 at the same time that Respondent's name is published on the L.I. as a result of a final order in this Case Nos. 122-01 and 149-01, the periods of ineligibility imposed by this Order shall begin to run on the date the period of ineligibility imposed by the Commissioner's Final Order in Case No. 31-01 expires.

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

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

**In the Matter of**

**RUBIN HONEYCUTT  
dba Mr. Ideal's**

**Case No. 14-02  
Final Order of Commissioner  
Jack Roberts  
Issued June 27, 2002**

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**SYNOPSIS**

Where Claimant performed labor, occasionally sold cars for Respondent, and was paid minimum wage for hours worked and Respondent claimed he was an independent contractor, the forum found that Claimant was an employee covered by state minimum wage and overtime provisions. Additionally, the forum found no wages were owed to Claimant due to the lack of reliable evidence establishing the dates and hours Claimant worked and dismissed the charges. ORS 652.140(2); ORS 652.150

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The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 21, 2002, at the Oregon Employment Department, located at 201 NE 8<sup>th</sup>, Grants Pass, Oregon.

Peter McSwain, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Randy Rush ("Claimant") was present throughout the hearing and was not represented by counsel. Rubin Honeycutt ("Respondent") was present for part of the hearing and was not represented by counsel.

In addition to Claimant, the Agency called as witnesses: Stanley Wegat, Respondent's friend; Toni Rush, Claimant's wife; Dale Durboraw, former Respondent employee; and Milo Shier, Claimant's brother.

Respondent called no witnesses, but testified on his own behalf.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-6;
- b) Agency exhibits A-1 through A-13 (filed with the Agency's case summary);
- c) Respondent exhibits R-1 through R-12 (filed with Respondent's case summary).

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 January 19, 2001, Claimant filed a wage claim form stating Respondent had employed him from November 5, 1999, until March 17, 2000, and failed to pay him a 25% commission on cars he sold and \$6.50 per hour for all hours worked.

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

3) On April 6, 2001, the Agency issued an Order of Determination, numbered 01-0250. The Agency alleged Respondent had employed Claimant during the period December 22, 1999, through March 16, 2000, and failed to pay Claimant at least \$6.50 per hour for each hour worked in that period, and was liable to Claimant for \$3,480 in unpaid wages. The Agency also alleged Respondent's failure to pay all of Claimant's wages when due was willful and Respondent, therefore, was liable to Claimant for \$1,560 as penalty wages, plus interest. The Order of Determination gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) On May 11, 2001, the Agency sent Respondent a letter stating its intent to issue a Final Order by Default if the Agency did not receive an answer and request for hearing or court trial by May 21, 2001.

5) On May 12, 2001, Respondent filed an answer that stated in its entirety:

"Dear Susan Dix,

"Please find enclosed copies of Randy Rushes [sic] pay checks. Some of these checks have draws on them, pending being paid back if he sold a vehicle.

"We would like to request any copies and or proof of evidence against Mr. I Deal's.

"We are requesting a hearing in this matter."

"Rubin Honeycutt"

6) On May 15, 2001, the Agency advised Respondent that his answer "must include an admission or denial of each fact alleged in the [Notice or Order] and a statement of each relevant defense to the allegations" and granted Respondent additional time until May 25, 2001, to file a supplemental answer.

7) On May 24, 2001, Respondent filed a supplemental answer that stated in its entirety:

"This is an answer from the Order of Determination section 2 that was filed by Randy Rush. Randy Rush was an Independent Contractor for Mr. Ideals. Randy started with Mr. Ideals 12-28-99 to 3-01-00. Mr. Rush did not work all the hours indicated. Mr. Rush worked a total of 192 hours @ \$6.50 hr. & 80 hours @ \$8.75 hr. for the year 2000. Mr. Rush was paid in the amount

of \$160 on December 28, 1999 for Transportation Consultant. Mr. Rush he would come and go as he felt like it. The time he was there was to sell cars if he sold we paid, if he did not sell we paid for the time that he was there. He never sold a car that the profit was more than the hours that was [sic] worked. If Mr. Rush took out a draw and if he sold a car if commission was more than the hours that he had in the difference would have been paid. Mr. Rush was paid for the hours he put in and agreed at the time. Randy Rush only put in a 40 hour week when I was out of town for business purposes and who knows if he worked the full 40 but was paid for the 40 and I paid it @ \$8.75 an hour. I am disputing the hours that he has claimed and I am requesting a hearing in this matter.

"Sincerely, Rubin Honeycutt, Owner"

8) On January 31, 2002, the Agency requested a hearing. On February 5, 2002, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:00 a.m. on May 21, 2002. With the Notice of Hearing, the forum included a copy of the Order of Determination, a "Summary of Contested Case Rights and Procedures" and a copy of the forum's contested case hearing rules, OAR 839-050-0000 to 839-050-0440.

9) On February 28, 2002, the forum sent Respondent a copy of

the amended contested case hearing rules and a revised Summary of Contested Case Rights and Procedures, effective February 15, 2002.

10) On April 29, 2002, 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 brief statement of any agreed or stipulated facts; and any wage and penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by May 10, 2002, and advised them of the possible sanctions for failure to comply with the case summary order. Both participants filed timely case summaries.

11) At the start of 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.

12) At the start of hearing, after the ALJ advised the participants of procedural matters, Respondent stated he could not be present for the duration of the hearing due to the press of business. At the Agency's suggestion, Respondent was allowed to present his evidence before the Agency began its case in chief. After testifying and submitting his

exhibits, Respondent affirmatively waived his right to cross-examine the Agency's evidence and left the hearing room.

13) The ALJ issued a proposed order on May 31, 2002 that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On June 5, 2002, the Agency filed exceptions to the proposed order. Those exceptions are addressed in the opinion section of this order.

#### **FINDINGS OF FACT – THE MERITS**

1) At all times material herein, Respondent Rubin Honeycutt operated a used car lot under the assumed business name of Mr. Ideal's and employed one or more individuals in Oregon.

2) Respondent employed Claimant from approximately December 22, 1999 until approximately March 1, 2000.

3) Claimant's duties primarily involved detailing cars and doing some occasional car repair. He also made keys for cars, did some paperwork, and occasionally sold cars.

4) Claimant and Respondent agreed that Claimant would receive \$6.50 per hour, not to exceed \$200 per week, as wages. Respondent expected Claimant to work only the number of hours necessary to arrive at \$200 per week, computed at the minimum wage rate of \$6.50 per hour. Respondent also agreed to pay Claimant a 25 per cent commis-

sion on any used cars he sold for Respondent.

5) The car lot was usually open six, sometimes seven, days per week, from about mid-morning until approximately 5 p.m. If Respondent was still on the premises or driving by the car lot after 5 p.m. and noticed people looking at the cars for sale, Respondent used the opportunity to try and sell a car. Likewise, Claimant, who lived nearby, returned to the car lot to attempt a sale if he happened to observe potential customers looking at cars after hours.

6) During some weeks of Claimant's employment, Respondent spent two days and one night in Sacramento purchasing used cars at an automobile auction. Respondent's friend Stan Wegat usually accompanied Respondent on buying trips because he was helping Respondent launch his business and had been helping him buy cars since October 1999. On those occasions, Respondent left Claimant behind to handle the car lot while he was away.

7) Between December 1999 and March 2000, Respondent paid Claimant gross wages totaling \$2,110. Respondent paid Claimant by check and noted on each check the number of hours Claimant worked. For example, on Claimant's January 14, 2000 check, Respondent made the notation "30 hrs" in the memo section of the check. On a check for \$350, dated February 24, 2000, Respondent made the notation "2/18 to 2/24 draw, 40 hrs."

Respondent usually asked Claimant at the end of a week how many hours he worked and after Claimant told him, he brought out his checkbook and wrote a check, deducting any draws Claimant had taken. The checks date from December 28, 1999, to March 1, 2000. Claimant cashed all of the checks. Other than the notations on each check, Respondent did not maintain a record of Claimant's hours worked.

8) Claimant filed a wage claim in November 2000 and claimed Respondent owed him wages dating from November 5, 1999, until March 17, 2000. At the time he filed the claim, he noted the hours he worked each day on a calendar provided by the Agency. The calendar shows a minimum of 10 hours worked every day in November and December 1999 (except Thanksgiving and Christmas) and every day in January and February 2000. The calendar does not include any work hours for March 2000.

9) Stan Wegat's testimony as a whole was credible. Although he was a friend of Respondent's and helped Respondent start his business in October 1999, Wegat did not testify in a manner that was slanted for or against Respondent or Claimant. For reasons not pertinent to this proceeding, Wegat has kept notes of his daily activities since 1980. During the wage claim investigation, he went over his notes with an Agency compliance specialist who then summarized each entry pertaining to Claimant. The sum-

mary is not a verbatim transcript of Wegat's notes. However, Wegat credibly testified that the Agency's summary accurately reflects the content of his notes pertaining to Claimant's employment with Respondent. Wegat readily acknowledged, and his summarized notes reflect, that he did not know what hours Claimant worked or whether Claimant worked every day of the week. Wegat testified that he was at the car lot at all hours with Respondent and sometimes Claimant was present. He logged most of his observations concerning Claimant in his notebook, usually in the context of other events that were taking place at the time. His summarized notes show that he observed Claimant at the car lot for the first time on December 22, 1999, and at various times on 19 days thereafter until February 14, 2000. Wegat acknowledged that his notes do not show Claimant's start or stop times or whether he was actually working on the dates Wegat noted his presence at the car lot. For instance, the summarized entry on January 2, 2000 reads: "Randy called [from] lot." There is no additional information regarding hours worked or actual work performed. The forum credits Wegat's testimony, which is corroborated by his contemporaneous notes, in its entirety.

10) On key points, Claimant's testimony conflicted with his prior statements to the Agency, was internally inconsistent, and reflected his apparent propensity for exaggeration. For instance, on the wage claim form he filed with

the Agency, he stated he sold six cars during his employment with Respondent from November 5, 1999, until March 17, 2000. During his testimony, however, he claimed he sold 11 cars in December 1999 and January 2000. Later, he testified he sold 13 cars during that same time period. He also testified that the 70 hour work weeks he recorded on the Agency's wage claim calendar were a "conservative estimate" of the hours he worked each week, indicating that on many occasions he worked many more hours than he claimed on that calendar. During his testimony, however, he insisted he kept track of his daily hours on a personal calendar at home that he used when recording his hours on the Agency calendar. He did not explain why he estimated the hours he worked if he had, at hand, a contemporaneous record of the actual hours he worked. He also did not account for the absence of his personal calendar at hearing.

Significantly, Claimant tried to evade questions pertaining to principal issues and the answers he ultimately provided either contradicted his earlier testimony or previous statements he made to the Agency. As an example, Claimant initially testified that Respondent agreed to pay him \$6.50 per hour and a 25 per cent commission on each car he sold. Later, he testified that the agreement was for \$200 per week, which is consistent with his statement on his wage claim form. Moreover, although Claimant's reported hours show he worked

every day except Thanksgiving and Christmas, he testified that Respondent often gave him days off whenever he requested one and Wegat's summarized notes show he was "taking some time away" from the car lot in February 2000. Finally, Claimant admitted he "probably started working for [Respondent] on December 21 or 22 [1999]," in contrast to his previous statements that he was employed by Respondent from November 5, 1999, until March 16, 2000. Claimant repeatedly equivocated about the number of hours and days he worked, the dates he was employed by Respondent, the number of cars he sold, and the amount of pay he received from Respondent. The ALJ carefully observed Claimant's demeanor. Beginning with his oath to testify truthfully, Claimant repeatedly averted his eyes and physically shifted his position in the witness chair as often as he shifted his stories. As a result, the forum did not believe any of his testimony unless other reliable evidence corroborated it.

11) There is no reliable evidence to determine how many hours or what days Claimant worked.

12) There is no reliable evidence to determine that Claimant performed work for which he was not properly compensated.

#### **ULTIMATE FINDINGS OF FACT**

1) Respondent at all times material herein conducted a business in the state of Oregon and engaged the personal services of

one or more employees in the operation of that business.

2) Respondent employed Claimant between December 22, 1999, and February 29, 2000.

3) Respondent and Claimant agreed Claimant would be paid \$6.50 per hour for 30 hours per week, plus a 25 per cent commission for any cars Claimant sold during his employment.

4) At all times material herein, the state minimum wage was \$6.50 per hour.

5) Respondent paid Claimant \$2,110 for hours Claimant worked between December 22, 1999, and February 29, 2000.

6) The forum is unable to determine the dates and hours Claimant worked, due to a lack of credible evidence.

7) The forum is unable to determine whether Claimant sold any cars or earned any commission during his employment with Respondent.

8) The forum is unable to compute what Claimant earned during the wage claim period, due to a lack of credible evidence establishing the dates and hours Claimant worked.

#### **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.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414.

3) ORS 652.140(2) provides in part:

“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.”

At times material herein, ORS 653.025 required, in pertinent part:

“ \* \* \* for each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages computed at a rate lower than:

“ \* \* \*

“(3) For the calendar years after December 31, 1998, \$6.50.”

Claimant was paid wages totaling \$2,110 during his employment with Respondent. There were no

wages due Claimant at the time he ceased employment with Respondent.

4) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to dismiss the Claimant’s wage claim and Agency’s Order of Determination filed against Respondent.

#### OPINION

The Agency was required to prove: 1) that Respondent employed Claimant; 2) any pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) that Claimant performed work for which he was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230 (2000). In his answer, Respondent asserted that, although Claimant performed primarily general labor and was paid an hourly rate for all hours worked, he was an independent contractor and was paid for all hours worked. The forum found that Respondent failed to prove his affirmative defense and determined that Claimant was Respondent’s employee and covered by Oregon’s minimum wage and overtime provisions. Additionally, the forum found the Agency failed its burden of proving Claimant performed work for which he was not properly compensated.

1. Respondent employed Claimant.

Respondent bears the burden of proving Claimant was an independent contractor. *In the Matter of Leslie Elmer DeHart*, 18 BOLI 199 (1999). Respondent did not provide any evidence that supports this defense other than his bare assertion in his answer. In fact, at hearing, Respondent appeared to concede he employed Claimant by acknowledging that Claimant was hired to perform general labor and to occasionally sell cars for \$6.50 per hour up to \$200 per week, plus a 25 per cent commission for any car sold. Respondent contended Claimant could set his own hours, but he emphasized that Claimant's pay was for hours not to exceed \$200 per week at the minimum wage rate. Claimant testified that he was told he would receive \$6.50 per hour and later in his testimony stated that he was promised \$200 per week. Documentary evidence shows Claimant received numerous checks from Respondent in the amount of \$200 for 30 hours of work, until the last two weeks of his employment when Respondent paid him \$350 for 40 hours of work. The forum infers from the evidence that Claimant and Respondent initially agreed Claimant would receive minimum wage for approximately 30 hours per week, along with a commission for any cars he sold. Respondent hired Claimant to perform general labor and some sales, paid him at an hourly rate, and limited the number of hours he worked per week. These are all indicia that Claimant

was Respondent's employee.<sup>1</sup> The forum concludes from those facts that Claimant was an employee and covered by Oregon's minimum wage and overtime laws.

2. Respondent does not owe Claimant any wages.

Claimant bears the burden of proving he performed work for which he was not properly compensated. *In the Matter of Ann L. Swanger*, 19 BOLI 42, 56 (1999). Claimant's testimony was exaggerated and unbelievable on so many key points that the forum gave it no weight except where it was consistent with other reliable evidence. While there is no dispute that Claimant performed work for Respondent, there is no other evidence from which this forum can conclude Claimant worked hours over and above the hours for which he was paid. All of the witnesses verified Claimant's presence at the car lot at certain times, but not one had first hand knowledge that Claimant worked a "minimum" of 70 hours per week for the 12 weeks he claimed. Indeed, credible evidence showed he did not work every day and, more likely than not, was no longer employed by

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<sup>1</sup> See, e.g., *In the Matter of R.L. Chapman Ent. Ltd.*, 17 BOLI 277 (1999) (Claimants who were hired as hourly workers to perform tasks requiring no specialized training, received an hourly pay rate, and whose hours were controlled by respondent were employees, not independent contractors).

