In the Matter of

LABOR READY NORTHWEST, INC.

Case Nos. 122-01 and 149-01

Final Order on Reconsideration of Commissioner Dan Gardner

Issued August 19, 2004

SYNOPSIS

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

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 repre-

sented 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[1] (generated in case no. 122-01 prior to case consolidation); XB-1 through XB-4[2] (generated in case no. 149-01 prior to case consolidation); and X-1 through X-6 (generated subsequent to the consolidation of cases 122-01 and 149-01 and prior to hearing);

b) Agency exhibits A-1 through A-53 and A-62 through A-64 (submitted prior to hearing); and A-66 through A-69 (submitted at hearing);

c) Respondent exhibits R-1, R-10, R-12 through R-14, and R-17 (submitted prior to hearing).

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

FINDINGS OF FACT – PROCEDURAL

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

a) Between approximately May 8 and June 9, 2000, Respondent provided manual labor as a subcontractor on the Cornelius Public Works Facility – Phase I Project (the "Cornelius Project"), a public works project subject to regulation under Oregon's prevailing wage rate laws and intentionally failed to pay $971.90 in prevailing wages to eight employees – Joseph Baker,

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[1] 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.

[2] *Id*.

Catherine Clayton, Chris Francis, Jason Henry, Renaldo Ramirez, Alfredo Rodriguez, Miguel Silva, and David Snyder, in violation of ORS 279.350 and OAR 839-016-0035. The Agency sought a $24,000 penalty for these eight alleged violations.

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

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

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

e) The Agency alleged the following aggravating factors:

> "Respondent knew, or should have known, of the violations and avoiding the violations would not have been difficult. Respondent has a lengthy history of prior violations regarding some of the same types of violations alleged herein and has failed to take appropriate remedial actions to stop their recurrence. The violations are serious and of great magnitude. Respondent has been issued a formal warning letter and been the subject of a Final order regarding violations of Oregon's prevailing wage rate laws."

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

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

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

5) On February 28, 2001, the Agency filed a motion to consolidate the hearings in case number 31-01 and the Agency's case against Respondent involving the Cornelius Project. On April 2,

2001, the ALJ heard oral arguments from Respondent and the Agency regarding the Agency's motion to consolidate. That same day, the ALJ issued an interim order denying the Agency's motion. In pertinent part, the order stated:

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

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

7) On April 12, 2001, the Hearings Unit served Respondent with: a) a Notice of Hearing in case number 122-01 involving the Cornelius Project that set the hearing for September 17, 2001; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent.

8) On April 20, 2001, the Agency issued another Notice of Intent to Place on List of Ineligibles and to Assess Civil Penalties in the amount of $24,000 in which it made the following charges against Respondent:

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

b) Respondent did not file certified payroll reports regarding the work performed by its employee on the Central Project until January 18, 2001, in violation of ORS

279.354 and OAR 839-016-0010. The Agency sought a $4,000 penalty for this alleged violation.

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

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

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

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

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

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

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

11) Respondent, through counsel, filed an answer and re-

quest for hearing on May 18, 2001.

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

13) On June 4, 2001, the ALJ ordered the Agency and Respondent each to submit a case summary regarding case number 122-01 that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; a brief statement of the elements of the claim and any civil penalty calculations (for the Agency only); and a brief statement of any defenses to the claim (for Respondent only). The ALJ ordered the participants to submit their case summaries by September 7, 2001, and notified them of the possible sanctions for failure to comply with the case summary order.

14) On June 29, 2001, the Hearings Unit served Respondent with: a) a Notice of Hearing in case number 150-01 involving the Central and Beaver Projects that set the hearing for January 15, 2002; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent.

15) On July 31, 2001, the Agency filed a motion to amend its Notice in case number 122-01[3] 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.[4] Five of the allegations were identical to the five violations alleged contained in the Agency's Notice in case number 149-01.[5] The remaining six were as follows:[6]

"8. At times material, Respondent often required its employees to report to work at Respondent's office, then drive to a particular location to perform work for one of Respondent's clients. At times material, Respondent often required its employees to travel from the place where its employees performed work for Respondent's clients to Respondent's office at the conclusion of the workday. Respondent failed to pay its em-

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[3] 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.

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

[5] *See* Finding of Fact 8 – Procedural, *supra*.

[6] The allegations are referred to by the same numbers in the Agency's motion to amend.

ployees at least the statutory minimum wage of $6.50 per hour for time spent travelling between Respondent's office and the work location where the employees worked for Respondent's clients (and back again). This is in violation of ORS 653.025 and OAR 839-020-0045(3).

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

"10. Respondent filed certified payroll records for employees' work on an Oregon prevailing wage rate project (Southern Oregon University Center for the Visual Arts) in or about late 1999. The certified statements did not meet all the requirements of ORS 297.354(1).[7]

"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 renumbering case number 150-01 to 149-01.

19) On August 17, 2001, the ALJ issued an interim order in which he granted the Agency's motion to amend, consolidated case numbers 122-01 and 149-01 for hearing and rescheduled the

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[7] At hearing, the Agency moved to correct the statutory citation to 279.354(1). Respondent did not object and the ALJ granted the motion.

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)." Re-

spondent 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. 28th 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. 28th St., Tacoma, WA 98409."

3) On July 22, 1999, the Agency issued a Notice of Intent to Assess Civil Penalties against LRI and LRNWI alleging that Respondents had violated Oregon's prevailing wage rate laws in October and November 1998 and in February 1999 and proposing to assess $20,000 in civil penalties. The case was set for hearing and assigned case number 70-99. On June 1, 2000, after hearing, the Commissioner issued a final order concluding that LRI had: (a) violated ORS 279.355 and OAR 839-016-0025 by failing to make and maintain records of the daily hours worked by its employees on a public works project; (b) violated ORS 279.355 and OAR 839-016-0025 by failing to make and maintain records of the daily compensation paid to each of its employees on the project; and (c) violated ORS 279.354 by filing certified payroll reports that inaccurately stated the projects on which two employees had worked. The commissioner imposed civil penalties totaling $13,000 for these violations.

4) On November 1, 2000, the Agency issued a Notice of Intent to Assess Civil Penalties alleging that Respondent had violated Oregon's prevailing wage rate laws on the New Bend Middle School Project in May and June 2000. The Notice proposed to assess $44,000 in civil penalties and to place Respondent on the

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

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

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

THE CORNELIUS PROJECT

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

the Cornelius Project. The contract was for the amount of $1,666,600.

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

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

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

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

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

11) During his investigation, Wells received twelve payroll reports[8] from Respondent reflecting

[8] Throughout this Final Order, the forum uses the term "payroll report" to

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.[9]

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

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

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

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

16) On November 21, 2000, Respondent created a work ticket seeking "back pay on ticket 54272" from I-5 for 5.25 hours of work that Rodriguez, Clayton, and Ramirez each performed on June 12, 2000. Handwritten on the work ticket are the words "Back pay on ticket 54272-1128 Date 6/12/00 got paid $6.50 & was prevailing wage." On November 24, 2000, Respondent created a billing detail for an invoice to I-5 regarding "BACK PAY" that sought $111.67 additional pay each for Clayton, Ramirez, and Rodriguez based on 5.25 hours work performed by each of them at the "bill rate" of $21.27 per hour.

17) On July 6, 2000, Respondent created work tickets seeking "back pay" for "work ticket

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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."

[9] *See id.*

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

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

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

20) An itemized statement of deductions created by Respondent for Chris Francis shows that Respondent issued a check to Francis on June 28, 2000, for 6 hours worked on June 28, 2000, doing "CARPENTRY – INSTALLATION - CABINETWORK" for I-5. Francis was paid gross wages of $60, computed at $10 per hour. A second itemized statement of deductions created by Respondent for Francis shows that he received a check on July 6, 2000, for 6 hours worked on July 6, 2000, doing "CARPENTRY - NOC" for I-5. Again, he was paid gross wages of $60, computed at $10 per hour.

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

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

23) On November 21, 2000, Respondent completed a second payroll report for the week ending July 7, 2000, stating that Baker worked as a "laborer" for 7 hours of straight time on the Cornelius Project on July 3, 2000, at the wage rate of $31.26 per hour and did not work at all on July 6, earn-

ing 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"[10] and was completed by Ivy Finnegan, an "Administrative Assistant."[11]

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

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

30) Respondent's computer data base shows that Francis worked 4 hours on August 9, 8.5 hours on August 10, and 8 hours

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[10] The original payroll report was denoted "Payroll No. 5."

[11] Sherry Johnson, another "Administrative Assistant," completed the first report.

on August 11, 2000 and was paid $31.26 per hour for this work.

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

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

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

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

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

36) Each payroll report submitted by Respondent on the Cornelius Project was accompanied by a "Statement of Compliance" that was signed by one of Respondent's administrative assistants and contained the following language:[12]

> "1. Payroll Number
>
> "2. Payroll Statement Date
>
> "3. Contract Number
>
> "4. Date
>
> "I, (*name of signatory party*), (*title of signatory party)*[13] do hereby state (1) That I pay or supervise the payment of the persons employed by (*Vendor)*[14] on the (*Building or work)*[15]: 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 (*Vendor*)[16] from the full weekly wages earned by any person and that no deductions have been made either directly or indi-

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[12] The cited text reproduces the language, but not the specific format of the Statement of Compliance.

[13] Each was filled in with the words "Administrative Assistant."

[14] Each was filled in with the words "Labor Ready Northwest, Inc."

[15] Each was filled in with the words "Public Works Bldg"

[16] Each was filled in with the words "Labor Ready Northwest, Inc."

rectly 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 amount of the required fringe benefits as listed in the contract, except as noted in Section 4(c) below.

"(c) Exceptions

"Exception (*Craft*) Explanation

"5. Remarks

"6. Name Title Signature

"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[17] on 6/12/00 (@ $6.50 per hour) and $110.72 (@ $21.09 per hour) on 11/21/00.

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

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

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

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

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

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

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

THE CENTRAL PROJECT

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

[17] All payments represent gross wages.

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.[18] Wadsworth worked 8.5 hours for Andersen on the Central Project on September 2 and was paid $57.38 in gross wages, computed at $6.75 per hour.

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

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

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

48) On January 4, 2001, Laing telephoned Salazar and told her that Wadsworth's correct classification was Carpenter, Group 1, and that Respondent must pay Wadsworth overtime for all 8.5 hours that he worked because September 2 was a Saturday. Laing told Salazar that the correct rate was $43.83 per hour. That same day, Salazar caused a check to be issued to Wadsworth in the amount of $194.50 ($315.58 gross pay less deductions). This was the total amount due to Wadsworth.

49) On January 18, 2001, Respondent completed a payroll report that showed Wadsworth had worked as a laborer for 8.5 hours of straight time on September 2, 2000, at the pay rate of $43.83 per hour. Respondent's accompanying "Statement of

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[18] The words "High School" appear in the "Other" box of Respondent's September 2, 2000, work ticket reflecting Wadsworth's work.

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 28th St., Tacoma, WA 98409-8020" in which she wrote, in pertinent part:

> "We recently received a complaint that shows that your employees may not have received the correct rate of pay on the [Beaver Acres Elementary School Fire Rebuild Project]. To resolve this matter quickly, please supply **any and all** time records, payroll records, and certified payroll records for **all** employees who performed work on the project. If you had apprentices on the project, please provide a list of names of these employees, proof of registration and standing in a bona fide apprenticeship program and ratio standards for the workers.
>
> "In addition, if you paid fringes to a third party trust, plan, fund, or program (such as vacation, holiday, medical, pension, etc.), please provide the hourly fringe rate paid to each program and copies of the monthly statements and copies (front and back) of canceled checks showing payments to the fund.
>
> "I need to have this information in my office no later than **August 21, 2000**.
>
> "* * * * *
>
> "Please call me at the number below if you have any questions." (Emphasis in original)

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

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

a) A report for April 22-28 2000, for laborers from Respondent's Tigard location lists the wage rate of all 24 workers as $6.50 per hour of straight time work. "HORIZON RESTORATION SYSTEMS" is typed on the first line of the report. A handwritten notation on top of the report reads "ST rate 27.59 OT 37.64." After each worker's name is a typed figure in a box showing gross wages calculated at $6.50 per hour,[19] 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.[20] Respondent's typed entries show that Cheri Lagasse worked 10.5 hours of straight time on April 28, 2000, and was paid $172.25 for 26.5 hours of straight time work. Handwritten figures in the same boxes show that she was paid for 24 straight time hours and 2.5 overtime hours, with gross wages of $756.16. Six workers have $2.00 deducted from their pay with the notation "equip." This report is not accompanied by a statement of certification. (Exhibit A-33, pp. 10-13)

b) A second report for April 22-28, 2000 for laborers from Respondent's Tigard location that has "CORRECTION" marked on it. With one exception, all workers listed are the same. The added worker is Kerry Lee, who is shown as working 8 hours straight time and 5 hours overtime on April 28, 2000, earning gross wages of $400.92. Lee and all others on the list are described as "laborers" at the rate of pay of $27.59 per hour straight time and $34.64 overtime. The handwritten gross wages on the original report are typed in this report. Cheri Lagasse is shown as having worked 8.0 hours of straight time and 2.5 hours of overtime on April 28. A Statement of Compliance dated "2000/8/9" accompanied this report. It contains a statement above the certificate preparer's signature that reads: "I have read this Certified Statement, know the contents thereof, and it is true to my knowledge." (Exhibit A-33, pp. 5-9)

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

d) A second report for April 29-May 5, 2000, for workers from Respondent's Tigard location dated 8/9/2000 with "CORRECTION" marked on it that lists David Batson as a "laborer with a wage rate of $37.64 per hour for 8.5 hours of overtime worked on Saturday, April 29, 2000, with gross wages of $319.94. A Statement of

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[19] For example, Arturo Perez's gross wages for 8 hours equal $52.00.

[20] For example, Arturo Perez's handwritten gross wages are $220.72 (8.0 x $27.59).

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.[21] "HORIZON RESTORATION SYSTEMS" is printed across the top of the first page of the report. "CORRECTION FOR ELEM. PW" is typewritten under the box entitled "PROJECT AND LOCATION," and "Back paid for W/E 4/28 is handwritten in that same box." "NOT A PAYROLL" is typed in the box entitled "PROJECT OR CONTRACT NO." This report is not accompanied by a statement of certification. (Exhibit A-33, pp. 14-17)

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

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

[21] For example, Dale Saffel's gross wages were $337.44 (16.0 x $21.09).

appears to be due overtime wages. While the base rate shown for Kerry is correct at $27.59, the overtime rate shown is incorrect. The rate should be $37.64, but is shown at $34.64. The gross amount shown on the certified payroll does not match up with either overtime rate, so it is not clear how this gross amount was figured. However, s/he was due $408.90 for the 13 hours worked on April 27, and was only paid $400.92. This leaves $7.97 still owing for these hours. Please review your records, make up the difference in pay to this employee and provide proof of payment to the Bureau.

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

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

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

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

"For several employees, there is a $2.00 deduction shown on the certified payroll report, with the hand-written notation of "equip." Please explain what this deduction is for. ORS 652.610 requires that any deductions from an employee's pay must be for the employee's benefit, and must be authorized in writing by the employee. Please provide copies of the written authorizations for the seven employees with the equipment deductions. If this is an unauthorized deduction, it is possible the amount deducted will need to be refunded to the employees.

"Finally, there may be two employees who worked on this project that did not appear on

the certified payroll reports. I have information indicating Daniel Mark and Daryl Single performed work on this project. Please provide any and all information regarding these employees as it relates to this project.

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

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

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

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

a) Payroll report for April 22-28, 2000 for "Group 1" laborers from Respondent's Tigard location on the Beaver Acres Project. "CORRECTION" is stamped on this document. This was accompanied by a statement of compliance with form language identical to that on statements of compliance submitted with payroll reports by Respondent for the Cornelius Project. This report shows that Kerry Lee worked 12.0 hours of straight time and 1.0 hour of overtime on April 28 and was paid gross wages of $368.72.

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.

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.

d) Statement of Eligibility Requirements for Earned Income Credit 2000.

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.

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

> "Labor Ready's policy is to give a worker, when needed, a few dollars in cash to go to the job site. We will advance him/her $1.00 to $5.00 in cash and deduct the amount from their paycheck at the end of the pay period. Occasionally at the worker's request, we will advance them larger amounts (i.e., workers on prevailing wage jobs).
>
> "All cash advances and equipment, borrowed or purchased, are signed for the by [*sic*] worker involved in the transaction." (Exhibit A-36, p. 5)

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

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

> "I received the amended certified payroll you submitted for the [Beaver Acres Elementary School Fire Rebuild Project]. The amended certified payroll reports are necessary, but simply correcting numbers on a computerized spreadsheet does not provide any proof that the workers were actually paid the amount of wages due them.
>
> "You must still provide documentation that has been requested twice before. This is the third and final request for this documentation. Please provide any and all daily time records (or 'wage tickets,' if this is the Labor Ready term for time records) and payroll records for all employees who performed work on this project. The payroll records I am requesting are not the same as certified payroll reports. If the payroll records do not clearly delineate the number of hours worked and amount of wages paid for the work on the project in question, you must provide <u>all</u> time cards for the duration of each pay period, including those for other projects. The information provided must be for the duration of Labor Ready

Inc.'s work on this project; at least from April 22, 2000 through May 19, 2000. If you are unclear as to what is being requested, please contact me so I can explain. Should you fail to provide these requested records, I will be forced to subpoena the records. I will also consider recommending the assessment of civil penalties against Labor Ready Northwest, Inc. and/or Labor Ready, Inc. for violation of ORS 279.355 and OAR 839-016-0030, for failure to provide records showing whether or not the prevailing wage rate has been paid.

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

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

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

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

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

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

"You are using the federal PWR payroll form for this project, but this form is missing some of the information re-

quired 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,[22] 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.

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[22] 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.

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

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

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

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

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

> "Pending receipt of the proof of voucher payments * * * it appears all employees were paid correctly on this project."
>
> "* * * * *
>
> "When we spoke on Thursday, I mentioned that while I had received some of the requested documentation, Labor Ready had not responded to any of the questions I asked in my letter of October 13, 2000. At this point, rather than provide individual answers to all those questions, I think it would be more beneficial to simply ask for an answer to one question, which is why there continue to be errors on the certified payroll reports.
>
> "* * * * *
>
> "Please provide the requested documentation (proof of payments to workers) and an answer to the question of certified payroll report errors by no later than February 7, 2001. Failure to respond may negatively impact the administrative action currently underway."

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

The voucher could be exchanged for cash in Respondent's cash dispensing machine located in Respondent's local offices.

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

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

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

RESPONDENT'S GENERAL BUSINESS PRACTICES

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

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

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

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

> "II. Prevailing wage laws require three basis [*sic*] things of Labor Ready:
>
> "(A) *Payment of prevailing wages to workers.* Prevailing wages are usually (but not always) much higher than competitive wages, and they vary from region to region. Prevailing wages may also include daily or weekend overtime obligations which are different from general state law. A statement of the prevailing wage for each job category in a particular region may be obtained from the federal or state (as applicable) Department of Labor.
>
> "* * * * *
>
> "It is critically important that we don't fail to identify a prevailing wage job. Become adept at spotting prevailing wage-sounding projects. Do not rely on the customer to advise you as to whether a job is prevailing wage. Call the state or

federal Department of Labor and see if the project is listed (although even this is not foolproof). Do a site visit, look for postings regarding prevailing wage, and inquire of other contractors."

MITIGATION

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

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

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

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

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

AGGRAVATION

79) On January 26, 2000, Tyrone B. Jones, a BOLI Wage & Hour Division compliance specialist, sent a letter to Timothy J. Adams at Labor Ready's corporate office, 1016 S. 28th 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.[23]

CREDIBILITY FINDINGS

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

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

ULTIMATE FINDINGS OF FACT

CORNELIUS PROJECT

1) On December 20, 1999, a contract for the Cornelius Project, a public works project in Hillsboro, Oregon, was awarded to I-5 Excavating, Inc. ("I-5"). The Project was first advertised for bid on November 8, 1999, and its contract was for the amount of $1,666,600.

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

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

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

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

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

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[23] *See* Finding of Fact 15 – Procedural, *supra*.

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

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

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

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

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

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

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

14) On August 18, 2000, Respondent filed a payroll report for the week ending July 7, 2000, for work on the Cornelius Project. This report lacked the statement of certification required by ORS 279.354 and OAR 839-016-0010 and stated that Baker worked 15 hours of straight time as a "laborer" on July 6. Respondent's corrected report, filed on November 21, 2000, also lacked a statement of certification and stated that Baker had not worked at all on July 6.

15) On August 18, 2000, Respondent filed a payroll report for the week ending July 21, 2000, for work on the Cornelius Project. This report lacked the statement of certification required by ORS 279.354 and OAR 839-016-0010 and stated that Francis worked as a "laborer" for 4 hours of straight

time on Saturday, July 15, and 9 hours of straight time on July 19. Respondent's corrected report, filed on November 21, 2000, was identical, except for the payroll number, to the first report, and also lacked a statement of certification.

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

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

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

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

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

CENTRAL PROJECT

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

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

22) On Saturday, September 2, 2000, Respondent's Salem office dispatched Aaron

Wadsworth to perform manual labor for Andersen Woodworks at the Central Project. Wadsworth worked 8.5 hours for Andersen on the Central Project that day. Respondent paid him $57.38 in gross wages, calculated at the rate of $6.75 per hour. Wadsworth only worked one day on the Central Project.

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

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

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

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

BEAVER ACRES PROJECT

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

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

29) On August 4, 2000, Susan Wooley, a compliance specialist employed by the Wage & Hour Division of BOLI, sent a letter to Respondent in which she requested, among other items, "any and all time records, payroll records, and certified payroll records for all employees who performed work on the project." Wooley requested these records because she was unable to determine if Respondent had paid the prevailing rate of wage to its employees on the Beaver Acres Project without them. Wooley requested that these records be provided to her no later than August 21, 2000.

30) On August 18, 2000, Wooley received several payroll reports from Respondent reflecting work done by Respondent's employees on the Beaver Acres

Project. Wooley reviewed the reports but was unable to determine the amount Respondent's employees were paid on the project because of confusing information on the payroll reports and because Respondent did not send any time records or payroll records.

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

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

33) After reviewing Respondent's October 3 submissions, Wooley was still unable to determine if Respondent's workers had been paid the prevailing wage rate. On October 13, 2000, she sent a third letter to Respondent that again requested time records showing the hours Respondent's workers had worked and payroll records documenting the pay that Respondent's workers had actually received. Wooley also requested copies of all canceled checks issued to Respondent's workers on the Beaver Acres Project and other information concerning the workers. Wooley requested that this documentation be provided no later than October 25, 2000, and stated that she would subpoena the records if they were not provided by that date and "take further action as allowed by the prevailing wage rate laws."

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

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

36) On February 5, 2001, Rischman sent a letter to Wooley explaining the reason for inconsistencies in Respondent's certified payroll reports. After receiving that letter, Wooley was finally able to determine that Respondent had

paid all wages due to its workers on the Beaver Acres Project.

CONCLUSIONS OF LAW

1) ORS 279.348(3) provides:

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

OAR 839-016-0004(17) provides:

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

ORS 279.348(5) provides:

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

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

2) ORS 279.350(1) provides, in pertinent part:

> "The hourly rate of wage to be paid by any contractor or subcontractor to workers upon all public works shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality where such labor is performed. The obligation of a contractor or subcontractor to pay the prevailing rate of wage may be discharged by making the payments in cash * * *."

OAR 839-016-0035(1) provides:

> "Every contractor or subcontractor employing workers on a public works project shall pay to such workers no less than the prevailing rate of wage for each trade or occupation, as determined by the Commissioner, in which the workers are employed."

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

> "In all cases where labor is employed by the state, county, school district, municipality, municipal corporation, or subdivision, through a contractor, no person shall be required or permitted to labor more than

10 hours in any one day, or 40 hours in any one week, except in cases of necessity, emergency, or where the public policy absolutely requires it, in which event, the person or persons who employed for excessive hours shall receive at least time and a half pay:

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

"* * * * *

"(C) For all work performed on Saturday * * *."

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

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

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

"(A) On Saturdays;

"* * * * *

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

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

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

3) *Former* ORS 279.354 provided, in pertinent part:

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

thereof and that the same is true to the contractor or subcontractor's knowledge. The certified statements shall set out accurately and completely the payroll records for the prior week including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid.

"(2) Each certified statement required by subsection (1) of this section shall be delivered or mailed by the contractor or subcontractor to the public contracting agency. Certified statements shall be submitted as follows:

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

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

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

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

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

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

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

"(a) For any public works project of 90 days or less from the date of award of the contract to the date of completion

of work under the contract, the form shall be submitted once within 15 days of the date the work first began on the project and once before the agency makes its final inspection of the project;

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

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

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

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

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

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

Respondent filed several payroll reports for work performed by its employee on the Beaver Acres Project that did not meet the requirements of ORS 279.354 and OAR 839-016-0010, constituting one violation of ORS 279.354 and OAR 839-016-0010.[24]

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 conspicu-

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[24] The forum finds one violation because the Agency only alleged one violation.

ous and accessible place in or about the project. Contractors and subcontractors shall be furnished copies of these wage rates by the commissioner without charge."

OAR 839-016-0033(1) provides:

"Contractors shall post the prevailing wage rates applicable to the project in a conspicuous place at the site of work. The posting shall be easily accessible to employees working on the project."

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

5) ORS 279.355(2) provides:

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

OAR 839-016-0030 provides, in pertinent part:

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

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

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

6) ORS 279.370 provides, in pertinent part:

"(1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed $5,000 for each violation of any provision of ORS 279.348 to 279.380 or any rule

of the commissioner adopted pursuant thereto."

OAR 839-016-0500 provides:

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

OAR 839-016-0520 provides:

"(1) The commissioner shall consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be assessed against a contractor, subcontractor or contracting agency and shall cite those the commissioner finds to be applicable:

"(a) The actions of the contractor, subcontractor, or contracting agency in responding to previous violations of statutes and rules.

"(b) Prior violations, if any, of statutes and rules.

"(c) The opportunity and degree of difficulty to comply.

"(d) The magnitude and seriousness of the violation.

"(e) Whether the contractor, subcontractor or contracting agency knew or should have known of the violation.

"(2) It shall be the responsibility of the contractor, subcontractor or contracting agency to provide the commissioner with evidence of any mitigating circumstances set out in subsection (1) of this rule.

"(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of the underpayment of wages, if any, in violation of any statute or rule.

"(4) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the contractor, subcontractor or contracting agency for the purpose of reducing the amount of the civil penalty to be assessed."

OAR 839-016-0530 provides, in pertinent part:

"(1) The commissioner may assess a civil penalty for each violation of any provision of the Prevailing Wage Rate Law (ORS 279.348 to 279.380) and for each violation of any provision of the administrative rules adopted under the Prevailing Wage Rate Law.

"(2) Civil penalties may be assessed against any contractor, subcontractor or contracting agency regulated under the Prevailing Wage Rate Law and are in addition to, not in lieu of, any other penalty prescribed by law.

"(3) The commissioner may assess a civil penalty against a contractor or subcontractor for any of the following violations:

"(a) Failure to pay the prevailing rate of wage in violation of ORS 279.350;

"(b) Failure to post the applicable prevailing wage rates in violation of ORS 279.350(4);

"* * * * *

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

OAR 839-016-0540 provides, in pertinent part:

"(1) The civil penalty for any one violation shall not exceed $5,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

"(2) For purposes of this rule "repeated violations" means violations of a provision of law or rule which has been violated on more than one project within two years of the date of the most recent violation.

"(3) Notwithstanding any other section of this rule, when the commissioner determines to assess a civil penalty for a violation of ORS 279.350 regarding the payment of the prevailing rate of wage, the minimum civil penalty shall be calculated as follows:

"(a) An equal amount of the unpaid wages or $1,000, whichever is less, for the first violation;

"(b) Two times the amount of the unpaid wages or $3,000, whichever is less, for the first repeated violation;

"(c) Three times the amount of the unpaid wages or $5,000, whichever is less, for the second and subsequent repeated violations.

"* * * * *

"(5) The civil penalty for all other violations shall be set in accordance with the determinations and considerations referred to in OAR 839-016-0530.

"(6) The civil penalties set out in this rule shall be in addition to any other penalty assessed or imposed by law or rule."

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

7) ORS 279.361(1) provides:

"(1) When the Commissioner of the Bureau of Labor and Industries, in accordance with the provisions of ORS 183.310 to 183.550, determines that a contractor or subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works * * * or a contractor or subcontractor has intentionally failed or refused to post the prevailing wage rates as required by ORS 279.350(4), the contractor or subcontractor or any firm, corporation, partnership or association in which the contractor or subcontractor has a financial interest shall be ineligible for a period not to exceed three years from the date of publication of the name of the contractor or subcontractor on the ineligible list as provided in this section to receive any contract or subcontract for public works. The commissioner shall maintain a written list of the names of those contractors and subcontractors determined to be ineligible under this section and the period of time for which they are ineligible. A copy of the list shall be published, furnished upon request and made available to contracting agencies."

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

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

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

"* * * * *

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

"* * * * *

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

names were first published on the list."

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

OPINION

RULINGS RESERVED FOR PROPOSED ORDER

A. Exhibits A-54 through A-56.

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

In its exceptions, the Agency acknowledged that Exhibits A-54 to A-56 did not establish a "prior violation" within the meaning of OAR 839-016-0520(1)(b), but argued that they were relevant to show "[t]he actions of the * * * subcontractor * * * in responding to previous violations of statutes and rules" under OAR 839-016-0520(1)(a). The forum disagrees. This rule is intended to penalize contractors and subcontractors for actions taken after an actual determination that a previous violation occurred.[25] 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

[25] 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."

"actions" with regard to Alder took place in May 2001, and cannot be evaluated as responding to a subsequent determination. The Agency's exception is DENIED.

B. Exhibits A-57 through A-61.

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

C. Exhibits 72 and 73.

These exhibits consist of documents that the Agency downloaded from the Internet between the first and second day of hearing. They were offered in rebuttal to show that the operations of LRNWI and LRI were sufficiently intertwined so that LRI's prior violations should be imputed to LRNWI for the purpose of assessing civil penalties. However, although these documents supported the allegations in the Agency's amended Notice of Intent, they did not rebut any evidence presented by Respondent and were irrelevant for that purpose. Respondent's relevancy objection to Exhibits A-72 and A-73 is sustained.

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

At the conclusion of the Agency's case-in-chief, Respondent moved to dismiss the Agency's charges that Respondent failed to post the applicable prevailing wage rates on the Cornelius and Central Projects, arguing that the Agency elicited no testimony and presented no other evidence in support of these charges. In response, the Agency argued that it had presented a prima facie case through three pieces of evidence: (1) evidence that Respondent did not pay the prevailing wage rate on the Cornelius Project until July 6, 2000; (2) evidence that Respondent did not pay the prevailing wage rate on the Central Project until the Agency told Respondent's representative that the Central Project was a prevailing wage rate job;

and (3) evidence cited in the final order issued in case number 31-01 that Respondent did not post on prevailing wage rate jobs in the year 2000. The ALJ denied Respondent's motion. In the proposed order, the ALJ reconsidered this ruling and reversed it, granting Respondent's motion with respect to both the Cornelius and Central Projects on the grounds that the Agency had not presented a prima facie case in its case in chief. In this reconsideration, the ALJ declined to consider evidence relevant to the Agency's posting allegations that came in after the Agency had rested its case. The Agency filed exceptions to the ALJ's conclusions, arguing that it had presented a prima facie case in its case in chief and that evidence presented after the Agency had rested its case must be considered in a review of Respondent's motion to dismiss. The Agency cited Oregon appellate court decisions in support of both points.

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

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

The Agency established the following relevant facts in its case in chief. First, Respondent did not begin paying the prevailing wage rate until July 6, 2000, well after its employees began working on the Cornelius Project. Second, Respondent underpaid its worker on the Central Project until the Agency notified Respondent that the Central Project was a prevailing wage rate job. Third, Timothy Adams, Respondent's general counsel and executive vice president, previously testified on June 19, 2001, a year after Respondent employed workers on the Cornelius and Central Projects, that the posting of prevailing wage rates on job sites by Respondent where Respondent has workers "is not part of our compliance process."[26] 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

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

(1991); *Arkad Enterprises v. Bureau of Labor and Industries,* 107 Or App 384, 386-87 (1991), (quoting *City of Portland v. Bureau of Labor and Industries,* 298 Or 104, 118 (1984). A reasonable inference can be drawn from these facts that Respondent did not post the applicable prevailing wage rates on the Cornelius or Central Projects. Consequently, the forum confirms the ALJ's original ruling at hearing to deny Respondent's motion to dismiss the Agency's posting allegations and reverses the ALJ's contrary ruling in the proposed order.

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

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

ORS 279.350(4) requires all subcontractors who employ workers on a public works project to "keep the prevailing wage rates for that project posted in a conspicuous and accessible place in or about the project." The Oregon Court of Appeals has interpreted this language to require that "every contractor and subcontractor engaged in a public project to personally initially post the prevailing wage and to maintain that posting throughout the course of its employees' work on the project. *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries,* 188 Or App 346, 369, 71 P3d 559, 572 (2003), *rev den* 336 Or 534 (2004).

A. <u>The Cornelius Project.</u>

Respondent was unaware that the Cornelius Project was a public works until July 6, 2000, when one of Respondent's employees told Shannon Shields, manager of Respondent's Hillsboro office who had dispatched Respondent's employees to the Project, that he thought the Cornelius Project was a prevailing wage rate job. Shields then called I-5, the prime contractor, and was informed that Respondent's workers were performing work subject to the prevailing wage. That same day, Shields took a copy of the applicable prevailing wage rates to the

Cornelius Project job site, gave them to I-5's foreman, and asked him to post them. It is undisputed that Respondent did not pay its workers on the Cornelius Project the prevailing wage rate before July 6, 2000. Based on Shields' testimony that she did not believe the Cornelius Project was a public works project before July 6, 2000, and her attempted posting that date, the forum infers that Respondent had not posted or made an attempt to post the prevailing wage rates for the Cornelius Project before July 6, 2000. There is no evidence that Shields or any other representative of Respondent took any other action after July 6, 2000, to post the rates on the Cornelius Project or to verify that they had been posted or were kept posted. Respondent's failure to personally initially post the prevailing wage and to maintain that posting throughout the course of its employees' work on the Cornelius Project constitutes a violation of ORS 279.350(4).

1. Aggravating circumstances.

The violation is a serious one that requires placement on the Commissioner's List of Ineligibles if the Commissioner finds that the violation was intentional. The magnitude is substantial because Respondent did not provide its workers with any way of finding out they were being underpaid and six workers were initially paid less than the prevailing wage rate. There was no evidence that Respondent made any inquiry as to whether the job was a public works when taking the job order. Respondent also failed to take adequate steps to post once it learned the Cornelius Project was a public works. In addition, Respondent previously violated the same statute on the New Bend Middle School Project.

2. Mitigating circumstances.

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

3. Amount of civil penalty.

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

B. The Central Project.

In contrast to the Cornelius Project, where Respondent employed workers for several months, Respondent only employed one worker for one day on the Central Project. The Agency presented evidence that Respondent initially paid its worker $6.75 per hour, as opposed to the prevailing wage rate of $43.83 per hour, and that Respondent sent a check for the difference to BOLI four months later when BOLI in-

formed Respondent's Salem branch office that the Central Project was a public works. Based on Rischman's testimony, Respondent's statements in its training manual, and Respondent's prompt payment of wages owed in the Cornelius and Central Projects when Respondent learned those projects were public works, the forum concludes that Respondent has a corporate policy of paying its workers the prevailing wage rate on public works where Respondent is aware that the job is a public works. Since Respondent did not initially pay its worker the prevailing wage rate in this case, the forum infers that Respondent did not know the Central Project was a public works until so notified by BOLI. Lacking knowledge that the Central Project was a public works, Respondent would have had no reason to post, and there was no evidence presented that Respondent did post. From this evidence, the forum concludes that Respondent did not post the Central Project and violated ORS 279.350(4).

1. Aggravating circumstances.

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

2. Mitigating circumstances.

There are no mitigating circumstances.

3. Amount of civil penalty.

ORS 279.370(1) gives the Commissioner the authority to assess civil penalties for violations of ORS 279.350(4) based merely on Respondent's failure to perform its statutorily prescribed obligation, which was to post and keep the prevailing wage rates posted on the Central Project as long as its worker was employed on that project. *Labor Ready at* 360. Respondent's intent is immaterial. *Id.* The Agency sought a $5,000 civil penalty for Respondent's violation. This is Respondent's third violation, and the forum finds that a $5,000 civil penalty is appropriate.

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

ORS 279.350(1) requires payment of the prevailing rate of wage on public works contracts. To establish a violation of that statute, the Agency must prove: (1) The project at issue was a public work, as that term is defined in ORS 279.348(3); (2)

Respondent was a contractor or subcontractor that employed workers on the public works project whose duties were manual or physical in nature; and (3) Respondent failed to pay those workers at least the prevailing rate of wage for each hour worked on the project. *In the Matter of William George Allmendinger*, 21 BOLI 151, 169-70 (2000). In this case, elements (1) and (2) are undisputed on both the Cornelius and Central Projects.

A. <u>The Cornelius Project.</u>

The Agency alleged that Respondent failed to pay the prevailing wage rate to eight workers – Joseph Baker, Catherine Clayton, Chris Francis, Jason Henry, Renaldo Ramirez, Alfredo Rodriguez, Miguel Silva, and David Snyder -- on the Cornelius Project. The evidence shows that Respondent employed both laborers and carpenters on the Cornelius Project, and that the applicable prevailing wage rate, including fringe benefits, was $27.59 per hour for laborers and $31.86 per hour for carpenters. Respondent's records show that six workers – Clayton, Ramirez, Rodriguez, Baker, Francis, and Faried Hawash -- were initially paid less than the prevailing wage rate. There is no evidence that Henry or Silva worked on the Cornelius Project or that Snyder was underpaid. With one exception, Respondent subsequently issued back pay checks to all six workers, bringing their wages up to the prevailing wage rate. That exception is Francis, who received a check for back pay, but was still owed $34.50 in unpaid wages at the time of hearing. Although Respondent's subsequent payment of back wages may be considered as a mitigating factor,[27] 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. <u>Aggravating circumstances.</u>

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

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[27] *Id., 22 BOLI at* 286.

elects not to do so. For purposes of the rule, the contractor, subcontractor and contracting agency are presumed to know the circumstances of the public works construction project."

Giving Respondent the benefit of the doubt, Respondent's violation stemmed from its initial lack of knowledge that the Cornelius Project was a public works project. Although Respondent's branch manager testified that no one from I-5 informed Respondent that the Cornelius Project was a public works project, there was no evidence presented that anyone from Respondent inquired if the job was a public works project prior to July 6, 2000, over three weeks after Respondent first sent workers to that project. This violation might have been avoided altogether if Respondent had simply made that inquiry when taking I-5's job order or had sent someone to visit the job site. However, Shields testified that she had received no training about prevailing wage rate jobs prior to the Cornelius Project. If she had received this training, she might have been aware of Respondent's corporate advice to "not rely on the customer to advise you as to whether a job is prevailing wage."[28]

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

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

2. Mitigating circumstances.

There are two circumstances that mitigate Respondent's five violations to a limited degree. First, Respondent eventually paid full back pay to five workers and all but $34.50 in back pay to a sixth. Second, Respondent's prevailing wage unit manager has created an audit team in her department that conducts daily reviews of two reports in an attempt to minimize the possibility that Respondent has unknowingly sent workers to prevailing wage rate jobs.[29]

3. Amount of civil penalty.

ORS 279.370(1) gives the Commissioner the authority to assess civil penalties for violations of ORS 279.350(1) based solely

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[28] *See* Finding of Fact 73 – The Merits, *supra*.

[29] *See* Finding of Fact 75 – The Merits, *supra*.

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

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

B. <u>The Central Project.</u>

The Agency alleged that Respondent failed to pay the prevailing wage rate to one worker, Aaron Wadsworth, who was employed by Respondent as a carpenter and laborer on the Central Project. The evidence shows that Respondent employed Wadsworth on that project for 8.5 hours on one day. That day was September 2, 2000, a Saturday. Credible evidence established that Wadsworth performed work fitting into the classifications of both carpenter and laborer. The Agency established that Wadsworth was entitled to be paid a carpenter's wage, the higher rate, because there was no way to determine how many hours he worked in each classification. The applicable prevailing wage rate on the Central project for carpenters was $23.94 per hour plus $7.92 per hour in fringe benefits, with an overtime rate totaling $43.83 per hour. Instead, Respondent paid Wadsworth $6.75 per hour. Four months later, Respondent issued a back pay check to Wadsworth, bringing his wages up to the prevailing wage rate. Again, although Respondent's subsequent payment of back wages may be considered as a mitigating factor, it is not a defense to the alleged violation. *Loren Malcolm*, 6 BOLI at 11. The forum finds that Respondent committed one violation of ORS 279.350(1) by failing to pay Wadsworth the prevailing wage rate at the time his wages were initially paid.

1. Aggravating circumstances.

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

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

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

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

2. Mitigating circumstances.

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

3. Amount of civil penalty.

The Agency alleged that Respondent's violation was a "second and subsequent repeated" violation and sought $5,000 in civil penalties for the alleged violation. OAR 839-016-0540(2) defines "repeated violations" as "violations of a provision of law or rule which has been violated on more than one project within two years of the date of the most recent violation." Here, Respondent had two violations within two years of September 2, 2000. First, the New Bend Middle School Project violation that is reflected in the final order in case

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

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

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

Former ORS 279.354 required contractors and subcontractors on public works projects to file certified statements, in writing, "in form prescribed by the Commissioner of the Bureau of Labor and Industries." The certification was to be "verified by the oath of the * * * subcontractor * * * that the * * * subcontractor has read such statement and certificate and knows the contents thereof and that the same is true to the * * * subcontractor's knowledge." It also contained the requirement that the certified statements "set out accurately and completely the payroll records for the prior week including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid." *Former* OAR 839-016-0010 implemented this statute by creating a form, the "WH-38," for contractors and subcontractors to use in complying with *former* ORS 279.354. The rule allowed contractors and subcontractors to use their own form, so long as it contained "all the elements of Form WH-38." The rule further required that "the certified statement contained on Form WH-38" must be attached to "payroll forms submitted" if the contractor or subcontractor used their own payroll form. In addition, both the statute and rule established deadlines for submitting the forms.

A. <u>The Cornelius Project.</u>

The Agency alleged that Respondent filed six payroll reports "that were inaccurate and/or incomplete by, among other deficiencies, falsely certifying that all wages earned had been paid, in listing improper pay rates and in failing to show overtime wages earned." An inspection of Respondent's original payroll reports and comparison with subsequent corrected payroll reports and payroll records reveals a number of deficiencies. First, all six payroll reports lacked the certification language required by ORS 279.354 and contained on the Agency's WH-38. That language reads "I have read this certified statement, know the contents thereof and it is true to my knowledge." Respondent argues that the language printed under the

signatory's name on its "Statement of Compliance" accompanying its payroll reports – "The willful falsification of any of the above statements may subject the contractor or subcontractor to civil or criminal prosecution" – is the "functional equivalent" of the language contained on the Agency's WH-38. Respondent misses the mark. The language on the WH-38 is an affirmative oath that mirrors the statute; the language on Respondent's form merely states the consequences of willfully providing false information. Second, none of the payroll reports list the location of the project – they merely state "PUBLIC WORKS BUILDING." Third, five of Respondent's payroll reports incorrectly classify Joseph Baker, Faried Hawash, or Joseph Baker as "laborers" instead of "carpenters." Fourth, Respondent's payroll report for the week ending July 7, 2000, incorrectly reported that Baker had worked 15 hours straight time[30] 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.[31] Seventh, based on Respondent's corrected report, Respondent's payroll report for the week ending August 11, 2000, reported Francis had worked days that he had not worked and did not report days that he did work.

1. Aggravating circumstances.

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

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

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[30] 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.

[31] *Id*.

Third, Respondent was on notice and had knowledge that its practices regarding certified payroll reports required by *former* ORS 279.354 were defective. All of Respondent's reports are prepared by staff employed by Respondent's corporate parent in Tacoma, Washington. That corporate parent was notified by the Agency on January 26, 2000, that its certified payroll reports must contain the following language: "I have read this certified statement, know the contents thereof and it is true to my knowledge." There was no evidence that Respondent has modified its forms to meet that requirement.

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

2. Mitigating circumstances.

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

3. Amount of civil penalty.

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

B. The Central Project.

The Agency's sole allegation concerning Respondent's payroll report submitted for the Central Project is that it was untimely filed. The evidence does not clearly establish the starting and completion date of the project, or whether the project took more or less than 90 days to complete. Either way, under OAR 839-016-0010(5), Respondent was required to submit its payroll and certified statement "within 15 days of the date [Respondent] first began work on the project[.]" Respondent's employee, Wadsworth, worked on September 2, 2000. This made Respondent's reports due on September 17, 2000. Respondent did not complete its report to the Agency until January 18, 2001. This constitutes one violation of ORS 279.354 and *former* OAR 839-016-0010(5).

1. Aggravating circumstances.

First, it should have been simple for Respondent to comply with *former* ORS 279.354 and *former*

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

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

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

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

2. Mitigating circumstances.

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

3. Amount of civil penalty.

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

C. The Beaver Acres Project.

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

The Agency alleged that Respondent filed payroll reports "that were inaccurate and/or incomplete by, among other deficiencies: not being properly certified; inaccurately listing pay rates and amounts; not including the group, where appropriate, for the classification of work its employees performed and omitting required general information about the project." Respondent filed several original payroll reports and two versions of corrected payroll reports for the Beaver Acres Project. The original and second corrected payroll reports all lack an appropriate statement of certification. The originals do not specify the "group" classification for Respon-

dent's workers[32] and state the name, but not the location of the project. Among other things, the payroll reports also report some overtime hours as straight time hours and contain multiple entries for the same category, *e.g.* gross wages, for a large number of workers. They also fail to break out fringe benefits from hourly wages.

1. Aggravating circumstances.

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

2. Mitigating circumstances.

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

3. Amount of civil penalty.

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

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

This issue arose pursuant to a complaint that employees of Horizon Restoration Systems had not received the correct rate of pay on the Beaver Acres Project. During

[32] 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.

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. <u>Aggravating circumstances.</u>

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.[33]

PLACEMENT ON THE LIST OF INELIGIBLES

The Agency seeks to debar[34] Respondent for two concurrent three year periods on the basis that Respondent's failures to pay and post the applicable prevailing wage rate on the Cornelius and Central Projects were intentional.

A. Liability of Respondent.

ORS 279.361 provides that when a subcontractor intentionally fails or refuses to pay the prevailing wage rate to workers employed upon public works or when a subcontractor "intentionally" fails or refuses to post the prevailing wage rates as required by ORS 279.350(4), the subcontractor and any firm in which the subcontractor has a financial interest shall be placed on the list of persons ineligible to receive contracts or subcontracts for public works for a period not to exceed three years. The forum has already concluded that Respondent failed to pay and post the applicable prevailing wage rates on the Cornelius and Central Projects. The only question is whether those failures were "intentional." If so, the Commissioner is required to place Respondent on the List of Ineligibles.

B. Intentional Failure to Pay.

To "intentionally" fail to pay the prevailing wage, "the employer must either consciously choose not to determine the prevailing wage or know the prevailing wage but consciously choose not to pay it." *Labor Ready at* 364. The inclusion of the word "intentionally" in ORS 279.361(1) implies a "culpable mental state," indicating that debarment should not be "triggered by merely innocent, or even negligent, failure to pay." *Id. at*

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

[34] In this Order, "debar" and "debarment" are synonymous with placement on the List of Ineligibles.

360. Under this standard, the forum must assess Respondent's state of mind at the time that its employees were not paid the prevailing wage in order to determine whether Respondent "intentionally" failed or refused to pay the prevailing wage.

1. The Cornelius Project.

On the Cornelius Project, the evidence was undisputed that Respondent was unaware that it was sending its employees to a public work until July 6, 2000, three weeks after it sent its first employee to the Cornelius Project. Between June 12 and July 6, 2000, Respondent employed six workers on the Project – Clayton, Ramirez, Rodriguez as laborers, and Francis, Baker, and Hawash as carpenters. Respondent paid all six substantially less than the prevailing wage during that time period. Prior to July 6, there is no evidence that Respondent was aware that it was sending its workers to a public work subject to the prevailing wage rate, or that Respondent consciously chose not to determine the prevailing wage or knew the prevailing wage but consciously chose not to pay it. Rather, Respondent's underpayment can be characterized at best as an "innocent" mistake and at worst as "negligent." Based on the Court of Appeals' earlier decision, the forum concludes that Respondent's failure to pay its workers the prevailing wage prior to July 6, 2000, was not intentional under ORS 279.261(1).