Respondent after he received his March 1, 2000, pay check. Accordingly, the forum finds the Agency did not prove its case by a preponderance of the evidence, and the Order below is the proper disposition of this matter.

#### **AGENCY'S EXCEPTIONS**

The Agency asserts that because several witnesses placed Claimant on Respondent's job site at various times on various days and on weekends and Respondent did not produce contradictory evidence, logic dictates that Claimant was "regularly on the [car] lot morning[,] day, and evening, and on most weekends." The Agency further posits that an inference may be drawn from those "random sightings" that Claimant worked more than a 30-hour workweek, despite Claimant's "nervousness during testimony, a conversational tendency to exaggeration, or [his] poor memory." The Agency concludes with the suggestion that the forum find Claimant worked at least a "regular work week and sixteen hour weekends." There is no reliable evidence in the record to warrant such a finding. This forum has repeatedly declined to "speculate or draw inferences about wages owed based on insufficient, unreliable evidence." *Id.* at 57, quoting *In the Matter of Burrito Boy*, 16 BOLI 1, 12 (1997). Claimant's testimony was contradictory regarding the hours and days he worked; thus, he failed to establish he worked more than 30 hours per week. As a result, despite Respondent's failure to

maintain and keep records of Claimant's hours worked, the Agency's case must fail for lack of reliable evidence.<sup>2</sup>

#### **ORDER**

NOW, THEREFORE, as Respondent has been found not to owe Claimant wages, the Commissioner of the Bureau of Labor and Industries hereby orders that Order of Determination 01-0250 against Rubin Honeycutt be and is hereby dismissed.

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<sup>2</sup> As a caution to employers, however, this opinion does not imply that employers may avoid their wage obligations to employees by violating ORS 653.045. The Commissioner is authorized to assess a civil penalty "not to exceed \$1,000 against any person who willfully violates \* \* \* ORS 653.045 \* \* \* or any rule adopted pursuant thereto." See ORS 653.256.

In the Matter of

**PETER N. and PATSY A. ZAMBETTI dba Safe-T-Tek**

**Case No. 66-01**

**Final Order of Commissioner  
Jack Roberts**

**Issued July 10, 2002**

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**SYNOPSIS**

Where Respondents submitted an answer to the Order of Determination and requested a hearing, and failed to appear at the hearing, they were found in default of the charges in the charging document. The Agency made a prima facie case establishing that Respondents failed to pay Claimant all wages earned and due after Claimant quit his employment, in violation of ORS 652.140(2). Respondents' failure to pay the wages was willful and Respondents were ordered to pay civil penalty wages, pursuant to ORS 652.150. ORS 652.140(2); ORS 652.150.

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The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 13, 2002, in the hearing room of the Bureau of Labor and Industries,

located at 800 NE Oregon Street, Portland, Oregon.

Cynthia Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Robert K. Douglas ("Claimant") was present throughout the hearing and was not represented by counsel. Peter N. and Patsy A. Zambetti ("Respondents") failed to appear for hearing in person or through counsel.

In addition to Claimant, the Agency called as witnesses: Alan Woolley, Oregon Employment Department JOBS Plus representative; Michael Wells, former BOLI Wage and Hour Division Compliance Specialist; Vicki S. Larson-Scorvo, Oregon Employment Department JOBS Plus Processing Unit; and Larry McNamee, Respondents' former employee.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-17;<sup>1</sup>
- b) Agency exhibits A-1 through A-10 (filed with the Agency's case summary).

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

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<sup>1</sup> Administrative exhibit X-17 was admitted post-hearing as the original of X-16.

Fact, Conclusions of Law, Opinion, and Order.

**FINDINGS OF FACT –  
PROCEDURAL**

1) On August 9, 2000, Claimant filed a wage claim form stating Respondents had employed him from June 1 until July 28, 2000, and failed to pay him the agreed upon rate of \$13.00 per hour for all hours worked.

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

3) On November 13, 2000, the Agency issued an Order of Determination, numbered 00-3463. The Agency alleged Respondents had employed Claimant during the period July 3 through July 28, 2000, at the rate of \$13.00 per hour for 154 hours of work, no part of which had been paid, leaving a balance due and owing of \$2,080. The Agency also alleged Respondents' failure to pay all of Claimant's wages when due was willful and Respondents, therefore, were liable to Claimant for \$3,120 as penalty wages, plus interest. The Order of Determination was personally served on Patsy Zambetti at 1906 28<sup>th</sup> Avenue, Forest Grove, Oregon, and gave Respondents 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) On January 8, 2001, Respondents filed an answer and

requested a hearing. Respondents alleged in the answer that Claimant was hired as a salesman and worked 51 hours in July 2000 for \$6.50 per hour. Respondents acknowledged in their answer that Claimant was not paid for hours worked in July 2000 stating, "[h]e has never asked us for [his pay] nor come in to retrieve [his pay]."

5) On January 30, 2001, the Agency requested a hearing. On February 16, 2001, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9 a.m. on June 6, 2001. With the Notice of Hearing, the forum included a copy of the Order of Determination, a "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES" and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440. The Notice of Hearing and accompanying documents were mailed to Peter and Patsy Zambetti at 9850 SW Frewing Street, #45, Tigard, Oregon 97223. The U.S. Post Office did not return the Notice of Hearing documents to the Hearings Unit.

6) On April 30, 2001, the forum issued a case summary order requiring the Agency and Respondents to submit case summaries that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondents only); and 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 their case summaries by May 25, 2001, and advised them of the possible sanctions for failure to comply with the case summary order. The case summary order was mailed to Peter and Patsy Zambetti at 9850 SW Frewing Street, #45, Tigard, Oregon 97223, and was not returned by the U.S. Post Office.

7) On May 25, 2001, the Agency advised the forum that Respondents had filed bankruptcy under Chapter 13 and requested the scheduled hearing be removed from the docket "until further notice." On May 29, 2001, the forum issued an order that cancelled the hearing, but left the Hearings Unit file open until the Agency either requested a new hearing date or withdrew the charging document. The order canceling the hearing was mailed to Peter and Patsy Zambetti at 9850 SW Frewing Street, #45, Tigard, Oregon 97223, and was not returned by the U.S. Post Office.

8) On January 16, 2002, the Agency requested that the hearing be rescheduled for June 13, 2002, and submitted a copy of a notice issued by the U.S. Bankruptcy Court stating that Respondents' bankruptcy case, after notice and hearing, was dismissed and administratively closed.

9) On February 1, 2002, the forum issued an interim order rescheduling the hearing for June 13, 2002, and on the same date

issued a second case summary order requiring the Agency and Respondents to submit their case summaries by June 3, 2002. The interim order rescheduling the hearing and the case summary order were mailed to Peter N. and Patsy A. Zambetti dba Safe-T-Tek at two separate addresses provided by the Agency: P O Box 115, Forest Grove, Oregon 97116-0115 and 1906 28<sup>th</sup> Avenue, Forest Grove, Oregon 97116. Neither order was returned by the U.S. Post Office.

10) On February 28, 2002, the forum sent Respondents a copy of the amended contested case hearing rules and a revised Summary of Contested Case Rights and Procedures, effective February 15, 2002. The amended rules and revised summary were mailed to Peter and Patsy Zambetti at PO Box 115, Forest Grove, Oregon 97116-0115 and 1906 28<sup>th</sup> Avenue, Forest Grove, Oregon 97116 and were not returned by the U.S. Post Office.

11) On April 30, 2002, the Agency moved for a discovery order requiring Respondents to produce four categories of documents. The Agency included a copy of its informal discovery request, marked as "Agency Exhibit A," which was mailed to Respondents at PO Box 115, Forest Grove, Oregon 97116, on April 16, 2002. The relevance of the documents sought was readily apparent. Respondents filed no response to the Agency's motion. On May 13, 2002, the forum issued an interim order that granted

the Agency's motion and required Respondents to produce all of the requested documents to the Agency no later than May 17, 2002.

12) The Agency filed its case summary, with its attached exhibits, on June 3, 2002. Respondents did not file a case summary.

13) On June 11, 2002, the Agency filed an addendum to its case summary and by separate letter the same date, provided the name of a witness scheduled to testify by telephone at the hearing. On June 12, 2002, the Agency filed a second addendum to its case summary.

14) On June 13, 2002, at the time set for hearing, Respondents did not appear at the hearing and no one appeared on their behalf. After waiting 30 minutes, the ALJ declared Respondents to be in default and commenced the hearing, pursuant to OAR 839-050-0330(2).

15) The Agency waived the ALJ's recitation of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

16) On June 14, 2002, at approximately 9 a.m., a male called the Hearings Unit and identified himself as Peter Zambetti. He stated to the Hearings Unit Coordinator that he and his wife, Patsy Zambetti, had not been notified of the hearing date. He denied receiving mail from the Hearings Unit and stated that he and his wife only receive mail at

PO Box 115, Forest Grove, Oregon 97116. The caller further stated the Zambettis do not receive mail at their home address, which they keep confidential. The home address the caller provided does not match the street address recorded in the Hearings Unit's file. The Hearings Unit Coordinator advised the caller that the Hearings Unit mailed all notices and correspondence pertaining to the rescheduled hearing to PO Box 115, Forest Grove, Oregon 97116.

17) The ALJ issued a proposed order on June 17, 2002 that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The proposed order was mailed to Respondents at their last known addresses: PO Box 115, Forest Grove, Oregon 97116-0115, and 1906 28<sup>th</sup> Avenue, Forest Grove, Oregon 97116. Neither the Agency nor Respondents filed exceptions.

#### **FINDINGS OF FACT – THE MERITS**

1) At all times material herein, Respondents Peter N. and Patsy A. Zambetti jointly operated a business that sold emergency preparedness products under the assumed business name Safe-T-Tek and employed one or more individuals in Oregon. Respondents jointly registered their assumed business name with the Secretary of State's office on April 21, 2000. The address listed for each Respondent was 9850 SW Frewing Street, #45, Tigard, Oregon 97223. Patsy Zambetti was

listed as the "authorized representative" of the business.

2) Respondents employed Claimant as a sales manager from approximately June 1 until July 28, 2000. When Respondents hired him, Claimant was receiving unemployment benefits from the Oregon Employment Department. Claimant was Respondents' friend and had given them advice while they negotiated the purchase of their business in March 2000. After he was hired, Claimant was responsible for marketing, selling, and delivering emergency preparedness products to customers. Claimant also worked in Respondents' warehouse assembling "survival kits" for sale and delivery.

3) Respondents agreed to pay Claimant \$13.00 per hour. Claimant's wage rate remained \$13.00 per hour during his employment.

4) While receiving unemployment benefits, Claimant became aware of the JOBS Plus program administered through the Oregon Employment Department ("Department"). The program is designed to help unemployed Oregon residents re-enter the work force by offering incentives to employers for hiring workers receiving unemployment benefits or public assistance. The program reimburses a participating employer \$6.50 per hour for wages paid to the eligible worker and also reimburses the employer's share of wage taxes and workers' compensation insurance. Claimant introduced the concept to Respondents who, after meet-

ing with JOBS Plus Coordinator Woolley at Respondents' work site on June 6, 2000, signed a "work site agreement" that provided them a subsidy for wages paid to Claimant from June 5 until the agreement automatically terminated December 5, 2000.

5) On June 20, 2000, Respondents paid Claimant gross wages of \$1,144, less lawful deductions, for 88 hours of work at the rate of \$13.00 per hour for the pay period June 1 to June 15, 2000.

6) On June 21, 2000, Respondents certified to the Department that Claimant worked 88 hours during the wage period June 5 through June 15, 2000. On June 27, 2000, the Department reimbursed Respondents at the rate of \$6.50 per hour for 88 hours, plus taxes and insurance, for a total gross reimbursement of \$638.92.

7) On July 5, 2000, Respondents paid Claimant gross wages of \$1,144, less lawful deductions, for 88 hours of work at the rate of \$13.00 per hour for the pay period June 16 to June 30, 2000.

8) On July 24, 2000, Respondents certified to the Department that Claimant worked 168 hours during the wage period June 16 through July 15, 2000. On July 27, 2000, the Department reimbursed Respondents at the rate of \$6.50 per hour for 168 hours, plus taxes and insurance, for a total gross reimbursement of \$1,155.76.

9) Throughout his employment, Claimant kept a daily mileage record that he also used to track the number of hours he worked per day. He transferred the hours he recorded on his mileage record to a calendar provided by the Agency when he filed his wage claim.

10) Between July 1 and July 28, 2000, Claimant worked 158 hours, 4 of which were in excess of 40 hours per week, earning a total of \$2,080 in gross wages.

11) Respondents have not paid Claimant for any of the hours he worked in July 2000.

12) Claimant quit his employment without notice on July 28, 2000, because he was not receiving any pay for the work he performed.

13) On August 18, 2000, Respondents certified to the Department that Claimant worked 80 hours during the wage period July 16 through August 15, 2000. The Department reimbursed Respondents a total of \$500.84, including taxes and insurance, for the 80 hours reported.

14) Claimant's civil penalty wages, computed in accordance with ORS 652.150, equal \$3,120 (\$13.00 per hour x 8 hours per day x 30 days).

15) Claimant was an articulate witness who had a clear recollection of the circumstances of his employment. His testimony was consistent with prior statements on his wage claim. The

forum credited his testimony in its entirety.

16) Woolley, Larson-Scorvo, and Wells were all credible witnesses.

#### **ULTIMATE FINDINGS OF FACT**

1) Respondents at all times material herein conducted a business that engaged the personal services of one or more employees in Oregon.

2) Respondents engaged Claimant's personal services between June 1 and July 28, 2000.

3) Respondents and Claimant agreed Claimant would be paid \$13.00 per hour.

4) Claimant quit his employment without notice to Respondents on July 28, 2000.

5) Claimant worked 158 hours during July 2000, 4 of which were in excess of 40 hours per week. For all of these hours, Claimant earned a total of \$2,080. Respondents paid Claimant nothing and therefore owed Claimant \$2,080 in earned and unpaid compensation on the day his employment terminated.

6) Respondents owe Claimant \$2,080 for wages earned.

7) Respondents willfully failed to pay Claimant the \$2,080 in earned, due and payable wages no later than August 4, 2000, the fifth business day after Claimant quit his employment without notice to Respondents. Respondents have not paid the wages owed and more than 30 days have

elapsed from the date the wages were due.

8) Civil penalty wages, computed pursuant to ORS 652.150 and OAR 839-001-0470, equal \$3,120 (\$13.00 per hour x 8 hours per day x 30 days).

### CONCLUSIONS OF LAW

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

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein. ORS 652.310 to 652.414.

3) ORS 652.140(2) provides in part:

“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.”

Respondents violated ORS 652.140(2) by failing to pay

Claimant all wages earned and unpaid within five days, excluding Saturdays, Sundays and holidays, after Claimant quit his employment without notice.

4) 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.”

Respondents are liable for \$3,120 in civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(1).

5) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondents to pay Claimant his earned, unpaid, due and payable wages and the civil penalty wages, plus interest

on both sums until paid. ORS 652.332.

## OPINION

### DEFAULT

When Respondents failed to appear and no one appeared on their behalf at hearing, the forum found Respondents in default pursuant to OAR 839-050-0330. The Agency, therefore, needed only to establish a prima facie case on the record to support the allegations in its charging document. *In the Matter of Usra Vargas*, 22 BOLI 212 (2001). Although the forum may consider Respondents' answer when making factual findings, unsworn and unsubstantiated assertions in the answer are overcome whenever controverted by other credible evidence. *In the Matter of Nova Garbush*, 20 BOLI 65, 71 (2000). Other than acknowledging that Claimant was not paid for any hours worked in July 2000, Respondents contributed nothing to the record for the forum to consider. Having considered all of the evidence in the record, the forum concludes the Agency presented a prima facie case in support of its claim that Respondents failed to pay Claimant for all hours worked in July 2000. The forum further concludes Respondents' failure to pay Claimant his wages earned and owed was willful.

### AGENCY'S PRIMA FACIE CASE

The Agency was required to prove: 1) that Respondents employed Claimant; 2) Respondents agreed to pay Claimant \$13.00

per hour; 3) that Claimant performed work for which he was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondents. *Vargas* at 220. In this case, the only elements that Respondents contest in their answer are Claimant's pay rate and the amount and extent of work he performed in July 2000.

#### A. Claimant's wage rate.

Respondents contended in their answer that Claimant's wage rate during his employment was \$6.50 per hour. However, Claimant's credible testimony and the pay stubs Respondents and Claimant provided during the wage claim investigation overcome Respondents' unsworn and unsubstantiated assertion. The pay stubs show that in June 2000 Respondents paid Claimant \$13.00 per hour for two pay periods, for a total of \$2,288. Evidence also shows that in June 2000 Respondents requested and received a \$6.50 per hour wage subsidy for Claimant's wages for each of the June pay periods from the Oregon Employment Department. Claimant credibly testified that his wage rate did not change at any time during his employment and the forum concludes that Claimant's wage rate in July 2000 was the same as it was in June - \$13.00 per hour.

**B. The amount and extent of work Claimant performed for Respondents.**

Respondents acknowledge in their answer that Claimant worked at least 51 hours for them in July 2000 and was not paid for those hours. Prior to Claimant's wage claim, however, Respondents certified to the Oregon Employment Department that Claimant worked 160 hours in July 2000. Moreover, evidence shows Respondents requested and received a \$6.50 per hour wage subsidy for the wages they purportedly paid for those reported hours. Claimant credibly testified he worked 158 hours in July 2000 and was not paid for those hours.

When the forum concludes, as it does here, that an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. Where the employer has produced no records, as happened in this case, the commissioner may rely on evidence produced by the agency "to show the amount and extent of the employee's work as a matter of just and reasonable inference and then may award damages to the employee, even though the result be only approximate." *In the Matter of Ilya Simchuk*, 22 BOLI 186, 196 (2001), quoting *Anderson v. Mt. Clemens Pottery Co.*, 3289 US 680 (1946).

Respondents did not appear at hearing with evidence to support

their bare assertion that Claimant worked only 51 hours in July 2000. The forum, therefore, has only credited their assertion as an admission that Claimant worked hours for which he was not properly compensated. The forum has relied on Claimant's credible testimony, which was based on his contemporaneous mileage record, to determine the amount and extent of work he performed for Respondents. The forum also finds Respondents' representation to the Oregon Employment Department regarding Claimant's July 2000 hours to be consistent with Claimant's testimony. The forum concludes that Claimant performed 158 hours of work, including overtime hours, for which he was not properly compensated.

**CIVIL PENALTIES**

The forum may award civil penalty wages where a respondent's failure to pay wages is willful. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission willfully if he or she acts, or fails to act, intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

In their answer, Respondents acknowledge they did not pay Claimant for all of the hours he worked in July 2000. Claimant credibly testified that Respondents did not change the agreed upon wage rate at any time during his employment and credible evidence establishes Respondents

knew the amount and extent of the work Claimant performed during July. There is no evidence to show Respondents acted other than intentionally and as free agents when they failed to pay Claimant all wages owed at the time Claimant quit his employment. Respondents acted willfully and are liable for penalty wages under ORS 652.150 in the amount of \$3,120.

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, Respondents **Peter N. and Patsy A. Zambetti** are hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Robert K. Douglas, in the amount of FIVE THOUSAND TWO HUNDRED DOLLARS (\$5,200), less appropriate lawful deductions, representing \$2,080 in gross earned, unpaid, due and payable wages and \$3,120 in penalty wages, plus interest at the legal rate on the sum of \$2,080 from August 4, 2000, until paid and interest at the legal rate on the sum of \$3,120 from September 4, 2000, until paid.

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#### In the Matter of

**SCOTT E. MILLER dba Miller  
Accounting and Consulting**

**Case No. 139-01  
Final Order of Commissioner  
Jack Roberts  
Issued July 29, 2002**

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#### SYNOPSIS

Respondent, a certified public accountant, employed Claimant to perform secretarial and bookkeeping tasks and to prepare simple income tax returns at the rate of \$12.69 per hour. Claimant was not a professional employee excluded from coverage of Oregon's overtime laws. Respondent did not pay Claimant at the applicable overtime rate for all hours worked in excess of 40 per week and failed to pay Claimant all wages due upon termination. Respondent's failure to pay the wages was willful, and Respondent was ordered to pay civil penalty wages in addition to the wages owed. ORS 652.140(2), 652.150, 652.332, 653.261(1); OAR 839-020-0030(1).

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The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Indus-

tries for the State of Oregon. The hearing was held on November 15, 2001, in the Bureau of Labor and Industries hearing room located at 800 NE Oregon Street, Portland, Oregon.

Cynthia Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Edith "Lynn" Shelley ("Claimant") was present throughout the hearing and was not represented by counsel. Scott E. Miller ("Respondent") was present throughout the hearing and was not represented by counsel.

In addition to Claimant, the Agency called Michael Wells, BOLI Wage and Hour Division Compliance Specialist as a witness.

Respondent called himself, Michael Wells, BOLI Wage and Hour Division Compliance Specialist, and Claimant as witnesses.

The forum received as evidence:

a) Administrative exhibits X-1 through X-27 (generated before hearing); and X-28 through X-30 (generated after hearing).

b) Agency exhibits A-1 through A-7, A-9, and A-10 (filed with the Agency's case summary);

c) Respondent exhibits R-1 through R-4, R-6 through R-10, R-13, R-15 through R-17 (filed with Respondent's case summary); and R-18 through R-22 (submitted at hearing).

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

#### **FINDINGS OF FACT – PROCEDURAL**

1) On August 11, 2000, Claimant filed a wage claim form in which she stated Respondent had employed her from October 6, 1998, through December 17, 1999, and failed to pay her for overtime hours worked between February 1 and April 16, 1999.

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

3) On February 24, 2001, the Agency served Respondent with an Order of Determination, numbered 00-3472. The Agency alleged Respondent had employed Claimant during the period February 1 through April 16, 1999, at the rate of \$12.69 per hour and that Claimant had worked a total of 577.75 hours, 131 of which were hours worked in excess of 40 in a given work week, and that Respondent owed Claimant \$831.19 in wages, plus interest. The Agency also alleged Respondent's failure to pay was willful and Respondent, therefore, was liable to Claimant for \$3,045.60 as penalty wages, plus interest. The

Order of Determination gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) On March 13, 2001, Respondent filed an answer and request for hearing. Respondent's answer stated, in pertinent part:

"I received the Order of Determination No. 00-3472, 'the Order,' regarding the claim of Edith Lynn Shelley on February 24, 2001. Pursuant to the Order, I have 20 days to provide you with my request for hearing. Although I requested one in my letters dated January 15, 2001 and December 7, 2000, I reiterate my request for such a hearing.

"In my letter to Mr. Wells dated January 15, 2001, I requested the rules for conducting an appeal. I never received a response from him, but did receive a document title, 'Responding to an Order of Determination or Notice of Intent.' I can only assume these are all of the rules. Pursuant to this document, I must provide you with a written answer, within 20 days from receipt of the Notice [*sic*] of Determination, in which I must admit or deny each fact alleged in the Order and I must state all factual or legal defenses I intend to claim.

"I admit that Ms. Shelley worked for a sole proprietor-

ship named Scott E. Miller, CPA, CVA, that ceased doing business in November 1999. I admit Ms. Shelley earned a salary of \$2,200 per month based upon a 40 hour work week and that equates to \$12.69 per hour. I admit she was employed by the sole proprietorship during the period of October 7, 1998 through November 1999. I admit Ms. Shelley has assigned her wage claim to the BOLI. I deny the employer of Ms. Shelley was Scott E. Miller d/b/a Miller Accounting & Consulting. I deny the employer was required to pay overtime at 1½ times the calculated hourly rate. I deny that Ms. Shelley worked 131 hours of overtime that she would be due compensation under your 'claim.' I deny that the employer 'willfully' failed to pay Ms. Shelley. I further deny the claim by the BOLI that penalty wages, if due, would be \$3,045.60. I deny interest, if due, would be due starting May 1, 1999. I do not believe the BOLI is making any other claims.

"I incorporate by reference all my prior correspondence with the BOLI and verbal communications with Mr. Wells of the BOLI.

"In addition to the facts I denied above, the legal defenses I plan to assert are:

"1. The imposition of a civil penalty is unwarranted because all undisputed wages were paid timely under ORS

652.160 and the imposition of a civil penalty under ORS 652.150 requires a willful failure.

"2. Under ORS 652.12(4) [sic] an employer may enter into a written agreement with an employee regarding the payment of wages at a future date so the imposition of interest beginning May 1, 1999 would be improper.

"3. The hours over 40 per week were calculated by Ms. Shelley and I concur they are 123.75.

"4. Since Ms. Shelley assigned her claim to the BOLI, the BOLI would be required to adhere to the contract she entered into prior to her employment. This would require the BOLI to engage in mediation and then binding arbitration, not the administrative proceedings it has engaged in. Alternative dispute resolution is permitted by ORS 183.470 Sec. 16a. ORS 653.055 prevents an employer from using agreements to circumvent the proper payment of wages, but does not prevent alternative dispute resolution. Under the terms of the employment agreement, any other process would be invalid.

"5. A civil penalty can not be assessed without due process. Information was requested on January 15, 2001 and not received. A valid dispute was levied by the employer and repeated numerous times to both

the employee and to the BOLI. See ORS 183.090. Since there was a valid dispute and a request for appeal, no penalty should be assessed.

"6. Ms. Shelley was a professional under the criteria set forth by the BOLI and therefore the requirement to pay an overtime premium under OAR 830-020-0020 [sic] is not required.

"7. Please refer to my prior correspondence for other legal defenses.

"If I have left anything out, please let me know and I will promptly provide.

"With best regards,

"Scott E. Miller, CPA, CVA,  
President"

The Hearings Unit did not receive additional documents with Respondent's answer.

5) On May 2, 2001, the Agency requested a hearing. On July 11, 2001, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9 a.m. on November 15, 2001. With the Notice of Hearing, the forum included a copy of the Order of Determination, a "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES," a warning in eight languages that important documents affecting the recipient's rights are included, and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

6) By letter dated, August 24, 2001, Respondent amended his answer and stated:

“After reviewing my files, I became aware that I accidentally did not include an issue in my prior correspondence and would like to amend my response to include it.

“In my prior correspondence, I indicated my disagreement with the BOLI complaint because it failed to address the employment contract entered into as a condition of employment of Ms. Shelley with my CPA firm. I had indicated that Ms. Shelley was required to mediate and then arbitrate any issue arising out of the agreement and by the BOLI not doing so; it invalidated her claim as stated in paragraph 26.

“However, I did not specifically discuss paragraph 13 of the agreement which states ‘the employee may not assign any of his rights or delegate any of his duties or obligations under this Agreement.’

“I therefore request that my prior responses and correspondence be amended to include my objection to the BOLI being assigned Ms. Shelley’s claim as being in violation of the valid contract between Ms. Shelley and my CPA firm.

“Sincerely, Scott E. Miller”

7) On August 31, 2001, Respondent moved for summary judgment “based upon OAR 839-

050-0150(4)(a)(A) issue or claim preclusion, (B) no genuine issue as to any material fact exists and the participant is entitled to judgment as a matter of law, & (C) such other reasons as are just.” On September 4, 2001, the forum issued an interim order requiring the Agency’s written response to the motion by September 10, 2001. On September 6, 2001, the Agency requested an extension of time to respond to Respondent’s motion for summary judgment and represented that Respondent had indicated to her that he had no objection to a time extension. On September 7, 2001, the forum granted the Agency’s request and extended the response time to October 4, 2001.

8) On October 4, 2001, the Agency, through its counsel, Assistant Attorney General Andrus, filed its response to Respondent’s motion for summary judgment. On October 8, 2001, Respondent filed a Response to Response to Motion for Summary Judgment. The forum issued the following ruling on Respondent’s motion for summary judgment on October 15, 2001:

**“Introduction**

“This proceeding involves an assigned wage claim filed by Edith Shelley (“Claimant”) against Respondent. In its Order of Determination issued January 18, 2001, the Agency alleges Respondent failed to compensate Claimant for overtime wages earned during the period between February 1 through April 16, 1999, and,

thus, owes Claimant \$831.19 in unpaid wages, plus interest, and \$3,045.60, plus interest, as penalty wages for Respondent's willful failure to pay all of Claimant's wages when due.

"On August 31, 2001, Respondent filed a motion for summary judgment, pursuant to OAR 839-050-0150(4), contending that because Claimant had failed to comply with the conditions of a 'valid employment agreement,' Claimant's wage claim is invalid and Respondent is entitled to judgment as a matter of law. In support of his motion, Respondent provided copies of an Employment and Non-Compete Agreement signed by Claimant in October 1998; a letter dated June 8, 2000, from Respondent to Claimant; a memorandum dated December 17, 1999, from Respondent to Claimant; a Supreme Court case decided March 21, 2001; and a letter to Respondent from Claimant dated July 18, 2000. The Agency, through its counsel, Assistant Attorney General Stephanie Andrus, filed a timely responsive pleading in which it opposed Respondent's motion. Respondent, in turn, filed a response to the Agency's response on October 10, 2001.

#### **"Summary Judgment Standard**

"A motion for summary judgment may be granted where no genuine issue as to any material fact exists and a participant

is entitled to a judgment as a matter of law, as to all or any part of the proceedings. OAR 839-050-0150(4)(a)(B). The standard for determining if a genuine issue of material fact exists is as follows:

' \* \* \* No genuine issue as to a material fact exists if, based upon the record before the [forum] viewed in a manner most favorable to the adverse party, no objectively reasonable [fact finder] could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at [hearing].' ORCP 47C.

"Respondent has not stated grounds for summary judgment based on issue or claim preclusion, but has invoked OAR 839-050-0150(4)(a)(C), which says summary judgment may also be based on '[s]uch other reasons as are just.' The forum has considered Respondent's motion pursuant to OAR 839-050-0150(4)(a)(B) and (C) in the light most favorable to the Agency. ORCP 47C.

#### **"Respondent's Motion**

"Respondent argues that, as a condition of employment, Claimant signed an 'Employ-

ment and Non-Compete Agreement' whereby she agreed to mediate and arbitrate 'any disputes covered by [the] agreement' and that, under the agreement, her failure to do so would 'result in the claim being invalid.' Respondent further contends that because Claimant agreed to arbitrate any claims covered by the agreement, her assignment to the Agency was invalid and the Agency does not have standing in this action. Additionally, Respondent argues that if the Agency is found to have standing, then it is required to 'stand in the shoes' of the Claimant and mediate and then arbitrate the claim as required under the agreement.

"The threshold question in this case is whether the employment agreement at issue is a valid agreement. The dispute that Respondent argues is subject to mediation and arbitration is Claimant's entitlement to unpaid overtime wages, which is addressed in provision three of the employment agreement as follows:

'3. Compensation. The Employer shall pay the Employee as compensation for the services rendered by the Employee, a wage of \$12.69 per hour paid twice a month. Salary payments shall be subject to withholding and other applicable taxes. Compensation rates shall be reviewed annually. **Employer shall pay over-**

**time at the same rate as regular time.** Employee shall provide Employer a written time sheet for each pay period within 24 hours of its completion. Employee agrees that it is his responsibility to account for his hours daily and Employer shall not be held liable for any hours not reported on his time sheet. **All overtime shall be "banked" and may be used to increase paid hours, up to 40 hours per week, when there is a lack of work. All unused banked time will be paid each year with the period ending November 30<sup>th</sup> paycheck.'** (emphasis in original)

"The forum interprets this provision by looking first to its language, which the forum finds unambiguous, and then in context with the rest of the agreement. See *Pioneer Resources, LLC v. Lemargie*, 175 Or App 202 (2001) (first step in determining contracting parties' intent is to examine the text of the disputed provision in context with the document as a whole and, in the absence of any ambiguity, the analysis ends, and the provision's meaning is determined as a matter of law). In so doing, and in the absence of any ambiguity, the forum finds the parties and Respondent in particular, intended this provision to waive Respondent's statutory obligation to pay overtime

as a condition of Claimant's employment.