On July 6, 2000, Shields, Respondent's Hillsboro branch manager, learned that the Project was subject to the prevailing wage rate. Shields immediately began paying the applicable prevailing wage rate for laborers or carpenters to the workers Respondent employed on the Project. Shields also immediately issued "back pay" checks to Francis, Baker, and Hawash for the difference between their initial pay prior to July 6 and the prevailing wage.[35] This evidence establishes that, as of July 6, 2000, Respondent, through its manager Shields, knew that its workers were employed on a public work, knew the correct prevailing wage for laborers and carpenters on the Cornelius Project, and knew that it had not paid its workers the prevailing wage. Despite this knowledge, Respondent did not issue "back pay" checks to three other workers – Clayton, Ramirez, and Rodriguez -- until November 21, 2000, and provided no explanation for this failure. There was no evidence presented at hearing to explain this failure.[36]

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[35] *See* Finding of Fact 17 – The Merits, *supra*.

[36] The only evidence even tangentially related to Respondent's delay in paying Clayton, Ramirez, and Rodriguez was the following testimony of Shields:

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

"A: Yes.

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

The inclusion of the word "intentionally" in ORS 279.361(1) implies a "culpable mental state," indicating that debarment should not be "triggered by merely innocent, or even negligent, failure to pay." *Id. at* 360. As stated earlier, this requires an assessment of Respondent's state of mind after Shields learned on July 6 that "back pay" was due. The statutory requirement to pay the prevailing wage includes an obligation to pay all earned, due, and unpaid prevailing wages, which Respondent acknowledged by immediately paying three of its workers for the difference between their pay earned and received before July 6 and the prevailing wage.[37] However, there is no evidence as to why Clayton, Ramirez, and Rodriguez were not issued "back pay" checks until November 21, 2000. Respondent's failure to fulfill its statutory duty to issue "back pay" checks to these three workers no later than 35 days after they performed the work, without any evidence that Respondent made a conscious choice not to issue the checks, does not establish that Respondent "intentionally" failed to pay these three workers the prevailing wage rate. Consequently, Respondent may not be debarred for its untimely issuance of "back pay" checks to these three workers.

Respondent's failure to pay Chris Francis $34.50 in prevailing wage rate "back pay" is a different matter. This "back pay" amount was earned *after* July 6, 2000, when Respondent knew it was required to pay its workers the prevailing wage on the Cornelius Project. Francis worked as a carpenter and was entitled to be paid $31.86 per hour, as Respondent tacitly acknowledged on July 6, 2000, when it paid Francis $21.86 per hour for six hours of "back pay" earned on June 28, 2000.[38] Respondent admitted owing this amount to Francis on December 13, 2000, but still had not paid Francis at the time of the hearing. Respondent's defense was that BOLI had instructed Respondent not to pay these wages to Francis,

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

"A: Yes."

[37] *Cf.* ORS 652.120, which requires employers to pay employees "the wages due and owing to them" no more than 35 days after the employees performed their work.

[38] Francis had only been paid $10 per hour, and the additional $21.86 per hour brought his total wage to $31.86 per hour, the correct prevailing wage for carpenters. *See* Finding of Fact 24 – The Merits, *supra.*

but the Administrative Law Judge found that the testimony supporting this defense was not credible.[39]

In summary, it is undisputed that (1) Respondent knew the prevailing wage after July 6, but underpaid Francis by $.60 per hour for a total of 57.5 hours worked as a carpenter after that date; (2) on December 13, 2000, Respondent's corporate headquarters knew it had underpaid Francis by that amount; and (3) that Respondent still had not paid Francis at the time of hearing. Respondent's decision not to pay Francis the $34.50 it owed him was a conscious choice. Based on undisputed evidence that Respondent knew "the prevailing wage but consciously choose not to pay it, the forum finds that Respondent "intentionally" failed to pay the prevailing wage rate to Francis on the Cornelius Project, subjecting Respondent to debarment. *Id.* at 364.

2. <u>The Central Project.</u>

Respondent sent one worker to the Central Project for one day and did not pay that worker the prevailing wage until later notified by BOLI that the Central Project was a public work. When BOLI notified Respondent of that fact, Respondent immediately sent a check for the total amount of unpaid prevailing wages due to its worker. Although Respondent's job order indicated that its worker would be working at a high school, there was no evidence that Respondent knew the Central Project was a public work until notified by BOLI or that Respondent made a conscious choice not to determine that the Central Project was a public work.[40] As a result, the forum concludes that Respondent's failure to pay its worker the prevailing wage was not an intentional failure.

C. <u>Intentional Failure to Post.</u>

ORS 279.350(4) "requires every * * * subcontractor engaged in a public project to personally initially post the prevailing wage

[39] *See* Finding of Fact 82 – The Merits, *supra*.

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

and to maintain that posting throughout the course of its employees' work on the project." *Labor Ready at* 369. A "negligent or otherwise inadvertent failure" to post the prevailing wage rate is insufficient to require debarment. *Id.* A "heightened level of culpability [must] be proven before an employer [can] be debarred" based on an intentional failure to post. *Id. at* 366.

1. The Cornelius Project.

Prior to July 6, 2000, Respondent's failure to post the prevailing wage rates on the Cornelius Project cannot be considered intentional, as Respondent was not aware that the Cornelius Project was a public work before that time and could not have consciously chosen not to post. On July 6, 2000, Respondent became aware that the Cornelius Project was a public work. Respondent's manager took a copy of the prevailing wage rates to the job site and asked the general contractor's foreman to post them.[41] It is undisputed that Respondent's manager knew the correct prevailing wage rate for carpenters and laborers, the two classifications in which its workers were employed, and that she took no action to post the rates herself at that time or any subsequent time and made no effort to determine whether the rates had been posted or were kept posted. There was no evidence that anyone else employed by Respondent took any action to post the rates or determine whether the rates had been posted or were kept posted

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

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

Neither of those circumstances is present in this case. As noted earlier, ORS 279.350(4) requires every subcontractor "to personally initially post the prevailing wage and to maintain that posting throughout the course of its employees' work on the project. *Id. at* 369. Once Respondent's manager knew that posting was required, Respondent's failure to

[41] The forum infers that Respondent's manager would not have taken the prevailing wage rates to the job site and asked the general contractor's foreman to post the rates unless Respondent's manager believed that posting was required.

personally post and maintain that posting was a conscious choice and an intentional failure within the meaning of ORS 279.261(1), subjecting Respondent to debarment.

2. The Central Project.

Respondent employed one worker for one day on the Central Project and was unaware that the Central Project was a public work until contacted by BOLI several months after its worker worked on the Central Project. Although Respondent's job order indicated that its worker would be working at a high school, there was no evidence that Respondent knew the Central Project was a public work until notified by BOLI or that Respondent made a conscious choice not to determine that the Central Project was a public work.[42] As a result, the forum concludes that Respondent's failure to post the prevailing wage rate was not intentional

D. Length of debarment.

ORS 279.361 provides that debarment shall be for "a period not to exceed three years." Although that statute and the Agency's administrative rules interpreting it do not explicitly authorize the forum to consider mitigating factors in determining the length of a debarment, the commissioner has held that mitigating factors may be considered in determining whether the debarment of a contractor or subcontractor should last less than the maximum three-year period allowed by law. *See In the Matter of Larson Construction Co., Inc.*, 22 BOLI 118, 165 (2001); *In the Matter of Keith Testerman*, 20 BOLI 112, 129 (2000); *In the Matter of Southern Oregon Flagging, Inc.*, 18 BOLI 138, 169 (1999); *In the Matter of Intermountain Plastics*, 7 BOLI 142, 160 (1988).[43] Aggravating factors may also be considered. *See, e.g., Testerman* at 129. The aggravating circumstances considered may include those set out in OAR 839-016-0520(1).

Aggravating circumstances in this case include: (1) Respondent's failure to pay three workers the prevailing wage for five months *after* it learned its workers were entitled to the prevailing wage rate and failure to pay one worker the prevailing wage by the time of the hearing; (2) Respondent's initial failure to pay the

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

[43] *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."

prevailing wage to eight workers employed on the New Bend Middle School public works project; (3) Respondent's six violations of ORS 279.354 on the Cornelius Project; (4) Respondent's single violations of ORS 279.354 and ORS 279.355 on the Beaver Acres Project; (5) Respondent's initial failure to pay the prevailing wage on the Central Project; (6) Respondent's failure to post on the Central Project; and (7) Respondent's failure, despite a prior warning, to correct the certification statement attached to its payroll report.

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

Under the circumstances, the forum finds that one year is an appropriate period of debarment based on Respondent's intentional failure to pay the prevailing rate of wage to workers employed on the Cornelius Project and Respondent's intentional failure to post the prevailing wage rates as required by ORS 279.350(4) on the Cornelius Project.

RESPONDENT'S REMAINING EXCEPTIONS

A. Exception 1.

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

B. Exception 2.

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

C. Exception 3.

Respondent excepted to Proposed Finding of Fact 41 – The

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

D. <u>Exceptions 4A and 4B.</u>

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

E. <u>Exceptions 5 and 11.</u>

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

F. <u>Exceptions 6 and 12.</u>

Respondent excepted to the ALJ's use of Respondent's violations of ORS 279.354 on the Cornelius and Central Projects as aggravating factors in determining Respondent's period of debarment. Respondent's argument is that violations of ORS 279.354 are not aggravating factors "because it is impossible to have a correct certified payroll statement where there is an underlying failure to pay the prevailing wage rate * * * A failure to correctly certify a payroll statement automatically occurs in every instance of a failure to pay the applicable prevailing wage. Thus, this is not an aggravating factor; it is the same factor." Respondent's argument is misplaced. Failure to pay the applicable prevailing wage rate and failure to properly certify, though one may flow from the other, constitute two distinct, separate actions, as well as viola-

tions of two different statutes.[44] For that reason, Respondent's ORS 279.354 violations are properly considered aggravating factors.

G. Exceptions 7 and 13.

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

H. Exceptions 8 and 14.

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

I. Exceptions 9 and 15.

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

J. Exception 10.

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

K. Exception 16.

The forum has added an additional mitigating factor regarding the length of Respondent's de-

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[44] 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.

barment in response to Respondent's exception.

L. Exceptions 17 and 18.

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

ORDER

NOW, THEREFORE, as authorized by ORS 279.361, the Commissioner of the Bureau of Labor and Industries hereby orders that Respondent **Labor Ready Northwest, Inc.** or any firm, corporation, partnership, or association in which it has a financial interest shall be ineligible to receive any contract or subcontract for public works for one year based on its intentional violations of ORS 279.350(1) and ORS 279.350(4) on the Cornelius Project from the date of publication of their names on the list of those ineligible to receive such contracts maintained and published by the Commissioner of the Bureau of Labor and Industries.

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

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

In the Matter of
JOHN M. SANFORD, INC.

Case No. 04-04
Final Order of Commissioner Dan Gardner
Issued September 14, 2004

SYNOPSIS

Respondent failed to pay Claimant for all of the hours he had worked at the time he voluntarily quit his employment, in violation of ORS 652.140(2), and is liable for $1,083 in unpaid wages to Claim-

ant. Additionally, Respondent's failure to pay the wages was willful and Respondent is liable for penalty wages in the amount of $4,560, pursuant to ORS 652.150. ORS 652.140(2); ORS 652.150; ORS 652.332; OAR 839-001-0470(1)(c).

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 4, 2004, at the Oregon State Capitol, Hearing Room # 343, located at 900 Court Street NE, Salem, Oregon.

Jeffrey C. Burgess, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Bradley C. Hunter ("Claimant") was present throughout the hearing and was not represented by counsel. Attorney Joseph E. Penna represented John M. Sanford, Inc. John M. Sanford was present during the entire hearing as Respondent's corporate representative.

In addition to Claimant, the Agency called as witnesses: Newell Enos, BOLI Wage and Hour compliance specialist; Doug Schlatter, Doug Schlatter Logging Company; Peter Reifel, heavy equipment mechanic (qualified as an expert witness); John Sanford, Respondent's president; and Robert Schaffer, logger.

Respondent called the following witnesses: John Sanford, Respondent's president; Dalton Sheffield, feller buncher and Respondent's employee; and Terry Nighswonger, timber cutter.

The forum received as evidence:

a) Administrative exhibits X-1 through X-6;

b) Agency exhibits A-1 through A-5, A-9 through A-12, A-14, A-17, A-20, A-22, A-23, A-26, A-27, A-32, A-33, A-36, A-37, A-39, A-49, A-50 (filed with the Agency's case summary), and A-51 (submitted at hearing); and

c) Respondent exhibits R-2 through R-8 (filed with Respondent's case summary).

Having fully considered the entire record in this matter, I, Dan Gardner, 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 16, 2002, Claimant filed a wage claim form stating Respondent had employed him during the wage claim period of October 1 through November 3, 2002, and failed to pay him all wages that were due when he quit his employment.

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 January 2, 2002, the Agency notified Respondent that Claimant had filed a wage claim with BOLI alleging Respondent owed "unpaid statutory overtime wages of $1,083.00 at the rate of $19.00 per hour from October 1, 2002, to November 3, 2002."

4) On May 15, 2003, the Agency issued an Order of Determination numbered 02-4694. In the Order of Determination, the Agency alleged Respondent had employed Claimant during the period June 24 through November 3, 2002, failed to pay Claimant for all hours worked in that period and was liable to Claimant for $877.75 in unpaid wages, including overtime wages for hours worked in excess of 40 in a given work week, plus interest. 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 $5,472 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. Through counsel, Respondent timely filed a request for hearing and a general denial. The Agency sent Respondent a Notice of Insufficient Answer to Order of Determination and Respondent thereafter filed an Amended Answer denying any wages were owed and alleging that Claimant "over-reported his work hours" and "failed to return all equipment to employer upon his termination from employment."

5) On April 1, 2004, the Agency requested a hearing. On April 5, 2004, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:30 a.m. on May 4, 2004. With the Notice of Hearing, the forum included copies of the Order of Determination and 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.

6) On April 13, 2004, the ALJ ordered the Agency and Respondent each to submit a case summary 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 wage and 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 April 23, 2004, and notified them of the possible sanctions for failure to comply with the case summary order.

7) The Agency and Respondent timely filed case summaries.

8) On April 29, 2004, the ALJ received a letter from the Agency stating in pertinent part:

"The purpose of this letter is to notify you, consistent with Agency policy, that the hearing in the above-referenced matter has been scheduled to be held at the state capitol building for security reasons. Although there have been no direct threats of violence, there is reportedly some hostility toward the Claimant by Respondent's president. This measure is being taken out of an abundance of caution."

9) 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.

10) The ALJ issued a proposed order on June 10, 2004, 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. The Agency timely filed exceptions, which are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material, Respondent John M. Sanford, Inc. was an Oregon corporation engaged in "contract cutting" for logging companies and engaged the personal services of one or more persons in Oregon.

2) At all times material, John M. Sanford was Respondent's president.

3) Respondent, through Sanford, hired Claimant on June 24, 2002, as a "feller buncher operator." Respondent agreed to pay Claimant $19 per hour. Sanford told Claimant he could work as many hours per week as needed to perform his job. Feller buncher work is typically unsupervised.

4) Throughout his employment, Claimant operated a Timbco T445-D feller buncher equipped with a series of saws, referred to as a "hot saw," on the end of a boom which was designed to fell and bunch trees. The Timbco feller buncher most resembles an excavator and has many heavy moving parts that must be maintained daily.

5) Claimant performed all of his work in the forest and was unsupervised. The time he started and stopped work each day varied depending on the season. During fire season, his work hours were subject to "humidity closures" and "fire danger closures." When the wind or humidity reached certain levels, Claimant was required to shut down his feller buncher to prevent sparks from igniting dry forest materials. During extreme fire danger, all logging machines were required to be shut down at 1 p.m. every day. During fire season, Claimant often started work as early as midnight, but otherwise started work around 4:30 a.m. each day.

6) In addition to his felling and bunching duties, Claimant was responsible for maintaining the Timbco feller buncher. Routine daily maintenance included refuel-

ing, lubricating all moving parts with a hand grease gun, checking the oil, coolant, and hydraulic fluid levels, and clearing debris from all moving parts, including the boom area, the "hot saw's" teeth, and the exhaust manifold. Refueling the machine each evening usually took about ten minutes and the rest of the routine chores about 50 minutes. The feller buncher had several hoses that needed frequent replacement. When Claimant had to replace a hose, he drove to the nearest town with an auto shop and purchased a replacement hose. Depending on where Claimant was working, the nearest town could be up to two hours away. Some hoses are more difficult than others to replace, so the actual time Claimant spent replacing them varied. Claimant was also responsible for making minor repairs because there were no mechanics available in the forest. If maintenance or minor repair work was not done thoroughly or correctly, the feller buncher became a fire hazard. Proper maintenance also enhanced the machine's efficiency, which increased its time in operation. During fire season, Claimant was particularly conscientious about clearing forest debris from the machine. Beginning in August 2002, the time he spent on daily maintenance increased by about an hour.

7) Claimant recorded his work hours on a time sheet Respondent provided for that purpose. The time sheet included a column titled "sale" that showed the particular contract Claimant was working under and additional columns for Claimant's "bunching hours" and "maintenance hours." Respondent billed the logging companies directly for the feller buncher operator's hours, but did not bill them for "down time" on the machine or for the maintenance hours.

8) Claimant submitted his hours to Sanford by mail every two weeks and Sanford paid him by check twice per month. The first check each month was a $1,500 "draw" and the balance was paid two weeks later. Sanford, in turn, submitted a billing to the logging company, who then paid Respondent.

9) In August 2002, Sanford asked Claimant about the extra maintenance hour per day Claimant had recorded on his time sheets. Sanford had compared Claimant's time sheets with "the other guys" and perceived that Claimant was spending more time on maintenance than necessary. Claimant responded that he needed to maintain the equipment because it was a hot, dry summer and asked Sanford what he wanted him to do about the maintenance. Sanford did not respond and Claimant continued to care for the equipment in his customary manner. Claimant continued recording all of his maintenance time on his time sheets and Sanford continued to pay him for all of the hours he recorded, including the additional maintenance hour. Sanford did not discipline Claimant or question him again about his maintenance hours.

10) In September and October 2002, Respondent sent invoices to Valley View Logging & Cutting, Inc. for a "Gold Beach" contract that consistently showed Claimant worked one more "bunching hour" per work day than Claimant had reported on his time sheets or told the company's owners. When Valley View paid Respondent for the work, Valley View's owners deducted the "over billing" from the payments.

11) On Friday, November 1, 2002, Claimant left work and drove a company truck home to Klamath Falls as he regularly did every weekend. Over the weekend, Claimant was offered a job operating a feller buncher in Klamath Falls at the same pay rate he received from Respondent. The new job was scheduled to start the following Monday and Claimant decided to accept the job after unsuccessful attempts to reach Sanford to discuss the offer. On November 3, 2002, Sanford returned Claimant's telephone calls. Claimant told him he had accepted the job in Klamath Falls because it was closer to home and he did not want to pass up an opportunity to spend more time with his family. He also told Sanford that since he had to start his new job immediately, he would return the company truck on the following weekend. Sanford became angry and called Claimant a "son of a bitch."

12) After Claimant quit his employment, he immediately mailed his final time sheets to Respondent. Claimant recorded 200 straight time hours and 90 overtime hours on his time sheets between September 29 and November 3, 2002. The following week, Sanford called Claimant and accused him of "padding" his hours and informed him that he would adjust Claimant's paycheck accordingly. He also made some accusations and threats about some tools and his truck. Claimant became angry and told Sanford that he could come to Klamath Falls and pick up the truck, which was parked in front of Claimant's house with the tools locked inside.

13) On November 9, 2002, Sanford sent Claimant his final paycheck in the net amount of $1,303.94 and included a letter written on company letterhead that stated in pertinent part:

> "You will notice on your pay stub that I deducted several hours, this is time that you wrote down but didn't work according to your maintenance sheet. One example of time you wrote down but didn't work is me seeing you on the freeway where you couldn't have been if you had worked until 2 p.m. like you claimed.
>
> "Also like we talked about on the phone and I questioned you several times, you[r] time[s] for the last couple of months have hours on them that you did not work but you wrote down and were paid for. Example on the Gold Beach job the logger wrote down everyday when you got there and when you left (since he was

paying by the hour) and you wrote down 2 hours per day more than you worked. On that job alone the time that you cheated me worked out to $842.40, including the cost for payroll such as work comp, simple IRA, etc. I have several witnesses that will testify to when you showed up and when you left. It is amazing you claim to be working at night but when the new operator gets down to the machine the lights don't work on it, how where [sic] you working at night? Writing down time and being paid for work that you didn't do is call [sic] theft and I will press charges if you don't make restitution. And remember that is just one job there is more time than just that one job.

"Also there are tools missing from the machine. Are they in the truck? Where is the truck? If the tools aren't in the truck and if the ones in the truck are missing then I will expect to be paid for them.

"Sincerely,

"John M. Sanford"

Claimant's final paycheck covered the period beginning September 29 through November 3, 2002. Claimant received an itemized statement with his final paycheck that shows he was paid $19 per hour for 200 straight time hours and $28.50 per hour for 52 overtime hours for a total gross amount of $5,282, less lawful deductions.

14) Sanford informed the sheriff's office that his company truck was stolen and named Claimant as the perpetrator. He eventually had the truck towed from Claimant's address in Klamath Falls. Claimant was never arrested or prosecuted for theft of the truck. The company tools were inside the truck and Claimant prepared an inventory of the truck's contents that the tow truck driver acknowledged and signed when the truck was towed.

15) From September 29 until November 3, 2002, Claimant worked 290 hours, including 90 overtime hours. He earned a total of $6,365 but was paid only $5,282 for those hours as of the hearing date. Respondent had not paid Claimant for all of the hours Claimant worked at the time he quit his employment, leaving an amount still due and owing for wages of $1,083.

16) Respondent did not plead or show a financial inability to pay the wages at the time they accrued.

17) Claimant's demeanor was sincere and his testimony was straightforward and responsive. He had a clear recollection of pertinent facts and did not embellish his testimony in any way. His testimony regarding the hours he spent on maintenance duties was bolstered by other credible witness testimony and by Respondent's history of paying Claimant for the same number of hours performing maintenance work. While Claimant's reaction to Sanford's name calling may not

have been the wisest course to take, his testimony that he never intended to deprive Sanford of the company truck was entirely believable and his action does not detract from his overall credibility. The forum credits Claimant's testimony in its entirety.

18) Sanford's testimony that Claimant "padded" his maintenance hours on his time sheets beginning in August 2002 was disingenuous. Notwithstanding that he consistently paid Claimant for those hours through September 2002, credible evidence shows it was Sanford who inflated Claimant's hours when billing on Respondent's contract with the logging company. However, Sanford was forthcoming about the reductions he made from Claimant's final paycheck and acknowledged that, even according to his own calculations, Claimant was shorted $136.75 in wages. The forum therefore credits Sanford's testimony where it was consistent with other credible testimony or was a statement against interest.

19) All of the other witnesses testified credibly.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent was an Oregon corporation that engaged the personal services of one or more persons in Oregon, including Claimant, who was Respondent's employee.

2) Claimant worked as a feller buncher for Respondent between June 24 and November 3, 2002, at the agreed wage of $19 per hour. Claimant's overtime rate was $28.50 per hour.

3) From September 29 through November 3, 2002, Claimant worked 290 hours, including 90 overtime hours. Respondent owed Claimant total wages of $6,365 for these hours and to date has paid only $5,282, leaving unpaid wages of $1,083.

4) Claimant quit Respondent's employment without notice on November 3, 2002, and more than 30 days have passed since Claimant's wages became due.

5) Written notice of nonpayment of wages was sent to Respondent on behalf of Claimant on January 2, 2003.

6) Respondent willfully failed to pay Claimant wages owed to him in the amount of $1,083 and is liable for penalty wages.

7) Penalty wages, computed in accordance with ORS 652.150 and OAR 839-001-0470(1)(c), equal $4,560 ($19 per hour x 8 hours per day = $152 per day x 30 days = $4,560).

PROPOSED CONCLUSIONS OF LAW

1) At 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 actions, inaction, statements, and motivations of John M. Sanford, Respondent's president,

are properly imputed to Respondent.

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

4) 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. Respondent owes Claimant $1,083 in unpaid, due and owing wages.

5) Respondent is liable for $4,560 in penalty wages under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due upon termination of employment 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 his earned, unpaid, due and payable wages and the penalty wages, plus interest on all 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 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, 262-63 (2000). Respondent does not dispute that it employed Claimant during the period between September 29 and November 3, 2002, or that it agreed to pay Claimant $19 per hour. Respondent also does not dispute that it did not pay Claimant for all of the hours he reported on his time sheets, but justifies its refusal to pay by alleging Claimant did not work all of the maintenance hours he reported.

Respondent produced no evidence to support its contention that Claimant “over-reported” his maintenance hours during the period at issue in this matter. Sanford, Respondent’s president, admitted he was never present on the job site where Claimant worked and acknowledged that he continued to pay for additional maintenance hours even after he questioned Claimant about them in August 2002. Moreover, Claimant credibly testified that when Sanford raised the issue in August, Claimant accounted for the additional time spent on maintenance and when he asked Sanford about continuing to perform additional maintenance chores, Sanford did not reply. Evidence showed Claimant continued to maintain the Timbco feller buncher at the level he thought necessary and Respondent continued to pay him for the hours he reported until Claimant voluntarily quit in November 2002.

Notably, Respondent established the system by which Claimant kept a record of his own work hours, used that system until Claimant voluntarily quit Respondent's employment, and never questioned or disciplined Claimant for "over-reporting" his hours after Sanford's single inquiry about the hours in August 2002. Moreover, Respondent kept no independent record of Claimant's hours worked and had no evidence, beyond its bare assertion, that Claimant had not worked the hours he claimed. ORS 653.045 requires an employer to keep records of the actual hours worked each week by each employee. Respondent cannot use its established system of tracking work hours to circumvent its statutory duty to keep a record of Claimant's work hours. *In the Matter of Marion Nixon*, 5 BOLI 82, 88 (1986).

This forum has consistently held that if an employer disputes the number of hours claimed by a wage claimant, then "it is the employer's burden to produce all appropriate records to prove the precise hours and wages involved." *In the Matter of Barbara Coleman*, 19 BOLI at 265. Moreover, an employer has the duty to know the amount of wages due an employee and that amount is due upon termination of the employee's employment. *Id*. at 265.

In this case, Respondent offered no evidence of any kind to show that Claimant did not work the hours he reported on his time sheets. The forum, therefore, has accepted Claimant's credible statement and the record he maintained at Respondent's behest of the number of hours he worked and concludes that Respondent is liable to Claimant for unpaid wages in the amount of $1,083.

PENALTY WAGES

The forum may award penalty wages where a respondent willfully fails to pay any wages due to any employee whose employment ceases. 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. *In the Matter of Usra Vargas,* 22 BOLI 212, 222 (2001).

In this case, Sanford admits he knew as early as August 2002 that Claimant was recording an additional hour per day for maintenance. Although he initially questioned the additional hours per week, Sanford did not discipline Claimant for spending an excessive amount of time on maintenance, always paid him for the additional hours recorded, and never accused him of "padding" his hours until after Claimant voluntarily quit his employment. Instead, Sanford admits he purposely deducted "several hours" from Claimant's final pay check that had been duly recorded on Claimant's time sheet. From these facts, the forum infers Respondent voluntarily and as a free agent failed to pay Claimant all of the wages he earned between September 29 and November 3,

2002, at the time Claimant terminated his employment without notice. Respondent acted willfully and is liable for penalty wages pursuant to ORS 652.150.

Penalty wages, therefore, are assessed and calculated in accordance with ORS 652.150 in the amount of $4,560. This figure is computed by multiplying $19 per hour by 8 hours per day multiplied by 30 days. *See* ORS 652.150 and OAR 839-001-0470(1)(c).

AGENCY'S EXCEPTION

The Agency takes exception to the amount awarded as penalty wages and to the forum's calculation of penalty wages as set forth in the proposed order.

OAR 839-001-0470(1) provides, in pertinent part:

> "(b) The employee's wages will continue to accrue at the employee's hourly rate of pay times eight (8) hours for each day the wages are unpaid.
>
> "(c) The maximum penalty will be no greater than the employee's hourly rate of pay times 8 hours per day times 30 days.
>
> "(d) Except as provided in subsection (e), the wages of an employee that are computed at a rate other than an hourly rate (e.g. salaries) will be reduced to an hourly rate for penalty computation purposes by dividing the total wages earned during the wage claim period (the period for which wages are owed and upon which the wage claim is based) by the total number of hours worked during the wage claim period.
>
> "(e) Notwithstanding subsection (d), when wages are earned based on commission, bonus, piece rate, or other methods not based on hours worked, the wages will be reduced to an hourly rate for penalty computation purposes by dividing the total wages earned in the last 30 calendar days of employment by the total number of hours worked in the last 30 calendar days of employment. If the employee was employed for less than 30 days, the total wages earned during the entire period of employment will be divided by the number of hours worked during the entire period of employment." (emphases added)

The Agency, citing *In the Matter of Westland Resources Group LLC*[1] and *In the Matter of Sharon Kaye Price*,[2] argues that the rule has been consistently interpreted by this forum "to take into account overtime worked during the wage claim period and changes in rate of pay." The Agency's contention is not wholly accurate.

This forum has consistently held that where more than one wage rate is earned during a wage claim period, it is the

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[1] 23 BOLI 276, 286 (2002)

[2] 21 BOLI 78, 89-90 (2000)

agency's policy when determining the penalty wages "to compute the average hourly wage during the wage claim period, no matter how many wage rates applied. As a starting point, only the wage rates used and wages earned during the actual wage claim period are used to determine the average hourly wage.[3] The equation is as follows: Total earned during the wage claim period divided by the total number hours worked during the wage claim period, multiplied by eight hours, multiplied by 30 days." *In the Matter of Burrito Boy, Inc.*, 16 BOLI 1, 20 (1997). *See also*, *In the Matter of Mark Johnson*, 15 BOLI 139, 142-43 (1996) (holding that when more than one hourly rate is paid during a wage claim period and when a bonus is paid in addition to the hourly rate of pay, the agency's policy is to calculate an *average* hourly wage as a base factor for computing penalty wages).

In *Westland Resources* and *Price*, the claimants earned more than one wage rate during the wage claim periods and the forum correctly applied the above formula to come up with an average hourly wage as a base factor for computing penalty wages. In this case, Claimant did not earn more than one wage rate during the wage claim period.

Contrary to the Agency's argument, the forum normally has not computed an "average" hourly rate in those cases where a claimant was paid at one hourly rate during the wage claim period with no alternative form of compensation, even if the unpaid wages included overtime earnings. *See generally, In the Matter of Larsen Golf Construction, Inc.*, 25 BOLI _ (2004) (computing one claimant's unpaid wages at $18 per hour for straight time and $27 per hour for overtime work performed, but computed penalty wages by multiplying his hourly wage rate ($18 per hour) by 8 hours per day by 30 days); *In the Matter of Millennium Internet*, 25 BOLI _ (2004) (computing claimant's unpaid wages at $22 per hour for straight time and $33 per hour for overtime work performed, but computed penalty wages by multiplying claimant's hourly wage rate ($22 per hour) by 8 hours per day by 30 days); *In the Matter of Adesina Adeniji*, 25 BOLI _ (2004) (computing claimant's unpaid wages at $6.90 per hour for straight time and $10.35 per hour for overtime work performed, but computed penalty wages by multiplying claimant's hourly wage rate ($6.90 per hour) by 8 hours per day by 30 days); *In the Matter of Barbara Blair*, 24 BOLI 89 (2002) (computing claimant's unpaid wages at $10 per hour for straight time and $15 per hour for overtime work performed, but computed penalty wages by multiplying claimant's hourly wage rate ($10 per hour) by 8 hours per day by 30 days); *In the Matter of*

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[3] In this case, the Agency erroneously computed the amount of wages owed using Claimant's entire employment period rather than the wage claim period which evidence shows was from September 29 through November 3, 2002.

Stan Lynch, 23 BOLI 34, 38-39 (2002) (computing claimants' unpaid wages at their straight time rates and at one and one-half times their regular rate of pay for hours worked exceeding 40 in a work week, but computed penalty wages by multiplying their hourly wage rates by 8 hours per day by 30 days); *In the Matter of Ilya Simchuk*, 22 BOLI 186, 192 (2001) (computing claimant's unpaid wages at $10 per hour for straight time and $15 per hour for overtime work performed, but computed penalty wages by multiplying claimant's hourly wage rate ($10 per hour) by 8 hours per day by 30 days); *In the Matter of Danny Vong Phuoc Truong*, 21 BOLI 217, 224 (2001) (computing claimant's unpaid wages at $8.75 per hour for straight time and $13.13 per hour for overtime work performed, but computed penalty wages by multiplying claimant's hourly wage rate ($8.75 per hour) by 8 hours per day by 30 days); *In the Matter of R.L. Chapman Ent. Ltd.*, 17 BOLI 277, 281 (1999) (computing penalty wages by multiplying claimants' hourly wage rates by 8 hours per day by 30 days, even though one claimant's unpaid wages included overtime earnings); *In the Matter of Harold Zane Block*, 17 BOLI 150, 155-56 (1998) (computing claimant's unpaid wages at $5.50 per hour for straight time and $8.25 per hour for overtime work performed, but computed penalty wages by multiplying claimant's hourly wage rate ($5.50 per hour) by 8 hours per day by 30 days); *In the Matter of David Creager*, 17 BOLI 102, 106-07 (1998) (computing claimant's unpaid wages at $5.00 per hour for straight time and $7.50 per hour for overtime work performed, but computed penalty wages by multiplying claimant's hourly wage rate ($5.50 per hour) by 8 hours per day by 30 days); *In the Matter of Graciela Vargas*, 16 BOLI 246, 249 (1998) (computing claimants' unpaid wages at their straight time rates and at one and one-half times their regular rate of pay for hours worked exceeding 40 in a work week, but computed penalty wages by multiplying their hourly wage rates by 8 hours per day by 30 days); *In the Matter of Diran Barber*, 16 BOLI 190, 192-93 (1997) (computing claimant's unpaid wages at $4.75 per hour for straight time and $7.13 per hour for overtime work performed, but computed penalty wages by multiplying claimant's hourly wage rate ($4.75 per hour) by 8 hours per day by 30 days); and *In the Matter of Jewel Schmidt*, 15 BOLI 236, 239 (1997) (computing claimant's unpaid wages at $5.00 per hour for straight time and $7.50 per hour for overtime work performed, but computed penalty wages by multiplying claimant's hourly wage rate ($5.00 per hour) by 8 hours per day by 30 days).

The Agency argues that its policy and at least one prior BOLI case "[apply] the [average hourly rate] formula to overtime hours." The policy, actually an "interpretation" set forth in the Wage and Hour Division "Field Operations Manual" pertaining to "Penalty Wage Computations," in pertinent part, states:

"For an employee paid on an hourly or salary basis:

"Divide the total wages earned during the wage claim period by the total number of hours worked during the wage claim period to determine the employee's hourly rate of pay during the period of time covered by the claim.

"Multiply this rate by 8 (hours) X a maximum of 30 days."

While ordinarily the Agency's rule interpretations are afforded great deference, the interpretation in this case conflicts with the rule's language. A plain reading of OAR 839-001-0470(1)(d) shows that only those "wages of an employee that are computed at a rate *other than an hourly rate* (e.g. salaries) will be reduced to an [average] hourly rate for penalty computation purposes." (emphasis added) Otherwise, the "maximum penalty will be no greater than the employee's *hourly rate of pay* times 8 hours per day times 30 days." (emphasis added) OAR 839-001-0470(1)(c). The Agency's rule is consistent with the language set forth in ORS 652.150; therefore, the forum concludes that the statute and rule override the Agency's internal interpretation.

As the Agency points out, the forum previously has applied the average hourly rate formula in at least one case where the claimant was paid at one hourly rate during the wage claim period with no alternative form of compensation, and where the unpaid wages included overtime earnings. *See In the Matter of Norma Amezola*, 18 BOLI 209, 215 (1999). Such application departs from the majority of cases that are consistent with the Agency's rule. Absent an explanation or rationale for the departure, the forum finds the case an anomaly and to the extent that it deviates from the applicable law pertaining to penalty wage computations, *Amezola* is overruled. The forum's calculation of the penalty wages in this case is correct and the Agency's exception to the amount awarded as penalty wages is DENIED.[4]

Finally, the forum has determined the Agency erroneously computed Claimant's unpaid wages by basing the amount on his entire employment period rather than the wage claim period (the period for which wages are owed and upon which the wage claim is based). Undisputed evidence shows Claimant earned

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[4] The forum notes that the failure to pay overtime in this case exposed Respondent to civil penalties under ORS 653.055. Civil penalties are computed in the same manner as penalty wages under ORS 652.150. *See In the Matter of Larsen Golf Construction, Inc.*, 25 BOLI _ (2004), *citing Cornier v. Paul Tulacz, DVM PC*, 176 Or App 245 (2001) and *In the Matter of TCS Global Corp.*, 24 BOLI 246, 260 (2003). The Agency, however, did not allege a violation of the requirement to pay overtime under ORS 653.261 or amend its charging document to conform to the evidence at hearing. The forum therefore is precluded from awarding civil penalties in this case.

$6,365 between September 29 and November 3, 2002, and was paid only $5,282, leaving unpaid wages of $1,083. Respondent admitted he intentionally deducted hours from Claimant's final paycheck that Claimant duly reported on his time sheets. Respondent has an absolute duty under ORS 652.140 to pay the wages that are really due even if the amount due exceeds the amount alleged in the Agency's charging document. *In the Matter of Mary Stewart-Davis*, 13 BOLI 188, 199 (1994), *citing In the Matter of Handy Andy Towing, Inc.*, 12 BOLI 284, 294 (1994); *Garvin v. Timer Cutters, Inc.*, 61 Or App 497 (1983). Moreover, where credible evidence establishes a wage claimant is owed wages exceeding those alleged in the charging document, the commissioner has the authority to award the greater amount of unpaid wages. *In the Matter of Stan Lynch*, 23 BOLI 34, 44 (2002). The forum therefore has modified the factual findings, conclusions of law, and the order herein to reflect the correct amount Respondent must pay Claimant in earned, unpaid, due and payable wages.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, **John M. Sanford, Inc.** is hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Bradley C. Hunter, in the amount of FIVE THOUSAND SIX HUNDRED FORTY THREE DOLLARS ($5,643), representing $1,083 in gross earned, unpaid, due and payable wages, less appropriate lawful deductions, and $4,560 in penalty wages, plus interest at the legal rate on the sum of $1,083 from December 1, 2002, until paid and interest at the legal rate on the sum of $4,560 from January 1, 2003, until paid.

In the Matter of

WILLIAM E. COLSON, dba Sierra Vista Care Center

Case No. 02-90

Final Order of Commissioner Mary Wendy Roberts

Issued June 21, 1990[1]

The above-entitled case came on regularly for hearing before John W. Burgess, designated as Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon (the Agency). The hearing was held on December 12, 13 and 14, 1989, and

[1] This original Final Order was recently discovered and was not previously printed in the BOLIOs. The commissioner's Amended Final Order in this case is printed at 9 BOLIO 281 (1991). ED: September 2004

January 6, 1990, in the State Office Bldg, 1400 S. W. 5th Avenue, Portland, Oregon.

The Agency was represented by Linda Lohr, Case Presenter and employe of the Agency. Ruth L. Swetland (Complainant) was present throughout the hearing. William E. Colson dba Sierra Vista Care Center (Respondent), was represented by Mark A. Loomis and Lee A. Knottnerus, Attorneys at Law.

The Agency called the following witnesses: Robert Browning, Investigative Supervisor with the Civil Rights Division of the Agency; Jeanette Counterman, a former employe of Respondent; Victoria Pratt, Senior Investigator with the Civil Rights Division of the Agency; and Complainant.

Respondent called the following witnesses: Mr. Colson; Susan Fenderson, a former employe of Respondent; Betty Hefler, Certified Nurses Aide employed by Respondent: Joan Marti, Restorative Aide employed by Respondent; and Kathleen Pearce, bookkeeper employed by Respondent.

RULINGS ON MOTIONS AND OBJECTIONS

Rulings were reserved on motions and objections made at the hearing until issuance of this Order.

A. Ruling on Motion to Dismiss (Second Affirmative Defense)

At the commencement of the hearing, Respondent moved to dismiss the Amended Specific Charges on the ground that the Agency lacked authority to act because it had issued the Administrative Determination to Sierra Vista Care Center as respondent, rather than to Mr. Colson. Specifically, Respondent contends that because Sierra Vista Care Center was not the "appropriate" respondent to which to direct the Administrative Determination, the Determination was not issued within one year after the filing of the complaint as required by statute.

In aid of a Ruling on the Motion, the Forum supplements the Findings of Fact – Procedural (see pp 6087, infra) as follows:

a) Following the filing of the complaint, the G sent a "notification letter" together with a copy of the complaint to Loretta Androes, Administrator of Sierra Vista Care Center. The letter notified Ms. Androes that Complainant had filed the complaint, and requested that she submit a written response to the complaint.

b) The Agency's practice is to request a report on the status of a respondent named in a complaint from the State Corporation Division within 30 days after a complaint is filed. The report received in this case identified Sierra Vista Care Center as the assumed business name of William E. Colson, naming him as registrant and as the authorized representative.

c) About December 7, 1987, a letter to the Agency in response to

the allegations in the complaint was submitted by Susan Fenderson as Director of Nursing at Sierra Vista. Ms. Fenderson did not object to the complaint being directed to Sierra Vista, either in her letter or in her subsequent dealings with Agency personnel.

d) In June, 1988 the Agency investigator attempted to deal with Ms. Fenderson, who referred her to Ms. Van Gent, the new Administrator. Ms. Van Gent did not direct the investigator to Mr. Colson or any other person in his business organization. She made Sierra Vista's records available and discussed settlement of the complaint with the investigator. The matter was not settled, but Ms. Van Gent did not indicate that she had no authority to settle. The Agency relied on the apparent authority of Sierra Vista personnel.

e) Mr. Colson testified that he had not given Ms. Van Gent express authority to receive documents in legal matters, and that when she received the Determination, she should have forwarded it on to his Regional Manager for resolution or forwarding to Mr. Colson. Mr. Colson first became aware of the Administrative Determination during the summer of 1989 when the Agency issued its Specific Charges naming Sierra Vista as respondent.

RULING

ORS 659.095(1) provides that:

> "* * * Within one year following the filing of the complaint, the commissioner may issue, or cause to be issued, an administrative determination. If no administrative determination has been issued at the end of the one-year period, the commissioner has no further authority to continue proceedings to resolve the complaint * * *."

An "administrative determination" is defined as "a written notice to the respondent * * * which includes * * * [t]he name of the respondent * * *" ORS 659.095(2). Finding of Fact #2 of the Administrative Determination clearly satisfies this statutory definitional requirement that the name of the respondent be included. (See Finding of Fact – Procedural #3)

"Sierra Vista Care Center" is an assumed business name, and is the entity filed against, or a "respondent" ORS 659.010(13). Sierra Vista was the Complainant's place of employment, was the entity named in the administrative complaint, and was the entity with which the Agency dealt throughout its initial investigation. During that investigation, the Agency had communicated with Sierra Vista through at least three persons who acted for that entity with apparent authority to do so. They were the original Administrator, her successor, and the Director of Nursing. All were Mr. Colson's agents and none had objected on the ground that the Agency's actions were misdirected. From the standpoint of "notice," the Agency's directing of the Determination to Sierra Vista was notice to Respondent of the

Agency's Determination regarding the complaint. The Determination was "issued" within the meaning of ORS 659.095 when it was mailed to Sierra Vista.

It is the Specific Charges, and not the Administrative Determination or the administrative complaint, which frame the issues for the contested case hearing. The Charges allege the ultimate violations charged and the persons responsible therefore, and these need only be reasonably related to the complaint. In the Matter of Sapp's Realty, Inc., #11-83 (1985), citing School District No. 1 v. Nilsen, 271 Or 461, 534 P2d 1135 (1975). The timely issuance of the Administrative Determination allows the Agency (Commissioner) to retain authority beyond one year from the filing of the administrative complaint, and to further process an attempt to resolve the complaint. So long as the Administrative Determination is issued within one year, it is the Specific Charges which articulate the allegations to be adjudicated through the contested case hearing process, and it is the filing of the Specific Charges, not the issuance of an Administrative Determination, which triggers the contested case hearing. ORS 659.050, 659.060 and 659.095, Sapp's, supra.

Prior to hearing, the Agency requested, and was granted, permission to add Mr. Colson, dba Sierra Vista, as Respondent in the Amended Specific Charges. The request was unopposed (Finding of Fact – Procedural, #6). Respondent has not claimed or shown any prejudice as being due to the time at which he learned of the Determination or to the time at which he was named as Respondent in the Amended Specific Charges. It is improbable that he could do so, since it was the failure of his own agents to advise him of the complaint and subsequent investigation which caused his late participation. It would be contrary to the overall statutory scheme and to good sense to allow such an accidental or intentional non-disclosure to insulate Respondent.

Respondent's Motion to Dismiss is denied and Respondent's Second Affirmative Defense is not proved.

B. Ruling on Motion for Sanctions

Respondent seeks to have an inference drawn that Complainant failed to mitigate her damages because she did not produce certain documents in response to a subpoena duces tecum. The documents related to her looking for employment after her termination. Because of the reasoning in support of this Order, Respondent's Motion For Sanctions is denied.

C. Ruling on Admission of Deposition as Evidence

During the hearing, Respondent's counsel used Complainant's prior deposition to point out alleged inconsistencies between her testimony at the hearing and in her deposition. The deposition was admitted as

an exhibit "for impeachment purposes" (Exhibit R-14). Counsel also offered the deposition as substantive evidence. The deposition is so admitted. However, because Complainant's testimony in her deposition is confusing at times, little weight is given to that testimony in this Order.

D. Rulings on Objections

Respondent's counsel objected to evidence related to Complainant's return to work for "light duty" after her injury. The objection is denied because the evidence has some relevance, although no weight is given to the evidence in this Order.

The Case Presenter for the Agency objected to Ms. Hefler's testimony about statements made to her by Complainant. The objection is denied because the evidence has some relevance, although no weight is given to the testimony in this Order.

FINDINGS OF FACT – PROCEDURAL

1) On October 22, 1987, the Complainant filed a verified complaint with the Civil Rights Division of the Agency alleging that she was the victim of an unlawful employment practice on the part of her employer, Sierra Vista Care Center.

2) On September 12, 1988, after investigation and review, the Agency issued a Notice of Administrative Determination. The Administrative Determination, which found that there was substantial evidence of an unlawful employment practice under ORS 659.410, was sent to Sierra Vista Care Center.

3) Finding of Fact #2 of the Administrative Determination stated:

"Respondent [Sierra Vista Care Center] is an assumed business name whose principal is William E. Colson, dong business as a nursing home."

4) Efforts to resolve the case by conciliation failed.

5) On August 7, 1989, Specific Charges were sent to Sierra Vista by certified mail. A copy was also sent to Mr. Colson, as Authorized Representative for Sierra Vista Care Center, by certified mail. The respective mailings were received by Sierra Vista on August 9, 1989, and by Mr. Colson on August 16, 1989. In the Specific Charges, the Agency alleged a violation of ORS 659.410 by Sierra Vista Care Center, Respondent.

6) On August 24, 1989, Sierra Vista filed a timely Answer in which it denied that it had violated ORS 659.410.

7) On October 30, 1989, the Agency moved for leave to amend the Specific Charges, submitting a proposed amendment naming William E. Colson, dba Sierra Vista Care Center as Respondent. The Motion was unopposed and was granted on November 20, 1989. The Amended Specific Charges were thereafter served on Mr. Colson and his counsel, as well as on Sierra Vista.

8) The Amended Charges alleged that Respondent's termination of Complainant's employment violated ORS 659.410. Respondent relied upon the Answer previously filed on behalf of Sierra Vista.

9) The Agency also served on Respondent the following: a) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; b) a complete copy of the Agency's Administrative Rules regarding the contested case process; and c) a separate copy of the specific administrative rule regarding responsive pleadings.

10) A pre-hearing conference was held on December 7, 1989, and the Agency and Respondent each filed a Summary of the Case pursuant to OAR 839-30-071.

11) At the commencement of the hearing, the Hearings Referee advised the Agency and Respondent of the issues and the matters to be proved pursuant to ORS 183.415(7).

12) On March 19, 1990, the Hearings Unit of the Bureau of Labor and Industries mailed copies of the Proposed Order in this matter to all persons listed on the Certificate of Mailing. Pursuant to OAR 839-30-165, the Agency and Respondent had 10 days to file exceptions to the Order. On March 29, 1990 the Hearings Unit received Respondent's exceptions, which are addressed throughout this Final Order.

FINDINGS OF FACT – THE MERITS

1) Complainant worked for about three months at Gladstone Nursing Home. Complainant worked as a certified nurse's aide ("CAN"). Complainant resigned either in March or April 1986 when she understood that she had the choice to resign or be terminated.

2) On May 10, 1986, Complainant then went to work at Sierra Vista as a CAN. Respondent employed more than six persons at the nursing home. At the time, Complainant was 67 or 68 years old. At the beginning of her employment, Complainant worked about four hours a day. She gradually increased the number of hours which she worked until August 1986, when she began working full-time on the swing shift (2:30 p.m. – 10:30 p.m.). Complainant was paid at the rate of $4.00 per hour.

3) During the time that Complainant worked at Sierra Vista, there were often times when there was an insufficient number of CNAs to provide services; the CNAs were very busy; and the work was very demanding.

4) Sierra Vista's policy was to evaluate new employees after the first three months, but in practice the first evaluation was not made until more than three months after hire because the supervising or charge nurse was so busy. On October 8, 1986, after about five months work, Complainant received her first and only written evaluation.

5) Complainant's evaluation was made by charge nurse Vera Waldron. The evaluation was made on a form which listed various "traits, abilities and characteristics." The form included a rating scale for each which ranged, in effect, from unsatisfactory to excellent. In general, Complainant's performance was found to be satisfactory.

6) On the evaluation form was a section for "comments," and the charge nurse wrote in two criticisms of Complainant's performance, that she did not complete all of her assigned tasks and that she was untidy. Complainant disagreed with the criticisms. The evaluation did not identify the times when her tasks were found to be incomplete. When she worked less than full-time, Complainant was unable to complete all of her tasks because she had insufficient time. In fact, it was not uncommon for other CNAs, even full-time ones, not to complete their tasks because they were so busy.

7) During the time that Complainant worked for Sierra Vista, the nursing home had adopted written personnel policies. The personnel policies provided for disciplinary warning notices when an employe violated any of Sierra Vista's rules. An employe who received three warning notices was subject to discharge upon receipt of the third notice. At the time, Ms. Fenderson, the Director of Nursing with authority to terminate employees, followed the policy of three warnings before termination.

8) About December 30, 1986, Ms. Fenderson gave Complainant a memorandum in which she criticized Complainant's lifting of two patients. During each of the liftings, Complainant and the other CNA who assisted her had to ease the patient to the floor. The patient was not injured in either case.

9) Complainant was trained in the proper lifting of patients as were the other CNAs who worked at Sierra Vista. Strength is not as important as technique. The lifting of a patient is used to move a patient (e.g., from the bed to a wheelchair). Even when an acceptable technique is followed, it may be necessary and appropriate to ease a patient to the floor. At times, a patient may resist being moved, and may hit, kick or grab the CNA.

10) In the memorandum, Ms. Fenderson directed Complainant to attend a Safety Committee meeting on January 9, 1987. The Safety Committee was composed of employees from each of the staff positions, and the committee met monthly to review safety matters as well as the actions of employees. Complainant did not attend the meeting of the Safety Committee.

11) Complainant testified that she did attend the meeting. However, her testimony about the meeting was in general terms, and Ms. Fenderson denied that Complainant was there. Complainant's testimony is not credible on this point. In any event, Ms. Fenderson did not criticize Complainant

for not attending, and did not require Complainant to attend another meeting of the Safety Committee.

12) On March 17, 1987 Complainant injured her back while she and Betty Hefler (Bell) were lifting a patient, Geraldine Gilchrist. Complainant and Ms. Hefler moved Ms. Gilchrist from her wheelchair to her bed without injury to the patient. Complainant's back injury was not apparent at first, and she finished her shift. However, about 2:00 a.m. or 3:00 a.m. Complainant began to suffer pain in her back, and she decided to go to the emergency room of the hospital. Complainant was treated, and the doctor gave her a note which stated that she should perform only "light duty." Complainant gave the note to the charge nurse.

13) On March 18, Complainant went to work, and obtained a claim form from a representative of Respondent which was furnished by the insurance company that provided workers' compensation coverage to Respondent. Either that same day or within the next few days, Complainant described the way in which she was injured to a representative of Respondent, who typed the information on the form. Ms. Androes, the Administrator, signed the claim form on March 23. A representative of Respondent then submitted the form to the insurance company, and Complainant's claim was paid.

14) It was Sierra Vista's practice to require that the involved employe fill out an incident report any time either a patient or an employe was injured. On March 19, Complainant prepared an incident report in which she described the way in which she was injured while lifting Ms. Gilchrist with Betty Hefler. In the incident report, Complainant stated that:

> "* * * Betty is wearing a back brace and is on light duty and we should have gotten someone else to help me but just thought we could do it."

15) Complainant's statement is incorrect. Although Betty Hefler did wear a back brace at the time, the brace enabled her to lift patients, and she was capable of lifting patients. She was not, in fact, on light duty.

16) Complainant gave the incident report to the charge nurse, who in turn gave it to Ms. Fenderson, who acknowledged her receipt on March 19 by signing her initials. Thereafter, Ms. Fenderson gave the report to Ms. Androes, who maintained the reports.

17) After receipt of the incident report, between March 19 and March 23, Ms. Fenderson prepared a second memorandum, dated March 20, 1987, in which she made two criticisms of Complainant. The first criticism was that Complainant walked on a newly waxed floor which was "a major violation of safety rules." Complainant denied that she had walked on the waxed floor. The second criticism was that Com-

plainant "again violated safety rules" in lifting Ms. Gilchrist because Complainant "knew [she] should have gotten help." Ms. Fenderson did not also criticize Ms. Hefler in lifting Ms. Gilchrist, although she acknowledged that there was a basis for criticism. In the memorandum, Ms. Fenderson advised Complainant that "this is your second warning." However, Ms. Fenderson did not give the memorandum to Complainant until March 24.

18) On March 22, Ms. Fenderson directed the charge nurse to prepare a form, entitled "Disciplinary Warning Notice." In the notice, the charge nurse criticized Complainant for having made a request for a change of assignment on that date and in the past. In the addition, the charge nurse criticized Complainant for other instances of past behavior (e.g., "sporadic attendance," "not cooperating with her co-workers" and being "argumentative"). The dates of Complainant's past behavior were not stated, and the notice represents the first written criticism of such behavior. By contrast, in her evaluation, she was described as "Warm; friendly; sociable" and her attendance was considered satisfactory.

19) The notice of March 22 contains three boxes under "OFFENSES." The boxes are labeled "First Warning," "Second Warning" and "Final Warning." Each of the boxes is checked, and the words "Verbal warning" are written below the first two boxes. Complainant was never given the notice. The first time that she saw the notice was at her deposition when one of Respondent's attorneys showed it to her.

20) On March 23, Ms. Fenderson met with Ms. Androes, the Administrator, and talked about the termination of Complainant. By that date, Ms. Fenderson had decided to terminate Complainant. On that date, Ms. Fenderson prepared a third memorandum, in which she made three criticisms of Complainant. Her first criticism is based upon Complainant's unidentified repeated ("often") requests for changes in assignment. Her second criticism is about Complainant's past behavior of calling in ill to avoid working with certain other CNAs. Her third criticism is also about Complainant's past behavior ("complaints from your co-workers"). The criticisms are the first written criticisms of the behaviors described.

21) On March 24, when Complainant was to begin her shift, Ms. Fenderson met with her. Ms. Fenderson told Complainant that her employment was terminated effective at that time, and gave Complainant the two memoranda dated March 20 and March 23, respectively. Neither memorandum refers to termination, and Ms. Fenderson did not give Complainant a written statement of the reasons for termination, although it was her practice to do so. Sierra Vista did furnish a statement of the reasons for Complainant's

termination to the agent that represented Sierra Vista before the State Employment Division with regard to Complainant's claim for unemployment compensation. Sierra Vista gave as reasons that she would not work where assigned, that she failed to attend the Safety Committee meeting, and that she violated a safety rule in lifting Ms. Gilchrist. To the extent that Ms. Fenderson's testimony indicates that there were performance-related reasons for Complainant's termination, her testimony is not credible, as explained in the Opinion portion of this Final Order, which explanation is incorporated herein.

22) Within one week, Complainant filed for unemployment compensation. Respondent contested her claim. During April 1987, the Employment Division determined that Complainant was entitled to compensation. The rate of her compensation was $29 each week, and she received three weeks of compensation.

23) During the time that resolution of Complainant's claim was pending before the Employment Division, the Division did not direct her to potential employers. During about the next seven weeks after resolution, Complainant made application for a CNA position at two nursing homes and a foster care home (Mt. View Nursing Home, Golden Age Nursing Home and Mt. View foster care home). In the beginning of June 1987, the Mt. View Nursing Home offered her full-time work as a CNA at the same rate of pay that she had received from Respondent. Complainant did not accept the position, having decided that she no longer wanted to work in a nursing home because of her experiences at Sierra Vista and at Gladstone Nursing Home. Complainant determined that she wanted to work in a private home in which she could care for a member of the family.

24) A representative of the Employment Division informed her that work in a private home was virtually never listed with the Employment Division, and that she probably would have to find such work on her own. Because she did not believe that the Employment Division would assist her in finding a position in a private home and because she did not believe that for $29 a week it was worth her keeping an open file with the Employment Division, she stopped going to the Employment Division.

25) At about the same time, the beginning of June 1987, Complainant obtained work in a private home caring for an elderly woman. She worked for about two weeks for six hours each day at $5 per hour. Thereafter, she made little effort to find work. During the remainder of 1987, she went to three or four other employers at most, but left no application. During 1988, she made no applications for employment.

26) After Respondent terminated Complainant's employment, she became depressed. Respondent's action made her aware that

she was a 69-year-old woman and that she might not find another position. She lost her self confidence.

27) As time passed, Complainant's condition worsened. In late spring or early summer 1988, she began going to a counselor for assistance. As soon as she started to visit the counselor, her mental condition began to improve. Her counselor recommended that she return to work as a way to improve her mental condition.

28) In August 1988, her counselor told her about an opportunity to care for an elderly woman in a private home. Complainant secured the position. Once she began working again, her mental condition improved to the extent that she did not feel the need to return to her counselor, and she did not return.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent William E. Colson, dba Sierra Vista Care Center, employed more than six persons at said facility.

2) Complainant was a worker employed by Respondent.

3) On March 17, 1987, Complainant injured her back while performing work for Respondent. On March 18, she received medical treatment for her injury. On March 19, she notified representatives of Respondent of her injury. She applied for and received benefits under Oregon's Workers' Compensation Law.

4) On March 24, 1987, a representative of Respondent discharged Complainant from Sierra Vista because she had reported an on-the-job injury.

5) Complainant lost wages of $1600 ($4.00 per hour x 40 hours per week = $160 per week x 10 weeks from 3/27/87 to 6/2/87) because of her discharge.

6) Complainant suffered mental distress as a result of her discharge.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction in this matter.

2) At all material times, Respondent was an employer subject to the provisions of ORS 659.010(6), ORS 659.010 to 659.110 and 659.400 to 659.435.

3) At all material times, Respondent was a "respondent" as defined in ORS 659.410(1) and OAR 839-06-105(4)(b).

4) At the time of Complainant's injury, she was a "worker" under ORS 659.410(1) and OAR 839-06-105(4)(b).

5) At the time of Complainant's termination, she was a worker who had invoked or utilized the procedures provided for in ORS 656.001 to 545.794 and 656.802 to 656.807, Oregon's Worker's Compensation Law, and was a member of a class protected by the civil rights statutes. ORS 659.410(1); OAR 839-06-120.

6) Complainant's termination cased her financial harm and mental distress.

7) The conduct and knowledge of Ms. Fenderson, as well as that of the other supervisory employes at Sierra Vista, are properly imputed to Respondent.

8) Respondent committed an unlawful employment practice in the termination of Complainant because she invoked the procedures of the Oregon Worker's Compensation Law. ORS 659.410(1).

9) As authorized by ORS 659.060(3) and 659.010(2), the Commissioner of the Bureau of Labor and Industries of the State of Oregon may issue a Cease and Desist Order requiring Respondent to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110 and 659.400 to 549.435, to perform an act or series of acts reasonably calculated to carry out the purposes of those statutes, and to eliminate the effects of the unlawful practice found. The Order below is a proper exercise of that authority.

OPINION

I. RESPONDENT TERMINATED COMPLAINANT BECAUSE SHE INVOKED THE WORKERS' COMPENSATION PROCEDURE

In the Amended Specific Charges, the Agency alleged that Respondent's termination of Complainant was in violation of ORS 659.410. ORS 659.410(1) makes it an unlawful employment practice for an employer:

> "* * * to discriminate against a worker with respect to hire or tenure or an term or condition of employment because the worker has applied for benefits or invoked or utilized the procedures provided for in [the Oregon Workers' Compensation Law] * * *."

To implement and interpret the above statute, the Agency has adopted a rule on Intentional Discrimination (OAR 839-05-010). The rule provides that there is substantial evidence of intentional unlawful discrimination if:

> "(a) The Respondent is a respondent as defined by statute;
>
> "(b) The Complainant is a member of a protected class;
>
> "(c) The Complainant was harmed by an action of the Respondent;
>
> "(d) The Respondent's action was taken because of the Complainant's membership in the protected class."

It follows that where these elements are established by a preponderance of evidence at hearing in conformity with ORS 183.310 to 183.550, the Commissioner may issue an appropriate order under ORS 659.060(3).

Based upon the facts found, the first three elements of the rule are satisfied. (Conclusions of Law Nos. 3, 5 and 6). Therefore, the issue is whether Respondent ter-

minated Complainant's employment "because" she invoked the procedure in the Workers' Compensation Law.

The Agency has defined the term "invoke" as used in ORS 659.410(1) to include the "worker's reporting of an on-the-job injury" to her employer. OAR 839-06-105(2). Respondent contends that the Agency has defined "invoke" too broadly and, therefore, beyond the intentional of the legislature in using that term in ORS 659.410(1). Such a contention is without merit. The Agency's interpretation properly and logically identifies the first step by which an employe "invokes" the procedures of the Workers' Compensation Law.

Respondent contends that there is insufficient evidence that Complainant was terminated "because" she invoked the workers' compensation procedure; that is, that the Agency did not show that there was a causal connection between Complainant's reporting her injury and the termination.

It is undisputed that Complainant was injured on March 17, 1987, that she prepared the incident report regarding her injury on March 19 and provided information on her injury for the insurance claim form within a few days, and that Respondent terminated her on March 24, less than one week after she had reported her injury. Respondent argues that the necessary causal connection is not established by the Agency's showing only that the termination followed closely in time after Complainant reported her injury, citing In the Matter of KBOY Radio Station, No. 04-84 (1986). However, unlike the KBOY case, here there is more than just a temporal relationship between Complainant's report of her injury and Respondent's discharging her. There is documentary evidence.

Respondent relies upon this documentary evidence as proof that there were performance-related reasons for the termination of Complainant. Taken at face value, except for the evaluation, the documents could indicate this basis for termination. But when the documents are analyzed, it becomes clear that the documents, prepared after the report of injury, are a sham. Ms. Fenderson created those documents in order to adhere to Respondent's personnel policy of three disciplinary warnings before termination. Whether Ms. Fenderson was legally bound to provide three warnings is immaterial because she decided to follow the policy.

A. Evaluation (R-2)

This evaluation shows that as of October 5, 1986, Complainant was performing satisfactorily. In fact, she was considered by to "[w]arm; friendly; [and] sociable" to her co-workers and supervisors, and her attendance was average. There are two points for which she was criticized: incomplete tasks and untidy rooms. However, neither point was referred to in the subsequent memoranda given to Complainant, perhaps because it was recognized that the CNAs were so busy and that it was not

uncommon for them to have insufficient time to complete their work.

B. Memorandum, dated 12/30/86 (Exhibit R-1)

The memorandum refers to two incidents in which Complainant eased patients to the floor while lifting them. Ms. Fenderson wrote the memorandum, but it is reasonable to infer that she really was not seriously concerned about Complainant's lifting ability. When Complainant did not attend the Safety Committee meeting as Ms. Fenderson directed in the memorandum, Ms. Fenderson did not criticize her for not attending or direct her to attend another meeting so that Complainant's lifting technique could be reviewed. Ms. Fenderson simply allowed Complainant to continue lifting patients according to her technique. Therefore, Respondent's statement (Exhibit A-4) to The Gibbens Company that Complainant's non-attendance at the Safety Committee meeting was a reason for her termination not credible. Also not credible is Ms. Fenderson's excuse that she did not confront Complainant about her absence because it was not her responsibility to do so, even thought Complainant had disregarded her express directive to attend the meeting.

In addition, the inference that Ms. Fenderson was not seriously concerned about Complainant's lifting ability is supported by the fact that the patients involved were not injured in the incidents and that easing a patient to the floor may be an appropriate response to an uncooperative patient and thus not involve fault on the part of the CNA.

In conclusion, Ms. Fenderson's reliance upon the memorandum as the first of three warnings gave the memorandum a significance that it would not otherwise have had.

C. Memorandum, dated 3/20/87 (Exhibit A-1)

Ms. Fenderson followed Respondent's personnel policy that ordinarily an employe should receive three disciplinary warning notices before termination. She intended this memorandum as the second warning. In the memorandum, Ms. Fenderson made two criticisms of Complainant, that she walked on the newly waxed floor and that she lifted Ms. Gilchrist without adequate help. With regard to each incident, Ms. Fenderson found that Complainant had violated safety rules, but Ms. Fenderson's analysis of the incidents is inconsistent.

In the waxed-floor incident, Ms. Fenderson used the risk of Complainant's injury by "falling" in support of the violation of the safety rules, yet she did not use Complainant's actual injury sustained as a result of lifting Ms. Gilchrist in support of the the[2] violation of the safety rules. With regard to the waxed-floor incident,

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[2] ED: This transcript is a verbatim reproduction of the text of the original Final Order. Any subsequent grammatical errors in this Final Order also appeared in the original Final Order.

the Forum infers that Ms. Fenderson used the risk of injury as a nexus because she was looking for a basis to find a violation of the safety rules. If Ms. Fenderson had merely criticized Complainant for scuffing the waxed floor, which presumably was the housekeeper's complaint, Ms. Fenderson could not have reasonably relied upon such a criticism as a second warning.

With regard to the lifting incident, Ms. Fenderson used the statement made by Complainant in the incident report as an admission that she 'should have gotten help." But Complainant's statement was incorrect and Ms. Hefler was capable of lifting Ms. Gilchrist, as Ms. Fenderson should have determined. The Forum infers that Ms. Fenderson was looking for another basis to find that Complainant had violated the safety rules. This inference is supported by the fact that Ms. Fenderson did not also criticize Ms. Hefler for lifting Ms. Gilchrist, although Ms. Fenderson stated that there was a basis for such criticism. Clearly, if Ms. Hefler were incapable of making the lift as Ms. Fenderson believed, she should have also criticized Ms. Hefler for agreeing to do the lift, especially since Complainant was injured thereby. Ms. Fenderson singled out Complainant alone for criticism with regard to the lifting of Ms. Gilchrist.

Moreover, the Forum infers that Ms. Fenderson did not write the memorandum dated March 20 on that date. Ms. Fenderson did not give the memorandum to Complainant until March 24 when she terminated Complainant. Because it appears that the Disciplinary Warning Notice (Exhibit A-3), which was dated March 22, was originally intended as a record of the three warnings before termination, it also appears that Ms. Fenderson wrote the "March 20" memorandum only after she decided that the notice should not be given to Complainant and that Complainant should be terminated.

Ms. Fenderson relied on the waxed-floor and the lifting incidents in order to find that Complainant committed violations of safety rules so that she could use the memorandum to ostensibly comply with Respondent's personnel policy on three warnings before termination. Had she not been motivated to create a "second warning," she would not have relied on those incidents as bases for disciplinary action. The memorandum represents only "ostensible" compliance with Respondent's policy because the implicit purpose of a warning notice is to notify the employe of a problem so that the employe may have an opportunity to improve. Clearly, Ms. Fenderson's giving Complainant the memorandum at the time of her termination does not comply with that purpose.

D. <u>Disciplinary Warning Notice, dated 3/22/87 (Exhibit A-3)</u>

Ms. Fenderson directed the charge nurse to prepare the notice. The notice states without

explanation that there were two prior verbal warnings and that the notice is intended as the "Final Warning." Therefore, it is reasonable to infer that the notice was originally intended as a record of the three warnings referred to in Respondent's personnel policy. The notice contains criticism of Complainant's past behavior, except for the criticism about Complainant's request for change of assignment made that same day. The criticism in the notice is inconsistent with Complainant's evaluation, and represents the first written criticism of the behavior to which it refers.

Because Ms. Fenderson directed that the notice be prepared and yet she placed no reliance upon it, it appears that she decided that the notice should not be given to Complainant, and that she recognized a need for two more warnings in addition to the memorandum (Exhibit R-1) which she had previously given to Complainant. The two additional warnings, which she prepared, are the memorandum (Exhibit A-1), just discussed, and the memorandum (Exhibit A-2), dated March 23, 1987.

E. <u>Memorandum, dated 3/23/87 (Exhibit A-2)</u>

The memorandum contains three criticisms of Complainant's past behavior, and represents the first written criticisms of the behavior. In addition, in each instance the criticism is of repetitive behavior, as, requests for changes in assignment, calling in ill to avoid assignments, and "numerous" complaints from other employes.

The Forum infers from the memorandum that Ms. Fenderson was aware of Complainant's behavior referred to therein for some time. Ms. Fenderson gives no reason in the memorandum for making the criticisms at that time, and identifies no recent example of the behavior to suggest why she waited in making the criticisms, although she testified that she did rely upon Complainant's request for change in assignment referred to in the March 22 notice (Exhibit A-3). Ms. Fenderson chose March 23 as the date on which to make a written criticism of Complainant's past behavior because she had decided to terminate Complainant and needed to create a third warning according to Respondent's policy.

In summary, Ms. Fenderson would not have given significance to the first memorandum (Exhibit R-1) if she had not decided to terminate Complainant and, therefore, believed that there was a need to use the memorandum as the first warning. Ms. Fenderson prepared both of the other memorandum after she had decided to terminate Complainant and because of Respondent's policy o three warnings before termination. In the case of the "March 20" memorandum, she would not have relied upon the incidents referred to therein as bases for disciplinary action if she had not been motivated to create a warning so that she could terminate Complainant. Similarly, in the

case of the March 23 memorandum she would not have chosen at that time to make a written statement of criticism of Complainant's behavior if she had not been motivated to create another warning.

Since Ms. Fenderson created the sham memorandum in order to terminate Complainant, the "crucial question" is whether or not Ms. Fenderson would have terminated Complainant had Complainant not invoked the workers' compensation procedure. Complainant's invoking of the procedure, that is, her report to the employer of the injury incident, played more than a "key role" in her discharge and the answer to the question is that Ms. Fenderson did terminate Complainant because she invoked the procedure. OAR 839-05-015.

Ms. Fenderson knew of Complainant's report of her injury on the same day it was reported. Within three or four days thereafter, Ms. Fenderson decided to terminate Complainant. She then created the sham memorandum to create the appearance that there were performance-related reasons for her decision. It follows that the termination was because of the reporting of the injury. There is no other credible explanation of events in the record. The fact that Ms. Fenderson may have properly treated other CNAs who make workers' compensation claims is not persuasive in this case. To the extent that Ms. Fenderson's testimony is inconsistent with the inferences and conclusions herein, her testimony is not credible.

The Forum concludes that Ms. Fenderson knowingly and purposefully terminated Complainant because she had reported her injury. OAR 839-05-010(2) describes two methods of determining whether there is a causal connection between a Respondent's adverse action and a Complainant's protected class status. The Specific Intent Test is one; the other is the Different or Unequal Treatment Test.

At the beginning of the hearing, the Agency's position was that the "causal connection [between Complainant's report of her injury and her termination] may be proven through the use of either" test. Agency's Summary of the Case, 6. At the time of closing argument, the Agency stated that there was no evidence of Ms. Fenderson's specific intent. However, the absence of direct evidence of Ms. Fenderson's specific intent is not determinative because such intent may be shown by the circumstantial evidence referred to herein. Neither the absence of direct evidence of specific intent nor the Agency's comment made at closing argument necessarily requires that the different treatment test must be used.

II. RESPONDENT'S TERMINATION OF COMPLAINANT'S EMPLOYMENT CAUSED HER DAMAGES

A. Lost Wages

The purpose of an award for back pay is to compensate a

Complainant for the loss which the Complainant would have received but for the Respondent's unlawful employment practice. In the Matter of K-Mart Corporation, #52-79 (1982). Complainant claims lost wages from the date of termination, March 24, 1987, to August 12, 1988, in the amount of $11,520.00.

Respondent argues that she is not entitled to that amount of lost wages because she did not actively seek other employment after her termination, and thus did not exercise reasonable diligence to mitigate her damages. The facts show that Complainant is entitled to damages for lost wages, but not the full amount that she claims.

Respondent terminated Complainant on March 24, 1987, and within one week thereafter she opened a file with the Employment Division. Although she did not seek employment immediately, there is a reasonable explanation for her not doing so. Respondent contested her claim for unemployment compensation, and the Employment Division did not direct her to possible employers until after her eligibility for benefits was resolved sometime during April. In addition, she was depressed because of the manner in which Respondent had treated her. In any event, Complainant's delay in looking for employment was short because she did begin looking for employment in April. She made applications at two nursing homes and a foster care home during April and May. Her job seeking efforts were adequate. Complainant's testimony at her deposition about her applications for employment made during April and May is confusing. For example, at her deposition Complainant differentiated between applications for work made on her own and those made at the direction of the Employment Division, and it was not clear from her deposition testimony when she was making the distinction. (Deposition 40-48). Therefore, it cannot be found that her deposition testimony is inconsistent with her testimony at hearing.

During May, Complainant decided that she did not want to work again in a nursing home. Her decision was based upon the manner in which she perceived her treatment at Sierra Vista and at Gladstone Nursing Home. Complainant decided that she would rather work in a private home in which she could care for a member of the family. Because in all likelihood the Employment Division would not be able to assist her in finding employment in a private home and because she did not consider that it was worth her time, she also decided about the same time to no longer maintain an open file with the Employment Division. Therefore, when Mt. View Nursing Home offered her a full-time CNA position at the same rate of pay she had earned at Sierra Vista, she did not accept the position.

Complainant became depressed and lost her self confidence immediately after Respondent terminated her, but she

did not give her mental condition at that time as a reason for her refusal to accept a position at Mt. View Nursing Home. Complainant was still capable of performing the work of a CNA as evidenced by her caring for the elderly woman in the private home at the beginning of June. She just did not want to work in a nursing home again.

Complainant was free to make choices about her employment, but she must bear the consequences of her choices. Her refusal to accept the Mt. View position, which was substantially equivalent employment, concludes the period for measuring her lost wages. See, In the Matter of Pacific Motor Trucking Company, #16-78 (1982), aff. 64 Or App 361, 668 P2d 446 (1983), rev den 295 Or 773 (1983). Although the exact date of Complainant's refusal to accept the Mt. View position is not known, it was placed approximately at the beginning of June. Complainant is entitled to lost wages from March 24 to June 2, 1987, a period of 10 weeks. Therefore, Complainant is entitled to $1600.00 in lost wages.

Complainant seeks $3,000.00 in damages for the mental distress which she suffered as a result of Respondent' unlawful employment practice. Respondent's termination of Complainant's employment caused her to become depressed and lose her self-confidence and self-esteem. She testified that her depression increased to the point that in late spring or early summer 1988 she began to visit a counselor. Her counselor recommended that she return to work as a way in which to relieve her depression, and when Complainant did begin working again in August 1988, her mental condition improved to the extent that she no longer believed that she needed counseling.

An award of damages is intended to compensate Complainant for the mental distress which she suffered as a result of Respondent's termination of her employment. It is clear that Respondent's termination of her employment caused her mental distress. Her termination was sudden, and it is reasonable to infer that she was emotionally shocked by its suddenness. However, it is also recognized that this is not a case of protracted harassment. For these reasons, an award of $2000.00 in damages is reasonable compensate for Complainant's mental distress suffered as a result of Respondent's termination of her employment.

III. AFFIRMATIVE DEFENSES

A. First Affirmative Defense

Respondent contends that the Amended Specific Charges does not state a claim. Respondent has not proven the defense. (See, Part I, OPINION).

B. Second Affirmative Defense

At the hearing, Respondent indicated that this defense was the basis for the contention that the Agency lacked jurisdiction because the Administrative Determination was not properly

issued. Respondent has not proven the defense. (See, Ruling On Motion to Dismiss, supra).

C. Third Affirmative Defense

Respondent contends that the personnel actions taken against Complainant were for legitimate, non-discriminatory reasons. The evidence shows that Respondent terminated Complainant because she invoked the procedures in the Workers' Compensation Law.

D. Fourth Affirmative Defense

Respondent contends that Complainant failed to mitigate her damages. Respondent has proved a partial failure to mitigate. (See, Part II, OPINION)

E. Fifth Affirmative Defense

Respondent withdrew this defense at the hearing.

IV. EXCEPTIONS

Respondent filed many exceptions to the Proposed Order. Rulings on the various exceptions are stated below.

A. Proposed Rulings on Motion to Dismiss and Motion for Sanctions

(Exception 1) Respondent pointed out that the year in which the Agency's request for a report from the State Corporation Division should be 1987, not 1989. Finding of Fact No. 3 has been revised, and now appears in Finding a).

(Exceptions 1-3) Respondent argued that Findings of Fact Nos. 3, 4 and 5 omit certain facts. The claimed omissions are irrelevant, and the essential facts are now restated either in supplemental findings a) through e) or in the Findings of Fact – Procedural.

(Exception 2) Respondent argued that Finding of Fact No. 4 is incorrect. The finding is restated in supplemental findings a) through e) and shows actual reliance on Sierra Vista's response.

(Exceptions 3-4) In effect, Respondent requested reconsideration of the proposed rulings on the Motion to Dismiss and the Motion For Sanctions. The conclusions reached in the proposed rulings are correct. Some language has been clarified. Respondent also claimed that there were no findings of fact or conclusions of law in support of the proposed denial of his Motion For Sanctions. Respondent's claim has no merit. The denial of his Motion was based upon the "reasoning in support of this Order," which reasoning acknowledges a partial failure to mitigate. (See, Part II, OPINION)

B. Proposed Findings of Fact – The Merits

Respondent took exception to the following proposed findings of fact.

Finding of Fact No. 5

(Exceptions 5) This finding relates to Complainant's evaluation. This finding states that "In general, Complainant's performance was found to be satisfactory." (Emphasis added). Respondent claimed that this finding does not address two of the 16 areas of

evaluation in which Complainant was found to be unsatisfactory. Respondent's claim disregards that the finding is "In general" (not in every instance), her work was satisfactory. Respondent also disregards that the evaluation itself contains a similar general finding under the final heading ("Overall Evaluation * * *") where it is stated that Complainant is "Doing an average job."

Finding of Fact No. 6

(Exception 5) This finding relates to the criticism in Complainant's evaluation that she did not complete all of her tasks during some unspecified time period. The finding points out that while she worked part-time for several months she did not have sufficient time to do everything. Respondent argues that because she also worked full-time during the evaluation period she "had difficulty completing tasks while she worked full time." Such conclusion does not necessarily follow.

(Exception 6) Respondent objected to the statement that "it was not uncommon for CNAs, even full-time ones, not to complete their tasks" although Respondent acknowledges that there "may have been testimony that CNAs occasionally fail to complete their tasks." Respondent's objection has no merit.

Finding of Fact No. 16

(Exception 6) This finding relates to Complainant's submission of the incident report and Ms. Fenderson's receipt of it. Respondent stated that this finding does not address Ms. Fenderson's testimony that she did not know when she received the report. At the time of hearing, she may not have recalled when she received the report, but her initials below the handwritten date "3-19-87" appear on the face of the report (Exhibit R-12). Therefore, the finding does not have to address her testimony.

This finding has been revised to express the point that Ms. Fenderson received the report on 3/19/87. Ms. Fenderson's testimony that she did not know that Complainant would file a Workers' Compensation claim is irrelevant because she became aware that Complainant had "invoked" the Workers' Compensation procedures when she received the report. OAR 839-06-105 (2).

Finding of Fact No. 17

(Exception 7) This finding relates to Ms. Fenderson's preparation of the second memorandum "between March 19 and March 23." Respondent argued that there is "no evidence to indicate that Ms. Fenderson did not prepare the second memorandum on or before March 20." As noted in the Opinion, there is inferential evidence. See, Part II, OPINION.

(Exception 7) This finding also states that Ms. Fenderson criticized Complainant in lifting a patient, but did not also criticized Ms. Hefler, who assisted her in making the lift. Respondent claimed that Ms. Hefler testified that she "may have been verbally reprimanded." Respondent is in-

correct. Ms. Hefler testified that she was never reprimanded.

Finding of Fact No. 20

(Exception 7) This finding relates to Ms. Fenderson's criticisms of Complainant made in the third memorandum. Respondent stated that the finding does not address the evidence that the criticisms were true. Assuming the criticisms were true, however, Ms. Fenderson only made them at that time because she needed a third warning before she could terminate Complainant.

Finding of Fact No. 21

(Exception 8) This finding relates to Ms. Fenderson's lack of credibility, and states that "her testimony is not believable as explained in the Opinion herein." The Opinion identifies (pp. 22-29) the facts and inferences drawn from the facts which support this finding. Nothing more is required. For clarity, however, the term "credible" has been substituted and the explanation in the Opinion has been specifically incorporated. Therefore, there is no merit to Respondent's exception that there are no findings to support the conclusion that Ms. Fenderson was not credible.

C. Proposed Ultimate Findings of Fact

Respondent took exceptions to the below-listed Ultimate Findings of Fact.

Ultimate Finding of Fact No. 4 (Conclusion of Law No. 8)

This finding (and similar conclusion of law) is that Complainant was terminated because she had invoked the workers' compensation procedures. Respondent made the following arguments in support of his contention that the finding and conclusion are in error:

1. Referee failed to comply with administrative rules.

The finding is based upon facts related to the Specific Intent Test in OAR 839-05-010(2)(a). The Opinion (p. 29) makes this point clear. In its Summary of the Case, the Agency relied upon both the Specific Intent Test and the Different or Unequal Treatment Test. Therefore, Respondent was on notice of the Agency's alternative theories of the case from the beginning of the hearing. The Opinion has been revised to show that it is proper to base the decision herein on the Specific Intent Test regardless of the Agency's comment on the evidence made at closing argument.

2. Agency failed to make a prima facie case.

(Exception 11) Respondent's claim that the present case is "similar" to the KBOY Radio Station case is incorrect. The present case is distinguishable because here the termination not only followed a few days after the report of the injury but was shown to be pretextual.

(Exceptions 12-14) Respondent's criticisms of the inferences drawn in the Opinion are without merit.

(Exception 12) Respondent's claim that there is no "articulated basis" to disbelieve Ms. Fenderson's testimony is incorrect. (See, Opinion 22-28)

Respondent argued that incidents described in the memorandum prepared by Ms. Fenderson did occur and that these incidents plus other testimony formed a proper basis to terminate Complainant. But the real reason for termination was that Complainant invoked the Workers' Compensation procedures. Ms. Fenderson's testimony that she was terminated for performance-related reasons was not believable.

(Exception 14) Respondent's statement that Ms. Fenderson "incorporated the complaints on the [Disciplinary Warning] Notice into her third warning letter" is not supported by her statements made in that memorandum. The significance of the third memorandum is that Ms. Fenderson chose to criticize Complainant's past behavior at that time in order to terminate her.

3. Referee failed to make findings of fact.

(Exceptions 14-15) Respondent claimed Complainant's lack of credibility is not addressed. Respondent's claim is without merit. Many findings of fact are based upon Complainant's testimony, but in each instance her testimony is not contradicted. In two instances (Finding of Facts Nos. 11 and 13) her testimony was contradicted. In Finding of Fact No. 11, her testimony is disbelieved. In Finding of Fact No. 13, the conflict in testimony over whether Ms. Fenderson typed the workers' compensation claim form is immaterial because Ms. Fenderson already knew that Complainant had reported her injury. There is no need to resolve any conflict in No. 13. Complainant's testimony is not relied upon to show the real reason for her termination. Her testimony is relied upon and findings are made thereon on the question of her job seeking after termination.

(Exception 14) Respondent is incorrect when he states that the Referee found that she was "confused" in her testimony. The Referee found that her testimony at her deposition was "confusing" and, therefore, refused to find such testimony inconsistent with her hearing testimony for impeachment. This Order has been revised to illustrate the confusing nature of her testimony at her deposition.

(Exception 15) Respondent also claimed that certain testimony was ignored. Such testimony was irrelevant with one exception. This Order has been revised to show that Ms. Fenderson's record in treating other CNAs is not persuasive in Complainant's case.

4. Findings of Fact do not support conclusions.

(Exception 16) Respondent excepted to certain inferences which are drawn. The inferences are reasonable. Respondent also

objected to the inference that there are no recent examples of Complainant's past behavior in the third memorandum. Finding of Fact No. 20 has been revised to make clear that her acts were "unidentified" in the memorandum and the Opinion was revised to make clear that the memorandum "identifies" no recent example of her behavior.

Ultimate Finding of Fact No. 5

(Exception 17) Respondent made four objections to this finding on the amount of Complainant's lost wages.

The first objection was that she failed to mitigate. This Order has been revised to show a partial failure.

The second objection was that the findings do not support the conclusion that the Employment Division did not direct Complainant to employers. Finding of Fact No. 23 has been revised to support the conclusion.

The third objection was that the act of not maintaining an open file at the Employment Division terminates any award for lost wages from that date. That act alone is not determinative. The case relied upon by Respondent does not stand for that proposition.

The fourth objection is that Respondent is entitled to the $87 in unemployment compensation received as an off-set from the award of lost wages. The case relied upon by Respondent in support of his objection is distinguishable because the present case is an unlawful employment practice case under ORS Chapter 659.

Ultimate Finding of Fact No. 6

(Exception 18) Respondent objected to the finding that Complainant suffered mental distress as a result of her termination. He argued that discriminatory termination alone is not sufficient to support an award for mental distress. The demonstrated effects of a discriminatory termination do support such an award. In the Matter of Arkad Enterprises, Incident., #8-90, (1990); In the Matter of Bureau of Police of the City of Portland, employment al, #57-78, (1980). The cases cited by Respondent do not support his position.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, **William E. Colson, dba Sierra Vista Care Center** is hereby ordered to:

1) Deliver to the Business Office of the Portland office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for RUTH L. SWETLAND, in the amount of:

a) SIXTEEN HUNDRED DOLLARS ($1600.00), representing wages Complainant lost between March 24, 1987, and June 2, 1987 (10 weeks) as a result of Respondent's

unlawful practice found herein; PLUS,

b) FOUR HUNDRED FIFTY SEVEN DOLLARS and SEVENTY-NINE CENTS ($457.79), representing interest on the lost wages at the annual rate of nine percent accrued between June 3, 1987 and May 3, 1990, computed and compounded annually; PLUS,

c) Interest on the foregoing, at the legal rate, accrued between May 3, 1990 and the date Respondent complies herewith, to be computed and compounded annually; PLUS,

d) TWO THOUSAND DOLLARS ($2000.00), representing damages for the mental distress Complainant suffered as a result of Respondent's unlawful practice found herein; PLUS,

e) Interest on the damages for mental distress, at the legal rate, accrued between the date of this Final Order and the date Respondent complies herewith, to be computed and compounded annually.

2) Cease and desist from discriminating against any worker who applies for benefits under, gives testimony in connection with, invokes, or uses the Oregon Workers' Compensation procedures or who gives testimony in connection with or uses the civil rights procedures provided in ORS 659.410 – 659.435.

3) Post in a conspicuous place on the premises of Sierra Vista Care Center a copy of ORS 659.410, together with a notice that anyone who believes that he or she has been discriminated against may notify the Oregon Bureau of Labor and Industries.

4) Adopt a non-discriminatory policy and practice regarding employe discipline and termination procedures.

In the Matter of
JOHN M. SANFORD, INC.

Case No. 04-04
Amended Final Order of
Commissioner Dan Gardner
Issued September 22, 2004

ED: The Final Order in this case initially was issued on September 14, 2004 and published at 26 Bureau of Labor and Industries 73 (2004). The commissioner later discovered that the order incorrectly included the word "Proposed" before "Conclusions of Law" in the section of the order containing Conclusions of Law. That word was deleted in the Amended Final Order. The Final Order should be cited as: 26 BOLI 73, *as amended* 26 BOLI 111 (2004).

In the Matter of

KILMORE ENTERPRISES, INC.

Case No. 58-04

Final Order of Commissioner Dan Gardner

Issued December 14, 2004

SYNOPSIS

Claimant filed a wage claim alleging $3,242 in unpaid wages. Respondent, who had ceased doing business, alleged it had insufficient funds to pay the wages earned, due and owing. The Agency determined that Claimant's claim was valid and paid Claimant $2,160 from the Wage Security Fund. The forum made an independent determination that Claimant worked 203.5 hours for Respondent at the agreed upon rate of $12 per hour, later entered into an independent contract to perform a painting job for Respondent at the flat rate of $1,500 after he obtained his contractor license, and had a valid claim of unpaid wages in the amount of $1,742, for which he was overpaid $418 from the Wage Security Fund. The forum concluded the Agency was entitled to reimbursement only for the amount that comprised Claimant's valid claim which did not include the flat rate Claimant bid for as an independent contractor. The forum ordered Respondent to repay the Agency $1,742, plus a 25 percent penalty. Additionally, the forum determined that Respondent's failure to pay Claimant's wages when due was willful and Respondent is liable for penalty wages in the amount of $2,880, pursuant to ORS 652.150. ORS 652.140; ORS 652.150; ORS 652.332; ORS 652.414; OAR 839-001-0470(1)(b)&(c); OAR 839-001-0500 through 839-001-0520.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 28, 2004, in the U.S. Fish & Wildlife conference room, located at 2127 SE Marine Science Drive, Newport, Oregon.

Cynthia L. Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Glen A. Rager ("Claimant") was present throughout the hearing and was not represented by counsel. Lyle Kilthau, president of Kilmore Enterprises, Inc. ("Respondent"), appeared as Respondent's authorized representative. Edith Moore was present during the entire hearing as Respondent's corporate representative.

In addition to Claimant, the Agency called as witnesses: Kirk G. Smith, general contractor; Jack

Hamilton, Respondent client; Marjorie Hamilton, Respondent client; and Newell Enos, BOLI Wage and Hour compliance specialist.

Respondent called no witnesses.

The forum received as evidence:

a) Administrative exhibits X-1 through X-16;

b) Agency exhibits A-1 through A-26 (filed with the Agency's case summary).

Respondent did not offer any exhibits.

Having fully considered the entire record in this matter, I, Dan Gardner, 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 15, 2003, Claimant filed a wage claim form in which he stated that Respondent had employed him during the wage claim period of October 21, 2002, through February 25, 2003, and failed to pay him all wages that were due when he quit his employment.

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 January 21, 2004, the Agency issued an Order of Determination numbered 04-0035 ("Order"). In the Order, the Agency alleged Respondent had employed Claimant during the period October 21, 2002, through February 25, 2003, failed to pay Claimant for all hours worked in that period and was liable to Claimant for $3,942 in unpaid wages, plus interest. 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 $2,880 as penalty wages, plus interest. Additionally, the Agency alleged that it had determined Claimant was entitled to and had received payment from the Wage Security Fund ("Fund") in the amount of $2,160, and that the Commissioner was entitled to recover from Respondent the disbursed amount, together with a 25 percent penalty ($540), with interest at the legal rate per annum from February 1, 2004, until paid. The Order 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 18, 2004, Respondent, through its president, Lyle Kilthau, filed an answer and request for hearing. In its answer, Respondent alleged it had "paid all monies due with the exception of $1,200 owed to [Claimant] from [the] Hamilton job." The Agency subsequently notified Respondent that the answer was insufficient because it was not filed by counsel or an authorized

representative as required by statute. On March 11, 2004, the Agency received written confirmation that Lyle Kilthau was authorized to represent Respondent in the contested case proceeding.

5) On June 9, 2004, the Agency requested a hearing. On June 15, 2004, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9 a.m. on September 28, 2004. With the Notice of Hearing, the forum included copies 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.

6) On August 12, 2004, the ALJ ordered the Agency and Respondent each to submit a case summary 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; and a brief statement of the elements of the claim and any wage and penalty calculations (for the Agency only). The ALJ ordered the participants to submit their case summaries by September 17, 2004, and notified them of the possible sanctions for failure to comply with the case summary order.

7) On August 17, 2004, the Hearings Unit received the Agency's request for an extension of time to file case summaries. Respondent did not respond to the request and the forum extended the time for filing case summaries to September 21, 2004.

8) On September 1, 2004, the Agency moved to amend the Order of Determination to add Lyle Kilthau as a respondent because it had "recently received information that Mr. Kilthu [*sic*] [was] an employer within the meaning of ORS 653.310 and should be added as a Respondent." Respondent did not file a response to the motion. On September 13, 2004, the forum denied the Agency's motion based on its failure to allege sufficient facts on which the forum could find the amendment should be allowed.

9) On September 21, 2004, the Agency timely filed a case summary. Respondent did not file a case summary.

10) On September 21, 2004, the Agency filed a second motion to amend the Order of Determination to reduce the amount of wages sought by $700. The Agency stated that "it has come to light that Respondent paid the Wage Claimant $700, in cash, on or about December 15, 2003, and Respondent should be credited with having paid that amount." On September 21, 2004, the forum granted the Agency's motion and amended the Order of Determination by interlineation to reflect the $700 reduction and change the amount sought to $3,242.

11) On September 21, 2004, the Agency filed addenda to its case summary.

12) On September 22, 2004, the Agency filed a third motion to amend the Order of Determination to change the amount of penalty wages sought from $2,880 to $4,356, based on the Agency's revised penalty wage computation in accordance with OAR 839-001-0470(1)(e). Through Kilthau, Respondent timely filed its response to the Agency's motion before the start of hearing on September 28, 2004. In its response, Respondent objected to the "way someone computed the hours & flat rate." Respondent also stated that Claimant was paid $12 per hour, in cash, for the work he performed "with the exception of the Hamilton job which was never completed." Respondent also stated that Claimant "contracted to do a job at the Ridge for $1,500 flat rate which he was paid." After considering the Agency's motion and Respondent's response, the forum granted the motion after the hearing convened on September 28, 2004.

13) 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.

14) During the hearing, Respondent did not present any evidence other than the testimony elicited on cross-examination.

15) The ALJ issued a proposed order on November 10, 2004, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither Respondent nor the Agency filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material, Respondent was an Oregon corporation and was licensed by the Oregon Construction Contractor Board ("CCB") as a general contractor.

2) At all times material, Lyle Kilthau was Respondent's president.

3) Sometime prior to or during the summer of 2002, Respondent, through Kilthau, entered into a subcontract with Kirk Smith of Kirk Smith Painting and Drywall to paint eight units of the Spyglass Ridge apartment complex ("Ridge project"). Smith hired Claimant to work on the Ridge project and paid him $10 per hour to paint apartments. The painting project entailed more work than he anticipated for the six week project and, with Kilthau's agreement, Smith subcontracted with James Norman Construction to complete the remaining four units. Claimant worked for Smith on the Ridge project through the end of July 2002. After that, he worked "off and on" for Smith on different projects.

4) In early September 2002, Respondent, through Kilthau, agreed to pay Claimant $12 per hour to perform labor on some of Respondent's construction projects.

5) On or about August 1, 2002, Respondent entered into a

contract with Jack and Marjorie Hamilton to build an addition to their residence ("the Surfland project"). Claimant performed labor on the contract and his duties, which varied from day to day, included painting, "sweeping up," "tearing out" sheet rock, digging holes, and "putting up" siding. Kilthau was on the job site almost every day and the Hamiltons observed him instructing Claimant on what to do, telling Claimant what time to show up the next day, and showing Claimant how to operate a "chop saw." Claimant used his own hammer, but Respondent provided the rest of the equipment and machinery used on the job.

6) The Surfland project was not completed. The contract ended by mutual agreement at the end of November 2002, due to a pending CCB investigation. The Hamiltons paid Respondent for all of the work performed through November 2002.

7) Claimant prepared a log that showed he worked 119 hours on the Surfland project between October 21 and November 24, 2002. Respondent did not pay Claimant for any of the work he performed during that period. Claimant worked 22 days and averaged 5.4 hours per day on the Surfland project.

8) Between November 25 and December 23, 2002, Claimant worked for Respondent installing a metal roof on Randy and Linda Harmer's rental house in Newport. Claimant's log shows he worked eight days and a total of 29.5 hours on the Harmer rental, averaging 3.7 work hours per day. Between January 7 and 14, 2003, Claimant also worked on the Harmer residence, installing a deck, siding, and eaves. His log shows he worked 32.5 hours over a six day period, averaging 5.4 hour work days on the Harmer residence.

9) In mid-December 2002, Respondent paid Claimant $700, in cash, as wages.

10) In early January 2003, Claimant obtained a contractor license through the Oregon CCB. By early February 2003, Claimant had started his own painting and construction business.

11) Following several lawsuits involving the Ridge project, Kilthau asked Claimant what he would charge for repainting the four units James Norman Construction had painted at the Spyglass Ridge apartment complex during the summer 2002. Claimant told Kilthau he would do the job for $1,500. Based on their mutual agreement, Claimant repainted four units at the Spyglass Ridge apartment complex between January 20 and 28, 2003. In his log, Claimant recorded that he worked eight hours per day for seven days. He worked eight hour days because he was "on [his] own time."

12) From February 11 through February 25, 2003, Claimant worked as a laborer for Respondent on the "Otis deck project" at the agreed upon rate of $12 per hour. Claimant's log

shows he worked 22.5 hours during a four day period, averaging 5.6 hours per day.

13) Respondent did not ask Claimant to fill out any time sheets. Claimant wrote down his hours on a sheet of paper that showed his work hours by date and project.

14) After the Otis deck project, Claimant did not work as a laborer for Respondent. Claimant asked for his wages, but Kilthau "never made an effort" to pay him.