"This forum has consistently held that an employer may not avoid the mandate to pay overtime by entering into an agreement with an employee and an employee may not on his or her own behalf waive the employer's statutory duty to pay overtime. *In the Matter of Danny Jones*, 15 BOLI 25 (1996), citing *In the Matter of John Owen*, 5 BOLI 121 (1986). It is axiomatic that such an agreement is contrary to public policy. As this forum has noted before, '[i]f such an agreement were a defense, an employer could require an employee to 'agree' to waive overtime as a condition of employment, and the purposes of the overtime wage laws would be frustrated.' *In the Matter of John Owen*, 5 BOLI at 126. In this case, Respondent required Claimant to "agree" to waive overtime as a condition of her employment and, by doing so, rendered the compensation provision void as a matter of law. See *In the Matter of Locating, Inc.*, 14 BOLI 97 (1995) (finding written agreement between employee and employer void where employee agreed to accept straight time wages for overtime hours worked). The next question, then, is whether the 'Agreement to Mediate and Arbitrate' provision of the employment agreement is applicable to a void provision, *i.e.*, a nonexistent provision. The answer is

that it is not. The dispute raised by Claimant when she assigned her wage claim was the payment of overtime wages. The forum has found the employment agreement's compensation provision, that attempts to regulate payment of Claimant's overtime wages, void and unenforceable. Even if Claimant is required to mediate and arbitrate other disputes covered under the agreement,<sup>1</sup> there remains no contract provision related to this action that is subject to mediation and arbitration under the employment agreement.

"Based on the foregoing, Respondent's motion for summary judgment is **DENIED.**"

9) On October 15, 2001, the forum issued a case summary order requiring the Agency and Respondent to submit case summaries that included: 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 statement of any agreed or stipulated facts; and any wage and penalty calculations

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<sup>1</sup> "The forum makes no determination in this ruling regarding the enforceability of the mediation and arbitration provision. However, as the Agency points out, the provision's efficacy is dubious because it contains language that if deemed unconscionable would render the provision void and unenforceable."

(for the Agency only). The forum ordered the participants to submit their case summaries by November 2, 2001, and advised them of the possible sanctions for failure to comply with the case summary order.

10) On October 17, 2001, Respondent moved for a postponement that would allow him time to appeal the ALJ's ruling on his motion for summary judgment in the "formal court system," allow him time to engage in discovery, and allow time for a pending U. S. Supreme Court case to resolve. On October 22, 2001, the Agency filed objections to Respondent's motion.

11) On October 29, 2001, the forum denied Respondent's motion, finding a lack of good cause shown and no basis for a claim of excusable mistake.

12) On October 30, 2001, Respondent filed a motion for a discovery order seeking 12 categories of documents.

13) On November 1, 2001, Respondent filed a case summary with attached exhibits.

14) On November 2, 2001, the Agency filed objections to Respondent's motion for discovery order stating that the requests were vague, overbroad, and not likely to lead to relevant information.

15) On November 2, 2001, the Agency filed its case summary with attached exhibits.

16) On November 5, 2001, the forum issued a ruling on Re-

spondent's motion for a discovery order that stated, in pertinent part:

"My ruling on Respondent's motion for a discovery order is made in accordance with OAR 839-050-0200 and is as follows:

**"Requests 1 – 7 and 10 - 12**

"In each of these requests, Respondent is seeking documents related to the Agency's position regarding the enforceability of arbitration provisions in employment contracts and the ability of a wage claimant who is subject to an arbitration provision to assign wages to the Agency. The requested documents range from policy statements and internal memoranda to legal opinions. The Agency argues the requests are overly broad, seek privileged information, call for legal research on the part of the Agency, and are not likely to lead to relevant information. The forum concludes that the information sought is not reasonably likely to produce information generally relevant to this case. The forum has already issued a ruling that essentially narrows the issues to whether Claimant is owed overtime wages or is a 'professional' employee exempt from such compensation, and whether any failure to pay overtime compensation was willful. Respondent's requests focus solely on the enforceability of an arbitration provision that is no longer an issue before the forum. Accordingly,

Respondent's request for those documents is **DENIED**.

**"Requests 8 and 9**

"In request number eight, Respondent seeks 'all statistics that are already being calculated and maintained by the BOLI regarding the number of cases submitted to the BOLI and the ultimate disposition of those cases.' Respondent believes the information will help support his defense that the Agency denies employers, in general, due process. His request, however, is vague, overbroad, and imposes an undue burden on the Agency to produce information that Respondent has not established, even remotely, as relevant or likely to lead to relevant information. Accordingly, Respondent's request number eight is **DENIED**.

"In request number nine, Respondent seeks 'the information [the Agency] has regarding actual or potential bias by any of [the Agency's] employees.' This request, also, is vague and overly broad. Moreover, it is the Commissioner who makes the ultimate determinations of law and fact in a contested case. Speculation about bias on the part of Agency employees is not probative of any issues in this case. Respondent's request number nine is **DENIED**."

17) By letter dated November 7, 2001, the Agency advised

the forum that Respondent had filed certain documents in U. S. District Court. Copies of the documents were appended to the Agency's letter.

18) On November 7, 2001, Respondent filed a second motion for postponement based on a pending lawsuit against BOLI in federal court that Respondent filed on October 31, 2001. On November 9, 2001, the Agency filed its objections to Respondent's request by facsimile transmission, asserting the request was untimely and not for good cause shown.

19) On November 9, 2001, the forum issued its ruling on Respondent's second motion for postponement that stated in pertinent part:

"As with Respondent's first request, I have considered the requirements of OAR 839-050-0150(5) that says, in part, "the administrative law judge may grant the request for good cause shown." OAR 839-050-0020(10) provides, in pertinent part:

"'Good cause' means, unless otherwise specifically stated, that a participant failed to perform a required act due to an excusable mistake or circumstance over which the participant had no control. 'Good cause' does not include a lack of knowledge of the law including these rules.'

"I have also considered OAR 839-050-0000 which states that one of the purposes of the

hearings rules is to provide for timely hearings. I find Respondent's reason given in support of his second request does not satisfy the requirements of these rules.

"The request is untimely and based on a reason that does not constitute circumstances beyond Respondent's control. The forum is unaware of any reason, at present, why Respondent's recent action in federal court necessitates a postponement of the scheduled hearing. Respondent's request is **DENIED**."

20) At the start of hearing, Respondent stated he had no questions about the Notice of Contested Case Rights and Procedures, but stated for the record that he had a continuing objection to the ALJ's rulings on all of his prehearing motions.

21) At the start of hearing, the ALJ verbally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

22) At the start of hearing, the participants stipulated to the admission of exhibits A-9, A-10, R-1, R-4, R-8, R-9, and R-10.

23) During the hearing, Respondent objected to the admission of Claimant's time records into evidence on the basis they contained the names of Respondent's clients and were confidential business records. The Agency objected to the timeliness of the objection and argued

that the records were central to the issues in the case. The participants agreed that Respondent released the documents to the Agency prior to the hearing and did not claim a privilege at that time. The ALJ found that the time records were central to the issues before the forum and that Respondent had not timely objected to them based on a privilege. After finding that the names of Respondent's clients were not particularly pertinent to the case, the ALJ ordered the names be redacted from any records submitted as evidence in the record and ordered the participants to refrain from referring to Respondent's clients by name during witness testimony. The Agency was also ordered to return any and all copies of the time records that were not submitted as evidence to Respondent after the hearing and retain only those documents necessary to maintain its record of the proceeding.

24) Respondent advised the forum by letter dated December 5, 2001, that the Agency had not returned Claimant's time records to Respondent in accordance with the ALJ's oral ruling at hearing. Additionally, Respondent asserted the Agency had not complied with the ruling by failing to make the required redaction on the time records.

25) On December 19, 2001, the forum received a letter, with enclosures, from Agency case presenter Domas stating in pertinent part:

“Enclosed are the redacted exhibits per your oral order during the hearing in the above case. A copy has been provided to the Respondent. The Compliance Specialist is sending me Ms. Shelley’s time sheets and I am sending him a redacted copy. His copy of the time sheets will be destroyed.”

26) On December 21, 2001, the forum issued an interim order that stated in pertinent part:

“The Agency is hereby ordered to either (1) return all copies of all Respondent timesheets, retaining only a redacted copy of that which is necessary to preserve the Agency’s file, or (2) with Respondent’s permission, destroy all copies of all Respondent time sheets, retaining only a redacted copy of that which is necessary to preserve the Agency’s file. If the Agency destroys its copies of the timesheets, the Agency must provide to the forum, with a copy to Respondent, a statement certifying that all copies of all Respondent time sheets in the Agency’s possession were destroyed. Said documents must be turned over to Respondent or destroyed, with a certificate filed with the Hearings Unit, by Friday, January 4, 2001 [sic].”

27) On May 29, 2002, the ALJ issued a proposed order and notified the participants they were entitled to file exceptions to the proposed order. After receiving an extension of time to file his exceptions, Respondent filed timely

exceptions, which are addressed in the Opinion section of this Final Order.

#### **FINDINGS OF FACT – THE MERITS**

1) At all times material herein, Respondent Scott E. Miller was a certified public accountant who engaged in business as an accountant and tax consultant and employed one or more individuals in Oregon.

2) Respondent employed Claimant from October 7, 1998 until December 17, 1999.

3) When Respondent hired Claimant, he asked her to sign an employment agreement that stated in pertinent part:

“1. Employment. The Employer agrees to employ the Employee in the capacity of Paraprofessional, upon the terms and conditions set out herein.

“ \* \* \* \* \*

“3. Compensation. The Employer shall pay the Employee as compensation for the services rendered by the Employee, a wage of \$12.69 per hour paid twice a month. Salary payments shall be subject to withholding and other applicable taxes. Compensation rates shall be reviewed annually. Employer shall pay overtime at the same rate as regular time. Employee shall provide Employer a written time sheet for each pay period within 24 hours of its completion. Employee agrees that it

is [her] responsibility to account for [her] hours daily and Employer shall not be held liable for any hours not reported on [her] time sheet. All over-time shall be 'banked' and may be used to increase paid hours, up to 40 hours per week, when there is a lack of work. All unused banked time will be paid each year with the period ending November 30<sup>th</sup> paycheck."

Respondent wrote the employment agreement in 1997 and then hired an attorney to review the completed document.

4) In accordance with the employment agreement, Claimant maintained a weekly time sheet that recorded her billable and non-billable hours worked. On a written time sheet provided by Respondent, she recorded the tasks she performed each day, the name of the client each task pertained to, and the amount of time spent on each task. Claimant turned in her time sheets to Respondent each week and he reviewed and checked off each entry with a pencil or pen. After his review, Respondent entered the approved hours worked into a time and billing program on the computer. Claimant was paid \$12.69 per hour for each hour she worked throughout her employment.

5) Respondent shared an office suite with two other certified public accountants. Claimant was Respondent's only full time employee. Her duties included typing, filing, billing, and working

with a computer tax program to prepare simple tax returns. She also "stuffed" envelopes, answered telephones, and greeted clients for Respondent. There was no front desk person. Clients who were scheduled for appointments walked in and rang a bell for service. Claimant responded to the bell for Respondent and the other two accountants in the office.

6) During tax season, Respondent hired a part time employee to assist with tax preparation. Claimant and the part time employee both assisted Respondent by preparing simple tax returns. Respondent supervised Claimant and the part time employee.

7) Respondent set Claimant's hours and she normally worked from 8 a.m. until 5 p.m., five days per week. During tax season and at Respondent's request, Claimant worked hours that exceeded her 40-hour workweek. As provided in the employment agreement Claimant signed, Respondent "banked" Claimant's overtime hours with the understanding that the hours would be credited to Claimant, at her straight time rate, during the slow season to bring a slow week up to 40 hours when necessary. By the time Claimant's employment with Respondent ended in December 1999, she had accrued 123.75 overtime hours that Respondent had paid at Claimant's straight time rate of \$12.69 per hour. In May 2000, Claimant wrote Re-

spondent a letter that stated in pertinent part:

"I am writing this letter to give you the opportunity to voluntarily pay me the overtime pay I was denied. I calculate that at 123.75 hours at \$6.345 per hour or [sic] a total of \$785.19."

8) Claimant has taken some college level accounting and computer courses, but she does not have a college degree. She holds an Oregon tax consultant's license and passed an exam to become an "enrolled agent" for the IRS. She did not appear before the IRS as an enrolled agent or use her tax consultant license while working for Respondent. Respondent assigned Claimant uncomplicated tax returns to prepare during tax season, but Claimant's primary duty year round involved book-keeping and clerical tasks.

9) Claimant prepared tax returns by using a computer program that required only that she transfer the client's tax information to a standard prepared form. Respondent did not permit Claimant to interview or advise clients on tax matters. Respondent reviewed and signed every tax return Claimant prepared. Because he signed all of the returns, Respondent believed it was his duty to ensure that the work done by others was done correctly.

10) Between February 1 and April 16, 1999, Claimant worked 577.75 hours, 123.75 of which were hours exceeding 40 per week. For those hours, Claimant earned \$8,117.46 (577.75 multi-

plied by \$12.69 and 123.75 multiplied by \$6.35). Respondent paid Claimant only \$7,331.65. Respondent still owes Claimant \$785.81 in unpaid wages.

11) Claimant's last day of work was December 17, 1999.

12) Claimant's due and owing wages of \$785.81 remain unpaid.

13) The forum computed civil penalty wages pursuant to ORS 652.150, as follows: \$12.69 (Claimant's hourly rate) multiplied by 8 (hours per day), which equals \$101.52, multiplied by 30 days, which equals \$3,045.60.

14) All of the witnesses gave credible testimony.

#### **ULTIMATE FINDINGS OF FACT**

1) At all times material herein, Respondent conducted a business in the state of Oregon and engaged the personal services of one or more employees in the operation of that business.

2) Respondent employed Claimant between October 7, 1998, and December 17, 1999.

3) At all times material herein, Claimant was not a bona fide professional employee exempt from overtime.

4) Respondent and Claimant had a written agreement that Claimant would be paid \$12.69 per hour.

5) Between February 1 and April 16, 1999, Claimant worked 577.75 hours, 123.75 of which were in excess of 40 hours per

week. For all of these hours, Claimant earned a total of \$8,117.46. Respondent paid Claimant \$7,331.65 and therefore owed Claimant \$785.81 in earned and unpaid wages at the time Claimant left Respondent's employment.

6) Claimant quit her employment on December 17, 1999.

7) Respondent owes Claimant \$785.81.

8) Respondent willfully failed to pay Claimant \$785.81 in earned, due and payable overtime wages. Respondent has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.

9) Civil penalty wages, computed pursuant to ORS 652.150, equal \$3,045.60.

#### **CONCLUSIONS OF LAW**

1) During all times material herein, Respondent was an employer and Claimant was Respondent's employee subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.414, and 653.010 to 653.261.

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

3) ORS 653.261(1) provides:

"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, minimum meal periods and rest periods, and 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 that except in circumstances not relevant here:

" \* \* \* 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 653.281(1)."

Claimant was not exempt from overtime. Oregon law required Respondent to pay Claimant one and one-half times her regular hourly rate of \$12.69 per hour or \$19.04 per hour for all hours worked in excess of 40 per week. Respondent failed to pay Claimant at the overtime rate, in violation of OAR 839-020-0030(1).

4) ORS 652.140(2) provides:

"When an employee who does not have a contract for a defi-

nite 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."

Claimant's last day of work was December 17, 1999, but the record does not establish whether Claimant gave 48 hours or more notice to Respondent of her intention to quit her employment. Even assuming Claimant did not give the requisite notice, her wages would have been due no later than December 24, 1999. Respondent violated ORS 652.140(2) by failing to pay Claimant \$785.81 by that date.

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; pro-

vided, 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 is liable for \$3,045.60 in civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(2).

6) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant her earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

#### OPINION

In order to prevail in this matter, the Agency was required to prove: 1) that Respondent employed Claimant; 2) Respondent agreed to pay Claimant \$12.69 per hour; 3) that Claimant performed work for which she was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230, 263, 264 (2000). Undisputed evidence shows that Respondent employed Claimant and that he agreed to pay her \$12.69 per hour. The par-

ticipants agree that Respondent paid Claimant for all of the hours she worked in excess of 40 hours per week at the straight time wage rate of \$12.69 per hour. In his answer, however, Respondent contends that Claimant “was a professional under the criteria set forth by BOLI and therefore the requirement to pay an overtime premium under OAR 839-050-0030 is not required.” Respondent has the burden of presenting evidence to support his affirmative defense. *In the Matter of Lane-Douglas Construction*, 21 BOLI 36 (2000). Respondent failed to meet that burden. Evidence establishes that Claimant was, at best, Respondent’s assistant and an hourly employee who worked 123.75 hours in excess of 40 hours per week for which she was not properly compensated.

#### PROFESSIONAL EMPLOYEE

If certain conditions are met, professional employees may be excluded from overtime requirements. ORS 653.020(3) provides an exclusion for an individual:

“[e]ngaged in \* \* \* professional work who:

“(a) Performs predominantly intellectual \* \* \* tasks;

“(b) Exercises discretion and independent judgment; and

“(c) Earns a salary and is paid on a salary basis.”

OAR 839-020-0005 further states that:

“(3) ‘Professional Employee’ means any employee:

“(a) Whose primary duty consists of the performance of:

“(A) Work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes;

“ \* \* \* \* \*

“(b) Whose work requires the consistent exercise of discretion and judgment in its performance; and

“(c) Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; and

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

“ \* \* \* \* \*

“(5) ‘Independent Judgment and Discretion’ means the selection of a course of action from a number of possible alternatives after consideration of each, made freely without direction or supervision with respect to matters of signifi-

cance. It does not include skill exercised in the application of prescribed procedures.”

This forum has not previously discussed this particular exemption or the type of intellectual tasks contemplated as typical of employees performing “professional work.” The forum can, however, take guidance from the federal regulations interpreting the federal exemption statute, which is nearly identical to ORS 653.020(3).<sup>2</sup> Those regulations, which include a definition of “professional employee” very similar to the one in OAR 839-020-0005,<sup>3</sup> include a specific discussion of the exemption as it pertains to accountants. The regulations note that accountants who are not certified public accountants may also be exempt as professional employees if the accountants actually perform work requiring the consistent exercise of discretion and independent judgment and “otherwise meet the tests prescribed in the definition of ‘professional’ employee. Accounting clerks, junior accountants, and other accountants, on the other hand, normally perform a great deal of routine work which is not an es-

sential part of and necessarily incident to any professional work which they may do. Where these facts are found such accountants are not exempt.” 29 CFR § 541.301(f).

In this case, the evidence does not support that Claimant was exempt from overtime as an accountant or an accounting clerk who regularly exercised discretion and independent judgment. Although Claimant had taken some accounting courses and was certified to prepare income tax returns, she did not have the advanced specialized instruction or education contemplated by this exemption. There is no evidence in the record that Claimant prepared anything other than basic, uncomplicated tax returns and even those were subject to Respondent’s review and signature. Moreover, the majority of Claimant’s actual job duties were routine mental and physical tasks that did not require advanced instruction. Even when Claimant was actually preparing income tax returns, she was primarily filling out forms rather than analyzing or making independent judgments concerning individual clients. As the federal regulations further note, “some employers erroneously believe that anyone employed in the field of accountancy, engineering, or other professional fields, will qualify for exemption as a professional employee by virtue of such employment. While there are many exempt employees in these fields, *the exemption of an individual depends upon his [or her]*

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<sup>2</sup> See 29 USC § 13(a)(1), which makes exempt: “any 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 Procedures Act \* \* \*) [.]”

<sup>3</sup> See 29 CFR § 541.3.

*duties and other qualifications.*" (Emphasis added) The regulation emphasizes that the exemption does not apply to all employees of professional employers or all employees in industries having large numbers of professional members, or all employees in a particular occupation. Nor does the exemption apply to "persons with professional training, who are working in professional fields, but performing subprofessional or routine work." 29 CFR § 541.308. Even if evidence showed Claimant had professional training, she was performing routine work and is not exempt as a professional employee.

The final criteria requires that a professional employee "[e]arn[] a salary and [be] paid on a salary basis." ORS 653.020(3)(c). Evidence shows Respondent and Claimant agreed that Claimant would be paid \$12.69 per hour for every hour worked and, in fact, was paid that hourly rate for every hour she worked. The forum finds that when Claimant's job duties and form of compensation are measured against the applicable criteria, Claimant is not a professional employee and is not exempt from Oregon's overtime provisions.

#### **OVERTIME HOURS WORKED**

Respondent does not dispute that Claimant worked at least 123.75 hours of overtime and that he paid the overtime at Claimant's straight time rate of \$12.69 per hour. Claimant contends and her time sheets represent that she worked 131 hours. However,

missing from one of Claimant's time sheets are Respondent's check marks which, evidence established, serve to indicate he has reviewed and accepted the time sheet. That particular time sheet represents that Claimant worked 7.75 hours on March 15, 1999. Since the check marks are present on every other time sheet submitted, the forum infers that either Respondent had no knowledge of the time sheet or for some reason did not accept the time noted by Claimant. In either case, the forum has only credited those time sheets that Respondent reviewed and approved. As a result, the forum finds that Claimant worked a total of 123.75 hours in excess of 40 hours per week. For her total hours worked (577.75), Claimant earned \$8,117.46, including overtime, based on the agreed upon rate of \$12.69 per hour. The participants stipulated that Respondent paid Claimant a total of \$7,331.65. Respondent owes Claimant \$785.81 for overtime wages earned and unpaid.

#### **CIVIL PENALTIES**

An award of penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent, as an employer, had a

duty to know the amount of wages due to his employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238 (1983).

Respondent does not dispute that Claimant worked 123.75 overtime hours, but believed Claimant was a professional employee and therefore exempt from overtime. Respondent's failure to apprehend the correct application of the law pertaining to overtime exemptions and Respondent's actions based on this incorrect application does not exempt Respondent from a determination that he willfully failed to pay wages earned and due. *In the Matter of Locating, Inc.*, 14 BOLI 97 (1994), *aff'd without opinion, Locating, Inc. v. Deforest*, 139 Or App 600, 911 P2d 1289 (1996); *In the Matter of Mario Pedroza*, 13 BOLI 220 (1994). Respondent admits he did not pay Claimant one and one half times her regular rate of pay for her overtime hours worked and the evidence shows his failure to pay the additional half time wages was intentional. From these facts, the forum infers Respondent voluntarily and as a free agent failed to pay Claimant all of the wages she earned between February 1 and April 16, 1999. Respondent acted willfully and is liable for penalty wages under ORS 652.150.

Penalty wages, therefore, are assessed and calculated in accordance with ORS 652.150 in the amount of \$3,045.60. This figure is computed by multiplying \$12.69 per hour by 8 hours per day multi-

plied by 30 days. See ORS 652.150 and OAR 839-001-0470.

### RESPONDENT'S EXCEPTIONS

Respondent filed four general categories of exceptions to the proposed order. The forum has changed portions of the proposed order in response to some of the exceptions and overruled the remainder of the exceptions as discussed below.

#### A. Exception 1 - "Claimant intentionally gave inaccurate testimony designed to mislead the BOLI."

Respondent excepts to the forum's reliance on Claimant's testimony in the proposed order and contends that Claimant's statements regarding the nature of her work, the amount of time she spent on her work, her use of her technical licenses, and her exercise of independent judgment are "completely false." Respondent submitted, for the first time, unsworn statements of previous employees "[t]o support Respondent's claim that Claimant intentionally gave false testimony." This forum has previously held and continues to hold that credibility findings are accorded substantial deference and absent convincing reasons for rejecting such findings, they are not disturbed. *In the Matter of Staff, Inc.*, 16 BOLI 97, 117 (1997). In this case, Claimant's testimony regarding the substantive issues was bolstered by and consistent with Respondent's testimony. At this juncture, Respondent offers

two unsworn statements of former employees describing their job duties while employed by Respondent in an effort to discredit Claimant's testimony. Notwithstanding their lack of relevance,<sup>4</sup> the witness statements constitute new facts that are not part of the record. The forum is required to make its decisions exclusively on the record made at hearing. OAR 839-050-0380(1) states, in pertinent part, that "[a]ny new facts presented or issues raised in \* \* \* exceptions shall not be considered by the commissioner in preparation of the Final Order." See also *In the Matter of Diran Barber*, 16 BOLI 190 (1997). The forum, therefore, has not considered the statements and, after considering Respondent's arguments and the evidence, finds no convincing reason to disturb the ALJ's finding that all of the witnesses, including Claimant and Respondent, testified credibly. Respondent's exception is denied.

**B. Exception 2 - "Factual inaccuracies in the proposed order."**

Respondent cites three inaccuracies in the proposed order. First, Respondent correctly points out that the proposed order erroneously states that Claimant's earned and unpaid wages were due on February 7, 1999. The correct date is December 24, 1999, and the appropriate

changes were made in the Conclusions of Law and Order sections of this Final Order.

Second, Respondent notes that the proposed order did not mention a letter signed by Claimant stating she had been fully compensated for all of her time while employed by Respondent. There is no such letter in the record; however, Claimant acknowledged during her testimony that she had signed a statement agreeing she had been compensated for all hours worked, but that she did not sign a statement agreeing she had been paid at the proper rate. Respondent posits that Claimant has "waived her right to any additional compensation (if it were due her)" by acknowledging she was paid for all hours worked. Such a position is contrary to the law. Respondent is required to pay Claimant at the proper rate and Claimant's acceptance of straight time pay for her overtime hours worked is not a defense to an administrative action to collect earned, due, and payable wages. *In the Matter of Locating, Inc.*, 14 BOLI 97, 108 (1995). Respondent's exception on this point is denied.

Finally, Respondent states that during the hearing "Respondent made certain objections regarding the Forum's previous rulings [that] were not noted in the Proposed Order and may therefore provide an incomplete record of the hearing." The forum has modified Finding of Fact – Procedural 20 to reflect Respondent's continuing

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<sup>4</sup> The authors of the statements do not reveal any personal knowledge of Claimant's job duties during her period of employment with Respondent.

objection to the ALJ's rulings on Respondent's prehearing motions.

**C. Exception 3 - "The investigator failed to do his job correctly which resulted in Respondent being inappropriately assessed penalty wages."**

Respondent's lengthy exception regarding the competency of the Agency's investigation, if not completely irrelevant, is without merit. There is no evidence in the record made at hearing that (1) shows the Agency investigator failed to perform his job correctly or (2) that Respondent was inappropriately assessed civil penalty wages. Respondent's exception is denied.

**D. Exception 4 - "Not all of the evidence was considered or given appropriate weight."**

Respondent cites three examples of evidence Respondent believes the ALJ did not consider. First, Respondent contends the proposed order omitted evidence (an employment agreement that was reviewed by an attorney in 1997) that shows Respondent did not have the "intent or knowledge required for an award of penalty wages." To the contrary, the employment agreement was considered by the ALJ to the extent that it established that Respondent intended to pay Claimant straight time wages for overtime hours worked. Moreover, the agreement also established that Respondent vol-

untarily and as a free agent failed to pay Claimant all of her overtime wages, earned and due. Those facts, established in the employment agreement, are enough to find Respondent liable for civil penalty wages. Respondent's exception is denied. The forum, however, made a minor revision to Finding of Fact – The Merits 3 to clarify the finding.

Second, Respondent excepts to the lack of discussion in the proposed order regarding Respondent's claim that the Agency investigator "tried to use heavy handed and illegal tactics to force Respondent not to exercise his legal rights to appeal." There is no evidence in the record that warrants such a discussion and Respondent's exception is therefore denied.

Finally, Respondent asserts that despite the ALJ's finding that all of the witnesses were credible, the ALJ did not give Respondent's evidence equal weight. There is no evidence in the record that "there was a presumption that Respondent would not act truthfully." To the contrary, Respondent's testimony regarding the substantive issues was given considerable weight and was found to be consistent with Claimant's testimony. Respondent attached a different significance to the facts than the ALJ, but that difference does not render Respondent's testimony less than credible. The forum is not required to explain why it chooses which evidence to believe; likewise, if

from a basic finding of fact the forum could rationally infer a further fact, the forum need not explain the rationale by which the inferred fact is reached. *In the Matter of Scott Nelson*, 15 BOLI 168, 189 (1996). Respondent's misapprehension of the facts and law in this case, does not portend a lack of credibility on Respondent's part, but rather an earnest, albeit mistaken, belief that his interpretation of the facts and law and inferences drawn therefrom is correct. Respondent's exception is denied.

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages and civil penalty wages Respondent owes as a result of his violations of ORS 652.140(2), the Commissioner of the Bureau of Labor and Industries hereby orders **Scott E. Miller** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries in trust for Edith "Lynn" Shelley in the amount of THREE THOUSAND EIGHT HUNDRED THIRTY ONE DOLLARS AND FORTY ONE CENTS (\$3,831.41), less appropriate lawful deductions, representing \$785.81 in gross earned, unpaid, due and payable wages and \$3,045.60 in penalty wages, plus interest at the legal rate on the sum of \$785.81 from December 24, 1999, until paid and interest at

the legal rate on the sum of \$3,045.60 from January 24, 2000, until paid.

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#### In the Matter of

**TONI KUCHAR dba South  
Beach Gallery & Studio**

**Case No. 34-02**

**Final Order of Commissioner  
Jack Roberts**

**Issued August 2, 2002**

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#### SYNOPSIS

Where Claimant performed odd jobs for Respondent, was paid less than minimum wage for hours worked, was not paid for all hours worked, and Respondent claimed she was not an employee, the forum found that Claimant was an employee covered by state minimum wage provisions. The forum also found Claimant was underpaid wages for hours worked and not paid for all hours worked. Respondent kept no record of Claimant's work hours and the forum awarded Claimant \$203.50 in unpaid wages based on Claimant's credible testimony and contemporaneous records. Respondent's failure to pay was willful and the forum ordered Respondent to pay \$1,560 in civil penalty wages in addition to the unpaid wages. ORS 653.010; ORS 652.310; ORS 652.140(2); *former* ORS 652.150.

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The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on July 9, 2002, in the Abby Room of the Oregon Employment Department, located at 120 NE Avery Street, Newport, Oregon.

Peter McSwain, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Nicole J. Reed ("Claimant") was present throughout the hearing and was not represented by counsel. Toni Kuchar ("Respondent") was present throughout the hearing and was not represented by counsel.

In addition to Claimant, the Agency called as witnesses: Sam Reed, Claimant's grandfather, and Newell Enos, BOLI Wage and Hour Division Compliance Specialist.

In addition to herself, Respondent called as witnesses: Carrie Gartz, Respondent's friend, and Jack Parks, Respondent's husband.

The forum received as evidence:

a) Administrative exhibits X-1 through X-7;

b) Agency exhibits A-1 through A-8 (filed with the Agency's case summary) and A-9 through A-11 (submitted at hearing).

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

#### **FINDINGS OF FACT – PROCEDURAL**

1) On October 16, 2001, Claimant filed a wage claim form stating Respondent had employed her from July 26 through September 28, 2001, and failed to pay her at least the minimum wage rate for all hours worked.