15) Excluding work on the Spyglass Ridge painting project, Claimant worked 203.5 hours at the rate of $12 per hour from October 21, 2002, through February 25, 2003. He earned a total of $2,442, but was paid only $700 for those hours as of the hearing date. Respondent had not paid Claimant for all of the hours he worked at the time Claimant quit his employment, leaving an amount still due and owing of $1,742.

16) Respondent did not pay Claimant $1,500, as agreed, for the paint job Claimant completed on the Spyglass Ridge apartment complex.

17) On August 9, 2003, Claimant filed a wage claim against Respondent because he was not paid for all of the hours he "worked and was never paid for services." On the wage claim form, Claimant stated he was owed $3,242 for "framing of an addition and painting of apts."

18) On August 21, 2003, the Agency notified Respondent that Claimant had filed a wage claim with BOLI alleging Respondent owed "[u]npaid regular wages of $3,242 at the rate of $12 per hour and $1,500 per job from October 31, 2002 to February 25, 2003."

19) In a response dated August 25, 2003, Kilthau, on Respondent's behalf, stated that Respondent had "no employees," but that he had "hired" Claimant on a "piece rate" basis. He also stated Respondent owed Claimant $1,200, but that Claimant had "elected to keep scaffolding in lieu of money owed." Kilthau represented that Respondent was still operating as a business in August 2003.

20) On September 22, 2003, Agency compliance specialist Enos sent Respondent a letter requesting records, including time cards, proof of payment, copies of any contracts or wage agreements between Respondent and Claimant, copies of any W-2 or 1099 forms, copies of pay stubs or wage statements, and other documentation pertaining to Claimant's employment. Respondent did not respond to Enos's request.

21) In late September 2003, Kilthau advised Enos by telephone that Respondent was no longer in business. Kilthau also told Enos that he had paid Claimant in cash for some of the work he performed, still owed Claimant $1,200, and had no time cards or any other records pertaining to Claimant. In November 2003,

Kilthau provided Enos with a completed "Employer Information" form in which he stated that Respondent's business had ceased operating in "July or August" and had no assets.

22) Enos found that Respondent's CCB bond had lapsed and the business had closed as of September 30, 2003. When his investigation concluded, Enos determined that Claimant was Respondent's employee, was not paid for all of the hours he worked for Respondent, and was owed total wages of $3,942. Enos also determined that Respondent was no longer in business and had no assets.

23) Based on his determination, Enos recommended that Claimant's wages be paid from the Wage Security Fund ("Fund"). Subsequently, the Agency paid Claimant $2,160 from the Fund.

24) Claimant's testimony was generally credible and significantly bolstered by Jack and Marjorie Hamilton's credible testimony. Although he was somewhat evasive about the agreement he had with Respondent to complete the Spyglass Ridge apartment painting project, Claimant acknowledged and the forum finds as fact that (1) he determined the flat rate he charged Respondent for completing the project, (2) he determined the number of hours he worked each day on the project, and (3) he was working under his recently obtained CCB license and starting his own business during the period he worked on the project. Additionally, the forum accepts Claimant's record of his work hours because it was consistent with the Hamiltons' observations and Respondent did not refute the hours claimed. The forum credits Claimant's testimony in its entirety.

25) Both Jack and Marjorie Hamilton testified credibly. They did not exhibit any bias toward or against Respondent or Claimant and were not impeached in any way. They were closely involved in the remodeling project involving their home and had firsthand knowledge of key facts. The forum credited the testimony of each in its entirety.

26) All of the other witnesses testified credibly.

27) Respondent did not plead or show a financial inability to pay Claimant's wages at the time the wages accrued.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent was an Oregon corporation that engaged the personal services of one or more persons in Oregon, including Claimant, who was Respondent's employee.

2) Claimant worked as a laborer on various projects for Respondent between October 21, 2002 and February 25, 2003, at the agreed wage rate of $12 per hour.

3) From October 21, 2002 through February 25, 2003, Claimant worked 203.5 hours as Respondent's employee. At the

time Claimant left Respondent's employment, Respondent owed him total wages of $2,442 for these hours and to date has paid only $700, leaving unpaid wages of $1,742. At the time of hearing, Respondent still had not paid any of the remaining unpaid wages.

4) Claimant filed a wage claim. Written notice of nonpayment of wages was sent to Respondent on Claimant's behalf on August 21, 2003. After investigation, the Agency determined that Claimant's claim was valid, Respondent had ceased doing business and was without sufficient assets to pay the wage claim, and Claimant's wage claim could not otherwise be fully and promptly paid.

5) The Agency paid Claimant $2,160 from the Wage Security Fund based on the Agency's investigation and determination, which exceeded the amount Respondent owed to Claimant.

6) Claimant contracted with Respondent to complete a project that a previous contractor had failed to properly complete and, upon completion, Respondent failed to pay Claimant the contract amount of $1,500.

7) Respondent willfully failed to pay Claimant wages owed to him in the amount of $1,742 and is liable for penalty wages.

8) Penalty wages, computed in accordance with ORS 652.150 and OAR 839-001-0470(1)(c), equal $2,880 ($12 per hour x 8 hours per day = $96 per day x 30 days = $2,880).

CONCLUSIONS OF LAW

1) At times material herein, Respondent was an Oregon employer who engaged the personal services of one or more employees, including Claimant. ORS 652.310.

2) The actions, inaction, statements, and motivations of Lyle Kilthau, Respondent's president, are properly imputed to Respondent.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent. ORS 652.310 to ORS 652.332; ORS 652.409 to ORS 652.414.

4) Respondent violated ORS 652.140(2) by failing to pay Claimant $1,742 in earned and unpaid wages after he left Respondent's employment.

5) Respondent is liable for $2,880 in penalty wages under ORS 652.150 for willfully failing to pay all wages or compensation due Claimant when his employment terminated, 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 reimburse the Wage Security Fund in the amount of $1,742, plus 25 percent thereof, or $435.50, plus interest on both sums until paid. ORS 652.414.

OPINION

The Agency alleged Respondent employed Claimant between October 21, 2002, and February 25, 2003, and willfully failed to pay him all wages earned and due when Claimant left his employment. The Agency also alleged that the Wage Security Fund ("Fund") paid Claimant's unpaid wages to the extent allowed under ORS 652.414, and it seeks recovery of the full amount the Fund disbursed, along with payment of the remaining amount of unpaid wages owed to Claimant. According to the Agency, Claimant earned $3,242[1] during the wage claim period at the agreed rate of $12 per hour and a flat rate of $1,500 for a commercial paint job on four apartment units. Of the amount alleged, the Fund paid Claimant $2,160 and the Agency seeks an additional 25 per cent as a penalty, pursuant to ORS 652.414(3). Respondent admits it owes Claimant $1,200 for the "Hamilton job,"[2] but asserts that it otherwise paid Claimant "all monies due" at the rate of $12 per hour. Respondent further asserts Claimant was paid "in full" for the job he "contracted" to do for the flat rate of $1,500.

UNPAID WAGES – ORS 652.140

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, 262-63 (2000).

A. Employment Relationship

The Agency at all times has the burden of proving Respondent was an employer and Claimant was an employee as defined by the applicable statute.[3]

ORS 652.310(1) defines "employer" as:

> "[A]ny person who in this state, directly or through an agent, engages personal services of one or more employees * * *."

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[1] Prior to hearing, the Agency amended the charging document to decrease the amount of wages earned and unpaid, from $3,942 to $3242, based on its discovery that Claimant was paid wages totaling $700, in cash, during the wage claim period.

[2] Unless referred to in a quotation, the "Hamilton job" is otherwise referred to as the "Surfland project," which is what it was called throughout the hearing.

[3] This forum long ago adopted and has since consistently used the definitions of "employer" and "employee" in ORS 652.310 for the purposes of interpreting ORS 652.140 and ORS 652.150. *See In the Matter of Anna Pache,* 13 BOLI 249, 267 (1994); *see also In the Matter of Crystal Heart Books Co.*, 12 BOLI 33, 41 (1993) (relying on *Lamy v. Jack Jarvis & Co., Inc.*, 282 Or 307, 574 P2d 1107, 1111 (1978)).

ORS 652.310(2) defines "employee" as:

> "[A]ny individual who otherwise than as 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**." (Emphasis added)

Here, the Agency presented a preponderance of credible, unrefuted evidence that shows Claimant rendered personal services in this state to Respondent in exchange for a fixed rate of $12 per hour on the Surfland project, the Harmer residence and rental, and the Otis deck project. Moreover, Respondent admitted that Claimant rendered personal services at the $12 hourly rate.

However, Respondent argued that Claimant was not an employee when he worked on the Spyglass Ridge apartment complex paint job for the flat rate of $1,500, as the Agency contended, but instead was working independently under his own contractor license to complete a project a previous contractor had failed to properly complete.

This forum has held that where an employment relationship previously has been established, as it was in this case, the burden is on the employer to prove any change in the status of that relationship. *In the Matter of Rodrigo Ayala Ochoa*, 25 BOLI 12, 40 (2003), *revised final order on reconsideration*; *see also In the Matter of Superior Forest Products*, 4 BOLI 223, 231 (1984) ("Where a wage claimant has been a regular, hourly employee, and an employer seeks to deny liability for wages by asserting that at a certain point during employment the claimant's status changed from employee to either independent contractor or partner, and the claimant disputes this, the employer has the burden of proving such change in status."). To carry its burden in this case, Respondent was required to prove Claimant was an independent contractor when he performed the Spyglass Ridge paint job.

The test for distinguishing an employee from an independent contractor requires full inquiry into the true "economic reality" of the employment relationship based on a particularized inquiry into the facts of each case. *Ochoa* at 41-42, *citing In the Matter of Geoffrey Enterprises, Inc.*, 15 BOLI 148, 164 (1996) and *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947). This forum measures the degree of economic dependency in any given case by analyzing the facts presented in light of the following factors and no one factor is dispositive: (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. *In the Matter of Ann L. Swanger*, 19 BOLI 42, 53-55 (1999).

In this case, Respondent elicited testimony from Claimant on cross-examination that established the following: Respondent asked for and received a $1,500 bid from Claimant to complete work on a commercial project left undone by another subcontractor; Claimant worked on the project "on his own time," in contrast to working specific hours Respondent established on previous jobs; Claimant obtained a contractor license in early January 2003 prior to performing the project and began his own contracting business soon thereafter; and, except for four days in February 2003, ceased performing labor for Respondent at a fixed hourly rate.

The forum finds from these facts that a reasonable inference may be drawn that Claimant was no longer economically dependent on Respondent when he agreed to take on a commercial painting job for a flat fee. First, evidence shows Respondent did not supervise or control Claimant's work schedule or pay rate on the January 2003 Spyglass Ridge paint job as it did on the hourly residential projects. In fact, Claimant acknowledged that he was on his "own time" when he worked on the paint job and that he chose to work full eight hour days rather than the shorter work schedule Respondent dictated on the residential projects. Claimant admitted that he, not Respondent, determined the rate he would "charge" to do the work and the record as a whole shows Respondent asked for and accepted Claimant's "bid" on the Spyglass Ridge paint job.

Second, evidence shows Respondent had previously subcontracted the Spyglass Ridge paint job to a contractor who failed to properly complete the job. In order to meet its original obligation on the commercial project, Respondent either had to complete the job with its own employees and equipment or engage another contractor to finish the project. Here, instead of directing Claimant to work on the job for the previously established hourly rate, Respondent agreed to pay the flat rate Claimant proposed during the time Claimant was starting his own contracting business. There is no evidence that Respondent purposely changed Claimant's employment status from hourly employee to independent contractor to later deny liability for "wages" Claimant purportedly earned during that period. The Agency did not argue and the forum finds no evidence that the flat rate Respondent agreed to pay was for services "based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled" as required by statute. *See* ORS 652.310(2). Instead, evidence shows the flat rate was for a single, temporary enterprise that

Claimant had the requisite skills and credentials to perform. Moreover, he completed the job in 56 hours and averaged $27 per hour - considerably more than the $12 per hour he would have earned had Respondent performed the contract and used Claimant's services on an hourly basis. The forum infers from those facts that when Respondent accepted Claimant's bid to perform the job for $1,500 on his own time, the opportunity for profit and loss shifted to Claimant who had to depend on his own initiative, judgment, and foresight to complete the job in a manner that would result in such a profit.

Finally, while Claimant regularly performed hourly work for Respondent in the months preceding the Spyglass Ridge paint job, evidence shows he ceased working for Respondent after he launched his own contracting business and made his services available to the general public. Thus, the forum finds Claimant was transitioning from wage earner to entrepreneur when he agreed to do the Spyglass Ridge painting job and was no longer dependent upon Respondent for the opportunity to render services.

Consequently, after examining the totality of circumstances in this case, the forum concludes that as a matter of economic reality Claimant was Respondent's employee between October 21, 2002, and February 25, 2003, except for the period beginning January 20 through January 28, 2003, when he contracted with Respondent to complete the Spyglass Ridge painting project.

B. <u>Agreed Upon Rate</u>

In its response to the Agency's motion to amend, Respondent, through its president, asserted that Claimant was paid $12 per hour for the work he performed "with the exception of the Hamilton job which was never completed." The forum deems the statement an admission that Claimant worked for an agreed upon rate of $12 per hour for the work he performed on the Surfland project, Harmer residence and rental, and Otis deck project.

C. <u>Work Performed</u>

There is no dispute that Claimant performed work for which he was not paid. The only disagreement between Claimant and Respondent is the precise amount owed.

D. <u>Amount And Extent Of Work Performed</u>

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 forum 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 Claimant worked. Claimant credibly testified that he recorded the dates and hours he worked on each of Respondent's projects. His testimony was bolstered by other credible witnesses and, despite the opportunity to do so, Respondent produced no evidence to "negative the reasonableness of the inference to be drawn from [Claimant's] evidence." *Id*. at 255, *quoting Mt. Clemens Pottery Co.*, 328 US at 687-88. The forum concludes, therefore, that Claimant performed work for which he was not properly compensated and the forum may rely on the credible evidence he produced showing the hours he worked as a matter of just and reasonable inference. Claimant's testimony established he worked a total of 203.5 hours for Respondent and earned a total of $2,442, based on the agreed upon rate of $12 per hour. Respondent paid $700 of that amount and owed Claimant $1,742 in unpaid wages when Claimant left Respondent's employment.[4]

WAGE SECURITY FUND REIMBURSEMENT – ORS 652.414

In cases involving payouts from the Fund, where (1) there is credible evidence that a determination on the validity of the claim was made; (2) there is credible evidence as to the means by which that determination was made; and (3) the Agency has paid out money from the Fund and seeks to recover that money, there is a rebuttable presumption that the Agency's determination is valid for the sums actually paid out. *In the Matter of Catalogfinder, Inc.,* 18 BOLI 242, 260 (1999). In this case, Respondent rebutted the presumption by successfully challenging Claimant's employment status during part of the wage claim period. The effect was to reduce Respondent's liability to the Fund by $1,500, which, absent evidence to the contrary, is the amount Respondent owed Claimant for completing work on the Spyglass Ridge painting job pursuant to their oral contract. The Agency otherwise established that it (1) made a determination on the validity of Claimant's claim; (2) based its determination on the information available at the time; and (3) paid out money from the Fund and seeks to recover that money. The forum has made an independent determination that Respondent's liability to the Fund is limited to the amount disbursed that equals the amount Respondent owed Claimant when he left

[4] Other than Kilthau's assertion on Respondent's behalf, there is no evidence Claimant was paid for the work he performed as an independent contractor. However, Claimant must seek his remedy for Respondent's failure to pay the contracted amount in a private action in a different forum.

Respondent's employ. Consequently, Respondent is liable to the Fund for $1,742, plus an additional 25 percent penalty, or $435.50, as provided by statute.

PENALTY WAGES

In its Order of Determination, the Agency alleged Respondent willfully failed to pay Claimant the wages due after he left his employment and that 30 days had elapsed since the wages became due and owing, pursuant to ORS 652.140. 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. *In the Matter of Usra Vargas,* 22 BOLI 212, 222 (2001).

Respondent did not dispute that Claimant performed work as a laborer on certain projects for $12 per hour. In fact, Respondent, through Kilthau, claimed to have paid Claimant in full for his contract work, but readily admitted it still owed Claimant $1,200 for his labor on the Surfland project. Respondent did not allege it was financially unable to pay Claimant's wages at the time his wages accrued. Moreover, a preponderance of evidence shows Respondent did not cease doing business until several months after Claimant's wages accrued. Respondent did not present any evidence that explains or excuses its failure to pay Claimant all of the wages due when he left Respondent's employ. Based on those facts, the forum infers Respondent voluntarily and as a free agent failed to pay Claimant all of the wages earned between October 21, 2002, and February 25, 2003, for the work he performed on the Surfland project, Harmer residence and rental, and Otis deck project as Respondent's employee. Respondent acted willfully and is liable for penalty wages under ORS 652.150.

In its amended Order of Determination, the Agency sought $4,356 as a result of a revised penalty wage computation, computed pursuant to OAR 839-001-0470(1)(e), based on a presumption that Claimant was Respondent's employee when he contracted to complete the Spyglass Ridge painting project. Since the forum has determined otherwise, penalty wages are assessed and calculated by multiplying Claimant's $12 hourly rate by 8 hours per day multiplied by 30 days, in accordance with ORS 652.150 and OAR 839-001-0470(1)(b)&(c). Consequently, Respondent is liable for $2,880 in penalty wages.

ORDER

NOW, THEREFORE, as authorized by ORS 652.414, and as payment of the amount paid from the Wage Security Fund as a result of its violations of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders **Kilmore Enterprises, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE

Oregon Street, Portland, Oregon 97232-2180, the following:

A certified check payable to the Bureau of Labor and Industries in the amount of TWO THOUSAND ONE HUNDRED SEVENTY SEVEN DOLLARS AND FIFTY CENTS ($2,177.50), representing $1,742 of the $2,160 paid to Glen A. Rager from the Wage Security Fund and a 25 percent penalty of $435.50 on that sum, plus interest at the legal rate on the sum of $2,177.50 from February 1, 2004, until paid; and

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Glen A. Rager, in the amount of TWO THOUSAND EIGHT HUNDRED AND EIGHTY DOLLARS ($2,880), representing $2,880 in penalty wages, plus interest at the legal rate on the sum of $2,880 from May 1, 2003, until paid.

In the Matter of

CLEOPATRA'S, INC.

Case No. 31-04

Final Order of Commissioner Dan Gardner

Issued January 13, 2005

SYNOPSIS

Respondent did not file an answer to the Agency's formal charges and the forum held Respondent in default. The forum found that the Agency established a prima facie case and concluded that Respondent discharged Complainant in violation of ORS 659A.230 because she, in good faith, reported criminal activity. The forum ordered Respondent to pay Complainant $2,400 in lost wages and $25,000 for the emotional distress caused by Respondent's unlawful employment practice. ORS 659A.230; ORS 659A.820.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 30, 2004, in the W. W. Gregg 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"). Alice Tanzman ("Complainant") was present throughout the hearing and was not represented by counsel. Cleopatra's, Inc. ("Respondent"), after being duly notified of the time and place of the hearing and of its obligation to file an answer within 20 days of

the issuance of the Formal Charges, failed to file an answer as required. On the Agency's motion, the ALJ found Respondent in default and issued a notice of default. Respondent did not request relief from default in the time allowed and the forum issued a default order precluding Respondent from presenting evidence or argument at the hearing. Neither Respondent nor anyone on its behalf appeared at the hearing.

In addition to Complainant, the Agency called as witnesses: Claude DaCorsi, Respondent's former manager; Lorrie Baker, BOLI civil rights investigator; Howard Tanzman, Complainant's brother (telephonic); and Yvonne (Bonnie) Hembree, Complainant's former co-worker and past supervisor.

The forum received as evidence:

a) Administrative exhibits X-1 through X-13 (generated prior to hearing);

b) Agency exhibits A-1 through A-12 (submitted prior to hearing).

Having fully considered the entire record in this matter, I, Dan Gardner, 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 June 6, 2003, Complainant filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging she was the victim of Respondent's unlawful employment practices. After investigation and review, the CRD issued a Notice of Substantial Evidence Determination finding substantial evidence supporting the allegations in the complaint.

2) On August 21, 2002, the Agency submitted Formal Charges to the forum alleging Respondent discriminated against Complainant by terminating her because she, in good faith, reported criminal activity, in violation of ORS 659A.230. The Agency sought $17,500 for wages and benefits lost and $25,000 for emotional distress caused by Respondent's unlawful practices. The Agency also requested a hearing.

3) On August 5, 2004, the forum served the Formal Charges on Respondent together with the following: a) a Notice of Hearing setting forth November 30, 2004, in Portland, 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.

4) Copies of the Formal Charges, together with items a) through d) of Procedural Finding 3 above, were sent by certified mail, postage prepaid, to Respondent's last known addresses (supplied by the Agency), pursuant to OAR 839-050-0030(1). On August 9, 2004, the copy sent to "Cleopatra's, Inc., 8102 NE Killingsworth, Portland, Oregon 97218" was returned to the Hearings Unit with a label stating: "Cleopatra's Viewpoint Rest. & Lounge Moved Left No Address" and "Unable to Forward * * * Return to Sender." The copy sent to "Tracy Parks [*sic*], Cleopatra's, Inc., PO Box 56178, Portland, Oregon 97238" was delivered to and signed for by Tracy Park on August 17, 2004.

5) The "Instructions" on the Notice of Hearing (item a) in Finding 3, the Summary of Contested Case Rights and Procedures (item b) in Finding 3, and the Contested Case Hearing Rules (item c) at OAR 839-050-0130(1) in Finding 3, provide that an answer must be filed within 20 days of the issuance of the charging document. All three also provide that a corporation must be represented either by counsel or an authorized representative at all stages of the hearing, including filing an answer, and that before a person may appear as an authorized representative, the person must file a letter authorizing the person to appear on behalf of the corporation. The Hearings Unit did not receive any correspondence from Respondent within 20 days of the issuance of the Formal Charges.

6) On August 30, 2004, Agency case presenter Cynthia Domas mailed a letter to Respondent's registered agent that stated, in pertinent part:

> "Please be advised that the Agency will seek a default in the above matter if you do not file an Answer within ten (10) days from the date of this letter."

Respondent did not file a response to the Agency's letter or an answer to the Formal Charges.

7) On October 3, 2002, the Agency filed a Motion for Default. The ALJ granted the Agency's motion and issued a Notice of Default noting that the Formal Charges issued on August 5, 2004, that Respondent was required to file an answer within 20 days and failed to do so, and that it was in default under OAR 839-050-0330(1)(a). Respondent was advised it had ten days from the date the Notice of Default issued to request relief from default through counsel or an authorized representative as provided in the contested case hearing rules.

8) Respondent did not file a request for relief from default within the time allowed and the ALJ issued a default order on November 9, 2004, stating that Respondent would not be permitted to present evidence or participate in any manner in the hearing under the applicable rules.

9) A copy of the Notice of Default was mailed to "Tracy Park, Registered Agent, Cleopatra's,

Inc., 12707 SE 24th, Vancouver, Washington 98683-6599" and was not returned by the US Postal Service. A copy of the Notice of Default was also mailed to "Tracy Park, Registered Agent, Cleopatra's, Inc., PO Box 56178, Portland, Oregon 97238" and was returned to the Hearings Unit by the US Postal Service with a label stating: "Box Closed * * * Unable to Forward * * * Return to Sender."

10) A copy of the Default Order was mailed to "Tracy Park, Registered Agent, Cleopatra's, Inc., 12707 SE 24th, Vancouver, Washington 98683-6599" and was not returned by the US Postal Service. A copy of the Default Order was also mailed to "Tracy Park, Registered Agent, Cleopatra's, Inc., PO Box 56178, Portland, Oregon 97238" and was returned to the Hearings Unit by the US Postal Service with a label stating: "No Such Number * * * Unable to Forward."

11) On November 17, 2004, the forum mailed a copy of the amended contested case hearing rules, including a summary of the substantive rule changes, to Tracy Park, Respondent's registered agent, at the last known addresses. The copy mailed to the PO Box of record was returned to the Hearings Unit by the US Postal Service with a label stating: "Box Closed * * * Unable to Forward."

12) On November 23, 2004, the Agency filed a case summary.

13) At the start of hearing on November 30, 2004, the ALJ verbally advised the Agency and Complainant of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing, pursuant to ORS 183.415(7).

14) The ALJ issued a proposed order on December 14, 2004, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither Respondent nor the Agency filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At material times, Respondent was an Oregon corporation operating an adult nightclub and lounge known as Cleopatra's located in Portland, Oregon.

2) At material times, Tracy L. Park was Respondent's president and registered agent.

3) In 1992, Complainant was hired as a bartender at the Viewpoint Restaurant and Lounge located in Portland, Oregon. In or around September 2001, the business was sold to Respondent. Respondent changed the establishment's name to Cleopatra's, but everything else about the business remained the same, including the employees, location, and type of business.

4) After the new ownership took over, Complainant continued to work as the day shift bartender Tuesday through Friday, 11 a.m. to 7 p.m. She always worked straight through her shift without clocking out for lunch. She con-

tinued to earn $7.50 per hour for her bartending duties. Respondent paid Complainant bi-monthly.

5) Claude DaCorsi worked for the previous owners as a bouncer and was Complainant's co-worker at that time. After Respondent purchased the business in September 2001, DaCorsi was promoted to general manager. He was authorized to hire and fire employees and he directly supervised Complainant and the night shift bartender. Don Street, Respondent's night manager, was the "scheduler" and employees were told to call Street if they were unable to show up for work. Tracy Park, Respondent's president, was present during the day, primarily in her "upstairs" office, and had little interaction with Complainant.

6) On or about March 11, 2003, Complainant received notice from the company-provided health insurance carrier that Respondent had cancelled the employees' group health insurance coverage, effective December 14, 2002. Respondent did not tell any of the employees, including Complainant, that their health insurance had been cancelled, but continued to deduct the insurance premiums from their paychecks. Although DaCorsi was aware in January 2003 that the group coverage had been cancelled, he did not notify the employees until approximately two months later when he posted the information on the employee bulletin board. Complainant's first notice of the cancellation was the March 11 letter.

7) Between December 2002 and March 2003, Respondent deducted health insurance premiums totaling $186 from Complainant's paychecks. When Complainant learned she was no longer covered under the company-provided health insurance plan, she immediately called Respondent and spoke to DaCorsi, who confirmed that Respondent had discontinued the insurance coverage three months earlier. Complainant was upset that her health insurance had been cancelled without notice, but more upset that Respondent continued to deduct the premiums from her pay. She told DaCorsi she believed Respondent was "unethical, unprofessional," and was "stealing" from her. Complainant demanded reimbursement for the premiums that were deducted from her paychecks and DaCorsi replied, "No problem."

8) On March 13, 2003, DaCorsi gave Complainant $186, in cash, along with a typed letter, dated March 13, 2003, that stated in pertinent part:

> "Reimbursement to Alice Tanzman for insurance premiums taken from her checks after coverage was terminated on 12/14/02."

The amount "$186" was handwritten on the letter along with DaCorsi's and Complainant's signatures.

9) Complainant commented to DaCorsi that she hoped she would

not be fired because she requested reimbursement. DaCorsi told her she would not be fired, but that Park might want to talk to her about what had happened. Complainant replied that she considered the incident over and felt no need for further discussion.

10) On or about March 21, 2003, Don Street approached Complainant after she completed her shift and told her she was fired. When she asked why, Street told her that her "services were no longer needed." Complainant was "mad, shocked, and surprised" that she was discharged. She was not prepared to be unemployed and the notion of unemployment was "very stressful."

11) Complainant applied for unemployment benefits. The Employment Department mailed Respondent a "Notice of Claim Filed" and requested a response. DaCorsi submitted a written response on Respondent's behalf and where he was asked the cause for the discharge, DaCorsi wrote: "no reason given." DaCorsi also checked the box marked "no" in response to the question, "Was a company policy or procedure violated?" DaCorsi later told an Employment Department representative that Complainant was "basically laid off – a reduction in force."

12) The Employment Department adjudicator stated in a document entitled "Informal" that:

> "[Complainant] was discharged because she demanded reimbursement for health insurance premiums which were withheld from her wages after the employer stopped purchasing health insurance. I find the [Complainant] more credible than the employer because a distraint warrant was issued against the employer in January and because the [Complainant] described the woman hired to replace her. Count taken on that basis. The employer, however, stated the separation was a reduction in force and the [Complainant] was chosen because she was the highest paid employee (highly unlikely)."

Complainant was awarded unemployment benefits.

13) Respondent hired another bartender named Patricia Rini (phonetic) to replace Complainant.

14) Prior to her termination, Complainant had not received any written warnings or discipline.

15) While she was receiving unemployment benefits, Complainant diligently sought work and began working at another nightclub and lounge on June 1, 2003. She started her new job at a higher pay rate than the one she earned while bartending for Respondent. Her earnings continue to be more than she earned while in Respondent's employ.

16) After she was discharged, Complainant reinstated her health insurance. She was required to pay five months of premiums, "up front," going back

to her termination date, for a total of $2,480. Her premiums thereafter have been $496 per month.

17) Complainant's testimony was generally credible. Except for her testimony about the duration of her emotional distress, Complainant was straightforward, composed, and had good recall of key events leading up to the end of her employment. Her slightly exaggerated claim that she was "still not over it" was overcome by her overall testimony and demeanor that revealed the greater part of her emotional distress was caused by the financial insecurity of unemployment. She did not claim any particular attachment to her bartending job at Respondent's establishment and the forum reasonably infers that any distress she experienced due to her abrupt termination was primarily limited to the ten weeks she was unemployed.

18) The testimony of Baker, DaCorsi, Hembree, and H. Tanzman was credible.

ULTIMATE FINDINGS OF FACT

1) At times material, Respondent used the personal services of one or more persons in Oregon.

2) Respondent was Complainant's employer from September 2001 through March 21, 2003. Claude DaCorsi was a manager and Complainant's direct supervisor throughout Complainant's employment with Respondent.

3) During Complainant's employment, Respondent purchased health insurance coverage for its employees. Respondent paid a portion of the premiums and deducted the employees' contribution from their paychecks.

4) By letter dated March 7, 2003, the health insurance provider notified Complainant that the coverage provided through her employment with Respondent had been cancelled on December 14, 2002.

5) Respondent continued to deduct Complainant's portion of the health insurance premiums from her paycheck after the health insurance benefit was cancelled. Respondent never notified Complainant that her health insurance benefit had been cancelled.

6) On or about March 13, 2003, Complainant confronted Respondent, through manager DaCorsi, about the insurance premiums that were deducted from her paycheck. She told DaCorsi that she believed Respondent's retention of her portion of the insurance premiums after the benefits were cancelled amounted to theft. She demanded reimbursement for the premiums withheld that were not paid out to her health insurance carrier.

7) Respondent reimbursed Complainant for the deducted insurance premiums, but discharged her from employment following her shift on March 21, 2003. Complainant was never disciplined or given any warnings before she was discharged.

8) Respondent discharged Complainant because she confronted DaCorsi about what Complainant in good faith believed was theft on the part of Respondent.

9) Complainant diligently sought work after her termination and began a higher paying job on June 1, 2003. She would have earned an additional $2,400 in gross wages had she continued to work for Respondent from March 21 through June 1, 2003.

10) Complainant experienced emotional distress as a result of her discharge.

CONCLUSIONS OF LAW

1) At times material, Respondent was an employer subject to the provisions of ORS 659A.230. ORS 659A.001(4).

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659A.800; ORS 659A.830.

3) Respondent discharged Complainant in violation of ORS 659A.230 after she in good faith reported criminal activity.

4) 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 Complainant 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

DEFAULT

Respondent was found in default under OAR 839-050-0330 for failing to timely file an answer within the time specified in the Formal Charges. Where a respondent defaults, the Agency is required to present a prima facie case on the record to support the allegations in its charging document and to establish any damages. ORS 183.415(6). In this case, the Agency met that burden by submitting credible witness testimony and documentary evidence to support its allegations.

PRIMA FACIE CASE

ORS 659A.230 provides that "[[i]t is an unlawful employment practice for an employer to discharge * * * an employee * * * for the reason that the employee has in good faith reported criminal activity by any person."

To establish a prima facie case, the Agency must show: (1) Respondent was an employer as defined by statute; (2) Respondent employed Complainant; (3) Complainant, in good faith, reported criminal activity; (4) Respondent discharged Complainant; (5) Respondent discharged Complainant because

she, in good faith, reported criminal activity. *In the Matter of Hermiston Assisted Living, Inc.*, 23 BOLI 96, 121 (2002).

1. Respondent was an employer for the purpose of enforcing ORS 659A.230.

ORS 659A.001(4) defines "employer" as "any person who in this state, directly or through an agent, engages or uses the personal services of one or more employees, reserving the right to control the means by such service is or will be performed." A corporation is a "person" under the statute. ORS 659A.001(9). The record as a whole shows that at times material, Respondent was a corporation that used DaCorsi's and Complainant's personal services as manager and bartender, respectively, and, thus, was an employer for the purpose of enforcing ORS 65A.230.

2. Respondent employed Complainant.

The forum concludes from the whole record herein that Respondent employed Complainant as a bartender between in or around September 2001 through March 21, 2003.

3. Complainant, in good faith, reported criminal activity.

First, credible evidence shows Complainant immediately contacted Respondent, through its manager, DaCorsi, when she learned her health insurance had been cancelled and that Respondent had continued to withhold premiums from her paycheck for three months after the cancellation. She communicated to DaCorsi her belief that the continued payroll deductions amounted to theft and that she expected reimbursement for what she believed were purloined funds. DaCorsi did not dispute that this had occurred and reimbursed Complainant for the full amount she sought. Under the whistleblower statute, Complainant was not required to report what she believed to be criminal activity to a law enforcement agency. *See In the Matter of Hermiston Assisted Living, Inc.*, 23 BOLI 96 (2002) ("[As] long as criminal activity is *reported*, it does not matter to whom the report is made."). Thus, in this case, Complainant's communication to Respondent's manager meets the statutory "reporting" requirement.

Second, as a matter of law, theft is a criminal activity. *See* ORS 164.045(1) ("A person commits the crime of theft in the second degree if, by other than extortion, the person: (a) Commits theft as defined in ORS 164.015; and (b) The total value of the property in a single or aggregate transaction is $50 or more but is under $200 in a case of theft by receiving and under $750 in any other case." *See also* ORS 164.015 ("A person commits theft when, with intent to deprive another of property or to appropriate property to the person or to a third person, the person * * * [t]akes, appropriates, obtains or withholds such property from an owner thereof * * *." Moreover, misapplying entrusted property is also a

crime under Oregon law. *See* ORS 165.095 ("A person commits the crime of misapplication of entrusted property if, with knowledge that the misapplication is unlawful and that it involves a substantial risk of loss or detriment to the owner or beneficiary of such property, the person intentionally misapplies or disposes of property that has been entrusted to the person as a fiduciary * * *."). The forum finds that Complainant reported activity on the part of Respondent that, if proven under the criminal law standard, *i.e.*, beyond a reasonable doubt, constitutes criminal activity.

Third, credible evidence on the whole record establishes that Complainant's report of criminal activity was made in good faith. This forum has previously found that the good faith requirement is met "when a whistleblower has a reasonable belief that the wrongdoing reported has occurred, and the wrongdoing reported, if proven, constitutes criminal activity." *Hermiston Assisted Living, Inc.*, at 96. Here, Complainant had worked for Respondent well over a year without incident, enjoyed the benefits of health insurance, and was genuinely taken aback when she learned her health insurance had been cancelled without notice and the funds she had previously agreed to contribute toward her health insurance premiums were misapplied over a three month period. Her belief that Respondent was "stealing" from her was reasonable because Respondent's actions, if proven under the requisite standard, constitute theft or misapplication of entrusted property. Whether Respondent actually had the requisite intent to deprive Complainant of her "property" or actually had knowledge that misapplying funds is unlawful is irrelevant. Complainant is not necessarily privy to Respondent's intent. However, based on her knowledge of its actions, she reasonably concluded those actions constituted criminal activity and she reported her perception to Respondent's management with no apparent ulterior motive, *i.e.*, in good faith.

4. <u>Respondent discharged Complainant because she, in good faith, reported criminal activity.</u>

In this case, the Agency established a causal connection between Complainant's discharge and her good faith report of criminal activity. Credible evidence shows that (1) Complainant was never given any written warnings or disciplined for any reason while in Respondent's employ; (2) Complainant was discharged one week after she in good faith reported criminal activity; and (3) Respondent gave Complainant no reason for her discharge. Evidence also shows that Respondent, through manager DaCorsi, told the Employment Department that Complainant was laid off due to a "reduction in force." That statement was subsequently discredited by DaCorsi's acknowledgment at hearing that Respondent hired another bartender to replace

Complainant soon after she was discharged. Thus, based on the whole record, the forum concludes that Respondent more likely than not discharged Complainant because she in good faith reported criminal activity.

DAMAGES

Back Pay and Benefits Lost

It is well established in this forum that the purpose of back pay awards in employment discrimination cases is to compensate a complainant for the loss of wages and benefits that the complainant would have received but for the respondent's unlawful employment practices. *In the Matter of H. R. Satterfield*, 22 BOLI 198, 210 (2001). Benefits lost include, but are not limited to, out of pocket expenses for health insurance premiums a complainant incurs as a result of a respondent's unlawful employment practices. *In the Matter of Magno-Humphries, Inc.*, 25 BOLI 175, 197 (2004).

Credible evidence in this case shows Complainant earned $7.50 per hour and worked eight hours per day, four days per week, when she was discharged on March 21, 2003. Complainant mitigated her damages by diligently seeking employment and obtaining equivalent employment on June 1, 2003, that exceeded Respondent's in amount of pay. Back pay awards cease when a complainant obtains replacement employment for a similar duration with similar hours and hourly wage rate as when employed by the respondent. *Id.* at 198. Consequently, the forum finds Complainant's entitlement to lost wages ceased when she became employed ten weeks after her discharge. The forum calculates Complainant lost $2,400 in wages ($7.50 per hour x 32 hours per week x 10 weeks) as a result of Respondent's unlawful employment practices.

Complainant's claim for reimbursement of the amount she expended to reinstate her health insurance fails, however, because she did not establish that she otherwise was entitled to company-provided insurance benefits but for her unlawful discharge. The Agency cited no legal requirement or precedent, and the forum is not aware of any, that requires an employer to provide continuing health insurance coverage. Respondent decided to discontinue its employee group health insurance benefits before Complainant was terminated. Her loss of benefits was not due to Respondent's unlawful employment practices. While Respondent is liable to employees for any employee contributions that were paid but not used for health insurance coverage, it is not liable for the amount Complainant was required to expend to voluntarily reinstate her health insurance. Complainant was only entitled to recover the $186 that she contributed to the premiums after Respondent cancelled the coverage, and Respondent reimbursed her for that amount before her discharge.

Mental Suffering

The Agency seeks "mental, emotional and physical suffering" damages in the amount of $25,000 on Complainant's behalf. In determining a mental suffering award, the commissioner considers the type of discriminatory conduct, and the duration, frequency, and pervasiveness of the conduct. *In the Matter of Barrett Business Services, Inc.*, 22 BOLI 77, 96 (2001). The actual amount depends on the facts presented by each complainant. A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. *Id.* at 96.

Based on Complainant's credible testimony, the forum finds she suffered emotional distress related to her abrupt dismissal as a result of Respondent's unlawful employment practices. This forum has consistently held that the "anxiety and uncertainty connected with loss of employment income is compensable." *In the Matter of WS, Inc.*, 13 BOLI 64, 91 (1994). The forum has also held that the "specter and uncertainties of unemployment are also compensable when attributable to an unlawful practice." *Id.* at 91. Complainant credibly testified she was "mad, shocked, and surprised" that she was discharged for having reported Respondent's unlawful activity. She stated she was not prepared to be unemployed and until she found replacement employment, she was very "stressed and upset." The forum concludes that $25,000 will adequately compensate her for the emotional distress she suffered as a result of Respondent's unlawful employment practices under ORS 659A.230.

ORDER

NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), to eliminate the effect of Respondent's unlawful employment practices, and as payment of the damages assessed for its violation of ORS 659A.230, the Commissioner of the Bureau of Labor and Industries hereby orders **Cleopatra's, 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 Alice Tanzman** in the amount of:

a) TWO THOUSAND FOUR HUNDRED DOLLARS ($2,400), less appropriate lawful deductions, representing wages Complainant lost from March 21 to June 1, 2003, as a result of Respondent's unlawful employment practice; plus

b) Interest at the legal rate on the sum of $2,400 from July 1, 2003, until paid; plus

c) TWENTY FIVE THOUSAND DOLLARS ($25,000), representing compensatory damages for the emotional distress Complainant experienced as a result of Respondent's

unlawful employment practices; plus

d) Interest at the legal rate on the sum of $25,000 from the date of the final order until paid; plus

e) Cease and desist from discriminating against any employee in tenure of employment based upon the employee having reported in good faith criminal activity under the provisions of ORS 659A.230.

In the Matter of

Sean E. A. Reid and THE ORION DRIFTBOAT AND WATERCRAFT COMPANY, LLC,

Case No. 44-04

Final Order of Commissioner Dan Gardner

Issued January 12, 2005

SYNOPSIS

Respondent Orion Driftboat and Watercraft Company employed Claimant from May 1-21, 2003, at the agreed wage of $9 per hour and did not pay him any wages. Claimant worked 90 hours and earned $810. Respondent Orion was ordered to pay Claimant $810 in unpaid, due, and owing wages. Respondent Orion's failure to pay the wages was willful and Respondent Orion was ordered to pay $2160 in penalty wages. Respondent Reid did not employ Claimant. ORS 652.140(1), ORS 652.150, ORS 652.310, OAR 839-010-0470.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 2, 2004, at the office of the Oregon Employment Department, located at 119 N. Oakdale, Medford, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Jeffrey C. Burgess, an employee of the Agency. Wage claimant James R. Shaughnessy ("Claimant") was present throughout the hearing and was not represented by counsel. Respondent Sean E. A. Reid was present throughout the hearing and represented himself and acted as authorized representative for Respondent Orion Driftboat and Watercraft Company LLC ("Orion"). Senior Trooper Don Jeter, from the Oregon State Police, was also present throughout the hearing to provide security.

The Agency called the following witnesses: Claimant; Matt Tynan, Claimant's former coworker; Margaret Angier, Claimant's wife; and Katy Bayless, Agency compliance specialist.

The forum received into evidence:

a) Administrative exhibits X-1 through X-29 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-13, and A-16 (submitted prior to hearing).

Having fully considered the entire record in this matter, I, Dan Gardner, 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 9, 2003, Claimant filed a wage claim with the Agency alleging that Respondent Sean Reid ("Reid"), doing business as Orion Driftboat & Watercraft Co., 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 the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent.

3) On October 13, 2003, the Agency issued Order of Determination No. 03-2317 based upon the wage claim filed by Claimant. The Order of Determination alleged that Respondents "Sean E. A. Reid and The Orion Driftboat and Watercraft Company LLC, Employer" owed a total of $810 in unpaid wages and $2,160 in 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.

4) On December 11, 2003, Respondent Reid filed an answer and request for hearing in which he alleged that Claimant was an independent contractor. Reid did not deny that Claimant was owed $810 in unpaid wages and $2160 in penalty wages. Reid further alleged that the only reason Orion had not paid Claimant was that Claimant had not provided his "registered business number" as provided for in a "mutually agreed upon contract." The answer and request for hearing was not accompanied by written authorization giving Reid the authority to act as authorized representative for Respondent Orion.

5) On September 27, 2004, the Hearings Unit issued a Notice of Hearing to Respondents, the Agency, and Claimant stating the time and place of the hearing as November 2, 2004, at the Oregon Employment Department, 119 North Oakdale, Room 3, Medford, Oregon.

6) On September 30, 2004, the ALJ issued an Interim Order stating that Respondent Orion must be represented by an attorney or authorized representative and that, "except for a letter authorizing a person to appear on behalf of Respondent Orion as an authorized representative, the fo-

rum will disregard any motions, filings, or other communications from Respondent Orion unless they are through an attorney or authorized representative." This Interim Order was mailed to the Agency case presenter and to the following addresses:

"Sean E.A. Reid, 131 Oak Meadows Place, Ashland, OR 97520"

"The Orion Driftboat and Watercraft Company LLC, PMB 222, 1454 Ashland Street, Ashland, OR 97520"

7) All subsequent Interim Orders issued by the ALJ were mailed to Respondents at both addresses.

8) On September 30, 2004, the forum ordered the Agency and Respondents each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); 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 Friday, October 22, 2004, and notified the Agency and Respondents of the possible sanctions for failure to comply with the case summary order. The forum also enclosed a form designed to assist *pro se* respondents in filing a case summary.

9) On October 12, 2004, the Agency filed a motion for a discovery order seeking documents and responses to questions. The Agency represented that these documents and responses had been previously requested and not provided.

10) On October 12, 2004, the ALJ issued an initial ruling on the Agency's motion directing the Agency to issue interrogatories if it wished to obtain responses to the non-documentary information sought in its motion for discovery order.

11) Respondents did not respond to the Agency's motion. The ALJ found that the relevancy of the requested discovery was apparent and issued a discovery order requiring Respondents to provide the documents sought by the Agency.

12) On October 21, 2004, Respondent Reid telephoned the ALJ and stated that he needed a postponement for at least 90 days and a corresponding extension of time to file a case summary due to Respondents' need to be represented by an attorney and his current inability to afford an attorney. Reid stated that he had consulted several attorneys and each had asked for a retainer ranging from $12,000 to $15,000. The ALJ then initiated a conference call with Reid and Burgess and held a pre-hearing conference. The conference was not tape recorded.

13) During the pre-hearing conference, the Agency objected to a postponement on the basis that the Agency had lined up its

witnesses and was prepared to proceed, and because Respondent Reid had agreed in August to a November hearing date. The Agency did not object to an extension of time to submit case summaries, so long as the Agency received Respondents' case summary no later than October 26, 2004. Reid stated that he never agreed to a hearing in November and that he had asked for information from Burgess in May that had not been provided. The ALJ advised Reid that the means of obtaining information that had been informally requested and not provided was by filing a motion for a discovery order, as the Agency had done. The ALJ also advised Reid that the Hearings Unit had not yet received authorization for Reid to act as authorized representative for Orion, and that the forum would not consider any of Reid's motions on behalf of Orion until he filed such written authorization. The ALJ told Reid he could file his motions by fax as long as he also faxed copies directly to Burgess and called the ALJ and Burgess to confirm they had received Respondents' faxes and filed hard copies with the Hearings Unit. In response to Reid's question, the ALJ informed him that he could still get an attorney.

14) On October 21, 2004, after the prehearing conference, Reid faxed the following documents directly to the ALJ: 1) a written statement authorizing Reid to act as authorized representative for Orion; 2) a motion to postpone the hearing; and 3) a "motion to dismiss interim order case summaries."

15) Reid cited the following reasons in support of Respondents' motion to postpone:

> "1. Respondents need an attorney. Mr. Reid has been told by several attorneys that they required a retainer of $12,000 to $15,000 and Respondents cannot currently afford that amount, but expect to be able to afford a retainer within 90 days.
>
> "2. Mr. Reid never agreed with Mr. Burgess to the scheduling of a hearing in November.
>
> "3. Respondents have made repeated offers to settle the matter that the Agency has refused to accept.
>
> "4. The former Agency case presenter made unreasonable demands and threats towards Respondents prior to the transfer of the case to Mr. Burgess in or around May 2004.
>
> "5. Mr. Burgess has refused to provide requested information related to this case to Mr. Reid and Mr. Reid believed until recently that the case was still in the negotiating phase. Mr. Reid needs more time to file motions for a discovery order."[1]

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[1] This quote is taken from the ALJ's subsequent Interim Order denying Respondents' motion for postponement in which the ALJ summarizes Respondents' grounds for seeking a postponement.

16) Reid based his motion to dismiss the case summary interim order on the grounds that his name was misspelled in the caption as "Sean A. Reid" instead of "Sean E.A.Reid."

17) On October 22, 2004, the Agency filed its case summary.

18) On October 25, 2004, the ALJ issued an Interim Order denying Respondents' motion for postponement on the basis that Respondents had not stated good cause. The ALJ issued a second Interim Order denying Respondents' motion to dismiss the Interim Order for Case Summaries. The ALJ faxed this ruling to Burgess. The ALJ telephoned Reid to obtain a fax number so that the Interim Orders could be faxed to Reid. Reid stated he did not have a fax machine and that he could not afford to use someone else's fax machine. The ALJ told Reid that he had denied Respondents' motions for postponement and to dismiss the Interim Order for Case Summaries.

19) After talking with Reid, the ALJ contacted BOLI's Medford office and made arrangements to fax his two October 25 Interim Orders to that office. The ALJ then faxed those Interim Orders to BOLI's Medford office and confirmed that they were received. The ALJ telephoned Reid, who lives in Ashland, and informed him that he could pick up copies of the Interim Orders at BOLI's Medford office. Reid responded that it was too much of a burden for him to drive to Medford.