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

3) On January 10, 2002, the Agency issued an Order of Determination, numbered 01-4798. The Agency alleged Respondent had employed Claimant during the period July 26 through September 28, 2001, at the rate of \$6.50 per hour for 249 hours of work, no part of which had been paid except \$625, leaving a balance due and owing of \$993.50. The Agency also alleged Respondent's failure to pay all of Claimant's wages when due was willful and Respondent was liable to Claimant for \$1,560 as penalty wages, plus interest. The Order of Determination was personally served on Toni Kuchar at 3607 South Coast Highway, South

Beach, Oregon, and gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) On February 5, 2002, Respondent filed an answer and requested a hearing. Respondent's answer stated, in pertinent part:

"Nicole J. Reed was not hired as an employee. She did a couple of odd jobs for pay. Each job payed [*sic*] on that day (example) like yard work and washing paint off windows. She was never hired as a [*sic*] employee. During period she says she was employed the shop wasn't open. I sent statements 3 times to Bureau. One I faxed[,] 2 sent by mail. 36 pages, also statement from the women who had sublet my shop in August thru Sept. There was a craft bazaar [*sic*]. She was not here or hired by anyone.

"Nicole Reed owes Toni Kuchar \$50 on payment of loan to her. Nicole Reed was paid in full. She called and made threats to try & get money. The woman who had bazaar [*sic*] here took a phone call from Nicole Reed to me. Nicole didn't realize that she wasn't speaking to me. I sent statements of persons next door to me and never have they been reviewed."

5) On February 25, 2002, the Agency requested a hearing. On

February 26, 2002, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 10 a.m. on July 9, 2002. With the Notice of Hearing, the forum included a copy of the Order of Determination, a "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES" and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440. The Notice of Hearing and accompanying documents were mailed to Toni Kuchar, South Beach Gallery & Studio, 3607 South Coast Highway 101, South Beach, Oregon 97366-9635. The U.S. Post Office did not return the Notice of Hearing documents to the Hearings Unit.

6) On February 28, 2002, the forum sent Respondent a copy of the amended contested case hearing rules and a revised Summary of Contested Case Rights and Procedures, effective February 15, 2002. The amended rules and revised summary were mailed to Toni Kuchar, South Beach Gallery & Studio, 3607 South Coast Highway 101, South Beach, Oregon 97366-9635, and were not returned by the U.S. Post Office.

7) On April 30, 2002, the Agency moved for a discovery order requiring Respondent to produce five categories of documents. The Agency included a copy of its informal discovery request, marked as "Agency Exhibit A," which was mailed to Respondent at PO Box 93, South Beach, Oregon 97366, on April 10, 2002. The relevance of the documents

sought in four of the five categories was readily apparent. Respondent filed no response to the Agency's motion. On May 14, 2002, the forum issued an interim order that granted the Agency's motion and required Respondent to produce all of the requested documents in four of the five categories to the Agency no later than May 17, 2002. The forum's discovery order was mailed to Respondent at PO Box 93, South Beach, Oregon 97366, and was not returned by the U.S. Post Office.

8) On June 4, 2002, the forum issued a case summary order requiring the Agency and Respondent to submit case summaries that included: 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); and 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 their case summaries by June 28, 2002, and advised them of the possible sanctions for failure to comply with the case summary order. The case summary order was mailed to Respondent at PO Box 93, South Beach, Oregon 97366, and was not returned by the U.S. Post Office.

9) The Agency filed its case summary, with attached exhibits, on June 11, 2002. Respondent did not file a case summary.

10) At the start of hearing, Respondent stated she had received the Notice of Contested Case Rights and Procedures and had no questions.

11) At the start of hearing, the ALJ verbally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

12) During the hearing, Respondent stated that she did not receive the forum's discovery order or the interim order requiring case summaries that were mailed to her on May 14 and June 4, 2002, respectively, to PO Box 93, South Beach, Oregon 97366. Respondent further stated that she has received mail at that address since January 2002.

13) On July 10, 2002, at the participants' request, the forum mailed copies of administrative exhibits X-1 through X-7 to Respondent at PO Box 93, South Beach, Oregon 97366, and 3607 South Coast Highway 101, South Beach, Oregon 97366-9635.

14) The ALJ issued a proposed order on July 19, 2001, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

#### **FINDINGS OF FACT – THE MERITS**

1) At all times material herein, Respondent Toni Kuchar operated a blown glass retail business under the assumed business name

of South Beach Gallery & Studio and employed one or more individuals in Oregon.

2) Mutual friends introduced Claimant and Respondent during the summer of 2001. When they met, Respondent was preparing to open a shop in South Beach, Oregon, which displayed and sold hand blown glass. Claimant was looking for work at that time and Respondent agreed to pay her \$5.00 per hour to help Respondent ready the shop for business. Respondent told Claimant her hourly rate would increase to \$6.50 per hour after the shop's "grand opening" sometime in August.

3) Claimant's first day of work was July 26, 2001.

4) Between July 26 and September 28, 2001, Claimant performed odd jobs such as cleaning glass, answering the telephone, dusting shelves, sweeping floors, and painting walls. Claimant occasionally sold glass floats and tended the shop when Respondent was elsewhere.

5) In July and August 2001, Claimant worked irregular hours and usually called Respondent to determine what day and time Respondent needed her in the shop. Claimant's grandfather, with whom she lived, drove her to and from work each workday because Claimant did not have a driver's license.

6) In July and August 2001, Claimant kept a daily record of her

hours in a small loose leaf "Portable Student Planner"<sup>1</sup> because she believed Respondent was not recording her work hours. Claimant stopped recording her hours in September 2001 because Respondent began tracking Claimant's hours on a calendar, which hung on a wall, after the shop opened for business.

7) In September 2001, Claimant began attending an alternative high school two hours per day and received credit for any hours she worked for Respondent. Claimant believed the special program was designed "for kids who can't cope with regular high school." Claimant arranged to have her school hours switched from late afternoon to morning hours so that she was free to work for Respondent in the afternoons for five or six hours.

8) At all times material herein, Oregon's minimum wage was \$6.50 per hour. The difference between the amount Respondent was required to pay Claimant for every hour worked and the amount Respondent paid Claimant for every hour she worked is \$1.50.

9) For the week ending July 28, 2001, Claimant worked 18 hours and was paid \$5.00 per hour for a total of \$90.00. Respondent underpaid Claimant

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<sup>1</sup> Claimant's planner included a monthly calendar on which Claimant noted appointments and recorded her daily work hours in July and August 2001.

\$27.00 (18 hours x \$1.50 per hour).

10) For the week ending August 4, 2001, Claimant worked 14.5 hours and was paid \$5.00 per hour for a total of \$72.50. Respondent underpaid Claimant \$21.75 (14.5 hours x \$1.50).

11) Claimant's planner does not show any hours worked during the week ending August 11, 2001.

12) For the week ending August 18, 2001, Claimant worked 17.5 hours and was paid \$5.00 per hour for a total of \$87.50. Respondent underpaid Claimant \$26.25 (17.5 hours x \$1.50).

13) For the week ending August 25, 2001, Claimant worked 22 hours and was paid \$5.00 per hour for a total of \$110. Respondent underpaid Claimant \$33.00 (22 hours x \$1.50).

14) For the week ending September 1, 2001, Claimant worked 16 hours and was paid \$5.00 per hour for a total of \$80. Respondent underpaid Claimant \$24.00 (16 hours x \$1.50).

15) Claimant worked 11 hours in September for which she received no compensation. For those 11 hours, Claimant earned \$71.50 (11 hours x \$6.50 per hour).

16) Between July 26 and September 28, 2001, Claimant worked 99 hours, earning a total of \$643.50 in gross wages.

17) Respondent paid Claimant gross wages of \$440.

18) Respondent owes Claimant \$203.50 for 99 hours of work (88 hours x \$1.50 and 11 x \$6.50).

19) Claimant quit her employment without notice on September 28, 2001, after Respondent became angry when Claimant asked for the \$55.00 that Respondent owed her for hours worked in September. Claimant based her demand for payment on the \$5.00 per hour rate agreed upon when Respondent hired Claimant.

20) When Claimant filed her wage claim in October 2001, she returned to Respondent's business to make a copy of the September calendar showing her hours worked for that month. The calendar had disappeared and Respondent denied knowing its whereabouts.

21) At the time of hearing, Claimant was 16 years old.

22) Claimant's testimony about the numbers of hours she worked between July 26 and September 28, 2001, and the sum she was paid for working those hours was credible and bolstered by her contemporaneous planner. Although her interaction with Respondent during the hearing was acrimonious, the forum attributed Claimant's emotional behavior during some of her testimony to her youth and Respondent's confrontational manner when questioning Claimant. The forum has credited Claimant's testimony and the

notes on her contemporaneous planner in their entirety.

23) Gartz credibly testified that she knew Respondent needed help setting up her business and observed Claimant working at South Beach Gallery, which Respondent owned. She did not know specific dates or hours Claimant worked, but credibly testified that she observed Claimant working in the shop on several occasions and that Claimant told her, in September 2001, that Respondent still owed Claimant \$55.00. The forum has credited Gartz' testimony in its entirety.

24) Reed's testimony that he drove Claimant to and from work each day she worked was credible and the forum has credited his testimony in its entirety.

25) Respondent's testimony suggesting that Claimant was either "working off" money Respondent loaned to her or "working off the cost of blown glass [Claimant] had taken from the shop" was not credible. However, her contrary testimony that she needed someone to help ready her shop for business and that Claimant "desperately" needed a job and asked Respondent for a job, performed work at Respondent's shop, and was paid cash for the work performed, was consistent with other credible testimony. The forum, therefore, credits the latter testimony as an admission. Additionally, the forum believes Respondent's testimony that she maintained a wall calendar in September 2001 to note

hours worked, but does not believe her claim that she noted her niece's hours on the calendar rather than Claimant's or that her "niece" had the same name as Claimant. There was no evidence to support that claim and the forum only credits Respondent's statement that a wall calendar hung on the wall of her shop with notes pertaining to "Nicole's work hours" as an admission.

26) Parks' testimony was influenced by his marital relationship with Respondent and the forum gave it no weight.

27) Enos' testimony that Respondent provided no records to the Agency during the wage claim investigation was credible.

#### **ULTIMATE FINDINGS OF FACT**

1) Respondent, at all times material herein, conducted a business that engaged the personal services of one or more employees in Oregon.

2) Respondent engaged Claimant's personal services and suffered or permitted Claimant to work from July 26 through September 28, 2001.

3) Oregon's minimum wage at times material was \$6.50 per hour.

4) Claimant quit her employment without notice to Respondent on September 28, 2001.

5) Claimant worked 99 hours between July 26 and September 28, 2001, earning a total of \$643.50. Respondent paid

Claimant \$440 and owed Claimant \$203.50 in earned and unpaid compensation on the day her employment terminated.

6) Respondent willfully failed to pay Claimant the \$203.50 in earned, due and payable wages no later than October 8, 2001, the fifth business day after Claimant quit her employment without notice to Respondent. Respondent has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.

7) Civil penalty wages, computed pursuant to *former* ORS 652.150 and OAR 839-001-0470, equal \$1,560 (\$6.50 per hour x 8 hours per day x 30 days).

#### CONCLUSIONS OF LAW

1) ORS 653.010 provides, in pertinent part:

“(3) ‘Employ’ includes to suffer or permit to work; \* \* \*.”

“(4) ‘Employer’ means any person who employs another person \* \* \*.”

ORS 652.310 provides, in pertinent part:

“(1) ‘Employer’ means any person who in this state, directly or through an agent, engages personal services of one or more employees \* \* \*.”

“(2) ‘Employee’ means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or

agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled.”

During all times material herein, Respondent was an employer and Claimant was Respondent’s employee, subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.414, and 653.010 to 653.261.

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

3) At times material herein, ORS 652.140(2) provided:

“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 violated ORS 652.140(2) by failing to pay Claimant all wages earned and

unpaid within five days, excluding Saturdays, Sundays and holidays, after Claimant quit her employment without notice.

4) At times material herein, *former* ORS 652.150<sup>2</sup> provided:

“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 is liable for \$1,560 in civil penalties under *former* ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(2).

5) Under the facts and circumstances of this record, and according to the applicable law,

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<sup>2</sup> In 2001, the legislature amended ORS 652.150. The amendment is not relevant to this matter, which involves wages earned prior to its effective date of January 1, 2002.

the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant her earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

### OPINION

The Agency was required to prove: 1) that Respondent employed Claimant; 2) any pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) that Claimant performed work for which she was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230 (2000). Respondent does not dispute that Claimant performed odd jobs in Respondent’s shop for compensation, but denies Claimant was an employee. The evidence proves otherwise.

### RESPONDENT EMPLOYED CLAIMANT

Respondent’s bare assertion that Claimant was not an employee contrasts with evidence, including Respondent’s own testimony, that corroborates Claimant’s statements that she was paid, albeit underpaid, for work performed in Respondent’s shop at Respondent’s behest. ORS chapter 653 governs minimum wage claims. For purposes of chapter 653, a person is an “employee” of another if that other “suffers or permits” the person to work. *Id.* at 264. Respondent suf-

ferred or permitted Claimant to render services for her at Respondent's business, and the forum concludes that Claimant was Respondent's employee under ORS chapter 653.

#### **CLAIMANT'S PAY RATE**

ORS 653.025 prohibits employers from paying employees less than \$6.50 for each hour of work time. Any employer who pays less than the minimum wage is liable to the affected employee for the full amount of wages owed, less any amount paid, and for civil penalties provided in *former* ORS 652.150. See ORS 653.055. An agreement between an employer and employee to work at less than the minimum wage and an employee's acceptance of less than minimum wage are not defenses to a wage claim action. See ORS 653.055. See also *In the Matter of La Estrellita, Inc.*, 12 BOLI 232, 243 (1994). Respondent paid Claimant \$5.00 per hour and owes Claimant an additional \$1.50 for each hour worked for which Claimant was paid, and \$6.50 per hour for hours worked for which Claimant was not paid. Neither the agreement nor Claimant's acceptance of less than the minimum wage constitute a defense. Claimant is entitled to be paid \$6.50 per hour for all hours she worked for Respondent.

#### **CLAIMANT PERFORMED WORK FOR WHICH SHE WAS NOT PROPERLY COMPENSATED**

Claimant testified credibly that she worked for Respondent and was underpaid or not paid at all

for the hours she worked. Supporting Claimant's testimony, Gartz credibly testified that she observed Claimant working for Respondent and heard Claimant say in September 2001 that Respondent owed her \$55.00. Claimant's grandfather also credibly testified that he drove Claimant to and from her job each workday until Claimant quit because Respondent had not paid her. From those facts, the forum concludes that Claimant performed work for Respondent for which she was not properly paid.

#### **AMOUNT AND EXTENT OF HOURS WORKED**

When the forum concludes, as it does here, that an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. Where an employer has produced no records, as happened in this case, the commissioner may rely on evidence produced by the agency "to show the amount and extent of the employee's work as a matter of just and reasonable inference and then may award damages to the employee, even though the result be only approximate." *In the Matter of Ilya Simchuk*, 22 BOLI 186, 196 (2001), quoting *Anderson v. Mt. Clemens Pottery Co.*, 3289 US 680 (1946).

Respondent kept no record of the days or hours Claimant worked in July and August 2001. Claimant credibly testified that Respondent recorded her Sep-

tember 2001 hours on a calendar that hung on a wall in Respondent's shop and that the calendar disappeared after Claimant filed her wage claim. Respondent acknowledges the calendar, but claims the hours noted belonged to her niece with the same name as Claimant. Respondent offered no evidence to support her claim, nor did she comply with a discovery order requiring her to produce such information. The forum draws an adverse inference from Respondent's failure to produce the calendar and has consequently relied on Claimant's testimony and her contemporaneous planner to determine the amount and extent of work she performed for Respondent. The forum concludes that Claimant performed 99 hours of work for which she was not properly compensated. For all these hours, Claimant earned a total of \$643.50. Claimant credibly testified that she was paid \$5.00 per hour for 88 hours, which totals \$440 in wages she received from Respondent. Respondent owes Claimant \$203.50 in unpaid wages.

#### **CIVIL PENALTIES**

The forum may award civil penalty wages where a respondent's failure to pay wages is willful. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission willfully if he or she acts, or fails to act, intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v.*

*Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

Respondent acknowledged at hearing that Claimant performed work for her at Respondent's shop. Respondent denied, however, that she "employed" Claimant. The facts and law prove otherwise. Respondent's failure to apprehend the correct application of the law and Respondent's actions based on this incorrect application do not exempt Respondent from a determination that she willfully failed to pay wages earned and due. *In the Matter of Locating, Inc.*, 14 BOLI 97 (1994), *aff'd without opinion, Locating, Inc. v. Deforest*, 139 Or App 600, 911 P2d 1289 (1996); *In the Matter of Mario Pedroza*, 13 BOLI 220 (1994). Respondent does not deny she did not pay Claimant the minimum wage for all hours Claimant worked and the evidence shows her failure to pay the minimum wage rate was intentional. From these facts, the forum infers Respondent voluntarily and as a free agent failed to pay Claimant all of the wages she earned between July 26 and September 28, 2001. Respondent acted willfully and is liable for penalty wages under *former* ORS 652.150.

Penalty wages, therefore, are assessed and calculated in accordance with *former* ORS 652.150 in the amount of \$1,560. This figure is computed by multiplying \$6.50 per hour by 8 hours per day multiplied by 30 days. *See former*

ORS 652.150 and OAR 839-001-0470.

### ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages and civil penalty wages Respondent owes as a result of her violations of ORS 652.140(2), the Commissioner of the Bureau of Labor and Industries hereby orders **Toni Kuchar** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Nicole J. Reed, in the amount of ONE THOUSAND SEVEN HUNDRED SIXTY THREE DOLLARS AND FIFTY CENTS (\$1,763.50), less appropriate lawful deductions, representing \$203.50 in gross earned, unpaid, due and payable wages and \$1,560 in penalty wages, plus interest at the legal rate on the sum of \$203.50 from October 8, 2001, until paid and interest at the legal rate on the sum of \$1,560 from November 8, 2001, until paid.

### In the Matter of

### WESTLAND RESOURCES GROUP LLC

Case No. 158-01

Final Order of Commissioner  
Jack Roberts

Issued September 6, 2002

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### SYNOPSIS

Respondent willfully failed to pay an employee all wages earned. The commissioner ordered Respondent to pay the employee \$11,591.36 in unpaid wages plus \$6,487.00 in civil penalty wages. ORS 652.140, ORS 652.150, ORS 653.261, OAR 839-001-0030.

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The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 8, 2001, at the Salem office of the Bureau of Labor and Industries located at 3865 Wolverine NE, E-1, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case pre-

sender Cynthia L. Domas, an employee of the Agency. Glenn D. Woods ("Claimant") was present throughout the hearing and was not represented by counsel. Respondent, after being duly notified of the time and place of the hearing, failed to appear at the hearing and no one appeared on Respondent's behalf.

The Agency called Claimant Woods as its only witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-16 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-16 (submitted prior to hearing) and A-17 (submitted after the hearing);

c) Exhibit ALJ-1 (created by the Administrative Law Judge after the hearing).

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

#### **FINDINGS OF FACT – PROCEDURAL**

1) On July 10, 2000, Claimant filed a wage claim with the Agency. He alleged that Respondent had employed him and failed to pay wages earned between June 12, 1999, and April 7, 2000,

and due to him. (Testimony of Claimant; Exhibit A-1)

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 January 16, 2000, the Agency served Order of Determination No. 00-2933 on Timothy Murphy, Respondent's registered agent, based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of \$11,591.36 in unpaid wages and \$5,685.60 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. The Order of Determination also alleged that Claimant had earned \$17.00 per hour and \$25.00 per hour during the wage claim period.

5) On February 15, 2001, Respondent, through counsel Timothy J. Heinson, filed an answer and written request for hearing. In its answer, Respondent admitted that Claimant was employed by Respondent on or about June 12, 1999, to April 7, 2000, and that Respondent owed Claimant \$11,591.39 in unpaid wages. The answer also raised the affirmative defense that Re-

spondent was financially unable to pay the wages at the time they accrued.

6) On June 29, 2001, the Agency served a "BOLI Request for Hearing" on the forum.

7) On July 30, 2001, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and the Claimant stating the time and place of the hearing as January 8, 2002, and successive days thereafter, at 9:30 a.m., at BOLI's Salem office, 3865 Wolverine NE, Building E-1, Salem, Oregon. Together with the Notice of Hearing, the forum sent 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 October 1, 2001, the ALJ issued a case summary order requiring the Agency and Respondent each to submit a list of witnesses to be called, copies of documents or other physical evidence to be introduced, and a statement of any agreed or stipulated facts. The Agency was additionally ordered to submit wage and penalty calculations and a brief statement of the elements of the claim. Respondent was additionally ordered to submit a brief statement of any defenses to the claim. The ALJ ordered the participants to submit case summaries by December 21, 2001, and notified them of the possible

sanctions for failure to comply with the case summary order.

9) On October 5, 2001, the forum received a letter from Mr. Heinson stating that he no longer represented Respondent.

10) On November 13, 2001, the Agency filed a motion for a discovery order requesting that Respondent produce seven categories of documents and respond to five requests for admissions.

11) On November 13, 2001, the forum issued an interim order setting a 7-day timeline for Respondent's response to the Agency's motion and requiring that Respondent, as a corporation, file its response and be represented by counsel or an authorized representative. Included in the order was a statement that Respondent would be found in default and would not be allowed to participate in the hearing unless it was represented by counsel or an authorized representative.

12) On December 19, 2001, the Agency filed a motion for summary judgment, supporting it with affidavits and documents reflecting Respondent's financial status during Claimant's wage claim period. On the same day, the Agency filed a motion to amend the amount of penalty wages sought upwards to \$5,786.40.

13) On December 20, 2001, the Agency filed its case summary.

14) On December 21, 2001, the forum issued an interim order

requiring that Respondent's objections, if any, to the Agency's motion for summary judgment be filed no later than December 28, 2001. In the interim order, the forum also set forth the forum's standard for considering summary judgment motions.

15) Respondent filed no objections to the Agency's motion to amend the amount of civil penalties sought, and on January 2, 2002, the forum issued an interim order granting the Agency's motion.

16) On January 2, 2002, the forum issued an interim order granting the Agency's motion for summary judgment as to the amount of unpaid wages due and owing to Claimant and to the legal conclusion that penalty wages were owed. The forum ruled that the hearing would commence as scheduled for the sole purpose of determining the total amount earned and total number of hours worked by Claimant in the wage claim period. The interim order read as follows:

#### **"INTRODUCTION**

"This action arises from an Order of Determination issued by the Agency on January 9, 2001, seeking unpaid wages in the amount of \$11,591.36 as assignee of wage claimant Glenn D. Woods ("claimant"), along with \$5,685.60 as penalty wages pursuant to ORS 652.150. Respondent filed an answer and request for hearing on February 15, 2001, in which Respondent admitted owing

\$11,591.39 in unpaid wages to claimant, but denied that Respondent willfully failed to pay the wages and affirmatively alleged that Respondent was financially unable to pay the wages at the time the wages accrued.

"On December 19, 2001, the Agency filed a motion for summary judgment, contending that Respondent's admission of unpaid wages and evidence submitted by the Agency in support of its motion entitled the Agency to summary judgment. On December 21, 2001, the forum issued an interim order notifying Respondent that it must file any objections to the Agency's motion by December 28, 2001. As of today, Respondent has filed no objections to the Agency's motion.

#### **"SUMMARY JUDGMENT STANDARD**

"A motion for summary judgment may be granted where no genuine issue as to any material fact exists and a participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings. OAR 839-050-0150(4)(B). The standard for determining if a genuine issue of material fact exists follows:

' \* \* \* No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objec-

tively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at [hearing]. *In the Matter of Cox and Frey Enterprises, Inc.*, 21 BOLI 175, 178 (2000).'

#### **“UNPAID WAGES**

“In the Order of Determination, the Agency alleged claimant was due \$11,591.36 in unpaid wages, based on an hourly rate of pay of \$17.00 and \$25.50 per hour plus expense reimbursement. Respondent admitted owing claimant that amount in its answer, and did not deny that claimant’s rates of pay were \$17.00 and \$25.50 per hour. Based on Respondent’s admission, no genuine issue of material fact exists as to whether or not the alleged unpaid wages are due claimant and the Agency is entitled to judgment as a matter of law. The Agency’s motion regarding its allegation in the Order of Determination that \$11,591.36 in unpaid wages is due and owing to claimant is **GRANTED**.

#### **“PENALTY WAGES**

“In its Order of Determination, the Agency alleged that claim-

ant is entitled to \$5,685.60 in penalty wages pursuant to ORS 652.150 based on Respondent’s alleged willful failure to pay claimant’s wages. On December 19, 2001, the Agency filed a motion to amend to increase that figure to \$5,786.40. I have issued a separate interim order today granting that motion. In its answer, Respondent denied that its failure to pay claimant his wages was willful, and alleged the affirmative defense of financial ability to pay at the time the wages accrued.

“Under ORS 652.150, an award of penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *In the Matter of Usra Vargas*, 22 BOLI 212, 222 (2001). Respondent’s admission that it owes \$11,591.36 in unpaid wages to claimant establishes Respondent’s knowledge that it failed to pay claimant those of in wages. The forum infers from this knowledge that Respondent did acted voluntarily and as a free agent in failing to pay those wages, and there is no evidence that would allow the forum to view Respondent’s failure to pay claimant in any other light. *In the Matter of R.L. Chapman Ent. Ltd.*, 17

BOLI 277, 284 (1999). The forum therefore concludes that Respondent's failure to pay claimant's wages was willful.

"In support of its motion for summary judgment, the Agency has produced several affidavits and documents showing Respondent's financial condition during the wage claim period that ended on April 7, 2000.

"The affidavits establish that Respondent has operated its business since April 2000 and was still operating on July 21, 2001.

"Quarterly reports submitted by Respondent to the Oregon Employment Department show that Respondent paid wages to its employees in the second, third, and fourth quarters of 2000, and the first, second, and third quarters of 2001.

"Respondent's non-response to the Agency's request for admissions is a third piece of evidence that must be considered by the forum. On November 26, 2001, this forum issued an interim order ruling that Respondent must respond to the Agency's November 13, 2001, request for admissions by December 4, 2001, or those admissions would be deemed admitted. As of this date, Respondent had not responded and the statements of alleged fact contained in the Agency's requests for admissions are deemed admitted. Those admissions include the following

– From May 1, 1999, through June 30, 2000, Respondent did not close its doors for business other than for holidays and other regular non-business days; Respondent made payments to its creditors; Respondent made payments to employees; Respondent made payments to utility companies for services provided to Respondent; and Respondent made rent or lease payments to the owner of their office for the use of said office.

"Previously, this forum has rejected a 'financial inability to pay' defense where respondents paid other bills related to their business during the time they failed to pay claimant all wages due and continued to operate their business during that time. *In the Matter of Debbie Frampton*, 19 BOLI 27, 41 (1999); OAR 839-001-0480.

"Respondent's defense of financial inability to pay wages at the time they accrued is an affirmative one and Respondent bears the burden of persuasion to establish it. Consequently, Respondent has the burden of producing evidence to support this defense if it wishes to avoid summary judgment. A showing of financial inability to pay wages at the time they accrued requires specific information as to the financial resources and expenses of the business. *In the Matter of U.S. Telecom International*, 13 BOLI 114, 123 (1994). Respondent has pro-

duced no evidence. Because no genuine issue of material fact remains as to Respondent's alleged financial inability to pay claimant's wages at the time they accrued, the Agency's motion regarding its allegation in the Order of Determination that penalty wages are due is **GRANTED**.

#### **"AMOUNT OF PENALTY WAGES**

"Although the forum has ruled that the Agency is entitled to penalty wages, the amount of those wages is a different matter. Calculations for penalty wages are based on the hourly rate paid to the claimant. ORS 652.150, OAR 839-001-0470. Where more than one wage rate is paid during the wage claim period, penalty wages are computed by taking the total earned during the wage claim period, dividing that figure by the total number of hours worked during the wage claim period, multiplying that figure by eight hours, and multiplying again by 30 days. *In the Matter of Burrito Boy, Inc.*, 16 BOLI 1, 20 (1997). Respondent's denial that penalty wages are due carries with it the implicit denial of the specific amount of penalty wages owed. In addition, Respondent's answer denies the Agency's allegation that no portion of the wages earned by claimant during the wage claim period has been paid. Consequently, unresolved questions remain as to the total amount

earned and total number of hours worked by claimant in the wage claim period. Those questions must be resolved at hearing.

#### **"SUMMARY**

"The Agency is granted summary judgment as to the total amount of unpaid wages due and owing and the legal conclusion that penalty wages are owed. The hearing will commence as scheduled for the sole purpose of establishing the total amount earned and total number of hours worked by claimant in the wage claim period."

This ruling is modified to award the Agency \$11,591.39 in unpaid wages, the amount admitted by Respondent in its answer, instead of \$11,591.36, the amount sought in the Order of Determination. This ruling is **AFFIRMED**.

17) At the start of the hearing, Respondent had not appeared or notified the forum that it would not be appearing at the hearing. The ALJ waited 30 minutes past the time set for hearing before declaring Respondent in default and commencing the hearing.

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

19) During the hearing, the Agency moved to amend the Or-

der of Determination, based on Claimant's testimony at hearing, to allege that Claimant earned \$17.00 per hour and \$25.00 per hour during his employment. The ALJ granted the Agency's motion.

20) At the conclusion of hearing, the ALJ directed the Agency case presenter to submit penalty wage calculations based on Claimant's testimony at hearing no later than January 18, 2002. Those calculations were filed on January 9, 2002.

21) On February 13, 2002, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

22) On April 22, 2002, the Agency moved to dismiss the case based on the Chapter 7 Bankruptcy discharge of Respondent. On April 24, 2002, the ALJ issued an order granting the Agency's motion.

23) On August 16, 2002, the Agency, through its general counsel AAG Stephanie Andrus, filed a motion stating that the Agency's request for dismissal was in error and requesting that the Commissioner issue a Final Order. Andrus served the motion on Respondent, who filed no objections. The issuance of this Final Order confirms that the Agency's motion is GRANTED.

#### **FINDINGS OF FACT – THE MERITS**

1) During all times material herein, Respondent was an Oregon limited liability company that engaged or utilized the personal services of one or more employees in Oregon.

2) Respondent employed Claimant between June 12, 1999, and April 7, 2000. There was no evidence as to the circumstances of Claimant's termination.

3) Claimant worked as a truck driver and mechanic for Respondent. Respondent agreed to pay Claimant \$25.00 per hour for his work as a truck driver and \$17.00 per hour for his work as a mechanic.

4) Claimant's work week began on Monday and ended on Sunday.

5) Between June 12, 1999, and February 20, 2000, Claimant worked an average of 55 hours per week. On the average, he spent 50 of those hours driving truck and 5 hours working as a mechanic. He worked the 5 hours as a mechanic in the latter part of each week after he had already worked 40 hours. He took unpaid leave on the 4<sup>th</sup> of July, on the Friday before Labor Day and on Labor Day, on Thanksgiving and the day after Thanksgiving, and for a week between Christmas and New Year's Day.

6) Claimant maintained contemporaneous records of the hours he worked for the weeks beginning February 21, 2000, and March 6 through April 3, 2000.

7) Respondent provided no records of the hours worked by Claimant or amounts earned by Claimant during his employment.

8) Claimant's overtime rate as a mechanic was \$25.50 per hour (\$17.00 x 1.5) and overtime rate as a truck driver was \$37.50 per hour (\$25.00 x 1.5).

9) Between June 12, 1999, and April 7, 2000, Claimant worked 1639.75 hours straight time and 391.5 overtime hours as a truck driver. In the same period of time, Claimant worked 45.25 hours straight time and 204.5 overtime hours as a mechanic.

10) Between June 12, 1999, and April 7, 2000, Claimant earned a total of \$61,659.03. Claimant was paid all his wages except for the sum of \$11,591.39.

11) Civil penalty wages are computed as follows for Claimant: total amount earned by Claimant between June 12, 1999, and April 7, 2000 (\$61,659.03) divided by total number of hours worked by Claimant between June 12, 1999, and April 7, 2000 (2,281) = \$27.03 per hour x 8 hours x 30 days = \$6,487.00.