20) On October 25, 2004, the ALJ received Respondents' motion to "dismiss notice of hearing." Respondents filed this motion on October 21, 2004, by mailing it to the Hearings Unit but did not fax it to the ALJ. Respondents asked that the notice of hearing be dismissed because the "Order attached to the Notice of Hearing" names "SEAN A. REID" and there is no one named "Sean A. Reid" associated with Orion. The ALJ denied Respondents' motion on the basis that the Agency's Order of Determination named "Sean E. A. Reid" as a Respondent and Reid had stated that "Sean E. A. Reid" was his correct name.

21) On October 27, 2004, Respondents filed a motion to recuse the ALJ based on his "unethical, illegal and prejudicial actions."

22) On October 27, 2004, the ALJ received two phone calls from Reid demanding that ALJ recuse himself from the hearing. Because of Reid's threatening tone of voice and invective language,[2] the ALJ perceived the phone calls as threats and arranged for the presence of an

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[2] Examples include: "Your office has just been faxed and therefore you are served because I have telephone records of it, a demand to recuse your ass from this case, you prejudicial supposed attorney!" "I just wanted you to know this, Mr. McCullough, you ass!"

Oregon State trooper at the hearing. After making this arrangement, the ALJ telephoned Burgess to inform him that a state trooper would be at the hearing and the reason why. Burgess informed the ALJ that he had received similar phone calls from Reid.

23) On October 28, 2004, the ALJ issued an Interim Order denying Respondents' motion to recuse. The ALJ denied Respondents' motion based on Respondents' failure to support their motion with an affidavit establishing the prejudice of the ALJ.

24) On October 29, 2004, Respondents filed a "motion and demand to recuse addendum" in which Respondents disputed the ALJ's Interim Orders denying Respondents' motions and requested that BOLI "formally report [the ALJ's] unethical and perhaps criminal actions to the Oregon State Bar."

25) On October 31, Reid again telephoned the ALJ and left a message that the ALJ perceived as threatening because of Reid's tone of voice.

26) 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.

27) Prior to opening statements, the ALJ stated that Reid had made *ex parte* phone calls to him on October 21, 27, and 31, that the phone messages had been recorded and made an administrative exhibit, and that the transcribed phone messages had also been made an administrative exhibit. Burgess and Reid were both given copies of the transcribed phone messages. The ALJ also stated that state trooper Jeter had been asked to be present throughout the hearing based on Reid's phone calls.

28) Prior to opening statements, Reid objected to the presence of Jeter, renewed his motions to dismiss the captioned orders and rulings naming Sean A. Reid and Orion as joined Respondents and to recuse the ALJ, and objected to the testimony of any telephone witnesses. The ALJ denied Respondents' motions and declined to ask Jeter to leave.

29) After the Agency's opening statement, Reid stated that he wanted to call Burgess as a witness. The ALJ denied Reid's motion on the basis that Respondents had not submitted a case summary.

30) At the end of the Agency's case in chief, the Agency asked to have Reid testify as a witness. Reid objected and the ALJ sustained Reid's objection on the basis that the Agency had not listed Reid as a witness on its case summary.

31) Reid did not testify or offer any exhibits on Respondents' behalf.

32) The Agency offered Exhibit A-2, consisting of a Corporations Division printout re-

flecting Respondents' business status that was obtained by Burgess through the internet on September 24, 2004. Respondents objected and the ALJ stated he would rule on its admissibility in the proposed order. The Agency asked for a continuance to present substitute evidence if the ALJ did not receive Exhibit A-2 and the ALJ denied the Agency's motion. Exhibit A-2 is admitted for reasons stated in the Opinion.

33) During his closing statement, Reid moved to have the case referred to arbitration. The ALJ denied Reid's motion and informed Reid that there was no statutory provision for arbitration in wage claim cases.

34) At the conclusion of the hearing, Reid stated that all correspondence from the ALJ and Hearings Unit should be mailed to him at the following address: "Sean E. A. Reid, 131 Oak Meadows Place, Ashland, OR 97520." Reid stated it was unnecessary to send mail to the "PMB 222, 1454 Ashland Street, Ashland, OR 97520" address.

35) The ALJ issued a proposed order on November 22, 2004, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed. (Entire Record)

FINDINGS OF FACT – THE MERITS

1) Respondent Orion registered as a limited liability company ("LLC") with the Oregon Secretary of State on May 22, 2002, and was administratively dissolved on July 18, 2003. Respondent Reid was Respondent Orion's registered agent. While doing business as an LLC, Orion was engaged in the manufacture of wooden driftboats.

2) In or around February 2003, Claimant saw an advertisement in the employment section of the newspaper. In response to the ad, Claimant phoned and spoke with Reid, then went to an interview with Reid. After the interview, Reid called Claimant, told him he "was the lucky candidate," and told Claimant to "come down and talk about [his] employment."

3) Reid and Claimant agreed to the initial wage of $8.50 per hour, with a raise after two months to $9 per hour, then another raise to $10 per hour. They had "a loose agreement" that Claimant would show up to work by 10 a.m., keep his lunch break to 30 minutes, and work until [Reid] said the day was over at 5." Reid told Claimant that Claimant would work weekdays and sometimes on weekends.

4) Claimant was hired to work for Orion for an indefinite period of time. The job he was hired to do was building wooden driftboats.

5) Claimant began working for Orion on February 10, 2003. Reid was his supervisor.

6) Claimant had one other coworker, Matt Tynan, who was hired after Claimant and continued

working after Claimant left Respondent's employment.

7) When Reid first hired Claimant, he asked Claimant to provide him with a business registry number. Reid periodically asked Claimant for a business registry number throughout Claimant's employment with Orion. Claimant never gave Reid a business registry number.

8) Claimant had a fly fishing guide business at the time he started work at Orion. At the time Reid hired Claimant, Claimant told Reid that he had a two week fishing trip scheduled in Mexico for that business and would need time off for that trip. Claimant took two weeks off to go to Mexico for that business trip during his employment at Orion.

9) Claimant worked at Orion from February 10 through May 21, 2003. At Reid's request, he maintained a written record of the dates, times, and total hours per day that he worked and posted them above Reid's desk. Claimant did this throughout his employment.

10) There was no evidence that Reid maintained an independent record of the hours worked by Claimant.

11) Claimant had no experience building wooden driftboats prior to working for Orion.

12) While working for Orion, Claimant performed all his work at Orion's facility.

13) Reid provided all the tools and materials that Claimant used in his work for Orion. Reid did not ask Claimant to provide any tools.

14) Reid directed Claimant's work and told Claimant what to build and how to build it. Claimant was not involved in the design of Respondent's boats.

15) In February, March, and April 2003, Reid paid Claimant in cash for the work Claimant performed for Orion. Reid paid Claimant for all hours that Claimant wrote on his time sheet for those three months.

16) On May 20, 2003, Reid presented Claimant with a document entitled "INDEPENDENT CONTRACTOR AGREEMENT" and asked Claimant to sign it. The document contained the following language:

> "INDEPENDENT CONTRACTOR AGREEMENT"
>
> "I, _____ agree to work for The Orion Driftboat & Watercraft Company LLC as an independent Boatwright sub-contractor.
>
> "I am responsible for all, and any aspects of liability, insurance, workman's compensation, state and federal taxes, health costs, etc.
>
> "It is my responsibility to make The Orion Driftboat & Watercraft Company LLC aware of my Business Registry # _____, within thirty (30) days of the sighing (sic) of this agreement.

"Dated this 1 day of March, 2003

"

"Sub-contractor:

"

"Sean Reid, The Orion Driftboat & Watercraft Company LLC"

17) Claimant signed the agreement, but Reid did not. After Claimant signed it, he scratched out "1 day of March, 2003" and wrote in "5/20/03" and initialed it.

18) On May 21, 2003, Reid fired Claimant. Earlier, Claimant had borrowed $100 from Reid. Reid told Claimant that if Claimant paid him back the $100 and tied 15 flies, Reid would give Claimant the money owed to Claimant. Claimant gave Reid $100 and 15 flies in the next two days.

19) Reid then told Claimant he would put Claimant's check in the mail and that Claimant would receive it the following Monday. The check did not come in the mail and Claimant called Reid to ask about the check. Reid told Claimant to stop calling him or he would sue Claimant for harassment.

20) Claimant worked 90 hours for Respondent Orion between May 1 and May 21, 2003, at the agreed rate of $9 per hour, earning a total of $810. As of the date of hearing, Claimant had not been paid any of those wages.

21) Angier and Bayless were credible witnesses.

22) Tynan's testimony was credible except for his statement that he generally started work about 8 a.m. This testimony was not credible because he also testified that he worked similar hours as the Claimant, and Claimant's written time sheets show that Claimant showed up for work between 9 and 11 a.m.

23) With one exception, Claimant testified in a forthright manner, responding directly to questions on direct and cross examination with a clear recollection of events. The exception occurred when Ried questioned Claimant about Claimant's use of Respondent's business phone for his personal business purposes, at which time Claimant's memory inexplicably failed him. Claimant's testimony regarding his rate of pay and hours worked was unimpeached and supported by Tynan's credible testimony, the uncontroverted fact that Claimant was paid in full for all the February-April hours he wrote down on his timecard, and Respondents' failure to deny the alleged hours and amount owed.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent The Orion Driftboat and Watercraft Company LLC was a limited liability company that owned and operated a wooden driftboat manufacturing shop and employed one or more individuals in Oregon.

2) Respondent Orion, through Respondent Reid, hired Claimant in February 21, 2003, to build

wooden driftboats. Claimant built driftboats for Orion at Orion's shop until May 21, 2003, when he was fired.

3) Claimant had no prior driftboat building experience before he started work for Orion. He was hired for an indefinite period of time and performed all his work in Orion's shop, using Orion's tools and materials and working under Reid's direction. .

4) Claimant worked 90 hours for Respondent Orion between May 1 and May 21, 2003, at the agreed rate of $9 per hour, earning a total of $810. As of the date of hearing, Claimant had not been paid any of those wages.

5) Respondent Orion willfully failed to pay Claimant and Claimant is entitled to penalty wages in the amount of $2,160.

6) Claimant, through BOLI's Order of Determination, made written demand for payment of his wages on October 13, 2003.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Orion was an Oregon employer that engaged the personal services of Claimant. Respondent Reid did not employ Claimant. ORS 652.310.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondents. ORS 652.310 to ORS 652.332.

3) Respondent Orion violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid by the end of the business day on May 22, 2003. Respondent Orion owes Claimant $810 in unpaid, due and owing wages.

4) Respondent Orion is liable for $2,160 in penalty wages to Claimant. ORS 652.150.

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 Orion to pay Claimant his earned, unpaid, due and payable wages, and penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

To prevail, the Agency must prove: 1) that Respondent or Respondents employed Claimant; 2) any pay rate upon which Respondent(s) 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(s). *In the Matter of Toni Kuchar,* 23 BOLI 265, 273 (2002).

RESPONDENT ORION WAS CLAIMANT'S EMPLOYER

Respondents raised the affirmative defense of independent contractor by alleging in their answer that Claimant contracted with Orion as an independent contractor in a "mutually agreed upon contract." The only evidence submitted by Respondents in support of their independent con-

tractor defense was their unsworn answer. Although the forum may consider an answer when making factual findings, unsworn and unsubstantiated assertions in the answer are overcome whenever controverted by other credible evidence. *In the Matter of Peter N. Zambetti,* 23 BOLI 234, 241 (2002).

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 Heiko Thanheiser,* 23 BOLI 68, 75-76 (2002). 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 [she] renders [her] 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.* A signed, written contract, if it exists, does not control the outcome of this case, as the forum looks at the totality of the circumstances in determining whether a wage claimant was an employee or an independent contractor. *In the Matter of Triple A Construction, LLC,* 23 BOLI 79, 93 (2002).

In this case, the relevant facts show that Reid directed Claimant's work; Orion supplied all the materials and tools necessary to perform his work; Claimant had no investment in Orion; Claimant had no opportunity to earn a profit or suffer a loss, as he was paid a set wage of $8.50, then $9.00 per hour; Claimant learned how to build driftboats while working for Orion; Claimant was hired for an indefinite period of time; and Orion was Claimant's primary employer between February 10 and May 21, 2003. All these factors point the forum to the conclusion that Claimant was an employee, not an independent contractor, throughout his tenure at Orion. Finally, credible evidence established that Orion's purported "INDEPENDENT CONTRACTOR AGREEMENT" was not signed by Claimant until his next to last day of work, and that it was not executed by Orion, as Reid failed to sign it. Consequently, the forum gives this agreement no weight in determining whether or not Claimant was an employee or independent contractor. Based on this evidence, the forum concludes that Claimant was an employee, not an independent contractor.

The Agency also named Sean E. A. Reid as a Respondent in its Order of Determination. The Agency established that Orion was an active LLC during the entire period of Complainant's employment. The Agency did not

allege, and there is no evidence to support a conclusion that Reid was a successor to the business of the LLC or a lessee or purchaser of the LLC's business for the continuance of the LLC's business, such that Reid would meet the definition of an "employer" under ORS 652.310. There is no other evidence to support a finding that Reid is personally liable as an "employer" in this matter. The forum concludes that Reid was not Claimant's "employer" and has no personal liability in this matter.

CLAIMANT'S PAY RATE

The Order of Determination alleged that Claimant's agreed wage rate was $9.00 per hour during the wage claim period, and Claimant testified that Reid, on Orion's behalf, agreed to pay him $9.00 per hour. Respondents did not deny this allegation in their answer, and factual matters alleged in a charging document and not denied in the answer are considered to be admissions. OAR 839-050-0130(2). The forum concludes that Claimant's agreed wage rate during the wage claim period was $9.00 per hour.

CLAIMANT PERFORMED WORK FOR WHICH HE WAS NOT PROPERLY COMPENSATED

The Order of Determination alleged that Claimant was not paid for 90 hours of work. Respondents did not deny this allegation in their answer, and factual matters alleged in a charging document and not denied in the answer are considered to be admissions. OAR 839-050-0130(2). Claimant provided written documentation of the hours he worked, and Orion paid Claimant for working similar hours in the previous three months, bolstering Claimant's claim. Finally, Respondents provided no contrary evidence to dispute Claimant's allegation. The forum concludes that Claimant's agreed wage rate during the wage claim period was $9.00 per hour.

THE AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENT

The forum has already concluded that Claimant worked 90 hours for which he was not compensated, at the wage rate of $9.00 per hour. In all, Claimant earned $810 (90 hours x $9.00) for which he has not been paid.

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). Although Orion did not maintain a record of Claimant's hours, Reid,

as Orion's agent, asked Claimant to write down his hours and post them by Reid's desk. Claimant did this throughout his employment with Orion, including the wage claim period from May 1 through May 21, 2003. Based on this evidence, the forum concludes that Reid knew Claimant's hours of work. There was no evidence that Reid acted other than voluntarily or as a free agent in not paying Claimant for the work Claimant performed during the wage claim period. Therefore, Claimant is entitled to penalty wages.

Claimant was fired and his wages became due at the end of the business day of May 22, 2003. The Agency made a written demand for Claimant's wages on Claimant's behalf when it issued the Order of Determination. More than 12 days have elapsed since Respondents received that written notice of Claimant's wage claim was sent to and received by Respondents, and more than 30 days have elapsed since Claimant's last workday. Penalty wages are therefore assessed and calculated pursuant to ORS 652.150 (8 hours x $9 per hour x 30 days = $2,160).

ADMISSIBILITY OF EXHIBIT A-2

Exhibit A-2 consists of a two page printout of a "business name search" from the Oregon Secretary of State's website. The Agency offered A-2 to show that Orion was administratively dissolved on July 18, 2003. The Agency did not lay a foundation for its introduction through a witness and A-2 is not a self-authenticating document. At the time it was offered, the case presenter represented that he had personally obtained the information and printed it from the Oregon Secretary of State's internet website. Although the print at the bottom of Exhibit A-1 is not completely reproduced, an overall comparison of A-1 and A-2 makes it apparent that both documents came from the same website, that being the website of the Oregon Secretary of State. While not every document printed out from the internet can be considered reliable as to its ultimate source and the accuracy of its information, the forum considers that information obtained from the State of Oregon's official website is "evidence of the type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs." OAR 839-050-0260. Respondent's objection to the admission of Exhibit A-2 is overruled and Exhibit A-2 is admitted into evidence.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages as a result of its violations of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders **The Orion Driftboat and Watercraft Company LLC** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

A certified check payable to the Bureau of Labor and Industries in trust for Complainant James R. Shaughnessy in the amount of TWO THOUSAND NINE HUNDRED SEVENTY DOLLARS ($2,970), less appropriate lawful deductions, representing $810 in gross earned, unpaid, due and payable wages and $2,160 in penalty wages, plus interest at the legal rate on the sum of $810 from June 1, 2003, until paid, and interest at the legal rate on the sum of $2,160 from July 1, 2003, until paid.

In the Matter of

STIMSON LUMBER COMPANY

Case No. 75-03

Final Order of Commissioner Dan Gardner

Issued January 19, 2005

SYNOPSIS

The forum granted Respondent's motion to dismiss, holding that the Agency failed to adhere to its policy that allows a complainant's intake questionnaire to serve as a timely filed perfected complaint only when it contains all of the required information for a complaint as set forth in ORS 659A.820, except for the complainant's verified signature, and only when the Agency receives the questionnaire so close to the last jurisdictional filing date that it is unable to draft a perfected complaint and complete the usual filing process within the required time frame. Additionally, the forum held that Complainant's intake questionnaire, submitted on September 11, 2002, did not allege sufficient facts to support the OSHA complaint he subsequently filed on January 7, 2003, 126 days after the alleged OSHA violation. Accordingly, the forum concluded that Complainant's complaint was not timely filed in accordance with ORS 654.062(5)(b) and dismissed the Agency's formal charges. ORS 654.062(5)(a) & (b); ORS 659A.820.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 27-30, 2004, in Suite 200 of the Oregon Adult and Family Services offices located at 450 Marine Drive, Astoria, Oregon, and on February 2, 2004, in the W. W. Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Jeffrey C. Burgess, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Derick Degraffenreid ("Complain-

ant") was present throughout the hearing and was not represented by counsel. Attorneys Victor J. Kisch and Dennis Westlind represented Stimson Lumber Company ("Respondent"). Dennis Tracey was present throughout the hearing as Respondent's corporate representative.

In addition to Complainant, the Agency called as witnesses: Stan Penrose, Deputy Chief Electrical Inspector, Oregon Building Codes Division; John Powell, Chief Electrical Inspector, Oregon Building Codes Division; Robert Gellatly, Respondent employee; Daniel Fowler, Respondent employee; Tim Fowler, Respondent employee; and Heather Degraffenreid, Complainant's wife.

Respondent called as witnesses: Russell Crape, Respondent employee; Toby Stanley, Respondent's Plant Manager; Scott Westlund, Respondent's Operations Superintendent; Dennis Tracey, Respondent's Human Resources Manager; Dan Sweeney, Respondent's Vice President of Human Resources and Risk Management; Bob Banchero, Respondent's Western Operations Manager; Bill Dyer, Respondent employee; Jeff Webber, Respondent's Manufacturing Vice President; and Robert Guillory, former Respondent employee.

The forum received as evidence:

a) Administrative exhibits X-1 through X-29 (generated prior to, during, or after hearing);

b) Agency exhibits A-1 through A-4, A-12 through A-14, A-22, and A-23 (submitted prior to hearing);

c) Respondent exhibits R-2 through R-4, R-6 through R-8, R-14 through R-22, R-24, R-25, R-27 through R-31, R-33 through R-35, R-38, R-39, R-42, R-45 through R-47, R-50 through R-57 (submitted prior to hearing), and R-58 (submitted after hearing).

Having fully considered the entire record in this matter, I, Dan Gardner, 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 September 11, 2002, the Agency received an Employment Discrimination Questionnaire that Complainant filled out in his own handwriting. On page two, the questionnaire notes: "If any of the words or questions are hard to understand, call the intake office nearest you for help [telephone numbers for the Portland and Eugene office were provided at this point]. * * * When you are finished, please return the questionnaire in the enclosed envelope. (Note: this is not an official complaint, completing a questionnaire is a preliminary step.)" Following the statement, "I believe that I was discriminated against because of the following," the questionnaire lists the follow-

ing options to designate: "race, color, sex, religion, national origin, disability, injured worker status, age, opposition to health and/or safety hazard, or other." Next to the option "other" Complainant wrote, "Whistleblower law/Reporting criminal activity." Complainant wrote that the "earliest" and "most recent" date he was discriminated against was September 3, 2002. Where asked to describe "the harm or employment action" about which he was filing his complaint, Complainant wrote:

> "On or around the first part of August 2002, I informed the production foreman Scott Westlund that there was none [*sic*] licensed personnel performing electrical work without a license. I informed him that I got the info from the chief electrical inspector for the State of Oregon. He then called Bob Banchero, Manager of the Western operations, who first said that the state did know what we were doing and it was ok. The next day changed his statement to that they know we were not in compliance. After getting this change of info Stimson Management put a bid up for day shift electrician which I have held for over 2 yrs. I asked why my job was in the newspaper and they said they were just seeing what was available in our local area, but wouldn't comment about why my position was on the line. I called the chief electrical inspector back and asked him if there was a law that Oregon had that said a journeyman license had to be on day shift and he said NO. They later informed me on 9-3-02 that I would be moved to swing shift because they hired another electrician."

In response to the question, "Why do you think this happened to you," Complainant stated:

> "Because I blew the whistle on what was going on and if you do this you loose [*sic*] the [privilege] of being on day shift and are moved to nights. Any licence [*sic*] can be on night shift, not just mine. We have a contract and seniority rules and the company is blaintantly [*sic*] breaking the contract just like Oregon State law."

When asked the reason Respondent gave him for the action about which he was complaining, Complainant responded:

> "They said they wanted the most qualified person on days. I explained to them that he cannot do any more with his license than I can, and I have over 13 yr. of on the job training, 10 yrs as a millwright, 2 yrs + as an electrician, he is new, who's more qualified?"

When asked to give examples of how he was treated differently and/or harassed based on his protected class, Complainant wrote:

> "I am a contract negotiator for our newly formed union at this plant, and a [*sic*] active committee member. I hold a LME electrical license, I have over

> 13 yrs of OJT in maintenance, [and] I am a member of the apprenticeship committee. Basically, as long as I kept my mouth shut and allowed them to break the law I would keep my day shift position, but the way things were going someone was going to get hurt, killed, or burn the mill down."

On page 4, it states: "Fill in the following page(s) if you are making an injured worker or OSHA complaint." On the questionnaire's last page, it states: "**FOR OSHA COMPLAINTS ONLY**" and lists the following questions:

> "Were you retaliated against because you reported a health and/or safety problem? Yes or No
>
> "If yes, please fill in this section.
>
> "Brief job description
>
> "What was the health/safety hazard?
>
> "Did you report it? Yes or No
>
> "If yes, what was the date you reported it, to whom did you report, and what was that person's job title?
>
> "Was Oregon OSHA involved?
>
> "Did you notify Oregon OSHA? Yes or No
>
> "If yes, what date?
>
> "How did your employer know that you made the complaint to OSHA?
>
> "What action was taken by Oregon OSHA, and when?
>
> "Did the employer display an Occupational Health and Safety Poster where you worked?
>
> "What did the employer do to retaliate?
>
> "RETURN THE QUESTIONNAIRE IN THE ENVELOPE PROVIDED
>
> "IF YOU HAVE ADDITIONAL DOCUMENTATION, PLEASE SAVE IT FOR THE INVESTIGATOR"

Complainant did not respond to any of the questions pertaining to OSHA based complaints. On the questionnaire's first page, written in the section designated for "office use only," is the notation "WB" in the space below the word "basis" and handwritten at the top is "12/05" and "ST-EM-WB-021205-11978."

2) On December 5, 2002, Complainant filed a verified complaint, Case # ST-EM-WB-021205-11978, with the Agency's Civil Rights Division ("CRD") alleging he was the victim of the unlawful employment practices of Respondent based on "whistleblowing" under ORS 659A.230.

3) On December 30, 2002, Agency investigator Martindale spoke with Respondent's human resources manager and informed him that there existed the "possibility of [an] OSHA based complaint" in addition to the whistleblowing charge.

4) On January 7, 2003, the Agency received Complainant's signed and notarized complaint al-

leging he was the victim of the unlawful employment practices of Respondent based on his "reporting a safety and health hazard in the workplace" in violation of ORS 654.062. On the same date, the Agency received Complainant's signed and notarized statement that said in pertinent part: "I verify that the attached Questionnaire is a true copy of what I submitted to the [BOLI] on September 11, 2002. The Questionnaire fully and accurately states the facts related to this complaint of unlawful practices." The "attached Questionnaire" is identical to the original Employment Discrimination Questionnaire dated September 11, 2002, except that the "12/05" notation on the first page of the original questionnaire is crossed out and replaced with "01/07" and the original case number is blocked out and replaced with "Case # OS-EM-OS-020911-10046." Also, on the first page, in the section designated for "office use only," the abbreviation "WB" is blocked out and replaced with "OS" in the space below the word "basis." The abbreviation "OS" also replaces the blocked out "ST" notation in the space below the word "contract."

5) In his December 5, 2002, verified whistleblower complaint, Case # ST-EM-WB-021205-11978, Complainant alleged, in pertinent part:

> "1. I began working for Respondent on June 13, 1989. My position title is Electrician.
>
> "2. In August 2002 I told Scott Westlund, the Production Foreman, that John Powell, the Chief Electrical Inspector, from the Oregon Building Codes, that it is illegal to have non-licensed personnel perform electrical work without a license. Mr. Westlund then called Bob Banchero the Manager of the Western Operations. Mr. Banchero was aware that it was illegal because in the past he had mentioned that the state was aware of it and it was okay.
>
> "3. Respondent retaliated against me by placing a bid for my day shift position in the newspaper. I asked Respondent for a reason why my job was in the newspaper. I was told they were just seeing what was available in the local area, but would not comment on why my position was on the line.
>
> "4. On September 3, 2002, Respondent informed me that I was being transferred to the swing shift, which was a less desirable shift.
>
> "5. I believe Respondent discriminated against me by transferring me to a different shift based on my whistleblowing."

6) In his January 7, 2003, verified complaint based on opposition to safety and health hazards, Case # OS-EM-OS-020911-10046, Complainant alleged, in pertinent part:

> "1. I began working for Respondent on June 13, 1989. My position title is Electrician.

"2. In August 2002 I reported a safety and health hazard in the workplace to Production Foreman, Scott Westlund, the use of non-licensed personnel to perform electrical work. This has led to two fires the night before. I later told him that John Powell, the Chief Electrical Inspector, from the Oregon Building Codes, had confirmed to me that it is illegal to have non-licensed personnel perform electrical work. I was afraid that an employee would get severely injured or even killed. I was [the] only one that was licensed to do electrical work.

"3. Mr. Westlund called and reported my complaint to Bob Banchero, the Manager of the Western Operations. Mr. Banchero was aware that it was illegal because in the past he had mentioned that the state was aware of it and it was okay.

"4. Respondent retaliated against me for reporting the safety and health hazard by posting my day shift electrician for bid and then advertising in the newspaper. I asked Respondent's managers why and was told only that they were just seeing what was available in the local area.

"5. On September 3, 2002, Respondent informed me that I was being transferred to the swing shift, which was a less desirable shift.

7) On March 10, 2003, Agency investigator Martindale issued a "Complaint Dismissal Memo" that stated:

> "Complainant alleges that Respondent unlawfully discriminated against him in retaliation for his whistleblowing activities in that Respondent transferred him from his day shift position to a comparable but less desirable swing shift position. Complainant's alleged whistleblowing actions consist of having contacted the chief electrical inspector at the State Building Codes Division in order to clarify the regulations governing the duties which can be performed by two different grades of licensed electricians. Complainant informed Respondent that they were out of compliance, but he did not initiate a complaint with that agency.[1] His actions did not constitute whistleblowing, as provided in ORS 659A.230. I am therefore submitting this charge for administrative dismissal.
>
> "In the course of being interviewed in the investigation, Complainant articulated an OSHA basis for the same set of allegations. An OSHA charge was drafted and is currently under investigation."

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[1] The forum notes that Complainant was *not* required to initiate a complaint with the Building Codes Division to come under the protection of ORS 659A.230. *See* OAR 839-010-0110.

8) By letter dated March 19, 2003, the Agency notified Complainant that his whistleblower complaint, Case # ST-EM-WB-021205-11978, was dismissed because "[t]he Division did not find sufficient evidence to continue [its] investigation." In the same letter, Complainant was notified of his right to file a civil suit within 90 days of the mailing date of the letter based on the allegations in his complaint.

9) By letter dated March 19, 2003, the Agency notified Respondent that, after investigation and review, it had determined there was substantial evidence supporting the allegations in Complainant's complaint, Case # OS-EM-OS-020911-10046, and issued a Notice of Substantial Evidence Determination.

10) On November 4, 2003, the Agency submitted Formal Charges to the forum alleging Respondent discriminated against Complainant by retaliating against him for reporting a health and safety concern, in violation of ORS 654.062(5)(a). The Agency also requested a hearing.

11) On November 4, 2003, the forum served the Formal Charges on Respondent together with the following: a) a Notice of Hearing setting forth January 6, 2004, in Astoria, 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 pertaining to responsive pleadings.

12) On November 21, 2003, Respondent, through counsel, timely filed an answer to the formal charges denying the allegations of unlawful employment practices and affirmatively alleging that (1) the claim is preempted by federal law because it involves the interpretation or application of a collective bargaining agreement; (2) the exclusive remedy for the claim is the grievance procedure set forth in the parties' collective bargaining agreement; (3) Complainant failed to exhaust the grievance procedure prior to bringing his claim to the Agency; (4) the claim is barred because it was released and waived by Complainant as part of a negotiated settlement agreement; (5) the Agency has not alleged sufficient facts upon which to state a claim; (6) Complainant did not report a safety or health hazard by claiming unlicensed personnel were performing electrical work and Respondent had no prior knowledge of a safety or health hazard; (7) Respondent's actions were the result of legitimate, non-discriminatory and non-retaliatory reasons; (8) Complainant's claim is barred by the applicable statute of limitations; (9) Complainant's reinstatement to his former shift will create a hardship on Respondent and may violate the collective bargaining agreement; (10) Complainant cannot show by a preponderance of evidence that

"but for" a legitimate complaint of a safety concern he would not have been transferred to a different shift and cannot show that Respondent acted in bad faith or with a bad motive by returning Complainant to the swing shift; (11) Complainant engaged in misconduct that constitutes after-acquired evidence and mitigates his damages, if any; and (12) Complainant failed to present sufficient facts to support an award of damages based on emotional distress.

13) On November 25, 2003, Respondent moved for a postponement of the hearing. The Agency did not object and the forum granted Respondent's motion on November 26, 2003. The hearing was rescheduled for January 27, 2004.

14) On December 9, 2003, 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 the case summaries by January 15, 2004, and notified them of the possible sanctions for failure to comply with the case summary order.

15) On December 22, 2003, Respondent filed a Motion to Dismiss or for Summary Judgment on numerous grounds and requested oral argument on the motion. On December 24, 2003, Respondent filed a Supplemental Affidavit of Daniel J. Sweeney in Support of Stimson Lumber Company's Motion to Dismiss or for Summary Judgment. On December 29, 2003, the Agency requested an extension of time to respond to Respondent's motion. The forum granted the Agency's request and on January 12, 2004, the Agency timely submitted its response to Respondent's motion by and through its counsel, Assistant Attorney General Stephanie S. Andrus.

16) Respondent and the Agency timely filed case summaries on January 16, 2004.

17) On January 21, 2004, Respondent submitted corrected exhibits to replace two of the exhibits in its case summary.

18) On January 22, 2004, the Agency filed a supplemental case summary.

19) 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.

20) At the start of hearing, the ALJ addressed the issues raised in Respondent's Motion to Dismiss or for Summary Judgment and the Agency's response. Following a summary analysis of

the issues, the ALJ denied Respondent's motions.

21) At the start of hearing, the Agency moved the forum to take judicial notice of OAR 918-282-0000, *et seq.*, a copy of which was attached to the Agency's motion. Respondent did not object to the motion and the forum took notice of the administrative rules pertaining to the licensing of electricians in Oregon.

22) At the conclusion of hearing on February 2, 2004, the ALJ ordered the Agency to submit Complainant's medical and marriage counseling records for the ALJ's *in camera* inspection by February 9, 2004.[2] The ALJ also ordered the Agency to submit a statement of its policy to verify its position that Complainant's intake questionnaire satisfied the Agency's complaint policy.

23) The Agency timely submitted the medical and marriage counseling records. On February 9, 2004, after *in camera* review, the ALJ issued a protective order governing the classification, acquisition, and use of the records and subsequently released all of them to Respondent.

24) On February 9, 2004, the Agency submitted an "Affidavit of Amy Klare as Statement of Agency Policy," accompanied by a copy of the Agency's policy set forth in the "Civil Rights Operations Manual," a copy of OAR 839-003-0025 (Filing a Complaint), and a copy of 29 CFR § 1977.15 – Filing of complaint for discrimination.

25) On February 12, 2004, Respondent moved to admit the marriage counseling records which were marked as Exhibit R-58. The Agency did not object to the motion and Exhibit R-58 was admitted into the record.

26) During the hearing, the ALJ ordered the participants to submit written closing arguments to the forum and to each other no later than 5 p.m. on February 17, 2004. The ALJ ordered the Agency to submit its written rebuttal, if any, by noon on February 18, 2004.

27) The Agency and Respondent timely submitted written closing arguments and rebuttal. In its closing argument, Respondent renewed its motion to dismiss on the ground that Complainant did not file a verified complaint against Respondent within 30 days of the alleged retaliation. Respondent based its renewal on the Agency's February 9, 2004, submission of its Statement of Agency Policy, which Respondent contended demonstrates the Agency did not comply with its policy to accept questionnaires as complaints for timely filing purposes. Respondent's motion to dismiss is **GRANTED** for reasons stated in the Opinion section of this Final Order.

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[2] During the hearing, Complainant and his wife waived their privilege by consenting to the disclosure of the marriage counseling records and Complainant waived his privilege regarding the medical records.

28) On February 20, 2004, the ALJ reopened the evidentiary portion of the contested case record and ordered the Agency and Respondent to submit additional documentation pertaining to the disposition of Complainant's whistleblower complaint.

29) On February 26, 2004, the Agency timely submitted the Affidavit of Peter Martindale which included copies of a Memorandum, Complaint Dismissal Memo, and documentation establishing the ultimate disposition of Complainant's whistleblower complaint.

30) The record closed on February 26, 2004.

31) On July 8, 2004, the Agency submitted notice to the forum of a change in Complainant's employment status and stated that Complainant's separation from employment "affects the prayer for relief in that it would no longer be appropriate for the Forum to reinstate Complainant to the day shift electrician position." The Agency advised that "in all other respects, the Agency seeks the relief requested in the Formal Charges."

32) The ALJ issued a proposed order on August 6, 2004, 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. The Agency timely filed exceptions which are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At material times, Respondent was a corporation engaged in the production of wood products and utilized the personal services of one or more persons in Oregon.

2) In June 1989, Respondent employed Complainant as a millwright at its Clatskanie plant.

3) From 1991 until 1999, Respondent employed a full time journeyman electrician who worked the day shift at the Clatskanie plant. After extensive advertising, Respondent hired a new journeyman electrician who left Respondent's employ for a better paying position in or around February 2000. Respondent's search for another replacement was unsuccessful. Respondent's then plant manager, Bob Banchero, decided to assign some electrical work to Complainant, who was studying for his limited maintenance electrician ("LME") license. Effective May 23, 2000, Complainant was temporarily assigned to a day shift position to perform electrical work within the scope of his training. Banchero gave Complainant a letter, which he read and initialed, that stated in pertinent part:

> "You will be assigned to electrical work and earn $17.74 per hour until you are notified to the contrary or until the Company hires a journeyman electrician. Once your temporary assignment is concluded, you will return to work as a millwright at $16.82 an hour.

> At this point, we expect your temporary assignment to last about six months."

On June 1, 2000, Complainant attained his LME license.

4) Robert Gellatly, Complainant's co-worker and millwright on the swing shift, also was studying to obtain his LME license. After assigning Complainant to the day shift, Banchero assigned Gellatly to perform electrical work on the swing shift, anticipating he would pass the required test for the LME license. Gellatly tested for the LME license in or around June 2000, 2001, and 2002. He failed the test each time, but continued to perform limited maintenance electrician work on the swing shift.

5) In August 2002, Complainant contacted Oregon's Chief Electrical Inspector John Powell four times about licensing issues. He asked Powell if one electrical license covered the day and swing shifts at Respondent's plant. Powell told him that Respondent needed a licensed electrician on both shifts. At that time, Complainant was the only one licensed to perform electrical work in a limited capacity at the plant and he was concerned about Gellatly's status. His purpose for calling Powell was to make sure he was "speaking intelligently" about "building codes" – he "wanted to make sure that what [he] was saying [to Respondent] was correct." His inquiry focused on how "to get the training" and "whether it was recognized by the state." Also, he was "researching" to see if "we could be in more compliance" and still "give Robert [Gellatly] time to get his license."

6) On or about August 9, 2002, Complainant told production manager Scott Westlund that Respondent was not in compliance with electrical licensing laws. Complainant noted that Gellatly was not currently licensed. Westlund, who had begun his position in February 2002 and was not familiar with Gellatly's job duties, contacted Banchero, who was not aware at that time that Gellatly had failed his third attempt to obtain a LME license. On or about August 12, 2002, Banchero discussed Gellatly's status with facility manager, Toby Stanley, and they decided to renew the search for a journeyman electrician. They discussed the impact on existing personnel and Stanley was particularly concerned about repercussions in the plant, but both agreed that Respondent needed an on-site electrician who could perform all levels of electrical work. Within a few days after Complainant spoke with Westlund, Respondent began advertising for a journeyman electrician.

7) In late August 2002, Complainant contacted Deputy Chief Electrical Inspector Stan Penrose who advised him that "a person without [an electrical] license is authorized to change light bulbs and fuses."

8) On or about September 3, 2002, Respondent hired a journeyman electrician to work the day shift and returned Complainant to his millwright position on the

swing shift where he continued to perform LME duties.

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent was a corporation that utilized the personal services of one or more persons in Oregon.

2) In June 1989, Respondent employed Complainant as a millwright.

3) In May 2000, Respondent temporarily assigned Complainant to a day shift position to perform electrical work as a licensed maintenance electrician until notified to the contrary or Respondent hired a journeyman electrician.

4) On or about September 3, 2002, Respondent hired a journeyman electrician to work the day shift and returned Complainant to his millwright position, which included continuing LME duties, on the swing shift.

5) On September 11, 2002, Complainant submitted an Intake Questionnaire ("Questionnaire") to the Agency that alleged he was discriminated against on September 3, 2002, because he "blew the whistle" on Respondent's activities and for "reporting criminal activities" to Respondent's management.

6) On December 5, 2002, Complainant filed a verified complaint with the Agency that alleged a violation of whistleblower law, ORS 659A.230, based on the facts alleged in the Questionnaire, dated September 11, 2002.

7) On or about January 7, 2003, Complainant filed a new complaint with the Agency, signed and notarized on January 3, 2003, that alleged discrimination in violation of ORS 654.062 based on new facts that were not alleged in the September 11, 2002, Questionnaire.

8) After investigation and review, the Agency notified Respondent by letter dated March 19, 2003, that it had determined there was substantial evidence supporting the allegations in Complainant's second complaint, Case # OS-EM-OS-020911-10046, and issued a Notice of Substantial Evidence Determination finding substantial evidence of discrimination on the part of Respondent.

9) Complainant did not allege in his intake questionnaire or in his first verified complaint that he told Respondent or anyone else that Respondent's use of unlicensed personnel to perform electrical work resulted in two fires that occurred the night before he "reported a safety and health hazard to the production foreman."

10) There is insufficient evidence to conclude that the Civil Rights Division was unable to process a division-drafted complaint based on an ORS 654.062 violation within the 30-day filing period set forth in ORS 654.062.

CONCLUSIONS OF LAW

1) At all times material, Respondent was an Oregon employer as defined in ORS 659A.001 and ORS 654.005(5).

2) On January 7, 2003, Complainant filed a verified complaint with the Bureau of Labor and Industries alleging he was discriminated against on September 3, 2002, in violation of ORS chapter 654. Complainant's complaint was not timely filed pursuant to ORS 654.062(5)(b), and the Commissioner of the Bureau of Labor and Industries does not have jurisdiction of the persons and of the subject matter herein related to the alleged violation of ORS 654.062. ORS 654.062(5)(a)&(b); ORS 659A.820.

3) Under ORS 659A.850(3), the Commissioner of the Bureau of Labor and Industries shall issue an order dismissing the charge and complaint against any respondent not found to have engaged in any unlawful practice charged.

OPINION

RESPONDENT'S MOTION TO DISMISS

A participant in a BOLI contested case hearing is entitled to a dismissal of the case if the participant demonstrates that BOLI lacks jurisdiction over the subject matter of the claim. OAR 839-050-0150(1)(a). In its answer and renewed motion to dismiss, Respondent alleged that the forum lacks subject matter jurisdiction because Complainant did not file a verified complaint alleging retaliation for reporting a health and safety violation within 30 days of the alleged retaliation as required by statute.

ORS 654.062(5)(b), states, in pertinent part:

> "Any employee * * * who believes that the employee has been * * * discriminated against * * * by any person in violation of this subsection may, within 30 days after the employee has reasonable cause to believe that such a violation has occurred, file a complaint with the Commissioner of the Bureau of Labor and Industries alleging such discrimination under the provisions of ORS 659A.820. Upon receipt of such complaint the commissioner shall process the complaint and case under the procedures, policies and remedies established by ORS chapter 659A and the policies established by ORS 654.001 to 654.295 and 654.750 to 654.780 in the same way and to the same extent that the complaint would be processed by the commissioner if the complaint involved allegations of unlawful employment practices * * * under ORS 659A.030 (1)(f)."

For the purpose of ORS chapter 659A, a "complaint" means:

> "a written, verified statement signed by the complainant or the complainant's attorney that:
>
> "(a) Gives the name and address of the complainant and the respondent;
>
> "(b) Identifies the protected class basis of the complaint;

"(c) Describes the actions complained of, including:

"(A) The date(s) of occurrence;

"(B) What the action was and how it harmed the complainant; and

"(C) The causal connection between the complainant's protected class and the alleged harm."

OAR 839-003-0005(4).

In response, the Agency cited its policy to accept an intake questionnaire as a complaint for purposes of meeting filing deadlines, including the 30-day statute of limitations in ORS 654.062(5)(b), as justification for the verified complaint Complainant filed four months after the alleged retaliatory act.[3] The Agency provided the forum with a copy of its policy and a supplemental affidavit from the Civil Rights Division Administrator who cited several agency cases establishing this forum's position that "the filing of a questionnaire within the 30 day period satisfies the statute of limitations." Quoting from the Agency's policy, Respondent argues the policy is only applicable when "the division receives a questionnaire so close to the last jurisdictional filing date that it is unable to draft a perfected complaint and complete the usual filing process within the required time frame." Respondent contends the policy does not apply to this case because the Agency produced no evidence of circumstances that frustrated the Agency's ability to produce a division-drafted complaint within the 30-day filing period. Additionally, Respondent asserts that Complainant's intake questionnaire does not set forth the statutory basis of the complaint, as the policy requires.

The Agency's policy, which was incorporated into the "Civil Rights Operations Manual" and revised March 1, 2002, states:

"If a complainant submits a questionnaire to the division within the statutory time frame for filing a complaint of discrimination, the division may elect to accept the questionnaire as a timely filed complaint when:

"1. The questionnaire contains all the required information for a complaint pursuant to ORS 659A.820, except the complainant's verified signature; and

"2. The division was unable to process a division-drafted complaint within one year[4]

[3] The Agency asserted the verified complaint, filed on January 7, 2003, related back to the intake questionnaire submitted on September 11, 2002.

[4] ORS 659A.820(1) makes an exception for complaints filed pursuant to ORS 654.062(5), which are processed "under the procedures, policies and remedies established by ORS chapter 659A," but are subject to a 30 day filing period.

from the date of the alleged violation."

As background information, the Agency describes two occasional circumstances that generated the policy. One is where, as Respondent pointed out, the questionnaire is filed so close to the last jurisdictional filing date that the Agency is unable to draft a perfected complaint and complete the usual filing process within the required time period. The other is where a timely filed questionnaire is not perfected within the jurisdictional filing period due to "division processing error."

The Agency's policy reflects this forum's longstanding precedent that a complainant alleging a chapter 654 violation should not be penalized for technical defects related to agency bureaucracy if the complainant has timely contacted the agency and filled out a complaint form setting forth the particulars of the complaint. *See In the Matter of Acco Contractors, Inc.*, 1 BOLI 260, 261 (1980); *In the Matter of Day Trucking, Inc.*, 2 BOLI 83, 91 (1981).[5] *See also* OAR 839-003-0025(5). Respondent does not contend the Agency's policy is invalid, but rather that it does not apply to this case. Consequently, the only issues here are whether the Agency properly applied its policy and whether the intake questionnaire sets forth sufficient facts to support a chapter 654 violation.

1. <u>The Agency's policy was not properly applied in this case.</u>

The Agency did not assert and there is no evidence that it was unable to process a division-drafted complaint based on Complainant's intake questionnaire within the required time period. In fact, based on specific information derived from the questionnaire, the Agency drafted a complaint within three months of Complainant's allegation that Respondent violated ORS 659A.230 (Whistleblower Law), which was within the one year statute of limitations for discrimination complaints filed under ORS chapter 659A.

The record as a whole shows Complainant did not raise any issue pertaining to an ORS chapter 654 ("OSHA") violation until on or about December 30, 2002, which was 118 days after the alleged OSHA violation occurred. Thus, the only apparent reason the Agency was unable to timely process a perfected complaint based on an alleged OSHA violation is that Complainant did not raise the issue until well after the 30-day filing period expired. Moreover, the agency investigator's notes and "Dismissal Memo" reveal that the Agency did not rely upon the intake questionnaire as evidence of an OSHA violation, but rather upon Complainant's statements made "in the course of being interviewed in the investigation." The investigator did not document the "possibility of OSHA

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[5] *Overruled, in part*, *In the Matter of Western Medical Systems, Inc.*, 8 BOLI 108 (1989), for reasons not pertinent to this case.

based charges" until December 30, 2002, and, absent any contrary evidence, the forum infers that the "possibility" of an OSHA violation did not arise until on or about that date. Notably, Complainant filed a "division drafted" verified complaint alleging a "new basis" of discrimination within eight days after he made statements to the investigator that suggested a possible OSHA violation. Those facts in no way invoke the equitable principles upon which the Agency's policy is based.

Agency precedent recognizes that the relatively short 30-day filing period weighs in favor of a liberal construction of the definition of "complaint," which gives the Agency discretion to "elect to accept the questionnaire as a timely filed complaint." However, the Agency's policy and precedent contemplate that the complainant has timely submitted an intake questionnaire alleging an OSHA violation and that the Agency was unable to timely perfect the complaint for technical reasons. Those conditions have not been established in this case.

2. Complainant's intake questionnaire failed to sufficiently allege a violation of ORS chapter 654.

The Agency argues that the last phrase in the last sentence Complainant wrote in his intake questionnaire, *i.e.*, "the way thing[s] were going someone was going to get hurt, killed or burn the mill down," invokes an OSHA violation for timely filing purposes.[6] However, the forum finds Respondent's argument to the contrary more persuasive for several reasons.

First, as Respondent points out, Complainant's words, when viewed in context, at best appear as an afterthought and as justification for having "blown the whistle" on Respondent for engaging in what Complainant perceived as "criminal activity." He otherwise made no assertion that he reported a safety or health hazard, or that he told anyone he feared someone would be hurt, killed, or burn down the mill. Overall, Complainant's responses to the specific questions in the Questionnaire provided no reasonable basis for an OSHA based complaint. In fact, when confronted with several options, including a section denoted as "opposition to health and/or safety hazard," Complainant chose the section designated "other" by writing the

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[6] The Agency's additional assertion that the forum "has already recognized that the questionnaire set forth the necessary allegations concerning the reporting of a safety hazard in the workplace" is not accurate. At hearing, the forum denied Respondent's alternative motion for summary judgment based on a preliminary finding that the above-quoted phrase raised a genuine issue of material fact about whether the questionnaire invoked ORS chapter 654 provisions for the purpose of applying the Agency's policy, which had not been provided to the forum at that time.

words: "Whistleblower law/Reporting criminal activities."

Additionally, despite the questionnaire's instructions stating: "Fill in the following page(s) if you are making an * * * OSHA complaint," Complainant left the page entitled "FOR OSHA COMPLAINTS ONLY" blank. The questions on that page included, but were not limited to:

> "Were you retaliated against because you reported a health/safety problem?
>
> "What was the health/safety hazard?
>
> "Did you report it?
>
> "If yes, what was the date you reported it, to whom did you report, and what was that person's job title?"

Although the Agency minimizes the significance of Complainant's "failure to check a particular box" and urges the forum to consider "substance" over "form," the forum finds that the Questionnaire clearly asked for information required to support an OSHA violation. The forum further finds that Complainant's failure to answer the Questionnaire's substantive questions transcends "form" and denotes that his intent at the time was to file something other than an OSHA based complaint. Despite his status as an uncounseled layperson, Complainant was reasonably articulate and specifically and unequivocally alleged a whistleblower violation that resulted in a division-drafted complaint alleging a violation of ORS 659A.230, which was subsequently dismissed because the Agency "did not find sufficient evidence to continue [the] investigation."

Several months later and only after Complainant alluded to a possible violation during the waning whistleblower investigation, the Agency drafted a new complaint alleging an OSHA violation. The Agency correlated the new allegation to Complainant's Questionnaire in order to avoid the untimely filing issue and now contends the statute of limitations was tolled. This argument is undone by the Agency's own rules.

OAR 839-003-0040 provides:

> "(1) The division may amend a complaint to correct technical defects. The division may do this on its own initiative or at the complainant's request (with the division's agreement) any time prior to the issuance of Specific Charges. Examples of technical defects include: clerical errors, additions or deletions, name and address corrections, and statute citation errors.
>
> "(2) A complaint may be amended to add a protected class *only if the addition is supported by facts already alleged*. *New facts may not be added. If new facts are alleged, the complainant must file a new complaint meeting the standards provided in OAR 839-003-0005(4)*.

"(3) Amended complaints will be verified and signed by the complainant or the complainant's attorney.

"(4) The division will send a copy of the amended complaint to the complainant and the respondent." (emphasis added)

If, as the Agency contends, the facts in the Questionnaire were sufficient to support an OSHA violation and serve as a timely filed complaint under its policy, the Agency could and should have amended the whistleblower complaint to add the additional protected class. Under the rules, the only time a complainant is required to file a new complaint is when the allegations in the original complaint do not support an additional protected class. In this case, Complainant was required to file a new complaint because his original complaint did not contain the necessary "particulars" to support an OSHA violation. Consequently, the forum finds that Complainant's second complaint, filed on January 7, 2003, was not supported by facts in the Questionnaire dated September 11, 2002, and therefore was not timely filed.

The Agency's rules provide that "[i]f extenuating circumstances exist, the division may extend the 30-day period as provided in 29 CFR Part 15(d)(3)." OAR 839-003-0025(5)(b)(D). As the Agency's affidavit points out, the federal citation in the rule is incomplete. The applicable federal regulation, followed by the correct citation, provides, in pertinent part:

"(2) A major purpose of the 30-day period in this provision is to allow the Secretary to decline to entertain complaints which have become stale. Accordingly, complaints not filed within 30 days of an alleged violation will ordinarily be presumed to be untimely.

"(3) However, there may be circumstances which would justify tolling of the 30-day period on recognized equitable principles or because of strongly extenuating circumstances, e.g., where the employer has concealed, or misled the employee regarding the grounds for discharge or other adverse action; or where the discrimination is in the nature of a continuing violation. * * * In the absence of circumstances justifying a tolling of the 30-day period, untimely complaints will not be processed."

29 CFR § 1977.15(d).

The Agency has not alleged and the forum has not found that there were "strongly extenuating circumstances" that warranted extending the statutory filing period in this case. In fact, the record shows that Complainant more likely than not raised the OSHA issue when he realized his whistleblower complaint was failing and the Agency, in presumptive good faith, attempted to accommodate Complainant by invoking its policy, albeit in a misguided

manner, rather than by extending the filing period in the absence of the requisite "strongly extenuating" reasons.

The Agency's discretion to decide which questionnaires to accept as a timely filed complaint is not unrestrained. The Agency's actions still remain subject to judicial scrutiny for arbitrary and abusive exercise of discretion. Thus, the Agency is obliged to interpret and administer the 30-day filing requirement in a consistent and predictable manner that will provide guidance to participants in administrative proceedings and promote stability in the law. In fact, the Agency's policy naturally ensures those objectives by prescribing the circumstances under which it will elect to substitute a questionnaire for a verified complaint for timely filing purposes. The policy, consistent with this forum's precedent, provides a mechanism for achieving justice for those complainants who timely file a complaint through a questionnaire, but are hindered from filing a division drafted complaint by circumstances outside their control. In this case, the Agency knew Complainant's new allegation did not arise from his intake questionnaire because it required Complainant to file a new complaint alleging facts sufficient to support an OSHA violation. Despite this knowledge, the Agency invoked the policy in an attempt to avoid the statute of limitations issue. The Agency did not adhere to its policy when it elected to deem Complainant's intake questionnaire as an OSHA complaint for timely filing purposes and the forum concludes that Complainant did not timely file his complaint pursuant to ORS 654.062(5)(b).

Complainant's complaint is therefore barred by the statute of limitations as a matter of law. Accordingly, the Agency's formal charges and Complainant's complaint are hereby dismissed.

AGENCY'S EXCEPTIONS

The Agency requests reconsideration of the proposed order, contending (1) Complainant's statements in the intake questionnaire "set forth the essence of an OSHA violation * * * [because] [h]aving unlicensed personnel performing electrical work is inherently unsafe," and (2) the Agency's failure to "process the intake questionnaire as an OSHA retaliation complaint * * * is apparently a division processing error." Those contentions are not supported by the facts or law in this case.

First, Complainant plainly alleged he was discriminated against for "reporting criminal activity" under a whistleblower theory. Criminal activity and workplace safety concerns are discrete issues governed by completely different statutory schemes. Thus, disclosure of criminal activity under ORS 659A.230 is not the same as a complaint about workplace safety and health hazards under ORS 654.062. By any reading of the intake questionnaire, the crux of Complainant's claim was his express *belief* that Respondent

discriminated against him because he alerted management that it was engaging in illegal activity by allowing unlicensed workers to perform electrical work in violation of Oregon law.

While it is generally true that complainants are "unschooled in the law" and their allegations are normally liberally construed, BOLI's intake questionnaire form is manifestly calculated to elicit the full scope of a complainant's claims, artfully stated or not. The questionnaire includes a detailed section specifically designed for OSHA based complaints which significantly reduces the possibility of a complainant's mistaken omission of that claim. In this case, by opting not to address the substantive questions in that section, Complainant implied that he had no intention of pursuing an OSHA based complaint at the time he submitted his intake questionnaire. Indeed, his allegations were specific and his intent clear enough that agency personnel, who *are* schooled in discrimination law, timely drafted a verified complaint based on a whistleblower theory under ORS 659A.230. From the record, the forum finds no reasonable basis to conclude that the agency person who drafted the verified complaint neglected to record the full scope of Complainant's theory of the case.

Second, the forum does not agree with the Agency's assertion that merely permitting unlicensed personnel to perform electrical work is "inherently unsafe." While an electrical license may serve as verification the holder has the training and skills to perform electrical work, the lack of one does not automatically denote an inability to safely perform the work.[7] The Oregon Occupational Safety & Health Division ("OR-OSHA"), through its Standards & Technical Resources Section, addressed this issue in a letter of interpretation issued September 15, 1998, in response to an inquiry from John B. Curtin, HMSC/OPEU Steward, of the Hatfield Marine Science Center in Newport, Oregon.[8] In pertinent part, the letter states:

> "This letter is in response to your August 24th letter to Ron Havenkost in which you ask if there are any OR-OSHA standards prohibiting the assignment of electrical work to unlicensed workers. The answer is "No." While the Building Codes Division of Department of Consumer & Business Services does require certain tasks to be performed by licensed electricians, OR-OSHA's focus is on

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[7] In fact, Oregon's Electrical Safety Law sets forth numerous exemptions to the licensing requirement that apparently allow certain unlicensed persons with adequate training, experience, or knowledge to perform a broad range of electrical work. *See* ORS 479.540. *See also* OAR 918-282-0000(3).

[8] OR-OSHA (Letters of Interpretation) (last updated: Tuesday, 17-Aug-2004 15:25:57 PDT) http://www.cbs.state.or.us/external/osha/interps/subject.htm.

making sure that workers are adequately trained and qualified to safely perform the work assigned to them.

"All employers are required by OAR 437-001-0760(1)(a) to properly instruct and supervise their workers in the safe operation of any machinery, tools, equipment, processes or practices which they are authorized to use or apply. Since supervisors are employer representatives, the requirements are the same for them. If a standard is violated, then any citation that is issued by OR-OSHA will be issued to the company. Employees (including supervisors) may not be cited under the Oregon Safe Employment Act. Division 2, Subdivision S, 1910.333 requires that workers performing electrical work be adequately trained and qualified for the tasks assigned to them. To be qualified, according to 1910.399, a person must be familiar with the construction and operation of the equipment and the hazards involved. While in some cases training may be similar to, or even identical to that required for licensing, OR-OSHA's focus is on the safe performance of work rather than certification or licensing."[9]

In this case, Complainant did not allege at any time and there is no evidence that Respondent permitted untrained, unqualified, or inexperienced workers to perform electrical work. Rather, Complainant's focus and intent was on Respondent's alleged failure to follow statutory licensing requirements, which is a discrete issue that does not necessarily imply hazardous or unsafe working conditions. The forum finds that Complainant's specific allegations that Respondent illegally allowed unlicensed personnel to perform electrical work, together with his failure to address substantive questions regarding unsafe work conditions, fall short of placing the Agency on notice of an OSHA based complaint.

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[9] Although the Agency has statutory authority to process OSHA based discrimination complaints, it does not have the power to fix standards or prescribe the regulations governing workplace health and safety. Therefore, OR-OSHA's interpretation of its own rules and standards, while not binding on this forum, is helpful where, as in this case, the issue involves examining the "essence of an OSHA violation." However, the forum also notes that the Agency is not required to establish that a complainant opposed conditions that actually violated an OSHA statute or rule. The Agency only need prove that a complainant was retaliated against for expressing safety concerns "under or related to" ORS chapter 654. Thus, had Complainant alleged in his first perfected complaint that he *told* Respondent, based on his good faith belief, that he feared someone would be hurt or killed as a result of having unlicensed personnel perform electrical work, he would have adequately stated a claim under the statute.

Finally, a complaint's fundamental purpose is to provide notice of a complainant's claims to the named respondent. *See* ORS 659A.820(4) ("The commissioner shall notify the person against whom a complaint is made within 30 days of the filing of the complaint. The notice shall include the date, place and circumstances of the alleged unlawful employment practice.").

Notably, Respondent's first notice of Complainant's OSHA based complaint was on or after January 7, 2003.[10] The Agency argues that the January 7 complaint was "entirely superfluous" because Complainant's intake questionnaire "***is*** the complaint" for filing purposes. The Agency misses the point. The first complaint of record is Complainant's whistleblower complaint which derived from and supplanted the intake questionnaire. While an intake questionnaire constitutes the *agency's* notice of a complainant's claims, it is up to whoever drafts the perfected complaint to accurately set forth a complainant's theory of the case and notify the named respondent of the claims within the statutory time period. Under the Agency's policy, the content of the intake questionnaire only becomes pertinent for filing purposes when the perfected complaint is filed late or is deficient due to technical defects or agency error. Otherwise, the questionnaire is irrelevant. Where an additional protected class is added, the perfected complaint - not the questionnaire - must be amended in order to provide the respondent with proper notice of the additional claim. However, the amendment to add a protected class must be supported by facts already alleged. If new facts are alleged, a new complaint must be filed in accordance with OAR 839-003-0005(4). OAR 839-003-0040. In this case, Complainant alleged facts in his second complaint that he did not allege in his first complaint (or in the questionnaire), *i.e.*, that Respondent's use of unlicensed personnel to perform electrical work caused two fires that occurred the night before he reported a safety and health hazard to the production foreman. For that reason, the January 7 complaint was hardly superfluous; it was Respondent's first and only notice of those new facts and the additional protected class. The Agency has not established in any way that Complainant's first perfected complaint was untimely filed or failed to encompass the full scope of the allegations Complainant set forth in the intake questionnaire. Instead, a preponderance of credible evidence establishes that the Agency's first inkling of an OSHA based complaint was on or about December 30, 2002, 118 days after the alleged violation occurred and well

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[10] Evidence shows the Agency investigator advised Respondent's human resources manager of the "possibility" of an OSHA based complaint in late December 2002, but Respondent did not receive the required 30 day notice until on or after January 7, 2003, when Complainant filed a verified complaint.

after the statute of limitations had expired.

The Agency's retrospective observation that it should have recognized the OSHA possibility earlier is not supported by the evidence and, in any event, is not a "division processing error." The Agency treated Complainant's intake questionnaire as a whistleblower complaint because it was a whistleblower complaint. The Agency was not required to unilaterally expand Complainant's claims beyond the scope of his intention - it was only required to accurately set forth his factual allegations in the perfected complaint. The Agency did so in this case. The Agency's exceptions are DENIED.

ORDER

NOW, THEREFORE, as Respondent has not been found to have engaged in any unlawful practice charged, the complaint and the formal charges filed against Respondent Stimson Lumber Company are hereby dismissed according to the provisions of ORS 659A.850.

In the Matter of

ROGUE VALLEY FIRE PROTECTION, LLC

Case No. 33-04

Final Order of Commissioner Dan Gardner

Issued January 24, 2005

SYNOPSIS

The Agency alleged that Respondent discharged Complainant because he opposed safety hazards in Respondent's workplace. The Commissioner found that Complainant's opposition to Respondent's ladder safety policy was a substantial factor in Respondent's decision to discharge him and awarded $10,749.60 in lost wages and $5,000 in emotional distress damages. ORS 654.062(5)(a); OAR 839-04-0004.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on December 1, 2004, at Medford office of the Oregon Employment Department, located at 119. N. Oakdale Ave., Medford, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Patrick A. Plaza, an employee of the Agency. Complainant Forest Wilson ("Complainant") was present throughout the hearing and was not represented by counsel. Respondent Rogue Valley Fire Protection did not make an appearance and was held in default.

The Agency called the following witnesses: Complainant; Danielle Wilson, Complainant's wife; and Harold Rogers, former Civil Rights Division Senior Investigator.

The forum received into evidence:

a) Administrative exhibits X-1through X-24 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-3, A-5 through A-8, and A-10 through A-13 (submitted prior to hearing).

Having fully considered the entire record in this matter, I, Dan Gardner, 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 27, 2003, Complainant filed a verified complaint with the Agency's Civil Rights Division alleging that he was the victim of the unlawful employment practices of Respondent. After investigation, the Agency issued a Notice of Substantial Evidence Determination on October 24, 2003, finding substantial evidence supporting the allegations of the complaint.

2) On August 5, 2004, the Agency issued Formal Charges alleging that Respondent discriminated against Complainant by discharging him in retaliation for opposing safety hazards in Respondent's workplace in violation of ORS 654.062(5)(a) and OAR 839-004-0004. The Agency sought damages of "[l]ost wages in an amount to be proven at hearing and currently estimated to be approximately $6,000" and $5,000 for emotional stress.

3) On August 6, 2004, the forum served the Formal Charges on Respondent, accompanied by the following: a) a Notice of Hearing setting forth December 1, 2004, in Medford, 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.

4) On August 27, 2004, the Agency filed a Notice of Intent to File a Motion for Default based on Respondent's failure to file an answer to the Formal Charges after being served with the documents.

5) On September 14, 2004, the Agency moved for an Order of Default against Respondent based on Respondent's failure to file an answer.

6) On September 17, 2004, the ALJ issued a Notice of Default to Respondent in which the ALJ granted the Agency's motion and notified Respondent that it had ten days to seek relief from default. Respondent did not respond and on October 5, 2004, the ALJ issued an Order confirming Respondent's default.

7) At the time set for hearing, Respondent did not appear and had not notified the forum that it would be late or would not attend the hearing. The ALJ waited 30 minutes, then declared Respondent to be in default and commenced the hearing.

8) On October 20, 2004, the Agency moved to amend the Formal Charges in order to:

> "clarify for the record that it is Respondent's alleged unlawful employment practice as identified in paragraph II.15 and not Complainant's actions in paragraph II.14 that form the basis for the Agency's allegations that Complainant was retaliated against and subjected to unlawful employment practices as a result of his protected activity and membership in a protected class."

To accomplish this, the Agency sought to substitute "paragraph II.15" for "paragraph II.14" in six different places in the Formal Charges. The Agency also changed its prayer for damages to "[l]ost wages in an amount to be proven at hearing and currently estimated to be approximately $9,200[.]"

9) On October 27, 2004, the ALJ granted the Agency's motion. The ALJ relieved Respondent of default and directed the Agency to serve a copy of the Amended Formal Charges on Respondent.

10) On November 5, 2004, the Agency served its amended Formal Charges on Respondent, along with duplicates of all the documents served with the original notice of hearing.

11) On November 24, 2004, the Agency moved for the ALJ to take judicial notice of OAR 437-003-0503. At the hearing, the ALJ granted the Agency's motion and took judicial notice of that administrative rule.

12) Respondent did not file an answer to the amended Formal Charges.

13) On November 29, 2004, the Agency moved for an order of default against Respondent based on Respondent's failure to file a timely answer.

14) At 9 a.m. on December 1, 2004, the time set for hearing, Respondent did not make an appearance and did not contact the forum prior to the hearing. The ALJ waited until 9:30 a.m. to begin the hearing. When Respondent did not appear, the ALJ declared Respondent to be in default, then advised the Agency of the issues to be addressed, the matters to be

proved, and the procedures governing the conduct of the hearing.

15) Respondent did not seek relief from default prior to or after the hearing

16) On January 5, 2005, 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) At all times material herein, Respondent was a limited liability company registered in Oregon and an employer doing business in Oregon that engaged or utilized the personal services of one or more employees In Oregon, reserving the right to control the means by which such service would be performed.

2) Complainant enrolled as an apprentice sprinkler fitter in 1996 through a union program and completed his apprenticeship in or around 2001. Complainant continued working as a sprinkler fitter until he was laid off in February 2003.

3) During his apprenticeship, Complainant received training in ladder safety. During his training, Complainant was instructed that extension ladders must be secured at the top or the bottom to prevent slippage while someone was working on the ladder. This can be done by tying the ladder with a rope or having one person "foot the ladder" by holding it from the bottom.

4) In 2002, Complainant completed OR-OSHA online courses in Safety & Health Management, Safety Committee Operations, Accident Investigation, and Effective Safety Supervision. The primary focus of these courses was developing and maintaining a safe workplace and determining the cause of workplace accidents. Complainant received certificates of completion for each course.

5) On April 24, 2003, Complainant applied for work with Michael Couch, Respondent's "owner."[1] At the time he applied, Complainant provided Couch with copies of his OR-OSHA completion certificates. Although Respondent was not a "union shop," Complainant's union approved his employment with Respondent under a "salting agreement." Couch agreed to hire Complainant to install fire sprinklers. Complainant was happy to be hired by Respondent because it was a "local" job for him. When Complainant went to work for Respondent, he intended to work as long as Respondent's jobs continued.

6) Complainant's rate of pay while employed by Respondent was $28.84 per hour. Complain-

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[1] Complainant referred to Couch as Respondent's "owner." Corporation Division information received into evidence shows that Couch was the registered agent of Respondent and a "member."

ant was scheduled to work eight hours per day, five days per week.

7) Complainant's first day of work was April 28, 2003. Complainant worked at the Eagle Point Elementary School project installing fire sprinklers on April 28 and 29.

8) On April 30, 2003, Couch transferred Complainant to the White City Middle School Project to work as a Respondent's foreman. Couch told Complainant he was "responsible for running that job." Complainant's duties included supervising Weston Truelove, another employee of Respondent. Couch told Complainant that Truelove "had the skill level of an apprentice."

9) At the White City project, Complainant's job was installing piping into structural members to supply water to fire sprinkler heads. Complainant used several types of ladders on the job, including A-frame ladders, extension ladders, and a scissors lift.

10) Complainant worked at the White City project on April 30th, May 1st and 2nd, and May 5th, 7th, and 8th, 2003.

11) Between April 30th and May 1st, Complainant and Truelove used an A-frame ladder and scissors lift when they needed to perform work at heights they could not reach from the floor. They used the A-frame ladder when installing pipe in ceilings 8'-10' in height, and the scissors lift in rooms where the ceiling was higher. Ceiling heights on the White City project were as high as 30'.

12) On May 7th, it rained at the White City project.

13) On May 8th, it rained again at the White City project. In the morning, Complainant and Truelove installed pipe in the "Practice Rooms." Couch then called Truelove and asked him to inventory all the piping on the job. When Truelove finished that job, he came over to help Complainant. That was not possible because there was only one lift and Complainant was using it. However, there was work available for Truelove and Complainant on the west side of the rooms that required the use of an extension ladder.

14) The area where the extension ladder was needed had a concrete floor and roof, but unfinished walls, and the floor was wet from rain that had blown in. The work required Complainant or Truelove to work at a 15' height on a "20-25'" extension ladder borrowed from another subcontractor, with the top of the ladder resting on wooden ceiling joists.

15) Complainant called Couch to discuss the work situation. Couch told Complainant if he couldn't keep Truelove working, then send him home. Complainant told Couch there were projects that needed to be completed from an extension ladder. Complainant decided that Truelove could "foot" the ladder and Complainant would climb it. Truelove told Complain-

ant that "we are not allowed to foot the ladder."

16) Complainant asked Couch if he wanted "one guy footing the ladder while one is in the air or do you just want one guy on the ladder?" Couch interrupted Complainant and yelled "Forest, forget all that union shit. Okay? If I see two guys on an extension ladder I'll fire both of them. If that's not something you can handle, then I'm gonna have to let you go." Complainant responded "No, I understand. I just wanted to learn what you wanted so I wouldn't get in trouble if something happened." Couch answered "Yeah. Well just forget about all that OSHA crap. The fuckin' OSHA guy has never turned pipe wrenches in his life. If they come on the job, you'll know about before you see them because Scott will come and tell you – hey, the OSHA guy just showed up!"

17) Complainant shared this information with Truelove, who was so upset that he decided to go home and left Respondent's work site.

18) Complainant was concerned about Couch's statements and his own personal liability in the event an accident occurred while he or Truelove was using the extension ladder unsafely. Before proceeding with the extension ladder, Complainant decided to seek clarification from Couch regarding Respondent's ladder safety policy.

19) Complainant went to the contractor's job shack Complainant faxed a note to Mike Couch on which Complainant had handwritten the following:

"TO: Mike Couch 541-772-6641

RVFP

FR: Forest Wilson

Foreman, WCMS

re: use of extension ladder

Mike –

Regarding our telephone conversation this afternoon: I am sending this fax to confirm that it is the policy of RVFP to disregard OSHA regulations pertaining to the use of ladders.

Specifically, the company policy is that one man shall work from an extension ladder. The ladder shall not be held on the ground by another employee (i.e. 'footed') or, 'footed' until the ladder is securely fastened.

I understand that it is the company policy (as stated in our tele. conversation) to dismiss employees who disregard the company ladder standard.

Employees working on the WCMS project are following company rules and are not working under my direction. Furthermore, I am not responsible for their safety or compliance with OSHA regulations.

Signed,

Forest Wilson"

It took Complainant "5-8 minutes" to write and fax the note.

20) Complainant returned to work. An hour later, Complainant was told that his fax had not gone through to Couch. Complainant returned to the job shack and faxed the note again.

21) Two minutes later, Couch called Complainant on his cell phone. Complainant was in the contractor's job shack at the time. Couch made the following statement to Complainant:

> "Forest, I got your fax. I need you to come into the office and pick up your checks. Bring your keys and the tools I gave you. I can't be having this shit on my jobs. I don't know what you're talking about OSHA rules. I just got off the phone with OSHA and they said there is no such rule. So, I need you to come get your check."

Complainant understood from Couch's statements that he was fired.

22) The prime contractor's project superintendent and another employee of the prime contractor were also in the job shack when Couch told Complainant to come get his check. Complainant told both persons he had been fired.

23) Prior to his discharge, Respondent did not warn or discipline Complainant about any aspect of his work performance.

24) Complainant experienced embarrassment and humiliation at being terminated while he was in the prime contractor's shack. He had never been fired from a job before. He also felt shocked, disappointed, and aggravated at being "fired from a nice local job while trying to work safe." Complainant was very upset and very disappointed when he arrived home after being fired and told his wife that he had been fired.

25) On May 8, 2003, Complainant had been married for 14 months and had a six month old son. Complainant was the sole support of his wife and son. He applied for unemployment benefits, but they were initially denied because he had been fired. He contested the benefits and was awarded them four weeks after his termination. When he did receive benefits, they were less than half of the net weekly pay he earned while employed by Respondent. During that four week period, he had no income. He used a credit card to pay his mortgage and used his savings to pay his other expenses. It took Complainant about seven months to pay off his credit card bill and replenish his savings.

26) Complainant looked for work between May 8 and July 3, 2003. During that time, he talked constantly about how Respondent had fired him and had a hard time focusing on his relationship with his family. He became more irritable the longer he was out of work.

27) Complainant obtained subsequent employment on July 3, 2003, with Cascade Fire Protection Company. He worked 40 hours per week, earning $23.50 per hour, or $940 per week. He remained with Cascade until a month prior to the hearing.

28) Respondent continued to employ workers at the Eagle Point and White City projects until at least September 2003.

29) Complainant suffered $10,749.60 in wage loss between May 9 and September 1, 2003, as a result of his discharge from Respondent's employment, calculated as follows:

5/9: $ 230.72 ($28.84 x 8 hours)

5/12-16: 1,153.60 ($28.84 x 40 hours)

5/19-23: 1,153.60 ($28.84 x 40 hours)

5/26-30: 1,153.60 ($28.84 x 40 hours)

6/2-6: 1,153.60 ($28.84 x 40 hours)

6/9-13: 1,153.60 ($28.84 x 40 hours)

6/16-20: 1,153.60 ($28.84 x 40 hours)

6/23-27: 1,153.60 ($28.84 x 40 hours)

6/30-7/2: 1,153.60 ($28.84 x 40 hours)

7/3: 42.72 ($230.72 - $188)

7/7-11: 213.60 ($1,153.60 - $940)

7/14-18: 213.60 ($1,153.60 - $940)

7/21-25: 213.60 ($1,153.60 - $940)

7/28-8/1: 213.60 ($1,153.60 - $940)

8/4-8: 213.60 ($1,153.60 - $940)

8/11-15: 213.60 ($1,153.60 - $940)

8/18/22: 213.60 ($1,153.60 - $940)

8/25-29: 213.60 ($1,153.60 - $940)

30) Complainant filed a complaint with OR-OSHA after his termination. OR-OSHA inspected Respondent's work site on May 13 and 14, 2003. As a result of the inspection, OR-OSHA cited Respondent for three violations – failure to train all employees in ladder safety prior to work activity; failure to train all employees in the use of fall protection systems and the use of protective measures prior to the commencement of their work activity, and lack of MSDS sheets.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent was a limited liability company registered in Oregon and an employer doing business in Oregon that engaged the personal services of one or more employees.

2) Respondent, through Michael Couch, a member of the LLC, hired Complainant on April 24, 2003, to work as a fire sprin-

kler installer working 8 hours per day, forty hours per week, Monday through Friday, at the rate of $28.84 per hour.

3) Complainant's first day of work for Respondent was April 28, 2003. He worked April 28th and 29th at the Eagle Point Elementary School Project.

4) On April 30, 2003, Couch transferred Complainant to the White City Middle School Project to work as a Respondent's foreman. Complainant's duties included supervising Weston Truelove, another employee of Respondent who had less experience than Complainant as a fire sprinkler installer.

5) On May 8, Complainant and Truelove began their day by installing pipe in the "Practice Rooms." Truelove then inventoried Respondent's piping on the job. When he finished that job, he came over to help Complainant. That was not possible because there was only one scissors lift and Complainant was using it. However, there was work available for Truelove and Complainant on the west side of the rooms that required the use of an extension ladder.

6) The area where the extension ladder was needed had a concrete floor and roof, but unfinished walls, and the floor was wet from rain that had blown in. The work required Complainant or Truelove to work at a 15' height on an extension ladder borrowed from another subcontractor, with the top of the ladder resting on wooden ceiling joists.

7) Complainant called Couch and to discuss the work situation and told him there were projects that needed to be completed from an extension ladder. Complainant asked Couch if he wanted Complainant or Truelove to "foot" the ladder while the other worked on the ladder. Couch told Complainant that he would fire both of them if he saw them doing this.

8) Complainant was concerned about Couch's statements and his own personal liability in the event an accident occurred while he or Truelove was using the extension ladder unsafely. Before proceeding with the extension ladder, Complainant decided to seek clarification from Couch regarding Respondent's ladder safety policy and faxed a handwritten note to Couch in which he asked Couch to confirm that Respondent's policy was that employees should work alone on extension ladders, with no one else supporting it from ground level.

9) Within minutes of receiving Complainant's fax, Couch called Complainant and discharged him.

10) Couch discharged Complainant because he opposed Respondent's policy of not allowing one employee to support an extension ladder at ground level while the other person climbed the ladder or worked on it.

11) Complainant experienced emotional distress as a result of his discharge.

12) Complainant lost $10,749.60 in back wages 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 654.062 and ORS chapter 659A.

2) The actions, statements and motivations of Michael Couch are properly imputed to Respondent.

3) Respondent's discharge of Complainant violated ORS 654.062(5)(a) and OAR 839-004-0004.

4) 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 654.062(5)(a), ORS 659A.820 through ORS 659A.850.

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 Complainant lost wages resulting from Respondent's unlawful employment practice 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

Respondent was served with the Notice of Hearing and Formal Charges and was held in default. Respondent was relieved of default when the Agency issued amended Formal Charges, but again did not file an answer and then failed to appear at the hearing, was found in default, and did not request relief from default. When a respondent defaults, the Agency needs only to establish a prima facie case on the record to support the allegations of its charging document in order to prevail. *In the Matter of Executive Transport, Inc.,* 17 BOLI 81, 92 (1998).

PRIMA FACIE CASE

In this case, the Agency's prima facie case consists of the following elements: (1) Respondent engaged the personal services of one or more persons in Oregon; (2) Complainant was a worker who opposed any practice forbidden under or related to the Oregon Safe Employment Act (OSEA); (3) Respondent discharged Complainant; and (4) Complainant's opposition to practices forbidden under or related to OSEA was a substantial factor in Respondent's decision to discharge Complainant.

RESPONDENT WAS COMPLAINANT'S EMPLOYER

Document evidence obtained from the Corporations Division established that Respondent was registered as a limited liability company in 2003. Complainant's credible testimony and pay stubs

issued by Respondent established that Respondent, though Couch, hired Complainant and used his services between April 28 and May 8, 2003. This evidence establishes that Respondent was Complainant's employer.

COMPLAINANT WAS A WORKER WHO OPPOSED ANY PRACTICE FORBIDDEN UNDER OR RELATED TO THE OREGON SAFE EMPLOYMENT ACT (OSEA)

On May 8, 2003, Complainant was acting as Respondent's foreman, as well as installing pipe for fire sprinklers. As foreman, he supervised Wes Truelove, an employee whose experience and skill level were similar to those of a union apprentice. When Truelove completed the inventory work Couch had assigned to him, he needed to use an extension ladder to perform the only work available, which was installation of pipe approximately 15' above the floor.

Complainant had received extensive safety training, including training on ladder use, as a union apprentice and from OR-OSHA, and had been taught that an extension ladder must be "footed" by a person on the ground or tied to a support with a rope at its top. Complainant was particularly concerned in this instance because the floor was wet and he or Truelove would be working at a height of 15' above a cement floor. A fall under those conditions would most likely cause serious injury. With this in mind, Complainant called Couch and discussed the ladder situation with him. Couch's response was to let him know that he and Truelove would be fired if both of them were involved in using the extension ladder at the same time and that Complainant should "just forget about all that OSHA crap."

Complainant told Truelove about his conversation with Couch and Truelove became so upset that he left work. Knowing that he would have to use an extension ladder to complete the work, Complainant became concerned about his own personal liability in the event an accident occurred while he or Truelove used the extension ladder without the safety precautions Complainant had been taught. Complainant handwrote a note to Couch asking him to clarify that Respondent's extension ladder safety policy was the same as what Couch had told him over the phone – only one man would work from an extension ladder at a time. Couch's reaction was immediate. Within two minutes after receiving the fax, Couch called Complainant and told him to come in and pick up his check.

The purpose of the OSEA, as stated in ORS 654.003, is to:

> "assure as far as possible safe and healthful working conditions for every working man and woman in Oregon, to preserve our human resources and to reduce the substantial burden, in terms of lost production, wage loss, medical expenses, disability compensation payments and human

suffering, that is created by occupational injury and disease."

To prove a violation of ORS 654.062(5)(a), the agency need not establish that a complainant opposed conditions that actually violated a statute or an OR-OSHA rule. *In the Matter of Tomkins Industries, Inc.,* 17 BOLI 192, 206 (1998). The Agency only needs to prove that the complainant was discharged for expressing safety concerns "under or related to" the OSEA. The Complainant's concerns over ladder safety, given that the potential consequences of ladder slippage, fall within safety concerns related to the OSEA. As such, Complainant's opposition to Couch's cavalier reaction to his expression of those concerns was activity protected under ORS 654.062(5)(a) and OAR 839-004-0004.

RESPONDENT DISCHARGED COMPLAINANT

There is no dispute over the fact that Couch discharged Complainant on May 8, 2003.

COMPLAINANT'S OPPOSITION TO RESPONDENT'S LADDER SAFETY PRACTICE WAS A SUBSTANTIAL FACTOR IN RESPONDENT'S DECISION TO DISCHARGE COMPLAINANT

The evidence is undisputed that Complainant received no disciplinary warnings prior to his discharge. Couch's use of Complainant as a foreman creates an inference that Couch was satisfied with Complainant's work. In retaliation cases involving discharge, the Commissioner has previously held that a short intervening time between the act alleged to have caused the retaliation and the retaliatory act may be an indicator of retaliation. *See In the Matter of German Auto Parts, Incident.,* 9 BOLI 110, 124-27 (1990), *aff'd German Auto Parts, Inc. v. Bureau of Labor and Industries,* 11 Or Application 522, 826 P2d 1026 (1992) (complainant filed a complaint with OSHA and was fired the day after OSHA fined respondent); *In the Matter of LeeBo Line Construction, Inc.,* 1 BOLI 210, 214 (1979) (complainant was fired immediately after requesting additional safety equipment). In this case, Complainant was discharged within two minutes of opposing Respondent's ladder safety practices. Given Respondent's immediate response to Complainant's opposition and the absence of any performance problems on Complainant's part, the forum concludes that Complainant's opposition to Couch's directive about extension ladder safety was not only a substantial factor in Respondent's decision to discharge Cp, but was the only reason for Complainant's discharge.

DAMAGES

In its Formal Charges, the Agency sought "[l]ost wages in an amount to be proven at hearing and currently estimated to be approximately $9,200 and $5,000 for emotional distress.

A. Lost Wages.

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. *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 he 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), *aff'd without opinion, Servend International, Inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

Through documentary evidence and the credible testimony of Complainant, the Agency established Complainant was working eight hours per day, 40 hours per week at the wage rate of $28.84 per hour, for total average earnings of $230.72 per day and $1153.60 per week. His employment was expected to continue until Respondent completed the Eagle Point and White City projects, which continued until at least the end of August 2003. Cp credibly testified that he sought work until July 3, 2003, when he was hired as a sprinkler fitter at another company, where he continued to work until one month prior to the hearing. He was paid $23.50 per hour by his new employer and worked 40 hours a week. Because Complainant earned less at his new job, the forum has calculated his lost wages from May 9 until August 31, 2003, as shown in Finding of Fact 29 – The Merits. The forum has cut off Complainant's lost wages as of August 31, 2003, because there is no evidence as to how long Respondent's work on the Eagle Point and White City projects continued past that date. In sum, the Agency established that Complainant would have earned an additional $10,749.60 in wages, had he not been discharged by Respondent.

In previous cases, the forum has held that when a respondent employer is in default, the forum's award of damages for lost wages is limited to the amount alleged in the charging document "because that is the figure of which Respondent employer had notice prior to default." *See In the Matter of Vision Graphics and Publishing, Inc.,* 16 BOLI 124, 140 (1997). In this case, the amended Formal Charges sought "[l]ost wages in an amount to be proven at hearing and currently estimated to be ap-

proximately $9,200[.]" Because Respondent had notice of the approximate amount of lost wages and that the Agency intended to prove the specific amount of lost wages at the hearing, the forum has the authority to award Complainant the amount of lost wages actually proven at the hearing. That amount is $10,749.60.

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 emotional distress damages. *Id*. at 96.

The Agency relied on the testimony of Complainant and his wife to establish emotional distress damages. Complainant credibly testified that his discharge caused him significant emotional and financial stress in his life until at least July 3, 2003, when he obtained subsequent work. Complainant had never been fired before, and this upset and embarrassed him. He had received extensive safety training as a union apprentice and was shocked at being fired "for trying to work safe." He was the sole support of his family and had no income for four weeks after his discharge because Respondent fired him and he had to contest the Employment Department's initial denial of his unemployment benefits. His wife testified that he talked constantly about how Respondent had fired him, became more irritable the longer he was out of work, and had a hard time focusing on his family relationships. All of these circumstances constitute emotional distress that may be considered by the Commissioner when determining an appropriate award of damages.

When a respondent is found to have engaged in an unlawful employment practice, ORS 659A.850(4)(a) gives the Commissioner the authority to order that respondent to "[p]erform an act or series of acts * * * that are reasonably calculated to carry out the purposes of [ORS chapter 659A], to eliminate the effects of the unlawful practice that the respondent is found to have engaged in, and to protect the rights of the complainant and others similarly situated[.]" Based on the circumstances described in the previous paragraph, the forum awards Complainant the $5,000 emotional distress damages award sought by the Agency. The forum notes that the evidence presented supported a larger award than $5,000. However, in a default situation, where a specific amount of damages for emotional distress is sought, the charging document sets the limit on the relief the forum can award. *In the Matter of Kenneth Williams,* 14 BOLI 16, 26 (1995).

ORDER

NOW, THEREFORE, as authorized by ORS 659A.850, and to eliminate the effects of Respondent's violation of ORS 654.062(5)(a), and in payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Rogue Valley Fire Protection, LLC** to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in trust for Complainant Forest Wilson in the amount of:

a) TEN THOUSAND SEVEN HUNDRED FORTY NINE DOLLARS AND SIXTY CENTS ($10,749.60), less appropriate lawful deductions, representing wages lost by Forest Wilson between May 9 and September 1, 2003, as a result of Respondent's unlawful practices found herein, plus interest at the legal rate on that sum from August 31, 2003, until paid, plus

b) FIVE THOUSAND DOLLARS ($5,000), plus interest on that sum at the legal rate from the date of the Final Order until paid.

2) Cease and desist from discriminating against any employee based upon the employee's opposition to any practice forbidden under or related to the Oregon Safe Employment Act (OSEA).

In the Matter of

C. C. SLAUGHTERS, LTD.,

Case No. 19-04

Final Order of Commissioner Dan Gardner

Issued March 9, 2005

SYNOPSIS

Respondent, a nightclub that offered food, beverages, and music to the public, evicted Complainant from its premises on June 12 and June 14, 2004, because he had Parkinson's Disease, a disability. Complainant experienced substantial emotional distress as a result of Respondent's unlawful conduct and the commissioner awarded Complainant $25,000 in damages for emotional distress. ORS 659A.100(1)(a), ORS 659A.100(2)(a), ORS 659A.100(2)(d), ORS 659A.142(3), ORS 659A.400; OAR 839-006-0205(6), OAR 839-006-0205(10).

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of

the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 11, 2005, in the 10th 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 case presenter Jeffrey C. Burgess, an employee of the Agency. Complainant John Rivelli was present and was not represented by counsel. Respondent C. C. Slaughters, Ltd. did not file an answer or make an appearance at the hearing and was declared in default.

The Agency called the following witnesses: John Rivelli, Complainant; David Whitney, Delmar Gordy, and Tim Galtier, friends of Complainant who witnessed the alleged unlawful discrimination; and Peter Martindale, Civil Rights Division Senior Investigator.

The forum received into evidence:

a) Administrative exhibits X-1 through X-15 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-5 (submitted or generated prior to hearing);

Having fully considered the entire record in this matter, I, Dan Gardner, 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 30, 2002, Complainant filed a verified complaint with the Agency's Civil Rights Division alleging that he was the victim of the unlawful practices of Respondent in public accommodation. After investigation, the Agency found substantial evidence of an unlawful employment practice and issued an Administrative Determination on August 19, 2003.

2) On November 8, 2004, the Agency issued Formal Charges alleging that Respondent discriminated against Complainant by making a distinction, discrimination or restriction in a place of public accommodation because Complainant is a disabled person, in violation of ORS 659A.142(3) and OAR 839-006-0300. The Agency sought damages in the amount of $30,000 for emotional distress.

3) On December 7, 2004, the forum served the Formal Charges on Respondent,[1] accompanied by the following: a) a Notice of Hearing setting forth January 11, 2005, in Portland, Oregon, as the time

[1] After the Agency was unsuccessful in attempting to serve Respondent and Respondent's registered agent at his registered office, the Agency accomplished service by serving the Oregon Secretary of State by certified mail on December 7, 2004, as provided in ORS 60.121.

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.

4) On December 30, 2004, the Agency filed a motion for an Order of Default based on Respondent's failure to file an answer to the Formal Charges after being served with the documents.

5) Respondent had not responded to the Agency's motion at the time the hearing commenced.

6) At the time set for hearing, Respondent did not appear and had not notified the forum that it would be late or would not attend the hearing. The hearing commenced at 10 a.m. on January 11, 2005, instead of 9 a.m. as stated on the Notice of Hearing. At the outset of the hearing, the ALJ granted the Agency's motion for an Order of Default based on Respondent's failure to file an answer.

7) At the outset of the hearing, 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.

8) The ALJ issued a proposed order on January 25, 2005, 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) At all times material herein, Respondent C. C. Slaughters, Ltd, was an Oregon corporation doing business at 219 NW Davis Street, Portland, Oregon as a nightclub ("club") that served food and alcohol to the public.

2) In June 2002, Respondent's club enforced the following policy:

> "It is our policy the (sic) if someone is visibly intoxicated to have them stay and have some French fries and water, coffee or soda, and take the time to sober up. We do not ask someone to leave unless they become belligerent and are disturbing the peace."

3) Complainant was diagnosed with Parkinson's Disease ("Parkinson's") in 1992. Complainant receives treatment for Parkinson's at the Parkinson Center of Oregon, Oregon Health Sciences University ("OHSU").

4) Parkinson's is a progressively degenerative disease that progresses at different rates for different people. Body tremors are the most noticeable symptom of Parkinson's.

5) When Complainant was first diagnosed with Parkinson's, his only symptom was a twitch in his left foot. Since then, his disease progressed to his left side,

then to his right side. His balance is also impaired.

6) Complainant takes 21 pills each day to help control his Parkinson's. Without taking this medication, he can hardly move without assistance and is unable to turn over in bed without help.

7) It takes Complainant up to 30 minutes to dress in the morning because of Parkinson's. Parkinson's affects his ability to eat and swallow. Even with medication, Parkinson's causes him to walk with a noticeable shuffle most of the time, and he walks at a significantly slower pace than a person who does not have Parkinson's. If he focuses, he can walk without a shuffle for a short period of time, but then his shuffle resumes. Sometimes his body "locks up" on him while walking and he cannot walk further without the aid of something to grasp and pull himself along or someone helping him begin moving again.

8) Parkinson's also causes a noticeable tremor in Complainant's hands, neck, and head.

9) Complainant began visiting Respondent's club seven or eight years ago. He regularly visited the club on Wednesday nights, when it was country western night. Complainant visited the club primarily to socialize. He rarely drank alcohol there.

10) On June 12, 2002, Complainant planned to visit Respondent's club again to socialize with friends on Respondent's country western night. Prior to visiting Respondent's club, Complainant did not consume any alcohol or mind-altering drugs.

11) On June 12, 2002, Complainant entered Respondent's club in the evening, intending to meet his friend Delmar Gordy. There were about 30 patrons in the club at that time. Ron Williams, Respondent's bartender and night manager, stopped Complainant and told him he had to leave. Complainant asked why. Williams told him "because it looks like you've been drinking." Complainant asked "What makes you say that?" Williams answered "By the way you walk." Complainant explained that he had Parkinson's. Williams told Complainant unless Complainant had a note from his doctor stating Complainant had that condition, Complainant had to leave. During this conversation, Williams and Complainant were approximately three feet apart. Complainant's speech was not slurred, he did not have red eyes, and there was no alcohol on his breath. Complainant's friend Gordy came over at that point and explained to Williams that Complainant had Parkinson's. He also told Williams that Complainant rarely drinks, that Complainant had been coming to Respondent's club for a number of years, and that he had never seen Complainant inebriated. Williams responded that Complainant had to leave, and Complainant left Respondent's premises. In total, Complainant was at Respondent's club about 15 minutes.

12) There were about 30 patrons in Respondent's club on June 12,

13) Complainant felt embarrassed, shaken, and upset by Williams's refusal to let him stay in Respondent's club. He felt like the incident had "created a scene," that he had been on "public display," and thought other patrons might think he was a drunk. He went home after leaving Respondent's club and thought a lot that night about the way he was treated. He had trouble sleeping that night and the next couple of nights. He talked to "quite a few people" about the incident over the next two days. Two of his friends told him that if Respondent's club would not admit him, then "none of us are going to go in" and that "they would spread the word."

14) In response to Williams's request, Complainant contacted OHSU and obtained a card with his name, address, a contact person, and the name of his doctor on one side. The other side contained the following statement, along with other information relevant information concerning Parkinson's Disease: "**MEDICAL ALERT. I have a condition called PARKINSON'S DISEASE which makes me slow and sometimes I cannot stand up or speak. I AM NOT INTOXICATED.** ***Please call my family or physician for help."***

15) On or about June 14, 2002, Complainant went to Respondent's club to show the manager the medical documents he had obtained from OHSU. He met Dave Whitney, a friend, inside the club, thinking that Whitney would be able to help explain matters. He also felt that Whitney could provide him with "moral support" and help him feel "more at ease." There were about 60 patrons in Respondent's club at that time. Williams approached Complainant and told him he had to leave. Complainant and Whitney told Williams that Complainant had brought documentation from his doctor of his medical condition. Williams didn't even look at the documentation. He said that didn't make any difference, and he had talked to Respondent's owner, who told Williams that he shouldn't even have let Complainant into Respondent's club. Complainant then left Respondent's club.

16) Complainant felt "worse" after he left Respondent's club on June 14 because this was the second time he had been told to leave and because Williams "didn't even want to look at" his medical documentation. He was upset and felt that he had been on "public display again." He had trouble sleeping, as Williams's conduct made him think more about how difficult his social life was due to Parkinson's.

17) Between June 12 and June 21, 2002, Complainant thought about the situation a lot and talked to friends, family, and his co-workers about it. He thought a lot about being asked to leave Respondent's club and ex-

perienced even more stress.[2] He felt even more self conscious about his appearance to others. On June 21, his friend Tim Galtier telephoned and asked Complainant if he was going to Respondent's club that night. Complainant said he was not because "I can't get in" and told Galtier "I don't want to go through that again." Galtier had heard from other friends that Complainant had not been allowed into Respondent's club and asked Complainant if he had his medical documentation. Galtier told Complainant that he had talked with others who frequented Respondent's club and they had decided that if Complainant could not go into the club, then none of them would go into the club. Galtier said he would meet Complainant in front of Respondent's club. Complainant met Galtier, but was "too nervous and shaky" to go in. Galtier took Complainant's medical documentation inside and showed it to Williams. Williams appeared apologetic, "didn't even really look at the card," and told Galtier that Complainant was welcome to come inside. Galtier went outside and got Complainant and they both went inside. Williams offered to buy Complainant a drink, which Complainant politely declined. After a little while, Complainant was able to relax.

18) Subsequently, Complainant resumed his Wednesday night visits to Respondent's club. However, he always looked to see if Williams was working, was "very self conscious" about his appearance, and "would pretty much just stay in one spot so I wouldn't have to be moving around."

19) Complainant never received an apology from any of Respondent's employees.

20) Respondent's refusal to let Complainant remain in its club on June 12 and June 14, 2002, has made Complainant very apprehensive about shopping in new places, and particularly about visiting new bars. He keeps thinking that he will be stopped again and accused of being intoxicated. He has to "psych [him]self up" before entering in order to build his self confidence.

21) All of the witnesses who testified were credible.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent C. C. Slaughters, Ltd, was an Oregon corporation doing business at 219 NW Davis Street, Portland, Oregon as a nightclub that served food and alcohol to the public.

2) Complainant was diagnosed with Parkinson's Disease in 1992 and has been treated at OHSU for Parkinson's since that time. Parkinson's is a progressively degenerative disease that progresses at different rates for different people. Body tremors

[2] Complainant's most compelling testimony on this subject was "the disease is bad enough * * * dealing with it and that that happened made it just that much worse."

are the most noticeable symptom of Parkinson's.

3) Even with medication, Parkinson's substantially limits Complainant's ability to walk, to dress himself, and to balance. His walk is more like a shuffle. He cannot walk at the same pace as an average person and sometimes his body "locks up" and he cannot walk at all without an outside impetus to get him started again. It takes him up to 30 minutes to get dressed in the morning. He also has a noticeable tremor in his hands, neck, and head. Without medication, Complainant can hardly move without assistance and is unable to turn over in bed without help.