3) Claimant worked as a truck driver and mechanic for Respondent. Respondent agreed to pay Claimant \$25.00 per hour for his work as a truck driver and \$17.00 per hour for his work as a mechanic.

4) Between June 12, 1999, and April 7, 2000, Claimant worked 2,281 hours for Respondent and earned \$61,659.03. Claimant has been paid all wages earned except for \$11,591.39.

5) Respondent willfully failed to pay Claimant \$11,591.39 in earned, due and payable wages no later than April 14, 2000, five business days after Claimant's employment with Respondent terminated, and more than 30 days have passed since Claimant's wages became due.

6) Civil penalty wages are computed as follows for Claimant: total amount earned by Claimant between June 12, 1999, and April 7, 2000 (\$61,659.03) divided by total number of hours worked by Claimant between June 12, 1999, and April 7, 2000 (2,281) = \$27.03 per hour x 8 hours x 30 days = \$6,487.00.

**ULTIMATE FINDINGS OF FACT**

1) During all times material herein, Respondent was an Oregon limited liability company that engaged or utilized the personal services of one or more employees.

2) Claimant was employed by Respondent between June 12, 1999, and April 7, 2000, at which time his employment terminated.

**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, 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 652.414.

3) At times material, ORS 652.140(2) provided:

“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 schedule payday after the employee has quit, whichever event first occurs.”

The Agency provided no evidence as to whether Claimant quit or was fired. Therefore, the forum has determined the date the Claimant’s wages were due and payable based on the assumption that Claimant quit without notice, the circumstances most favorable to Respondent. Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid not later than April 7, 2000, five business days after Claimant left Respondent’s employment. Those wages amount to \$11,591.39.

4) ORS 652.150 provides:

“If an employer willfully fails to pay any wages or compensa-

tion 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 is liable for \$6,487.00 in civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(2).

5) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant his earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

#### **OPINION**

The facts in this case are undisputed. Respondent’s liability for Claimant’s unpaid wages was resolved in the ALJ’s interim order granting the Agency’s motion for

summary judgment, as was Respondent's liability for civil penalty wages. The only issue remaining is the amount of penalty wages to which Claimant is entitled.

Claimant received two wages rates during his employment, \$17.00 per hour as a mechanic and \$25.00 per hour as a truck driver, in addition to overtime pay at both rates. Where more than one wage rate is paid during the wage claim period, penalty wages are computed by taking the total earned during the wage claim period, dividing that figure by the total number of hours worked during the wage claim period, multiplying that figure by eight hours, and multiplying again by 30 days. *In the Matter of Burrito Boy, Inc.*, 16 BOLI 1, 20 (1997).

In this case, it is impossible to determine the exact number of hours that Claimant worked and corresponding amount that he earned because the employer provided only incomplete records of wages paid and no records of hours worked. Where an employer produces no records of hours or dates and only incomplete records of earnings, the commissioner may rely on evidence produced by the agency, including credible testimony by a claimant, "to show the amount and extent of the employee's work as a matter of just and reasonable inference" and "may then award damages to the employee, even though the result be only approximate." *In the Matter of Usra A. Vargas*, 22 BOLI 212, 220-21 (2001). In this case, Claimant's

credible testimony and contemporaneous time records lead the forum to conclude that Claimant earned a total of \$61,659.03 during the wage claim period and worked a total of 2,281 hours. As shown in Finding of Fact 11 – The Merits, this works out to \$6,487.00 in penalty wages. This exceeds \$5,786.40, the amount sought by the Agency in its amendment to the Order of Determination. However, this forum has previously held in wage claim cases that the commissioner has the authority to award monetary damages, including civil penalty wages, exceeding those sought in the Order of Determination where they are awarded as compensation for statutory violations alleged in the charging document. *In the Matter of Contractor's Plumbing Service, Inc.*, 20 BOLI 257, 274 (2000).

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages and civil penalty wages owed as a result of its violations of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders **Westland Resources Group LLC** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries in trust for Glenn D. Woods in the amount of EIGHTEEN THOUSAND SEVENTY-EIGHT DOLLARS

AND THIRTY-SIX CENTS (\$18,078.39), less appropriate lawful deductions, representing \$11,591.39 in gross, unpaid, due, and payable wages and \$6,487.00 in penalty wages, plus interest at the legal rate on the sum of \$11,591.39 from May 1, 2000, until paid, and interest at the legal rate on the sum of \$6,487.00 from June 1, 2000, until paid.

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**In the Matter of**

**CEDAR LANDSCAPE, INC.**

**Case No. 59-02**

**Final Order of Commissioner  
Jack Roberts  
Issued September 13, 2002**

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**SYNOPSIS**

Respondent failed to complete and return BOLI's 2001 prevailing wage rate survey by the date BOLI had specified. The Commissioner imposed a \$350 civil penalty for Respondent's violation of ORS 279.359(2). ORS 279.359, ORS 279.370; OAR 839-016-0520, OAR 839-016-0530, OAR 839-016-0540.

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The above-entitled case came on regularly for hearing before

Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on August 13, 2002, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Peter McSwain, an employee of the Agency. Respondent was represented by Stan Grace, Respondent's authorized representative.

Neither the Agency nor Respondent called any witnesses.

The forum received into evidence:

a) Administrative exhibits X-1 through X-5 (submitted prior to hearing) and X-6 (submitted at hearing);

b) Agency exhibits A-1 and A-4 (submitted prior to hearing) and A-2 (submitted at hearing).

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

**FINDINGS OF FACT –  
PROCEDURAL**

1) On March 5, 2002, the Agency issued a Notice of Intent to Assess Civil Penalties ("No-

tice”) in which it alleged that Respondent unlawfully failed to complete and return the 2000 and 2001 Construction Industry Occupational Wage Surveys (“wage survey”) by September 15, 2000, and September 21, 2001, respectively, in violation of ORS 279.359(2). The Agency alleged the violations were aggravated by Respondent’s knowledge or constructive knowledge of the violations, Respondent’s multiple violations and failure to take appropriate action to prevent a recurrence of the violation, the expenditure of significant Agency resources in attempting to obtain compliance, and the seriousness and magnitude of the violations because they affect the Commissioner’s ability to accurately determine the prevailing wage rates and potential skewing of the established rates, which impacts “contractors, subcontractors and employees throughout the state working on public work projects and also on the public agencies and the public fisc.” The Agency sought civil penalties of \$500 for the alleged 2001 wage survey violation and \$250 for the alleged 2000 wage survey violation.

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

3) The Agency’s Notice of Intent was accompanied by a letter from an Agency Compliance Specialist that was one and one-half

pages in length and enclosed a 2001 wage survey booklet. It asked Respondent to complete and return the survey by March 29, 2002, and informed Respondent that if the survey was completed and returned by March 29, 2002, then the Agency would not assess any civil penalties for prior years’ violations regarding the wage survey. It also stated that additional civil penalties would be sought “based on your continuing violations” if the Agency did not receive a completed survey from Respondent by March 29, 2002.

4) On April 4, 2002, the Agency mailed a Notice of Intent to Issue Final Order by Default to Respondent that notified Respondent it would be in default unless it filed an Answer and Request for Hearing by April 15, 2002. On April 8, 2002, Respondent filed an answer and request for hearing through S.G. Grace, who stated he was the “owner and registered agent” for Respondent and would be “the contact agent for Cedar Landscape.”

5) The Agency filed a request for hearing with the Hearings Unit on April 24, 2002.

6) On June 1, 2001, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for August 13, 2002; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency’s administrative rules regarding the contested case

hearing process; and d) a copy of the Notice of Intent.

7) On May 29, 2002, 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; and the elements of the claim, a statement of any agreed or stipulated facts, and any civil penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by August 5, 2002, and notified them of the possible sanctions for failure to comply with the case summary order. The forum also enclosed a form to Respondent designed to assist respondents who are not represented by an attorney.

8) On May 29, 2002, the forum ordered Respondent to provide a letter authorizing S. G. Grace to appear as its authorized representative at hearing and stated that the forum would disregard any motions, filings, or other communications from Respondent unless they were through an attorney or authorized representative.

9) The Agency filed its case summary on July 11, 2002.

10) Stan Grace appeared on Respondent's behalf at the hearing. The ALJ required Grace to submit a handwritten statement authorizing him to appear as Respondent's authorized representative before allowing him to participate in the hearing. At

the start of the hearing, 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.

11) At hearing, the Agency moved to dismiss its charges related to Respondent's alleged failure to return the 2000 wage survey, and the ALJ granted the motion.

12) On August 26, 2002, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

#### **FINDINGS OF FACT – THE MERITS**

1) At all material times, Respondent was an Oregon corporation and contractor based in Sherwood, Oregon and employed workers.

2) The Research and Analysis section of the Employment Department contracted with BOLI in 1998, 1999, and 2000 to conduct wage surveys. The BOLI Commissioner planned to, and did use the survey to aid in the determination of the prevailing wage rates in Oregon.

3) As part of its contract with BOLI, the Employment Department maintained electronic files showing the name of each business contractor to whom wage survey packets were sent, the address where the packets were sent, whether it was returned, the

date the packet was sent for the respective year in which it was sent, whether or not it was timely returned, and when the survey was returned if it was.

4) On August 28, 2001, the Employment Department sent Respondent a wage survey packet addressed to "Cedar Landscape, Inc." at "14145 SW Galbreath Drive, Sherwood, OR 97140" that included a postage paid, pre-addressed envelope for return of the survey. The packet was sent by first class mail and clearly gave notice that its completion and return was required by law and violation could result in the assessment of civil penalties. The packet instructed Respondent to complete and return the survey by September 21, 2001.

5) Reminder cards were sent by first class mail to Respondent at the same address on October 10 and October 20, 2001, indicating that the wage survey had not been received, that Respondent was required to complete and return it by law, and that penalties could be imposed. The second reminder card was also stamped "Final Notice."

6) The Commissioner held a rate setting meeting on November 19, 2001. Wage surveys received after that date were not included in the results of the survey.

7) Respondent received the 2001 wage survey.

8) In 2001, Respondent employed a manager whose function was to ensure all governmental requirements were performed.

Between March 5 and April 8, 2002, Stan Grace, Respondent's "owner and registered agent" \* \* \* "learned that [the manager] had not performed his assigned duties and also that many of [Respondent's] vital records were missing." Grace terminated the manager and is hopeful that "the new procedures that I have enacted will prevent future dilemmas." Grace was unaware that Respondent was late in responding to the 2001 wage survey until he received the Agency's Notice of Intent.

9) Grace completed and returned the 2001 wage survey forms between March 5 and March 29, 2001.

10) Respondent should have known of its failure to timely complete and return the 2001 wage survey.

#### **ULTIMATE FINDINGS OF FACT**

1) Respondent is an Oregon employer.

2) The Commissioner conducted a wage survey in 2001 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage.

3) Respondent received the 2001 wage survey packet.

4) Respondent failed to return the completed survey by September 21, 2001, the date specified by the Commissioner. Respondent did not return the completed survey until March 2002, by which time the Commissioner's prevail-

ing wage rate determination based on the 2001 wage survey was already completed.

### CONCLUSIONS OF LAW

1) ORS 279.359 provides, in pertinent part:

"(2) A person shall make such reports and returns to the Bureau of Labor and Industries as the commissioner may require to determine the prevailing rates of wage. The reports and returns shall be made upon forms furnished by the bureau and within the time prescribed therefor by the commissioner. The person or an authorized representative of the person shall certify to the accuracy of the reports and returns.

\*\*\*\*\*

"(5) As used in this section, 'person' includes any employer, labor organization or any official representative of an employee or employer association."

Respondent, an employer, was a person required to make reports and returns under ORS 279.359(2). Respondent's failure to return a completed 2001 wage survey by September 21, 2001, violated ORS 279.359(2).

2) ORS 279.370 provides, in pertinent part:

"(1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to

exceed \$5,000 for each violation of any provision of ORS 279.348 to 279.380 or any rule of the commissioner adopted pursuant thereto."

OAR 839-016-0520 provides:

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

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

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

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

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

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

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

"(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider

the amount of the underpayment of wages, if any, in violation of any statute or rule.

"(4) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the contractor, subcontractor or contracting agency for the purpose of reducing the amount of the civil penalty to be assessed."

OAR 839-016-0530 provides, in pertinent part:

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

"\* \* \* \* \*

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

"\* \* \* \* \*

"(i) Failure to submit reports and returns in violation of ORS 279.359(2)[.]"

OAR 839-016-0540 provides, in pertinent part:

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

"\* \* \* \* \*

"(5) The civil penalty for all \* \* \* violations [other than violations of ORS 279.350 regarding payment of the prevailing wage] shall be set in accordance with the determinations and considerations referred to in OAR 839-016-0530."

The imposition of a \$350 civil penalty for Respondent's violation of ORS 279.359(2) is an appropriate exercise of the Commissioner's discretion.

#### OPINION

#### THE AGENCY'S PRIMA FACIE CASE

To prove a violation of ORS 279.359(2), the Agency must show that:

(1) Respondent is a "person," which includes an "employer;"

(2) The Commissioner conducted a survey in 2001 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage;

(3) Respondent received the Commissioner's 2001 survey; and

(4) Respondent failed to make the required reports or returns within the time prescribed by the Commissioner.

*In the Matter of F.R. Custom Builders*, 20 BOLI 102, 109-10 (2000).

The Agency alleged all four of these elements in its Notice and

Respondent did not deny any of them. Respondent did not deny any of the Agency's allegations in its Answer and they are all deemed admitted. OAR 839-050-0130(2). The only issue remaining is the amount of civil penalties to be assessed.

### **CIVIL PENALTY**

The Agency seeks a \$500 civil penalty for Respondent's single violation of ORS 279.359. In determining the appropriate size of the penalty, the forum must consider the aggravating and mitigating factors set out in OAR 839-016-0520.

#### **A. Aggravating circumstances.**

The Agency alleged a number of aggravating circumstances<sup>1</sup> and proved several by a preponderance of the evidence. First, it would have been relatively easy for Respondent to comply with the law by returning the wage survey, and the Agency gave Respondent several opportunities to comply, in the form of reminder notices sent by the Employment Department, before issuing its Notice. Second, because it received those reminder notices from the Agency, Respondent knew or should have known of the violation. Third, the violation is serious, in that the Commissioner would be unable to complete his statutorily mandated duty of determining Oregon's prevailing wage rates if all survey recipients failed to return the wage

survey until it was too late to be considered. However, the forum can only speculate as to the magnitude of Respondent's violation, inasmuch as the Agency offered no evidence from which the forum could gauge the extent, if any, to which Respondent's failure to return the 2001 wage survey skewed the Commissioner's determination of the prevailing wage rates. The forum does not consider Respondent's actions with regard to the 2000 survey as an aggravating factor because the Agency's charge that Respondent failed to return the 2000 survey was dismissed.

#### **B. Mitigating circumstances.**

Respondent's violation is partially mitigated by two circumstances. First, Respondent has fired the manager who was responsible for Respondent's failure to return the 2001 wage survey. Second, Respondent states it has enacted new procedures to avoid noncompliance in the future. Although Respondent does not specify what those procedures are, the forum has considered Respondent's representation as mitigation because the Agency did not contest Respondent's assertion.

#### **C. Amount of civil penalty.**

The aggravating and mitigating circumstances in this case are similar to those in the case of *In the Matter of Spot Security*, 22 BOLI 170, 175 (2001). The Commissioner assessed a \$350 civil penalty in *Spot* and the forum

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<sup>1</sup> See Finding of Fact 1 – Procedural, *supra*.

assesses a \$350 civil penalty in this case.

### ORDER

NOW, THEREFORE, as authorized by ORS 279.370 and as payment of the penalty assessed as a result of its violation of ORS 279.359(2), the Commissioner of the Bureau of Labor and Industries hereby orders **Cedar Landscape, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232, a certified check payable to the Bureau of Labor and Industries in the amount of THREE HUNDRED AND FIFTY DOLLARS (\$350.00), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order and the date Respondent complies with the Final Order.

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