4) On June 12, 2002, Complainant entered Respondent's club in the evening, intending to meet his friend Delmar Gordy, and walked to the bar. Ron Williams, Respondent's bartender and night manager, stopped Complainant and told him because he thought Complainant had been drinking, based on the way he walked. Complainant explained that he had Parkinson's. Williams told Complainant unless Complainant had a note from his doctor stating Complainant had that condition, Complainant had to leave. Gordy then explained to Williams that Complainant had Parkinson's. Williams insisted that Complainant had to leave, and Complainant left Respondent's club.

5) In response to Williams' request, Complainant contacted OHSU and obtained medical documentation of his Parkinson's.

6) On or about June 14, 2002, Complainant went to Respondent's club with the intent of showing the manager the medical documents he had obtained from OHSU. Complainant and Whitney told Williams that he had medical documentation of his Parkinson's, but Williams said that didn't make any difference, and that Respondent's owner told him that he shouldn't have let Complainant into Respondent's club. Complainant then left Respondent's club.

7) On June 21, 2002, at the urging of his friend Tim Galtier, Complainant reluctantly went to Respondent's club again with his medical documentation. While Complainant waited outside, Galtier took Complainant's medical documentation into Respondent's club and showed it to Williams. This time, Williams allowed Complainant to come in and stay.

8) Complainant experienced substantial emotional distress as a result of being told to leave Respondent's club on June 12 and June 14, 2004.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was a place that offered a physical facility, food, beverages, and music to the public and a place of public accommodation as defined in ORS 659A.400.

2) The actions and statements of Ron Williams, Respondent's manager and bartender, are properly imputed to Respondent.

3) Complainant has Parkinson's Disease, a physical impairment that substantially limits his major life activity of walking, and is a "disabled person" as defined in ORS 659A.100(1)(a).

4) Williams ejected Complainant from Respondent's club on June 12 and June 14, 2002, because Complainant is a disabled person, thereby violating ORS 659A.142(3) and OAR 839-006-0300(1).

5) 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 practice found. ORS 659A.820 through ORS 659A.850.

6) 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 Complainant damages for emotional distress resulting from Respondent's unlawful practice 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

PRIMA FACIE CASE

Respondent C. C. Slaughters, Ltd was found in default under OAR 839-050-0330 for failing to timely file an answer within the time specified in the Formal Charges. In a default situation, the Agency is required to present a prima facie case on the record to support the allegations in its charging document and to establish damages. ORS 183.415(6); *In the Matter of Magno-Humphries, Inc.,* 25 BOLI 175, 192 (2004). In this case, the Agency met that burden through credible witness testimony and documentary evidence.

To establish a prima facie case, the Agency must present credible evidence of the following: (1) Respondent was a place of public accommodation as defined in ORS 659A.400; (2) Complainant is a disabled person; (3) Respondent made a distinction, discrimination or restriction against Complainant because he is a disabled person; and (4) Complainant was harmed by Respondent's conduct.

A. Respondent was a place of public accommodation as defined in ORS 659A.400.

ORS 659A.400(1) defines a place of public accommodation as "any place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements or otherwise." Undisputed testimony by Complainant and other Agency witnesses established that Respondent is a nightclub that is open to the public and provides food, beverages, and music to its patrons. This satisfies the first element of the Agency's prima facie case.

B. Complainant is a disabled person.

ORS 659A.100(1)(a) defines "disabled person" as "an individual who has a physical or mental impairment that substantially limits one or more major life activities * * *."

OAR 839-006-0205(10) defines "physical or mental impairment" as:

> "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."

Complainant's credible testimony established that he has Parkinson's Disease, a physiological disorder or condition that affects his neurological system.

"Major life activity" includes "self-care and ambulation." ORS 659A.100(2)(a); OAR 839-006-0205(6). "Ambulation" includes "the act or actions of moving about or walking." *Webster's Third New Int'l Dictionary* 67 (unabridged ed 1993). "Walking" is the specific major life activity in which the Agency alleged and proved that Complainant is limited.

Under ORS 659A.100(2)(d), a physical impairment "substantially limits a major life activity when:

> "(A) The impairment renders the individual unable to perform a major life activity that the average person in the general population can perform; or
>
> "(B) The impairment significantly restricts the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity."

Complainant credibly testified and the ALJ observed that Parkinson's restricts the condition and manner in which Complainant is able to walk. Complainant walks with a shuffle and cannot keep the same pace as an average person. Sometimes, his body "locks up" and he cannot walk at all without the aid of an outside impetus, either an assist from another person or something he can grasp to pull himself along. These facts establish that Parkinson's "substantially limits" one of Complainant's "major life activit[ies]."

Based on the above, the forum concludes that the Agency has met its burden of showing that Complainant is a "disabled person."

C. Respondent made a distinction, discrimination or restriction against Complainant because he is a disabled person.

Complainant was told to leave Respondent's premises by Respondent's manager on June 12 and 14, 2002. The issue before the forum is why Complainant was asked to leave.

On June 12, Respondent's manager accused Complainant of being drunk and told him to leave because of the way Complainant walked. Complainant's walk, which is more like a shuffle, is the most noticeable symptom of his disability. The manager refused to let Complainant stay, despite Complainant's statement that he had Parkinson's, that he had not been drinking, and the absence of any other physical signs that Complainant had been drinking. If the manager thought Complainant was drunk, it stands to reason that he would have followed Respondent's policy of having intoxicated persons "stay and have some French fries and water, coffee or soda, and take the time to sober up." The same policy states that people are not asked to leave "unless they become belligerent and are disturbing the peace." Complainant was not belligerent and was not asked to stay and have refreshments until he sobered up. Instead, he was asked to bring in a note from his doctor stating that he had Parkinson's and told to leave, which he did. The forum concludes from this evidence that Complainant was not drunk, that Respondent's manager knew he was not drunk, and that he was asked to leave because of his Parkinson's.

Two days later, on June 14, 2002, Complainant returned to Respondent's club with the intent of showing the manager the medical documents he had obtained from OHSU. He met Dave Whitney, a friend, inside the club, thinking that Whitney might be able to help explain matters. Respondent's manager approached Complainant and told him to leave, even though Complainant and Whitney told him that Complainant had brought documentation from his doctor of his medical condition. Respondent's manager refused to look at the documentation, saying it made no difference because he had talked to Respondent's owner, who said Complainant should not have been allowed into Respondent's club. The forum infers from these circumstances that the only reason Complainant was asked to leave was because of his Parkinson's.

Complainant's readmission into Respondent's club on June 21, 2002, is not evidence that Respondent had another possible motive for denying Complainant access to its club. Instead, testimony by Agency witnesses indicated that Respondent granted Complainant readmission because Complainant's friends were threatening to boycott Respondent's club unless Complainant was allowed in.

D. Complainant was harmed by Respondent's conduct.

Complainant visited Respondent's club on June 12 and 14, 2002, to listen to music and socialize with his friends. He was denied the ability to do either when Respondent's manager refused to let him remain in Respondent's club. Respondent's conduct harmed Complainant and satisfies the fourth element of the Agency's prima facie case.

DAMAGES

The Agency sought $30,000 in emotional distress damages in its Formal Charges. The commissioner considers a number of things In determining damages for emotional distress, 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 emotional distress damages. *Id*. at 96. In this case, the Agency relied primarily on Complainant's credible testimony to show the extent of his emotional distress. That testimony is summarized in the following three paragraphs.

Complainant felt embarrassed, shaken, and upset by Respondent's refusal to let him stay in Respondent's club on June 12, 2002. He felt like the incident had created a scene, that he had been on public display in front of 30 patrons, and thought other patrons might think he was a drunk. After he went home, he thought a lot that night about the way he was treated. He had trouble sleeping that night and the next couple of nights. It upset him enough that he talked to a number of people about the incident over the next two days.

Complainant felt even worse after he left Respondent's club on June 14 because this was the second time he had been told to leave and because Respondent's manager refused to look at the medical documentation he had instructed Complainant to obtain. He was upset and stressed and felt that he had been on public display again, this time in front of 60 patrons. He had trouble sleeping, began to think more about how Parkinson's had negatively impacted his social life, and felt even more self conscious about his appearance.

After Complainant resumed his Wednesday night visits to Respondent's club, he always looked to see if the same manager was working, felt very self conscious about his appearance, and tended to stay in one spot so he wouldn't be seen moving around. In addition, Respondent's refusal to let Complainant remain in its club on June 12 and June 14, 2002, has made Complainant very apprehensive about shopping in new places, and particularly about visiting new bars, in that he is afraid he will be stopped again and ac-

cused of being intoxicated because of his Parkinson's.

This is the first case before the forum alleging discrimination in public accommodation because of an individual's disability. In a 1998 case, the commissioner awarded $15,000 in damages for mental suffering to a complainant who was denied service at a fast food restaurant because of her race. *In the Matter of The Westwind Group of Oregon, Inc.,* 17 BOLI 46 (1998). In *Westwind*, the discriminatory incident lasted only a couple of minutes, but the complainant's upset lasted "during the episode, the remaining evening, and for a long time thereafter." In this case, there were two incidents of longer duration, both in front of numerous persons, that caused Complainant to experience significant emotional distress both during and after the incidents and up to the time of the hearing.

The Oregon legislature has declared that "the public policy of Oregon [is] to guarantee disabled persons the fullest possible participation in the social and economic life of the state [and]* * * to use and enjoy places of public accommodation * * * without discrimination." An award of $25,000 for emotional distress is justified by the facts in this case and furthers public policy.

ORDER

NOW, THEREFORE, as authorized by ORS 659A.850, and to eliminate the effects of Respondent's violation of ORS 659A.142(3) and in payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondent C. C. Slaughters, Ltd** to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in trust for Complainant John Rivelli in the amount of:

a) TWENTY-FIVE THOUSAND DOLLARS ($25,000), plus interest on that sum at the legal rate from the date of the Final Order until paid.

2) Cease and desist from making any distinction, discrimination, or restriction against any customer or patron because the individual is a disabled person.

In the Matter of

GARY LEE LUCAS dba Gary Lucas Construction and dba Gary Lucas Construction, Inc.,

Case Nos. 103-03 & 101-03

Final Order of Commissioner Dan Gardner

Issued March 31, 2005

SYNOPSIS

Respondent Gary Lee Lucas employed two Claimants as framers at the agreed rate of $15 per hour and did not pay them all their earned, due and owing straight time or overtime wages. Respondent was ordered to pay $6,194.65 and $4,557.84, respectively, to the Claimants. Respondent's failure to pay the wages was willful and the forum awarded $3,600 in penalty wages to each Claimant. Respondent was also assessed $2,000 in civil penalties for two violations of ORS 653.261. The Agency also alleged that Respondent committed 24 recordkeeping violations and failed to provide itemized statements of deductions of 12 occasions, but did not prove those allegations by a preponderance of the evidence. ORS 652.140(1) & (2), ORS 652.150, ORS 653.045, ORS 653.256, ORS 653.261.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 19, 2005, at the Bureau's Salem office located at 3865 Wolverine NE, E-1, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Jeffrey C. Burgess, an employee of the Agency. Wage claimants Mike Munro and Mark Fisler were present throughout the hearing and were not represented by counsel. Respondent Gary Lucas was present throughout the hearing and was represented by Gary G. Norris, attorney at law.

The Agency called the following witnesses: Mike Munro and Mark Fisler, wage claimants; Newell Enos, Wage & Hour Division compliance specialist; Gary Lee Lucas, Respondent; and Christy Patton, customer service program manager at the Oregon Construction Contractor's Board.

Respondent called the following witnesses: Gary Lee Lucas, Respondent; and Kimberly Wilson, Respondent's insurance agent.

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-19, A-20 (page 4 only), and A-21 through A-25 (submitted prior to hearing);

c) Respondent exhibits R-1 through R-15, R-20 through R-23, R-26 through R-28, and R-31 (submitted prior to hearing).

Having fully considered the entire record in this matter, I, Dan Gardner, 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 19, 2002, Claimants Mike Munro ("Munro") and Mark Fisler ("Fisler") filed wage claims with the Agency alleging Respondent Gary Lucas had employed them and failed to pay wages earned and due to them.

2) 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 Lucas.

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

4) On or about April 14, 2003,[1] the Agency issued Order of Determination No. 03-0012 based upon the wage claims filed by Claimants Munro and Fisler and the Agency's investigation. The Order of Determination alleged that Respondent Gary Lee Lucas owed a total of $11,680.80 in unpaid wages[2] and $7,401.60 in penalty wages,[3] plus interest, to Claimants Munro and Fisler 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 May 27, 2003, Respondent, through counsel, filed an answer and request for hearing. Respondent asserted that Claimants were independent contractors and that "all sums due and owing for work performed by wage claimants have been paid in full."

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[1] The Agency's Order of Determination is not signed or dated. However, it was served on Gary Lucas on April 21, 2003, and Respondent stated that its answer was submitted to the "Order of Determination issued April 14, 2003."

[2] The Agency alleged that Claimant Munro's period of employment was "7-8-03 to 11-30-02" and that he was owed $6,712.15 and that Claimant Fisler's period of employment was "7-29-03 to 12-2-02" and that he was owed $4,968.65.

[3] The Agency alleged that Claimant Munro was owed $3,765.60 and Claimant Fisler was owed "$3,6360."

6) On April 9, 2004, the Agency issued a Notice of Intent to Assess Civil Penalties in which it alleged that Respondent "Gary Lee Lucas, individually and doing business as Gary Lucas Construction and doing business as Gary Lucas Construction, Inc." had committed 44 violations of Oregon's wage and hour laws with respect to Claimant Munro's employment from "July 2, 2002 through November 30, 2002" and Claimant Fisler's employment from "July 27, 2002 through November 30, 2002." The Agency sought to impose $44,000 in civil penalties. The Notice of Intent alleged the following specific violations:

> "[Respondent willfully] failed to make required payroll and other records in violation of ORS 653.045 and OAR 839-020-0080; 12 violations;
>
> "[Respondent willfully] failed to keep available required payroll and other records in violation of ORS 653.045 and OAR 839-020-0080; 12 violations;
>
> "[Respondent willfully] failed to supply Claimants with itemized statements of amounts and purposes of deductions in the manner provided in ORS 652.610 in violation of ORS 653.045 and OAR 839-020-0012 and 839-020-0080; 12 violations; and
>
> "[Respondent willfully] failed to pay overtime for all hours worked over forty (4)) in violation of ORS 653.261 and OAR 839-020-0030; 8 violations."

7) On May 20, 2004, Respondent, through counsel, filed an answer and request for hearing.

8) On December 2, 2004, the Agency filed two separate "BOLI Request for Hearing" forms with the forum, one related to the Order of Determination and the other related to its Notice of Intent.

9) On December 8, 2004, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and Claimants stating the time and place of the hearing as January 19, 2005, at 3865 Wolverine Street NE, Bldg. #E-1, Salem, Oregon. Together with the Notice of Hearing, the forum sent copies of the Order of Determination and Notice of Intent to Assess Civil Penalties, 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.

10) On January 7, 2005, the Agency moved to consolidate the cases involving its Order of Determination and its Notice of Intent on the basis that the cases involved much of the same evidence and identical parties. Respondent did not object and the ALJ granted the Agency's motion.

11) At the start of the hearing, pursuant to ORS 183.415(7), the ALJ orally advised the participants 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 the hearing, the Agency moved to amend the Order of Determination as follows:

a) Allege that Claimant Fisler was paid $4,202.16 and is owed $4,647.84 in unpaid wages;

b) Allege that Claimant Fisler is owed $3,636 in penalty wages;

c) Allege that the respective wage claim periods for Claimants Munro and Fisler are "7/2/02 to 11/30/02" and "7/29/02 to 12/2/02."

Respondent did not object and the ALJ granted the Agency's motion.

13) The ALJ issued a proposed order on February 16, 2005, 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) At all times material herein, Respondent Gary Lee Lucas was licensed as an exempt[4] general contractor with the Oregon Construction Contractors Board ("CCB"). He has been licensed as a general contractor with the CCB since 1992.

2) On May 10, 2002, Respondent[5] contracted with Kenneth and Patricia Williams to build four "commonwall townhouses of 1560 sq. ft. to 1598 sq. ft." (the "townhouse job"). Abel Ovalle was a co-general contractor on the townhouse job with Respondent until the end of September 2002.

3) At that time, the construction business was booming in McMinnville and Respondent was not able to contract with any subcontractors with whom he had previously worked in McMinnville.

4) In late June 2002, Claimant Munro ("Munro") met Respondent at the house of a mutual acquaintance. Respondent and Munro began talking, and Respondent asked Munro if he wanted to help frame some townhouses. Munro agreed and Respondent told Munro to meet him at the townhouse job in a couple of days. Respondent did not inquire at the time if Munro was a CCB licensed contractor, but became aware during Munro's employment that Munro was not a CCB licensed contractor.

5) Munro has never been licensed as a contractor with the CCB.

6) Prior to Munro's first day of work, Respondent and Munro did not have an agreement as to Munro's specific rate of pay.

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[4] According to Patton, an "exempt" general contractor is a contractor who has represented to the CCB that he or she has no employees.

[5] "Respondent" hereafter refers to Gary Lucas, as there was no evidence presented to establish the existence of Gary Lucas Construction, Inc.

However, Munro understood that he would be paid on an hourly basis.

7) Although Respondent paid Munro $100 as a "draw on July's"[6] earnings on July 3, 2002, Munro's first actual day of work was July 8, 2002. At first, he helped Respondent and Ovalle set up footings and walls. Later, he did framing. He worked alongside Respondent throughout his employment and did the same type of work as Respondent and Ovalle. Later, he worked alongside Respondent, Fisler and Gettman, doing the work that they did.

8) Munro rode to and from work each day with Respondent. Munro did not have a driver's license at that time and it was convenient for him to ride with Respondent. Work usually commenced at 8 a.m. and finished at 4:30 p.m.

9) On July 29, 2002, Munro, Ovalle, and Respondent met at Respondent's house and Munro was given a check in the amount of $599.99. Respondent handwrote on the check "casual labor" for "May and June." During the same meeting, Respondent asked Munro what wage he wanted. Munro said $15 per hour and Respondent agreed to this rate. Munro cashed his check and loaned Respondent $250, which Respondent repaid by check later that same day.

10) Munro worked 148 hours during the period July 8-29, including 28 overtime hours. Calculated at $15 per hour, he earned $2,220.[7]

11) On August 9, 2002, Respondent gave Munro a check in the amount of $273.93 on which Respondent wrote "sub-framing." (Testimony of Munro, Respondent; Exhibits A-5, A-19)

12) On September 25, 2002, Respondent gave Munro a check in the amount of $1733.23.[8]

13) Munro worked 301 hours during the period August 10 to September 25, including 18 overtime hours. Calculated at $15 per hour, he earned $4,575.

14) On November 20, 2002, Respondent gave Munro a check in the amount of $1393.15 on which Respondent wrote "contract framing."

15) Munro worked 205 hours during the period September 26 to November 20, including 16 overtime hours. Calculated at $15 per hour, he earned $3,075.

16) While employed with Respondent, Munro provided no tools except the hand tools he carried in his nail bag. He did not

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[6] "Draw on July's" was handwritten on the $100 check by Respondent.

[7] For reasons explained in the Opinion, the forum has not awarded overtime wages to either Munro or Fisler and has therefore computed overtime wages due at $15 hour instead of $22.50 ($15 x 1.5 = $22.50)

[8] Respondent wrote something on this check, but the handwriting is too faint to be legible.

have a hand saw or a level and used Respondent's air compressor, air hoses, radial arm saw, and nail gun and Fisler's level. Munro provided no materials or supplies used in building the townhouses and did not work for anyone else while employed with Respondent. He was not free to hire anyone to work for him on the townhouse job.

17) Munro worked for Respondent on the townhouse job until November 30, 2002, when he walked off the job.

18) During his employment with Respondent, Munro's regular work schedule was Monday through Friday. He also worked 12 Saturdays and four Sundays.

19) In total, Munro worked 745.25 hours for Respondent. 69 of those hours were hours worked in excess of 40 in a given workweek. Those 69 hours were worked in the weeks of July 8-14, July 15-21, July 22-28, August 26-September 1, September 9-15, October 28-November 3, and November 11-17, 2002.

20) On or about December 11, 2002, Respondent gave Munro a check dated December 11, 2002, for $633.70 with a notation "sub-work" on it and a note attached to it that read:

"MIKE

60 HOURS

22.7%

353.20

SHORT 280.50

633.70"

21) Munro received no other documentation in which Respondent indicated he was being paid on a percentage basis.

22) Calculated at $15 per hour, Munro earned $11,178.75 while employed by Respondent. He was paid a total of $4,984.10, leaving $6,194.65 in due and owing unpaid wages.

23) In late July 2002, Respondent contacted Claimant Fisler ("Fisler") and asked him if he wanted to work with Respondent on the townhouse job. Respondent and Fisler had previously worked together framing houses and Fisler had a CCB license during one of the jobs. Fisler did not have a CCB license in 2002 and Respondent did not ask Fisler if he had a CCB license. At some point during his employment, Fisler told Respondent that he was not a CCB licensed contractor.

24) Fisler agreed to work with Respondent on the townhouse job and started work on July 29, 2002. At that time, Fisler and Respondent had not agreed to a specific rate of pay. Not long afterward, Respondent agreed to pay Fisler $15 per hour.

25) During his employment with Respondent, Fisler's regular work schedule was Monday through Friday, the same as Munro's. He also worked 12 Saturdays and three Sundays. He worked alongside Respondent, Munro, Ovalle, and Gettman, and

performed the same work that they did.

26) Fisler brought his nail bag and the hand tools in it, a skill saw, and a level to the townhouse job. Respondent provided the main power extension cord from the power box to the building site, an air compressor, air hoses, a big radial arm saw, and a nail gun. While employed with Respondent, Fisler provided no materials or supplies used in building the townhouses and did not work for anyone else. He was not free to hire anyone else to work for him on the townhouse job.

27) On August 9, 2002, Respondent gave Fisler a check in the amount of $300.00 on which Respondent wrote "sub-framing."

28) On September 25, 2002, Respondent gave Fisler a check in the amount of $1469.52 on which Respondent wrote "sub frame 3140."

29) Fisler worked 305 hours from August 10 to September 25, including 11 overtime hours. Calculated at $15 per hour, he earned $4,515.

30) On October 17, 2002, Respondent gave Fisler a check in the amount of $450.00 on which Respondent wrote "sub labor."

31) On November 20, 2002, Respondent gave Fisler a check in the amount of $1467.65 on which Respondent wrote "contract labor frame."

32) Fisler worked 160.5 hours from October 18 to November 20, including one overtime hour. Calculated at $15 per hour, he earned $2,407.50.

33) Starting in September 2002, Matt Gettman also worked with Respondent, Munro, and Fisler as a framer on the townhouse job.

34) Fisler's last day of work with Respondent was December 1, 2002. Respondent decided that Fisler's services were no longer needed after observing that Fisler's solo framing work on the north unit of the townhouse job was unsatisfactory. 35) On or about December 11, 2002, Respondent gave Fisler a check dated December 11, 2002, for $514.99 with a notation "sub-work" on it."

36) In total, Fisler worked 584 hours for Respondent. 12 of those hours were hours worked in excess of 40 in a given workweek. Those 12 hours were worked in the weeks of September 1-7, September 15-21, and November 3-9, 2002.

37) Calculated at $15 per hour, Fisler earned $8,760 while employed by Respondent. He was paid a total of $4,202.16, leaving $4,557.84 in due and owing unpaid wages.

38) Neither Munro nor Fisler ever received a statement showing itemized deductions taken from their paychecks. Respondent never took any deductions from their paychecks.

39) Fisler received no documentation in which Respon-

dent indicated he was being paid on a percentage basis.

40) With Munro's aid, Respondent wrote down the hours worked by Munro and Fisler at the end of each work day in a spiral notebook. Respondent wrote down the type of work performed, the dates on which the work was performed, the total hours worked each day by himself, Ovalle, Munro, Fisler, and Gettman, and also totaled the hours in each pay period. Respondent kept this record and provided a copy to Enos during his investigation of the Claimants' wage claims. Munro and Fisler also kept a separate record of their hours.

41) Neither Munro nor Fisler ever signed a subcontractor agreement or any type of contract with Respondent related to the townhouse job.

42) Munro and Fisler never filled out an employment application or any tax documents while working for Respondent or during their employment with Respondent.

43) Respondent did not have a regular payday. Respondent issued checks after receiving "draw" payments from Kenneth Williams, who paid Respondent whenever a defined amount of progress had been made on the townhouse job and the bank paid him.

44) Respondent determined the amount he paid out to Munro, Fisler, Gettman, and himself each time he received a draw by computing the total number of hours they each worked during the draw period, computing the percentage of total hours worked by each individual, then paying each person the same percentage of the total draw.[9]

45) On January 7, 2003, BOLI's Wage & Hour Division sent a letter to Respondent notifying him that Munro and Fisler had filed wage claims against him and demanding payment of $5,259 in unpaid wages at the rate of $15 per hour from July 2 to November 30, 2002, and $5,768 in unpaid wages at the rate of $15 per hour from July 27 until November 30, 2002.

46) On February 6, 2003, Enos sent another demand letter to Respondent seeking Claimants' unpaid wages.

47) Respondent did not pay Claimants any additional wages in response to Enos's letters and has not paid Claimants any additional wages since December 11, 2002.

48) Respondent owes Claimants $3600 each in penalty wages ($15/hour x 8 hours = $120 x 30 days = $3600).

49) There is no evidence in the record to establish the exis-

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[9] For example, if a $10,000 draw was received by Respondent and Respondent, Ovalle, Gettman, Munro and Fisler each worked 200 hours, each person's percentage would be 20% (200 hrs. X 5 = 1000 hrs; 200 ÷ 1000 = 20%) and each person would receive $2,000 ($10,000 x 0.20 = $2,000).

tence of a corporation named Gary Lucas Construction, Inc.

50) No evidence was presented to show whether or not Respondent made a record of Claimant's addresses.

51) Munro and Fisler were credible witnesses. Their testimony, though somewhat general, was internally consistent and straightforward. The only contradictory evidence was Respondent's less than credible testimony and the testimony of Enos concerning statements made to him by Abel Ovalle and Mr. Stephens of Nice Electric that their "understanding" was that Claimants "were working on a percentage basis of the draw." However, Enos did not testify that Ovalle and Stephens stated how they arrived at this "understanding." Consequently, the only testimony that Claimants actually agreed to this method of payment is that of Respondent. Respondent's attempt to impeach Claimants through the testimony of Kym Wilson also failed because of Wilson's lack of credibility. In conclusion, the forum has credited the testimony of Munro and Fisler whenever their testimony on a material issue conflicted with Respondent's testimony.

52) Respondent's testimony was filled with internal inconsistencies and inherently improbable statements. As a result, the forum has credited his undisputed testimony and his testimony that was supported by credible documentary evidence, but has disbelieved his testimony whenever it was contradicted by testimony of the Claimants.

The following examples highlight the internal inconsistencies in Respondent's testimony. Respondent testified that that both Claimants made it clear they weren't licensed contractors and said he didn't know they weren't licensed contractors, then testified that he brought Kym Wilson in to talk to them about getting insurance so they could become contractors. Respondent testified that he provided Enos with a list of all subcontractors and suppliers on the townhouse job, with the exception of Claimants, yet Matt Gettman, whom Respondent claimed was also a subcontractor, is conspicuously absent from the list. Respondent first testified that Munro started work for him in July 2002, then later testified that he believed Munro may have worked for him for half a day in May when attempting to explain why he wrote on Munro's first check that it was for "casual labor" for "May and June."

Respondent's testimony that Munro told him he was licensed through the state "as a labor" (sic) was completely improbable. Respondent testified that:

> "[a] licensed labor contractor is an individual who has the license to either hire people to work on a job for cleanup, pound nails, or whatever, or do it themselves. They can work on construction sites; they can work just about anywhere except high steel and so on and so forth. They're not governed

by the CCB but they are labor contractors and there are several of them. There's a lot of them in the agricultural business."

Given Respondent's long history as a contractor, this testimony about a non-existent licensing status is disingenuous. Of a similar nature was Respondent's testimony that Claimants were studying at work to be an "LLC."[10] Given the relative lack of sophistication of both Claimants, the fact that neither were licensed contractors, and Fisler's credible claim of ignorance as to the nature of an "LLC," the forum finds this testimony to be preposterous.

53) Enos was a credible witness and the forum has credited his testimony in its entirety. However, the forum has given no weight to his testimony concerning his conclusion that Claimants were not independent contractors. That is a legal conclusion for the forum to make.

54) Kym Wilson's credibility was eroded by her poor recollection. She did not recall seeing or talking to either Claimant, recalling only that she talked to "three persons" at Respondent's job site and that Respondent said there were guys working with Respondent who needed insurance because they were looking to be contractors on their own. She said two of the three did not qualify for insurance because they had not had insurance before, but the third, whom she twice named as Mike Holland, qualified because of his prior insurance coverage. There is no evidence that anyone named Mike Holland ever worked on the townhouse job. Since Claimant Fisler had previously been insured and presumably would have qualified for insurance, the forum concludes that Wilson did not talk to Fisler. Respondent attempted to bolster Wilson's testimony through Exhibit R-22, a letter from Wilson to Respondent thanking him "for the leads" Respondent gave her "to talk to Mike and Mark regarding their insurance needs." However, the letter is undated. Based on Wilson's poor recollection about her visit to the townhouse job, her testimony about Mike Holland and the reason she couldn't insure the other two persons, the forum gives the letter no weight. The only credible evidence supporting any of Wilson's testimony is Munro's statement that he recalls talking to her at the job site "about insurance or something." In light of the above, the forum has not given any weight to Wilson's testimony about her discussions with specific persons other than Respondent on the townhouse job.

Based on her specific recollection of the content of a

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[10] From the context of Respondent's testimony, the forum infers that Respondent was referring to a limited liability company, a new form of business in Oregon established by the 1993 Oregon Legislature that combines a corporation's limited liability with a partnership's economic and tax flexibility. *See In the Matter of Alpine Meadows Landscape,* 19 BOLI 191, 213 (2000).

conversation between herself and Respondent, the forum does credit one part of Wilson's testimony, even though it is not clear that it was related to these specific Claimants. That testimony came on direct and concerned her conversation with Respondent about why he wanted her to visit Respondent's job site. Her testimony was as follows:

> Q. "Why did Mr. Lucas say these individuals [with respect to three persons on Respondent's job site] needed insurance?"
>
> A. "Because they were looking to become contractors on their own and needed insurance to be able to work jobs."

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Gary Lee Lucas was a CCB licensed contractor and an employer who engaged the personal services of one or more employees in the state of Oregon whom he agreed to pay at a fixed rate.

2) Claimant Munro was hired by Respondent to work as a framer in the construction of four townhouse units in McMinnville. His first day of work was July 8, 2002. Respondent agreed to pay Munro $15 an hour for his work.

3) While employed with Respondent, Respondent set Munro's hours of work and Munro provided no tools except the hand tools he carried in his nail bag. Munro provided no materials or supplies used in building the townhouses and did not work for anyone else while employed with Respondent. He used Respondent's power tools and air compressor. He was not free to hire anyone to work for him on the townhouse job.

4) Munro worked for Respondent on the townhouse job until November 30, 2002, when he walked off the job.

5) In total, Munro worked 745.25 hours for Respondent. 69 of those hours were hours worked in excess of 40 in a given workweek. Munro was not paid time and a half for some or all of those 69 hours.

6) Calculated at $15 per hour, Munro earned $11,178.75 while employed by Respondent. He was paid a total of $4,984.10, leaving $6,194.65 in due and owing unpaid wages.

7) Claimant Fisler was hired by Respondent to work as a framer in the construction of the same four townhouse units as Munro. His first day of work was July 29, 2002. Respondent agreed to pay Fisler $15 an hour for his work.

8) While employed with Respondent, Respondent set Fisler's hours of work and Fisler provided no tools except the hand tools he carried in his nail bag, a skill saw, and a level. Fisler provided no materials or supplies used in building the townhouses and did not work for anyone else while employed with Respondent. He used Respondent's power tools and air compressor. He was not

free to hire anyone to work for him on the townhouse job.

9) Fisler's last day of work with Respondent was December 1, 2002, when he was involuntarily terminated by Respondent.

10) In total, Fisler worked 584 hours for Respondent. 12 of those hours were hours worked in excess of 40 in a given workweek. Fisler was not paid time and a half for some or all of those 12 hours.

11) Calculated at $15 per hour, Fisler earned $8,760 while employed by Respondent. He was paid a total of $4,202.16, leaving $4,557.84 in due and owing unpaid wages.

12) Neither Munro nor Fisler ever received a statement showing itemized deductions taken from their paychecks. Respondent never took any deductions from their paychecks.

13) With Munro's aid, Respondent wrote down the hours worked by Munro and Fisler at the end of each work day in a spiral notebook. Respondent wrote down the type of work performed, the dates on which the work was performed, the total hours worked each day by himself, Claimants, and two others who worked on the job and also totaled the hours in each pay period. Respondent kept this record and provided a copy to Enos during his investigation of the Claimants' wage claims.

14) No evidence was presented to show whether or not Respondent made a record of Claimant's addresses.

15) On January 7, 2003, BOLI's Wage & Hour Division sent a letter to Respondent notifying him that Munro and Fisler had filed wage claims against him and demanding payment of $5,259 in unpaid wages at the rate of $15 per hour from July 2 to November 30, 2002, and $5,768 in unpaid wages at the rate of $15 per hour from July 27 until November 30, 2002.

16) Respondent did not pay Claimants any additional wages in response to Enos's letters and has not paid Claimants any additional wages since December 11, 2002.

17) Respondent owes each Claimant $3600 in penalty wages ($15 per hour x 8 hours = $120 x 30 days = $3600).

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Gary Lee Lucas was an employer and Claimants were employees subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and 653.010 to 653.261. At all times material, Respondent employed Claimants.

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, ORS 653.261.

3) Respondent violated ORS 652.140(1) by failing to pay Claimant Fisler all wages earned and unpaid not later than Decem-

ber 2, 2002, the end of the first business day after Fisler's termination, and Respondent owes Fisler $4,557.84 in unpaid wages..

4) Respondent violated ORS 652.140(2) by failing to pay Claimant Munro all wages earned and unpaid not later than December 6, 2002, five business days, excluding Saturdays, Sundays, and holidays, after Munro quit, and Respondent owes Munro $6,194.65 in unpaid wages.

5) Respondent's failure to pay Claimants all wages due and owing was willful and Respondent owes each Claimant $3600 in penalty wages. ORS 652.150; OAR 839-001-0470.

6) Claimants each worked overtime hours for which they were not paid, constituting two violations of ORS 253.261.

7) 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, the penalty wages, and civil penalties, plus interest on all sums until paid. ORS 652.332, ORS 653.256.

OPINION

This case involves wage claims by Claimants Munro and Fisler, whom the Agency alleges worked for Respondent as framers. Respondent acknowledges that Claimants performed work on four townhouse units, but denies he employed Claimants or owes them any money. Instead, Respondent affirmatively alleges that Claimants were independent contractors working as subcontractors.

In order to prevail in this matter, the Agency is required to prove, by a preponderance of the evidence, the following four elements: 1) Respondent employed Claimants; 2) The pay rate upon which Respondent and Claimants agreed, if it exceeded the minimum wage; 3) 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 William Presley,* 25 BOLI 56, 69 (2004).

A. Respondent employed Claimants.

Respondent asserted in his answer that Claimants were independent contractors who worked on the townhouse job as subcontractors and were never his employees. 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, a preponderance of the evidence established that Respondent controlled the hours that Claimants worked. Munro and Fisler credibly testified that Munro rode to and from work with Respondent, that Munro, Respondent, and Fisler worked a similar, though not completely identical, schedules, and that Munro and Fisler worked alongside Respondent and Ovalle. Claimants also credibly testified that Respondent told them how he wanted the work performed. Respondent attempted to downplay the extent of his control over Claimants by asserting that Claimants and Gettman were subcontractors who had signed subcontract agreements with Respondent. In support of this allegation, Respondent offered a copy of a subcontract agreement purportedly signed by Fisler. When the Agency challenged the authenticity of the agreement, Respondent testified that he could not provide the original of Fisler's subcontract because Fisler had never returned it to him. The forum gave this testimony little weight in light of Respondent's general lack of credibility and unexplained failure to provide a copy or the original of his subcontract agreement with Munro. Respondent could have bolstered his testimony by providing a copy of his subcontract agreement with Gettman, or called Gettman and Ovalle as witnesses but did not do this. As a result, the forum has believed Fisler's testimony that he never signed the agreement. Respondent also produced a copy of Respondent's own CCB license, which showed him to be an "exempt"[11] contractor. However, the fact that Respondent was not licensed to have employees does not *per se* establish that he did not have employees.

Claimants had no investment in Respondent's townhouse job. They were not licensed contractors, did not bid on the job, and had no opportunity to make more money by working more efficiently and finishing the job in fewer hours. Other than Fisler's skill saw, they provided no power tools and used Respondent's air compressor, air hoses, radial arm saw, and nail guns to perform their job.

Claimants had no opportunity for profit or loss because they were hourly employees.

The skill and initiative required of Claimants was that of an ordinary framer; as they worked alongside and took directions from

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[11] *See* fn. 4, *supra*.

Respondent and Ovalle, the general contractors. They did not bid on the job, did no design work associated with the job, and there was no evidence that they did any work independently, except for Fisler's final work on the north unit that resulted in his termination due to unsatisfactory work. Respondent's testimony about "casual labor" bolsters the conclusion that Claimants did not exercise any special skill and initiative. When asked the meaning of the notation "casual labor" that he wrote on one of Munro's checks, Respondent testified that "casual labor is an individual who is a helper. Their responsibilities are only to follow the crowd but to produce. One without the expertise to be left alone at all times but capable of doing the work."

Claimants testified that Respondent told them there might be other projects in the future. This is insufficient evidence from which to conclude that Respondent hired them for an indefinite period of time. Given the contractual nature of Respondent's business, the forum concludes that Respondent hired Claimants with the intent that they would work on the townhouse job until the framing was complete, not for the indefinite future.

In summary, four of the five factors used by the forum in determining whether individuals are independent contractors or employees indicate that Claimants were employees.

Both Claimants credibly testified that they did not work anywhere else while working for Respondent. Respondent's claim that Claimants were subcontractors and independent contractors was further undermined by the testimony of Wilson, his insurer. Wilson testified that Respondent asked her to talk to persons working with him "because they were looking to become contractors on their own and needed insurance to be able to work jobs," casting further doubt on Respondent's claim that he employed no one and only used the services of subcontractors. Finally, Respondent inexplicably failed to list Gettman, whom he claimed was another "subcontractor" on the townhouse job, on the list of his subcontractors on the townhouse job that he provided during Enos's investigation.

Based on all of the above, the forum concludes that Respondent's townhouse job was Claimants' "economic reality" while Claimants worked with Respondent, and that Claimants were employees of Respondent and not subcontractors or independent contractors.

B. <u>Respondent agreed to pay Claimants $15 per hour.</u>

Claimants credibly testified that Respondent agreed to pay them $15 per hour. Respondent claimed that Claimants agreed to being paid a percentage of the draw that corresponded to the comparative number of hours they worked during each draw period. Based on Respondent's lack of credibility and the lack of any evidence to show that $15 per hour

was an unusual wage rate for a framer at that time, the forum concludes that Respondent agreed to pay Claimants $15 per hour.

C. Claimants performed work for which they were not properly compensated.

Munro worked 745.25 hours for Respondent. Calculated at $15 per hour, he earned $11,178.75. He was only paid $4,984.10. Fisler worked 584 hours. Calculated at $15 per hour, he earned $8,760 and was only paid $4,202.16. Both Claimants performed work for which they have not been properly compensated.

D. The amount and extent of Claimant's work.

The forum relies on Respondent's records to conclude that Munro worked 745.25 hours and Fisler worked 584 hours.

In conclusion, Claimants were Respondent's employees on the townhouse job. Calculated at $15 per hour, Respondent owes Munro $6,194.65 and Fisler $4,557.84 in unpaid wages.

CLAIMANTS ARE NOT ENTITLED TO OVERTIME PAY

Although Claimants collectively worked more than 40 hours in a given workweek during 10 separate weeks, the Agency's claim for overtime pay fails because of the insufficiency of the pleadings. ORS 183.415(2)(c) requires that the notice in a contested case shall include "[a] reference to the particular sections of the statutes and rules involved." The Oregon Court of Appeals has recently interpreted this language to require a citation to all administrative rules and statutes that are substantially relevant, as well as to the statutes and rules allegedly violated. *Drayton v. Department of Transportation,* 186 Or App 1, 62 P3d 430 (2003). ORS 653.261 gives the Commissioner the power to adopt rules requiring overtime pay "at a rate [no] higher than one and one-half times the regular rate of pay" after 40 hours of work in one week. The Commissioner has adopted rules requiring overtime pay. Those rules are set out in OAR 839-020-0030, which states that "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 * * *." There is no mention of ORS 653.261, OAR 839-020-0030, or the word "overtime" in the Agency's Order of Determination. The Agency's computation of wages due to the Claimants is contained in Exhibit A attached to the Order of Determination. Exhibit A contains no indication that overtime was a factor in determining the wages due to the Claimants. Because the Agency's Order of Determination lacks a citation to the overtime statute and rule allegedly violated, the Agency's claim for overtime must be denied.

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 was well aware of the hours worked by Claimants, as he kept a written record of their hours as required by law. Instead of paying them the agreed wage rate of $15 per hour, he unilaterally chose to pay them a percentage of the draw, a considerably smaller sum. There was no evidence that Respondent acted other than voluntarily or as a free agent in not paying Claimants their agreed wage rate for the work they performed during the wage claim period. Instead, the evidence shows that Respondent underpaid Claimants based on his perception that Claimants were independent contractors. This misguided perception is not a defense to an award of penalty wages, and the forum finds that Claimants are entitled to penalty wages. *In the Matter of Adesina Adeniji,* 25 BOLI 162, 174 (2004), *appeal pending*.

Claimant Munro voluntarily quit without advance notice, and his wages became due on December 6, 2002, five days after his last day at work and not counting Saturday or Sunday. Claimant Fisler was involuntarily terminated and his wages became due on December 2, 2002, the end of the first business day after his termination. More than 12 days have elapsed since written notice of Claimants' wage claim was sent to and received by Respondent, and more than 30 days have elapsed since Claimants' last workday. Penalty wages are therefore assessed for both Claimants and calculated pursuant to ORS 652.150 (8 hours x $15 per hour x 30 days = $3,600).

RESPONDENT DID NOT FAIL TO MAKE AND KEEP AVAILABLE REQUIRED PAYROLL AND OTHER RECORDS IN VIOLATION OF ORS 653.045 AND OAR 839-020-0080

In its Notice of Intent to Assess Civil Penalties, the Agency sought $24,000 in civil penalties based on Respondent's alleged willful failure to make and keep available required payroll and other records in violation of ORS 653.045 and OAR 839-020-0080. Because the Agency does not specifically allege which of the many subsections of OAR 839-020-0800 was violated, the forum looks to language of ORS 653.045 to determine if one or more violations occurred. *In the Matter of Alphabet House,* 24 BOLI 262, 282 (2003). ORS 653.045(1)(a) and (b) correspond to the Agency's allegation. Those subsections require employers to make and keep a record of:

> "(a) The name, address and occupation of each of the employer's employees;
>
> "(b) The actual hours worked each week and each pay period by each employee."

In this case, it is undisputed that Respondent kept a daily record of the hours worked by Munro and Fisler and totaled those hours each pay period. That same record also lists the names of Claimants Munro and Fisler and states the type of work performed. The fact that Respondent provided the record to Enos shows he kept the record. This evidence satisfies every requirement of ORS 653.045(1)(a) and (b) except for the record of Claimants' addresses. No evidence was presented as to whether Respondent maintained a written record of the addresses of Munro and Fisler. The Agency bears the burden of proof on that issue and did not meet that burden. Accordingly, the forum finds that Respondent did not violate ORS 653.045 and OAR 839-020-0080 as charged.

RESPONDENT DID NOT VIOLATE ORS 653.045(3), OAR 839-020-0012, OR OAR 839-020-0080 BY FAILING TO SUPPLY CLAIMANTS WITH ITEMIZED STATEMENTS OF AMOUNTS AND PURPOSES OF DEDUCTIONS IN THE MANNER PROVIDED IN ORS 652.610

The Agency alleged that Respondent violated ORS 653.045, OAR 839-020-0012, and OAR 839-020-0080 on 12 occasions by failing to provide Claimants "with itemized statements of amounts and purposes of deductions." In order to prevail, the Agency must prove that (1) Respondent made wage payments to Claimants; (2) Respondent made deductions from Claimants' wage payments; and (3) Respondent did not provide the itemized statement required by ORS 652.610 at the time Respondent made the wage payments. *Alphabet House,* at *285.*

The Agency proved that Respondent made wage payments to the Claimants and did not provide an itemized statement of deductions, but presented no evidence to show that Respondent made any deductions from any of the Claimants' paychecks. Since Respondent did not make any deductions, Respondent did not violate ORS 653.045, OAR 839-020-0012, or OAR 839-020-0080 by failing to provide Claimants "with itemized statements of amounts and purposes of deductions."

RESPONDENT FAILED TO PAY OVERTIME FOR ALL HOURS WORKED OVER 40 IN VIOLATION OF ORS 653.261 AND OAR 839-020-0030

In its Notice of Intent, the Agency alleged that Respondent failed "to pay overtime for all hours worked over forty (40) in violation of ORS 653.261 and OAR 839-020-0030." The Agency alleged "8 violations" and sought to assess $8,000 in civil penalties.

Undisputed evidence contained in Respondent's time records established that Claimants collectively worked more than 40 hours in a given workweek during 10 separate weeks. Munro worked overtime in three pay periods, and Fisler worked overtime

in two pay periods. Calculated at $15 per hour, Claimants were paid less than half the wages that they earned,[12] and Respondent substantially underpaid them in each pay period. Given Respondent's "percentage" method of payment, it is impossible to determine the exact weeks for which overtime was not paid. However, based on the substantial underpayment of wages in each pay period in which Claimants worked overtime, the forum concludes that Claimants were not paid overtime wages that they earned.

The Agency did not articulate how it determined Respondent had committed eight separate violations of ORS 653.261, and the forum is at a loss to determine how the Agency arrived at that figure. Without a means of determining the specific number of violations, the forum concludes that Respondent committed two violations of ORS 653.261, one relating to Munro and the other to Fisler.

CIVIL PENALTY

OAR 839-020-1020 sets out six mitigating and aggravating circumstances that may be considered by the commissioner in determining the amount of civil penalty to be assessed.

> "(a) The history of the employer in taking all necessary measures to prevent or correct violations of statutes or rules;
>
> "(b) Prior violations, if any, of statutes or rules;
>
> "(c) The magnitude and seriousness of the violation;
>
> "(d) Whether the employer knew or should have known of the violation;
>
> "(e) The opportunity and degree of difficulty to comply;
>
> "(f) Whether the employers' action or inaction has resulted in the loss of a substantive right of an employee."

It is the employers' responsibility to provide mitigating evidence, and the commissioner must consider all mitigating circumstances presented by the employer. OAR 839-020-1020(2) & (3). There was no evidence presented concerning (a) and (b). The magnitude and seriousness of the violations was moderate, as they impacted two workers. As to (d), Respondent claimed he was not responsible for creating records in 2000 because he was not Claimant's employer. The forum has concluded otherwise and has previously determined that an employers' failure to apprehend the correct application of the law and actions based on that incorrect application are not a defense. *In the Matter of Toni Kuchar*, 23 BOLI 265, 275 (2002). Respondent, as Claimants' immediate supervisor and employer, should have known of the violations, in that employers are presumed to know the laws they are required to follow. *In the Matter of John Mathioudakis,* 12 BOLI 11, 20-21 (1993). Complying with the law

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[12] *See* Ultimate Findings of Fact 6 and 11, *supra.*

would have been a simple matter of calculating the overtime pay due to Claimants based on the records Respondent kept and paying them their overtime wages. Finally, Respondent's failure to pay overtime to the Claimants resulted in a substantive loss to Claimants of payment of overtime wages for 89 hours of work. There are no mitigating factors. Considering all the aggravating circumstances, the forum assesses a civil penalty of $1,000 for each violation, for a total of $2,000.

ORDER

NOW, THEREFORE, as authorized by ORS 652.140(1) and (2), and as payment of the unpaid wages and penalty wages, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondent Gary Lee Lucas** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Mike Munro in the amount of NINE THOUSAND SEVEN HUNDRED NINETY-FOUR DOLLARS AND SIXTY-FIVE CENTS ($9,794.65), less appropriate lawful deductions, representing $6,194.65 in gross earned, unpaid, due, and payable wages and $3,600 in penalty wages, plus interest at the legal rate on the sum of $6,194.65 from January 1, 2003, until paid, and interest at the legal rate on the sum of $3,600 from February 1, 2003, until paid.

(2) A certified check payable to the Bureau of Labor and Industries in trust for Mark Fisler in the amount of EIGHT THOUSAND ONE HUNDRED FIFTY-SEVEN DOLLARS AND EIGHTY-FOUR CENTS ($8,157.84), less appropriate lawful deductions, representing $4,557.84 in gross earned, unpaid, due, and payable wages and $3,600 in penalty wages, plus interest at the legal rate on the sum of $$4,557.84 from January 1, 2003, until paid, and interest at the legal rate on the sum of $3,600 from February 1, 2003, until paid.

NOW, THEREFORE, as authorized by ORS 653.256, and as payment of the civil penalties assessed as a result of his violations of ORS 653.261, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondent Gary Lee Lucas** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in the amount of TWO THOUSAND DOLLARS ($2,000), 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 Respon-

dent **Gary Lee Lucas** complies with the Final Order.

In the Matter of

MERMAC, INC.

Case No. 26-05

Final Order of Commissioner Dan Gardner

Issued April 28, 2005

SYNOPSIS

Where Respondent corporation acquired a restaurant business from its president's friend, Ali Aazad, who had employed Claimant and would not or could not pay wages earned and owed to Claimant, and where Respondent continued the same business with the same employees, including Claimant, without any interruption or change of operations, the forum determined that Respondent was liable for Claimant's wages in the amount of $1,728.67 as a successor employer. ORS 652.310(1); ORS 652.140.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 8, 2005, in the W. W. Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Cynthia L. Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Cortney Barber ("Claimant") was present throughout the hearing and was not represented by counsel. Mohammad Sharifi-Tehrani, Respondent Mermac, Inc.'s corporate president, appeared as Respondent's authorized representative.

The Agency called as witnesses: Katy Bayless, BOLI Wage and Hour compliance specialist; Eric Hartman, Claimant's friend; and Claimant.

Respondent called its corporate president and authorized representative, Mohammad Sharifi-Tehrani, as its only witness.

The forum received as evidence:

a) Administrative exhibits X-1 through X-13; and

b) Agency exhibits A-1 through A-29 (filed with the Agency's case summary).

Having fully considered the entire record in this matter, I, Dan Gardner, 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 5, 2004, Claimant filed a wage claim form stating that Ali Azad had employed her during the wage claim period of November 15, 2002, to May 22, 2003, and failed to pay her all wages that were due at the time he sold his business. She further stated that the business continued under new ownership and that she was still owed wages for the wage claim period when she quit her employment on June 9, 2003.

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 her employer.

3) On May 20, 2004, the Agency issued an Order of Determination numbered 03-3747. In the Order of Determination, the Agency alleged Mohammad Sharifi-Tehrani ("Sharifi") and Respondent had employed Claimant during the period November 15, 2002, through May 22, 2003, failed to pay Claimant for all hours worked in that period, and were liable to Claimant for $1,692.52 in unpaid wages, plus interest. The Agency also alleged Sharifi and Respondent's failure to pay all of Claimant's wages when due was willful and both were liable to Claimant for $1,656 as penalty wages, plus interest. The Order of Determination gave Sharifi and 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. Sharifi and Respondent timely filed answers and a request for hearing. Both alleged that they acquired the business on May 23, 2003, did not employ Claimant during the wage claim period, and were not responsible for Claimant's unpaid wages.

4) On November 10, 2004, the Agency requested a hearing. On November 16, 2004, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:30 a.m. on February 8, 2005. With the Notice of Hearing, the forum included copies of the Order of Determination, "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES," and the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

5) On November 17, 2004, the ALJ issued a notice of administrative rule amendments that included a complete copy of the amended contested case hearing rules and a revised copy of the "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES." Due to an error in the mailing address, the documents were mailed a second time to Respondent Mermac, Inc., at the correct address, on November 29, 2004.

6) On November 29, 2004, the ALJ ordered the Agency and Respondents each to submit a case summary 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 wage and penalty calculations (for the Agency only). The ALJ ordered the participants to submit their case summaries by January 28, 2005, and notified them of the possible sanctions for failure to comply with the case summary order. Additionally, the ALJ provided Respondents with a Case Summary Form designed to assist authorized representatives and unrepresented respondents with filing a case summary.

7) On December 1, 2004, the Agency moved to extend the due date for case summaries to February 1, 2005. Respondents raised no objections to the Agency's motion within the time allowed and, by interim order dated December 15, 2004, the ALJ granted the Agency's motion.

8) The Agency timely filed a case summary. Respondents did not file a case summary.

9) On January 28, 2005, the Agency moved to amend the Order of Determination to remove Sharifi as an individual respondent because "the business is an active Oregon corporation and there is no legal basis that the Agency is currently aware of under which [Sharifi] would be individually liable." The Agency further moved to delete its request for penalty wages based on its position that the corporate respondent is a successor in interest to a previous employer and "it is the Agency's policy not to pursue penalty wages in such circumstances." Respondents did not file a response to the motion by the due date set forth in the ALJ's interim order dated January 28, 2005, and the ALJ granted the Agency's motion at the start of hearing on February 8, 2005.

10) On February 2, 2005, the Agency filed a second motion to amend the Order of Determination to increase the amount sought in back wages to $1,728.67, based on the Agency case presenter's determination that an error made in the original calculations warranted a correction to the amount sought. The Agency attached the "recalculations" to its motion as "Exhibit A." Respondents did not respond to the Agency's motion within the requisite time period and, at the start of hearing on February 8, 2005, the ALJ granted the Agency's motion to amend and deemed the amended allegation denied for hearing purposes.

11) On February 2, 2005, the Agency filed an addendum to its case summary.

12) On February 7, 2005, the ALJ contacted the participants to schedule a brief prehearing conference on the same date to discuss the Agency's motions. Respondent's authorized representative stated he was unavailable for a prehearing conference, but requested that the ALJ permit him to bring an "assistant" to the hearing because he was not familiar with "legal matters" and needed guidance. After establishing that the proposed assistant was not a member of the Oregon State Bar in accordance

with the contested case hearing rules, the ALJ denied Respondent's request.

13) At the start of hearing, the ALJ disclosed Respondent's authorized representative's ex parte request to appear with an "assistant" and affirmed her denial of that request, noting that Respondent had ample opportunity to retain legal counsel but, instead, chose to authorize a corporate officer to appear on its behalf.

14) 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.

15) During the hearing, the Agency case presenter offered a revised back wage calculation document referred to as "Exhibit A-29," which was admitted without objection. During a brief recess, the ALJ discovered that her copy of the exhibit was incorrectly marked as "Exhibit A-A" and directed the case presenter to properly mark the document as "Exhibit A-29."[1] On the record, the ALJ advised Respondent's authorized representative of the correction and affirmed that the correctly marked exhibit was admitted as "Exhibit A-29." Respondent made no objection to the correction or to the admission of the exhibit.

16) On February 16, 2005, 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. The Agency did not file exceptions. Respondent timely filed exceptions, which are addressed in the opinion section of this final order.

FINDINGS OF FACT – THE MERITS

1) At times material herein, Respondent Mermac, Inc. was an Oregon corporation engaged in the restaurant business and operating under the assumed business name of Hawthorne Street Café.

2) At times material herein, Mohammad Sharifi-Tehrani ("Sharifi") was Respondent's president.

3) Claimant began working at the Hawthorne Street Café, a Portland restaurant, on August 1, 2002. At that time, Ali Aazad owned the restaurant and employed nine workers, including Claimant. Aazad had previously conducted business as president of Nadia, Inc., an Oregon corporation that was involuntarily dissolved in June 1999. During Claimant's employment, Aazad continued to use the name Nadia, Inc. on the paychecks he issued through a payroll service named PayChex.

4) Aazad hired Claimant as a "server." Her duties included opening and closing the restau-

[1] The ALJ's case summary order directed the Agency to mark its exhibits as "A-1, A-2, etc." and Respondent to mark its exhibits as "R-1, R-2, etc." (Exhibit X-6)

rant, performing "prep" work, bussing tables, and serving food to customers.

5) Claimant earned $6.50 per hour, plus tips, until the minimum wage law changed January 1, 2003. Her hourly rate at that time increased to $6.90 per hour.

6) The restaurant opened at 7:30 a.m. and closed around 2:30 or 3 p.m. Claimant worked at the restaurant Friday through Monday, from approximately 7:30 a.m. until 2:30 or 3 p.m. On some days, she worked from 11 a.m. until the restaurant closed.

7) In or around mid-November 2002, Aazad stopped paying Claimant regularly. Although she was paid for her work in December, Claimant's paychecks regularly bounced after January 2003 because Aazad's account lacked sufficient funds to cover them. When Claimant repeatedly asked for her unpaid wages, Aazad assured her she would be paid the wages she was owed, along with the other employees who were not being paid during that time.

8) Sharifi, Respondent's corporate president, was Aazad's friend and when he heard Aazad was selling the café, he researched its history and determined that its longtime reputation as a high quality and popular restaurant was a good investment for Respondent. On or about May 23, 2003, the café's ownership shifted to Respondent. Sharifi "shadowed" Aazad during the month preceding Respondent's takeover and was told by several employees, including Claimant, that Aazad had not paid their wages and owed them for the work they had performed during the preceding months. Sharifi felt "compassion" for the employees, and, although he retained all of Aazad's employees after the takeover, he did not believe that Respondent had an obligation to compensate them for their unpaid wages. Sharifi paid one employee her unpaid wages totaling $80 out of his own pocket after she pleaded with him for money to put food on the table for her children. He did not compensate any other employees for the wages Aazad failed to pay.

9) In addition to retaining all of Aazad's employees, Respondent kept the café's same name and location because it had garnered a positive reputation in the community over the years and was a local landmark. Respondent did not change the menu or the basic décor and retained all of the preexisting kitchen equipment and dining room furniture and hardware.[2] The café did not close for any period after Respondent took over ownership. Sharifi believed that under good fiscal management the café could be profitable and as of the hearing date he believed the business was an

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[2] The forum also notes that although there was no testimony on the issue, Sharifi stated in the "Employer Response" to the wage claim that Respondent continued to use the same payroll service, "PayChex," as its predecessor. *See* Exhibit A-8.

"excellent, fine-tuned operation," stating: "I am famous now."

10) After the café's ownership transferred to Respondent, Claimant prepared a personal calendar of her previous work hours using the information retained on the café's business computer. Not all of the hours she worked for Aazad were still on the computer and she estimated some of the hours based on her "fairly consistent schedule."

11) On February 5, 2004, Claimant filed a wage claim against Aazad and prepared a calendar for the BOLI Wage and Hour Division using the information recorded on her personal calendar.

12) Claimant's records show that between November 15 and December 31, 2002, she worked 110.5 hours at minimum wage ($6.50 per hour) earning a total of $718.25. Aazad paid Claimant $549.25 of the amount owed, leaving a balance due of $169.

13) On January 1, 2003, the minimum wage rate increased to $6.90 per hour.

14) Claimant's records show that between January 1 and May 23, 2003, she worked 326.6 hours at the minimum wage rate, earning a total of $2,253.54. Aazad paid Claimant $693.87 of the amount owed, leaving a balance due of $1,559.67.

15) Between November 15, 2002, and May 23, 2003, Claimant worked 437.1 hours. She earned a total of $2,971.79 but was paid only $1,243.12 for those hours as of the hearing date. Aazad had not paid Claimant for all of the hours she worked at the time he transferred the café's ownership to Respondent, leaving an amount due and owing of $1,728.67.

16) Claimant's last work day for Respondent was June 9, 2003. Between May 23 and June 9, 2003, Claimant was paid for all of the work she performed for Respondent. At the time she left her employment on June 9, until the hearing date, Claimant had not been paid for all of the hours she worked for Aazad.

17) When BOLI's Wage and Hour Division pursued Respondent as a successor to Ali Aazad's restaurant business, Respondent provided information to BOLI that included paperwork showing it purchased the business from Aazad effective May 23, 2003, along with information regarding Aazad's whereabouts. BOLI attempted to collect Claimant's unpaid wages through Aazad to no avail. Although Aazad agreed to enter into a stipulated agreement to pay the wages, he later left the state and BOLI was unable to collect any of Claimant's wages from Aazad.

18) Claimant's demeanor was sincere and her testimony was straightforward and responsive. She had a clear recollection of pertinent facts and did not embellish her testimony in any way. Her testimony that she estimated some of her hours based on her "fairly consistent schedule" was reasonable and entirely believ-

able. The forum credits Claimant's testimony in its entirety.

19) Sharifi's testimony was believable. He did not dispute the key facts, but rather expressed a strong interest in justice being served. His strident belief that Respondent should not be held liable for "someone else's responsibility" was tempered by his understanding and concern for Claimant's plight. The forum credited his testimony in its entirety.

20) All of the other witnesses testified credibly.

ULTIMATE FINDINGS OF FACT

1) At times material herein before May 23, 2003, Ali Aazad was a person doing business as the Hawthorne Street Café in Portland, Oregon, and employed one or more persons in the operation of that business.

2) At times material herein, Respondent was and is an Oregon corporation. From May 23, 2003, to the present, Respondent has been engaged in the restaurant business, operating under the assumed business name of Hawthorne Street Café, and has continuously employed one or more persons in Oregon.

3) From August 1, 2002, until May 23, 2003, Claimant was Ali Aazad's employee.

4) On May 23, 2003, Respondent acquired the business known as the Hawthorne Street Café from Aazad and, up to and through the date of hearing, continued to operate the business, without interruption, under the same name, at the same location, using the same employees, including Claimant, the same restaurant equipment and furniture, and providing the same services as Aazad.

5) From November 15, 2002, to May 23, 2003, Claimant worked 437.1 hours, earning total wages of $2,971.79 for these hours and, to date, has been paid only $1,243.12, leaving unpaid wages of $1,728.67.

6) Respondent is a "successor" within the meaning of ORS 652.310(1), and therefore is subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

7) As a successor employer, Respondent is liable for Ali Aazad's failure to pay Claimant all wages earned and unpaid immediately upon her termination from employment. ORS 652.140(1).

CONCLUSIONS OF LAW

1) At 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 actions, inaction, statements, and motivations of Mohammad Sharifi-Tehrani, Respondent's president, are properly imputed to Respondent.

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

4) Respondent continued to conduct essentially the same business as its predecessor, Ali Aazad, and is a successor employer under ORS 652.310(1) and liable for Aazad's failure to pay Claimant all wages earned and unpaid after Respondent assumed ownership of the business and at the time Claimant's employment terminated. 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 Respondent to pay Claimant her earned, unpaid, due and payable wages, plus interest on that sum until paid. ORS 652.332.

OPINION

The primary issue in this case is whether Respondent was a successor to Claimant's previous employer, Ali Aazad, and thus liable for Claimant's unpaid wages.

ORS 652.310(1), in pertinent part, defines "Employer" as:

> "any person who, in this state, directly or through an agent, engages the personal services of one or more employees and includes any successor to the business of any employer * * * so far as such employer has not paid employees in full."

This forum has long held that the test to determine whether an employer is a successor is whether it conducts essentially the same business as conducted by the predecessor. The elements to consider include: the name or identity of the business; its location; the lapse of time between the previous operation and the new operation; whether the same or substantially the same work force is employed; whether the same product is manufactured or the same service is offered; and, whether the same machinery, equipment, or methods of production are used. Not every element needs to be present to find a successor employer. The forum considers all of the facts together to reach a decision. *In the Matter of Fjord, Inc.*, 21 BOLI 260, 286 (2001), *citing In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 256 (1999). *See also In the Matter of Tire Liquidators*, 10 BOLI 84, 93 (1991).

In this case, credible evidence shows and Respondent does not dispute that Respondent's acquisition of its predecessor's business, the Hawthorne Street Café, did not result in a name change, location change, or a change in type of services offered by the business. Moreover, the café continued to operate without interruption after Respondent acquired the business on May 23, 2003, using the same employees, the same menu, and the same restaurant equipment and furniture its predecessor, Aazad, used to conduct business. Respondent did not dispute that Sharifi, Respondent's president, was Aazad's friend and readily acknowledged that it took over the failing business to restore the landmark café to its former status. Other than alluding to some minor changes in

décor and Sharifi's desire to better manage the café, Respondent offered no evidence that remotely suggested any notable change in the business operation. Based on the facts as a whole, the forum concludes, as a matter of law, that Respondent was a successor employer to Ali Aazad and is liable for Claimant's unpaid wages.

Respondent argues that its predecessor bears sole responsibility for Claimant's wages and that to impose liability on Respondent, who did not employ Claimant during the wage claim period, is manifestly unjust. However, the foremost purpose for the application of the successor doctrine in the wage claim context is the protection of employees. *In the Matter of Gerald Brown*, 14 BOLI 154, 167 (1995). The forum in *Brown* explained it this way:

> "The buyer and seller, lessor and lessee, etc., of a business can protect their respective interests when negotiating a sale agreement, lease, or other business arrangement, by an indemnification clause in the acquisition agreement or by a lower purchase price. The employees are not parties to these negotiations and are in the least advantageous position to protect themselves when a change occurs in the employer's business. In importing and codifying the successor doctrine into the definition of 'employer' in ORS 652.310, the legislature has made a determination that the objectives of the wage collection laws require that the prerogative of owners independently to rearrange their businesses, and even eliminate themselves as employers, be balanced by some protection to the employees from a sudden change in the employment relationship. The ultimate issue is one of balancing the interests of the bona fide successor, the affected employee(s), and the public. By its adoption of the successor doctrine, the legislature has introduced into the balancing process an emphasis upon protection for victimized employees. In the balancing process attendant to the application of the successor doctrine, the legislative goal of protection of employees is subverted by leaving the employee without a remedy or with an incomplete remedy." (citation omitted)

Id. at 167.

Here, Respondent acquired the Hawthorne Street Café with full knowledge of the wages owed to Claimant and other employees and continued the business without any interruption or change in operations. Moreover, Respondent revealed that as of the hearing date it was still in possession of the café's property and business assets and has continued to operate the business, which is apparently thriving under Respondent's management. In contrast, credible evidence shows Respondent's predecessor is not available and has no apparent

ability to pay any part of the wage obligation he incurred. The forum finds that, under all the circumstances present in this case, the burden of imposing liability for Claimant's wages on Respondent is slight when compared to the overriding legislative purpose of protecting Claimant from nonpayment of the wages she earned while employed by Respondent's predecessor. Consequently, the forum concludes that this is an appropriate case to impose full liability upon Respondent for wages owed to Claimant.

In this case, the Agency provided credible evidence of Claimant's work hours and Respondent did not contradict that evidence. The forum, therefore, has accepted Claimant's credible statement and the record she prepared of the number of hours she worked and concludes that, as a successor employer, Respondent is liable to Claimant for unpaid wages in the amount of $1,728.67.

RESPONDENT'S EXCEPTIONS

Respondent objects to three factual findings in the order,[3] stating that they are "incorrect" or "erroneous." Based on the whole record herein, the forum concludes that the findings are supported by a preponderance of the evidence and Respondent's exceptions on those grounds are DENIED.

Additionally, Respondent asserts that its authorized representative is "Iranian by birth and English is not [his] first language," and that its case was damaged because the ALJ did not allow "an assistant present to aid [Respondent's authorized representative] with the proceedings." The forum notes that Respondent did not request an interpreter in accordance with the contested case hearing rules which state that "[a] participant wishing to obtain the services of an interpreter * * * must notify the administrative law judge no later than 20 days before the hearing." OAR 839-050-0300(1) Moreover, the record shows that Respondent's authorized representative made no assertion at any time prior to or during the hearing or otherwise demonstrate that he was "unable to speak or understand the English language." *Id.* Consequently, Respondent's exception is DENIED.

Finally, Respondent asserts that: "the ALJ and the Case Presenter met without me being present and changed the exhibit numbers on several previously presented exhibits." There is no evidence that supports that contention. Instead, the record shows the ALJ received an exhibit that was not marked pursuant to instructions in the case summary order. During a break in the proceeding, the ALJ asked the Agency case presenter to mark copies of the exhibit with the correct exhibit number to avoid later confusion. Immediately following the break, the ALJ's request and

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[3] *See* Findings of Fact – Procedural 13 and Findings of Fact – The Merits 8.

the corrected exhibit number was made part of the record and Respondent did not at any time object to the correction or the exhibit. Respondent's exception is DENIED.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, **Mermac, Inc.** 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 Cortney Barber, in the amount of ONE THOUSAND SEVEN HUNDRED TWENTY EIGHT DOLLARS AND SIXTY SEVEN CENTS ($1,728.67), representing gross earned, unpaid, due and payable wages, less appropriate lawful deductions, plus interest at the legal rate on that sum from June 1, 2003, until paid.

In the Matter of

JAMIE SUE SZIISZ dba Jamie Sziisz Salon Studio & Spa,

Case No. 41-05

Final Order of Commissioner Dan Gardner

Issued May 17, 2005

SYNOPSIS

Respondent owed $452.44 in unpaid wages to two wage claimants when it ceased doing business. BOLI determined that the wage claimants were entitled to receive payment from the Wage Security Fund and paid the claimants in full. The commissioner found Respondent liable to reimburse the Wage Security Fund for the $452.44 in wages paid out, plus a 25 percent penalty of $113.11. ORS 652.140, 652.310, 652.332, 652.414

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 5, 2005, at the Bureau's Salem office lo-

cated at 3865 Wolverine NE, E-1, Salem, Oregon. The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Cynthia L. Domas, case presenter and an employee of the Agency. Tonya McCammon ("Claimant McCammon") and Susan McDonald ("Claimant McDonald") were present throughout the hearing and not represented by counsel. Respondent did not appear at the hearing and was held in default.

The Agency called Claimants McCammon and McDonald and Wage & Hour Division Compliance Specialist Katy Bayless as witnesses.

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-24 (submitted or generated prior to hearing).

Having fully considered the entire record in this matter, I, Dan Gardner, 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, 2003, Claimant McDonald filed a wage claim with the Agency alleging that Respondent had employed her and deducted money from her paycheck to pay insurance premiums, then never paid the premiums.

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

3) On May 29, 2004, McDonald signed a "Wage Security Fund Assignment of Wages" in which she assigned to the Commissioner of the Bureau of Labor and Industries all wages due from Respondent.

4) On December 26, 2003, Claimant McCammon filed a wage claim with the Agency alleging that Respondent had employed her and failed to pay wages earned and due to her.

5) At the time she filed her wage claim, McCammon assigned to the Commissioner of the Bureau of Labor and Industries, in trust for McCammon, all wages due from Respondent.

6) On May 24, 2004, McCammon signed a "Wage Security Fund Assignment of Wages" in which she assigned to the Commissioner of the Bureau of Labor and Industries all wages due from Respondent.

7) On June 17, 2004, the Agency issued Order of Determination No. 04-2359 in which it alleged the following:

(a) Claimants McCammon and McDonald performed work, labor and services for Respondent and were paid all sums due and owing except

the sum of $452.44, representing $358.80 in earned and unpaid wages to Claimant McCammon and $93.64 in money deducted from Claimant McDonald's check to pay a medical insurance premium that was not paid. The Agency determined these sums were due and owing to them, along with interest at the legal rate per annum from December 1, 2003, until paid;

(b) Pursuant to ORS 652.414, the Agency determined that the wage claimants were entitled to receive payment from the Wage Security Fund ("WSF") in the sum of $452.44.

(c) The wage claimants received payment in the amount of $452.44 from the WSF;

(d) The Commissioner of the Bureau of Labor and Industries is entitled by ORS 652.414(2) to recover from the employer the amount paid from the WSF, together with a penalty of 25 percent of the sum paid from the Fund, which amount is $113.11, along with interest at the legal rate per annum;

(e) Respondent willfully failed to pay the due and owing wages and Claimants are entitled to $3,312 in penalty wages, along with interest at the legal rate per annum.

8) On August 11, 2004, Respondent filed an answer and request for hearing in which she alleged, in an unsworn statement, that Claimant McDonald's insurance premium had been paid and that Claimant McCammon had been paid fully for the time that she worked.

9) On January 31, 2005, the Agency filed a "BOLI Request for Hearing" with the forum.

10) On February 1, 2005, the Hearings Unit issued a Notice of Hearing to Respondent and the Agency stating the time and place of the hearing as April 5, 2005, at 9:30 a.m., at BOLI's Salem office located at 3865 Wolverine St. NE, Bldg. E-1, Salem, 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, a Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

11) On March 22, 2005, the Agency filed a motion to amend the Order of Determination to withdraw its request for penalty wages. Respondent did not object and the ALJ orally granted this motion at hearing.

12) Respondent did not make an appearance at the hearing. The ALJ waited until 10 a.m. to commence the hearing, then declared Respondent in default and commenced the hearing.

13) On April 19, 2005, 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) In 2003, Respondent was a person who operated a hair salon and spa and engaged the personal services of one or more persons in Salem, Oregon.

2) Respondent hired both Claimants in 1998. During their employment, McCammon cut hair and performed permanent cosmetics and McDonald cut and colored hair and performed manicures and pedicures. Respondent and Claimants agreed that Claimants's wage would consist of a 45 percent commission of their gross sales.

3) Claimants were Respondent's employees in 2003.

4) Claimant McCammon quit Respondent's employment on November 13, 2003. Before she quit, she worked the following hours in November:

November 3: 12 hours

November 5: 7 hours

November 6: 7 hours

November 10: 12 hours

November 12: 7 hours

November 13: 7 hours

Calculated at $6.90 per hour,[1] McCammon earned $358.80 in gross wages in November 2003 (52 hours x $6.90).

5) Respondent has not paid McCammon for any of the hours she worked in November 2003.

6) Respondent issued paycheck number 3781 to McDonald on October 15, 2003. Respondent took a deduction of $93.64 from that check to pay McDonald's medical insurance premium covering the period October 16-31, 2003. Respondent did not pay McDonald's medical insurance premium and her insurance coverage ended on October 14, 2003. Respondent has not repaid that sum to McDonald.

7) Claimant McDonald quit Respondent's employment on October 18, 2003. (Testimony of McDonald)

8) The investigation of the wage claims filed by Claimants was assigned to Wage & Hour Compliance Specialist Katy Bayless. She investigated the claims by reviewing the documentation submitted by Claimants, which included their wage claims and calendars of hours worked, and interviewing Respondent. At the conclusion of her investigation, she made a determination that Claimants had valid wage claims.

9) Bayless also determined that Respondent's business no

[1] Although McCammon was paid a 45 percent commission as an agreed rate, the Order of Determination calculated her unpaid wages based on the statutory minimum wage of $6.90 per hour.

longer existed as of January 1, 2004, and that Respondent lacked sufficient assets to pay the wage claims.

10) On June 14, 2004, BOLI caused the WSF to issue checks in the amount of $331.35 to Claimant McCammon and $86.47 to Claimant McDonald, representing net wages. Claimants were actually paid gross wages of $452.44, but BOLI caused the WSF to take statutory deductions from the gross wages before issuing checks to Claimants.

11) Twenty-five percent of $452.44 is $113.11.

12) Bayless, McCammon, and McDonald were credible witnesses.

ULTIMATE FINDINGS OF FACT

1) In 2003, Respondent directly engaged the personal services of one or more employees in Oregon. During that time, Claimant McCammon and Claimant McDonald rendered personal services to Respondent in Oregon.

2) In November 2003, Claimant McCammon earned $358.80 in wages that Respondent has not paid to her.

3) In October 2003, Respondent deducted $93.64 from Claimant McDonald's paycheck to pay McDonald's medical insurance premium covering the period October 16-31, 2003. Respondent did not pay McDonald's medical insurance premium and has not repaid that sum to McDonald.

4) Claimants filed wage claims with BOLI. BOLI determined that the wage claims were valid, that Respondent's business no longer existed, and that Respondent lacked sufficient assets to pay the wage claims. Subsequently, the commissioner caused the $442.44 claimed by Claimants to be paid to them from the WSF.

5) Twenty-five percent of $452.44 is $113.11.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer subject to the provisions of ORS 653.010 to 653.025 and 652.110 to 652.414 and Claimants McCammon and McDonald were Respondent's employees.

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

3) Respondent violated ORS 652.140(2) by failing to pay both Claimants all wages earned and unpaid not later than five days, excluding Saturdays, Sundays and holidays, after termination of their employment.

4) 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 may recover from Respondent the $452.44 paid to Claimants McCammon and McDonald from the Wage Security Fund and sought in the Order of Determination, along with a 25

percent penalty of $113.11 assessed on that sum, plus interest until paid. ORS 652.332, ORS 652.414(2).

OPINION

In cases involving payouts from the WSF, where (1) there is credible evidence that a determination on the validity of the claim was made; (2) there is credible evidence as to the means by which that determination was made; and (3) BOLI has paid out money from the WSF and seeks to recover that money, a rebuttable presumption exists that the Agency's determination is valid for the sums actually paid out. *In the Matter of Catalogfinder, Inc.,* 18 BOLI 242, 260 (1999). The first and second elements of this test are satisfied by Bayless's credible testimony concerning her investigation and eventual determination, credible testimony by both Claimants, and Agency exhibits showing the documents Bayless gathered in her investigation. Bayless's testimony that BOLI paid Claimant $452.44 from the WSF, coupled with the Order of Determination itself, satisfies the third element. Consequently, Respondent is liable to repay the WSF the sum of $452.44, the amount actually paid out, plus a 25 percent penalty on that sum, or $113.11, for a total of $565.55, plus interest.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and ORS 652.414 and as payment of the unpaid wages and penalty assessed as a result of Respondent's violations of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders **Jamie Sue Sziisz** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

> A certified check payable to the Bureau of Labor and Industries in the amount of FIVE HUNDRED SIXTY FIVE DOLLARS and FIFTY FIVE CENTS ($565.55), representing $452.44 paid out of the Wage Security Fund to wage claimants Tonya McCammon and Susan McDonald and $113.11 as a 25 percent penalty on the sum of $452.44, plus interest at the legal rate on the sum of $565.55 from June 14, 2004, until paid.

In the Matter of

GORDY'S TRUCK STOP, LLC,

Case No. 92-03

Final Order of Commissioner Dan Gardner

Issued June 7, 2005

SYNOPSIS

Complainant took family leave to spend as much time as possible with her dying father. While on family leave, her supervisor repeatedly visited and called her and pressured her to return to work. Finally, her supervisor threatened to fire her if she did not return to work, forcing Complainant to interrupt her family leave entitlement and return to work for one day shortly before her father's death. The forum found that Respondent, acting through its supervisor, constructively denied family leave to Complainant from the first time her supervisor pressured her to return to work and actually denied her family leave by forcing her to return to work for one day during her period of family leave entitlement, in violation of ORS 659A.183. The forum also found that Respondent's act of forcing Complainant to return to work for one day before her entitlement to family leave had expired also constituted retaliation in violation of ORS 659A.183 and *former* OAR 839-009-0320(2). The forum awarded Complainant $30,000 in damages for emotional distress and mental suffering. ORS 659A.001(12); ORS 659A.150(1), (2), (4), & (6); ORS 659A.153; ORS 659A.156; ORS 659A.159(1)(b); ORS 659A.162; ORS 659A.183; *former* OAR 839-009-0320(2).

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 1, 2005, at the office of the Oregon Employment Department located in Bend, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Patrick Plaza, an employee of the Agency. Penny Howell ("Complainant") was present throughout the hearing and was not represented by counsel. Jennifer Wells, attorney at law, represented Respondent. Gordon Wanek, Respondent's owner, was present throughout the hearing.

The Agency called the following witnesses: Complainant; Job Valverde, Civil Rights Division senior investigator (telephonic);

Marlene Edwards, Complainant's former supervisor (telephonic); Bernice Webster and Barbara Tinbush, Complainant's aunts (telephonic); Kathryn Sanders (telephonic) and Carolynn Eaton-Wallace, Complainant's former co-workers; and Sue Tinbush, Complainant's mother.

Respondent called Gordon Wanek and Marlene Edwards (telephonic) as witnesses.

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-12 (submitted prior to hearing);

c) Respondent exhibits R-1 and R-3 through R-5 (submitted prior to hearing).

Having fully considered the entire record in this matter, the Administrative Law Judge hereby makes 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 June 21, 2002, Complainant filed a verified complaint with the Agency's Civil Rights Division alleging that she was the victim of the unlawful employment practices of Respondent. After investigation, the Agency issued a Notice of Substantial Evidence Determination on May 6, 2003, finding substantial evidence supporting the allegations of the complaint.

2) On November 19, 2004, the Agency issued Formal Charges alleging that Respondent discriminated against Complainant by denying her family leave and harassing and retaliating against her because she used OFLA, in violation of *former* ORS 659.492, *current* ORS 659A.183, and *former* and *current* OAR 839-009-0320. The Agency sought damages for "mental, emotional and physical suffering, including precious time lost with a dying parent that can never be recaptured, in the amount of $30,000." Complainant alleged in her verified complaint that Respondent terminated her in retaliation for using family leave, but the Agency did not include this allegation in its Formal Charges.

3) On November 19, 2004, the forum served the Formal Charges on Respondent, accompanied by the following: a) a Notice of Hearing setting forth March 1, 2005, in Eugene, 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.

4) On December 6, 2004, Respondent, through counsel, filed an answer and request for hearing.

5) At the commencement of hearing, the ALJ 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.

6) On April 29, 2005, 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. Respondent filed exceptions on May 6, 2005. Those exceptions are discussed in the Opinion section of this Final Order. Finding of Fact 5 – The Merits has also been modified in response to Respondent's exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material, Respondent Gordy's Truck Stop, LLC, was a limited liability company doing business in LaPine, Oregon, and employed 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in 2001 or 2002.

2) Gordon Wanek was Respondent's owner and a member of the LLC at all times material herein.

3) Respondent was open for business 24 hours a day, seven days a week, throughout Complainant's employment with Respondent.

4) Complainant was initially employed by Respondent on March 18, 2001, as a dishwasher at the rate of $7 per hour. She was subsequently promoted to prep cook and continued to wash dishes as needed. She worked from 3 p.m. to 11 p.m. throughout her employment with Respondent.

5) Marlene Edwards was Respondent's kitchen manager and Complainant's immediate supervisor from September 2001 until Complainant's discharge in March 2002. Edwards was in charge of all kitchen shifts. She supervised as many as 12 people, was in charge of scheduling work shifts for kitchen staff, recommended pay raises for kitchen staff, and had the authority to fire employees. She usually worked six days a week, from 3 p.m. to 11 p.m. She also covered shifts for kitchen staff who didn't show up for work and visited Gordy's from time to time when she was not scheduled to work to make sure there were no problems.

6) Complainant had worked with Edwards about 10 years earlier at the LaPine Inn, but was not a personal friend of Edwards.

7) Complainant was continuously employed by Respondent between March 18, 2001, and February 3, 2002, and worked an average of 25 or more hours per week during the 180 days immediately preceding February 3, 2002.

8) Complainant and her parents, Ron and Sue Tinbush, lived in two separate residences about three miles apart in LaPine, Oregon during Complainant's employment with Respondent.

They had a close relationship and Complainant visited her parents daily and telephoned them almost every day.

9) On or about November 26, 2001, Complainant's father, Ron Tinbush, learned that he had lung and throat cancer and had only had six months to live. After sharing this information with his family, Ron Tinbush decided to remain living at home ("the Tinbush house") until his death.

10) During Complainant's employment with Respondent, Respondent had a written personnel policy, a copy of which was given to Complainant, which included the following language:

> "FAMILY AND MEDICAL LEAVE
>
> "Gordy's will provide leaves of absence to eligible employees in accordance with federal and state laws. * * *
>
> "In general, eligible employees are entitled to a total of twelve (12) workweeks of leave during any twelve month period for one of [sic] more of the following:
>
> "* * * * *
>
> "To care for a child, spouse, or parent who has a serious health condition."

11) In early February 2002, Complainant told Edwards that her father had cancer, with only six months to live as of November 2001, and that she needed to take family leave to care for him. Complainant was aware of Respondent's family and medical leave policy at that time. Complainant requested leave until her father died or 12 weeks had passed, whichever came first. At the same time, Complainant gave Edwards a handwritten request containing the same information as her oral request. Edwards approved Complainant's leave request, and Complainant started her family leave on February 3, 2002. Complainant had not previously taken any family leave since starting work for Respondent.

12) Edwards orally told Respondent's main office personnel that Complainant's father was very ill and Complainant was going to be off on family leave.

13) Complainant is a single mother with two daughters. After Complainant commenced her family leave, each weekday she took one daughter to kindergarten, then went to the Tinbush house with her preschool daughter. She stayed at the Tinbush house until school was out, then picked up her daughter and returned to the Tinbush house, where she stayed until 8 or 9 p.m.

14) Edwards called Complainant at the Tinbush house an average of once a week during Complainant's family leave. Each time she called, she asked Complainant when she was going to return to work. The first call was during Complainant's first week of family leave. Edwards's calls made Complainant feel pressured to return to work.

15) On one occasion when Edwards called the Tinbush house, she asked Complainant when she would come back to work, stated that her father could linger on forever, and told Complainant she needed to come back to work. Edwards added that Complainant would lose her job if she didn't come back to work. Edwards did not specify a deadline for Complainant to return to work in that call.

16) At the time of Complainant's family leave, the Tinbushes did not consider Edwards to be a family friend.

17) Edwards, a Jehovah's Witness, visited the Tinbush house twice prior to February 3, 2002, both visits occurring sometime in the 1990s. The purpose of her visit on both occasions was to preach to Sue Tinbush about the Jehovah's Witness religion. Sue Tinbush is a Catholic and did not welcome this visit.

18) Edwards visited the Tinbush house twice after Complainant commenced her family leave and before Complainant's father died. The first visit was about February 10, 2002, when she brought a food basket as a gift from Respondent and its employees. The second visit occurred sometime between the first visit and March 5, 2002. Both times, Edwards wanted Complainant to tell her when she would return to work, with the result that Complainant felt pressured to return to work. Edwards did not visit with Complainant's parents during her visits to the Tinbush house.

19) Two to three weeks after Complainant started her family leave, she wrote a second note to Respondent in which she stated she was on family leave, that her father was sick and dying, and that she was going to stay on family leave until her father died or 12 weeks had passed. Carolynn Eaton-Wallace, Complainant's friend and former co-worker, delivered the note to Edwards. Complainant had told Eaton-Wallace that Edwards kept calling her, asking her to return to work, and that she was afraid she would lose her job. When Eaton-Wallace gave the note to Edwards, Edwards "nastily" said "I'll take it" and told Eaton-Wallace she would have to get a replacement for Complainant because "her father could just linger on forever." Edwards contacted Complainant, acknowledged she got the note, and asked when Complainant was coming back to work.

20) Bernice Webster, Complainant's aunt and Ron Tinbush's sister, stayed at the Tinbush house for several weeks immediately prior to March 7, 2002. During that period of time, she spoke with Edwards two or three times when Edwards called to speak with Complainant. On one of those occasions, Edwards told Webster that she really needed Complainant at work and asked Webster to try and persuade Complainant to come to work. Edwards told Webster that Com-

plainant's father could live any number of days. Webster told Edwards that Complainant was in no shape to come to work. Webster informed Complainant of Edwards's comments and advised Complainant to hang up if Edwards called again.

21) Sue Tinbush, Complainant's mother, talked to Edwards on one occasion when Edwards called to talk with Complainant. Edwards told her there was no reason for Complainant to stay home because Ron Tinbush "could last forever."

22) Edwards's phone calls and visits to Complainant were "very stressful and emotional" for Complainant.

23) Complainant cried and complained to her mother that she was very upset about Edwards calling and trying to get her to come back to work because she only had a limited amount of time left with her father.

24) No one, including Complainant and her family, ever told Edwards not to call or come to the Tinbush house.

25) During Complainant's absence, Edwards and other kitchen staff worked extra hours to cover Complainant's shifts. Edwards did not hire anyone else to replace Complainant. Edwards and the other kitchen staff worked six days a week to cover Complainant's shifts. By March 5, 2005, they were tired from working the extra shifts.

26) Edwards asked Complainant to return to work on March 5, 2002, Complainant's birthday, and threatened her with loss of her job if she did not work. Complainant worked her regular shift, 3 p.m. to 11 p.m., because she was in fear of losing her job. When she arrived home after work, the hospice worker on duty at the Tinbush house told her that her father had taken a turn for the worse and only had 24-48 hours to live. Complainant phoned Edwards and told her that she had to go back on her family leave, as her father wasn't going to last much longer.

27) Being absent from her father's side on March 5, 2002, made Complainant feel "very sad and emotional." She still thinks about having to work that day and feels "very emotional" about it.

28) Complainant's father was unconscious during the last two weeks of his life. During this time, Complainant still talked to him and tried to comfort him, while crying much of each day.

29) Complainant's father died on March 7, 2002, at 5 p.m. Within three hours, Edwards showed up at the Tinbush house and asked Complainant when she was coming back to work.

30) Edwards fired Complainant a week later.

31) Edwards's calls to Complainant during her family leave kept Complainant feeling "torn up," not knowing what to do. In general, they were "very stressful and emotional" for her. Com-

plainant was "terrified" of losing her job because she was a single mother who was the sole support of her two children.

32) Complainant was also very upset between February 3 and March 7, 2002, because her father was dying. Complainant received no income during her family leave except for her tax returns and felt financially stressed during her leave.

33) Wanek did not ask Edwards to contact Complainant and find out when she would be back to work and was unaware of Edwards's visits and calls to Complainant during her family leave except for the visit when Edwards delivered the food basket.

34) Respondent has a written "open door" grievance policy in its employee handbook stating that employees with grievances should first talk to their manager, then Wanek if their manager's response did not satisfy them. Complainant did not tell Wanek about Edwards's harassment while she was still employed by Respondent. Complainant was discharged on or about March 14, 2002. When she complained to Wanek about the harassment, he told her to talk to Edwards, the person who had harassed and discharged her, and denied that Edwards had ever gone to the Tinbush house.

35) Bernice Webster was a credible witness despite her natural bias. She had a specific recollection of conversations with Edwards and of Complainant's emotional response to her father's terminal illness and Edwards's attempts to get her to return to work. Her testimony was not exaggerated and she readily acknowledged her inability to recall or lack of knowledge in response to several questions posed by the Agency case presenter. The forum has credited her testimony in its entirety.

36) As Complainant's mother, Sue Tinbush had a natural bias. Her demeanor during the hearing was sincere. She answered questions in a forthright manner and her testimony was supported by other credible evidence, with one exception. The exception was her testimony that she thought Complainant went on family leave a week before Ron Tinbush died. With this exception, the forum has credited her testimony in its entirety.

37) Barbara Tinbush had a natural bias as Complainant's aunt. However, that did not affect her testimony. She answered questions directly, did not speculate about things she had no knowledge of, and gave testimony that was consistent with other credible evidence in the record. The forum has credited her testimony in its entirety.

38) Kathryn Sanders is Complainant's friend and former co-worker at Gordy's who quit in May 2002. Her testimony and statements she made to an Agency investigator reflected a bias against Respondent and Edwards in particular. Her memory

was also impaired, as shown by her testimony that Complainant's father passed away on the same day Complainant returned to work. The forum has only credited her testimony where it was corroborated by other credible evidence in the record.

39) Carolynn Eaton-Wallace was the most objective witness who testified. Although she testified that she had been dissatisfied with Edwards's management and quit because of it, the forum was not left with an impression that she had any sort of grudge against Respondent or Edwards that biased her testimony. She was a friend of Complainant's, but not a family friend. She is not employed by Respondent and did not have a financial stake in the outcome. Unlike Edwards, she testified in person and the forum had an opportunity to observe her demeanor. Her demeanor was sincere and she testified at length, answering questions forthrightly and without prompting. She had a clear recollection of events. The forum has credited her testimony in its entirety and relied heavily on it. Whenever her testimony contradicted testimony given by Edwards, the forum has believed Eaton-Wallace.

40) Job Valverde's testimony was mostly limited to authenticating documents and describing the procedural aspects of the Agency's investigation. He also testified that the contents of his typed interview with Complainant were accurate. The forum has credited his testimony in its entirety.

41) With two exceptions, Gordon Wanek's testimony was credible. First, his claim that he never heard anything about Edwards's calls and visits to Complainant until he received Complainant's BOLI complaint. This testimony was contradicted by the more credible testimony of Complainant and Eaton-Wallace, who both testified that Complainant told Wanek about Edwards's calls and visits during their meeting with Wanek after Edwards fired Complainant. Second, his testimony about his "open door" policy and willingness to meet with employees about their grievances was not credible in light of his instructions to Complainant to talk to Edwards when Complainant complained to him about Edwards's harassment and her termination.

42) Edwards was a telephone witness and the forum had no opportunity to observe her demeanor. In contrast, the Agency's key witnesses -- Complainant, Eaton-Wallace, and Sue Tinbush, whose testimony clashed with that given by Edwards – testified in person. At the time of the hearing, Edwards had not worked for Respondent for some time, which eliminated the prospects of financial gain or loss or retaliation by Respondent as issues that might have otherwise affected her credibility. Her response to every question was immediate and direct. However, her testimony lacked candor and seemed con-

trived to show herself in the best possible light. For example, she testified that she lost her own mother, father, and husband to cancer, and that the reason she kept calling Complainant at home was to see how things were and to let Complainant know she was available if Complainant wanted to talk to someone. On direct, she testified that she considered herself to be a family friend with the Tinbushes, then on cross acknowledged she did not socialize with them, but said she had been to the Tinbush house twice "quite awhile ago." Subsequently, Sue Tinbush credibly testified that Edwards was not a family friend and the two times Edwards had visited the Tinbush house were in her capacity as a Jehovah's Witness coming to peddle her religion to an unwilling audience. Edwards's testimony was also contradicted by the more credible testimony of Complainant, Webster, and Sue Tinbush. Edwards's claim that she kept calling because "[Complainant] was hurting and I was hoping that she would talk to me and maybe be able to feel better about things" was directly contradicted by all these witnesses, who testified that the only focus of Edwards's calls were to try to get Complainant to return to work as soon as possible and that her calls included callous comments about Ron Tinbush's remaining life span. Her claim that Complainant voluntarily returned to work on March 5 is simply unbelievable. The forum can imagine no rational reason why Complainant would have voluntarily returned to work on March 5, 2002, at a time when she planned to continue her leave until her father had died or 12 weeks had passed, when she was emotionally distraught over her father's condition and Edwards's continuing harassment, and when her father had lapsed into a coma. Edwards's credibility is further eroded by her testimony that Complainant only worked a partial shift on March 5, whereas Respondent's record shows that Complainant worked her full shift. Finally, the fact that Edwards visited the Tinbush house three hours after Ron Tinbush died to ask when Complainant would return to work undercuts her claim that she was only trying to be sensitive to Complainant and her family. The forum has only credited her testimony where it was corroborated by other credible evidence in the record.

43) Complainant was an extremely emotional witness, on the point of tears during much of her testimony. The forum found her testimony at hearing to be credible, despite conflicts between her testimony and prior statements made in on her formal complaint, intake questionnaire, and to Agency investigators. On her intake questionnaire and formal complaint she stated that Edwards "called almost daily" and "just about everyday." In her September 16, 2002 interview with Valverde, she stated that Edwards "came to see [me] almost every other day" and "came to [the Tinbush] house at least on six different times." In an April 2,

2003, interview with Agency investigator Barbara Turner, Complainant stated that Edwards came to the Tinbush house "at least four times" and "called [me] every other day asking if [I] was going to come back to work." In contrast, at hearing she testified that Edwards called once a week on the average and came to the Tinbush house several times. Since these statements agreed with testimony given by Edwards and the Agency's other witnesses, the forum has accepted them as true and considered Complainant's prior statements to be exaggerations. Likewise, on her formal complaint, intake questionnaire, and in her interview with Valverde, Complainant stated that her leave started on February 18, 2002, whereas she testified at hearing that it began on February 3, 2002, a fact that was undisputed. Complainant's testimony on all significant points was corroborated by other credible evidence in the record. The forum has believed Complainant over Edwards and Wanek whenever their testimony conflicted.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent Gordy's Truck Stop, LLC, was an employer that employed 25 or more persons in the State of Oregon for each working day during each of 20 or more calendar workweeks in 2001 or 2002.

2) Complainant was continuously employed by Respondent between March 18, 2001, and February 3, 2002, and worked an average of 25 or more hours per week during the 180 days immediately preceding February 3, 2002.

3) Marlene Edwards was Respondent's kitchen manager and Complainant's immediate supervisor from September 2001 until Complainant's discharge in March 2002.

4) In early February 2002, Complainant told Edwards that her father had cancer, with only six months to live as of November 2001, and that she needed to take family leave to care for him. Complainant requested leave until her father died or 12 weeks had passed, whichever came first. At the same time, Complainant gave Edwards a handwritten request containing the same information as her oral request. Edwards approved Complainant's leave request, and Complainant started her family leave on February 3, 2002.

5) Edwards called Complainant at her parents's house an average of once a week during Complainant's family leave. Each time she called, she pressured Complainant to return to work. On one occasion, Edwards said Complainant would lose her job if she did not come back to work. On another occasion, she tried to get Complainant's aunt, Bernice Webster, to convince Complainant to return to work.

6) Edwards visited the Tinbush house twice between February 10 and March 5, 2002. Both times, Edwards wanted

Complainant to tell her when she would be returning to work, with the result that Complainant felt pressured to return to work.

7) Edwards asked Complainant to return to work on March 5, 2002, and threatened Complainant with the loss of her job if she did not work. Complainant worked her regular shift, 3 p.m. to 11 p.m., because she was in fear of losing her job. When she arrived home after work, she learned her father only had 24-48 hours to live. Complainant phoned Edwards and told her that she had to go back on her family leave, as her father wasn't going to last much longer.

8) Complainant's father died on March 7, 2002, at 5 p.m. Within three hours, Edwards showed up at the Tinbush house and asked Complainant when she was coming back to work.

9) Complainant experienced and continues to experience substantial emotional distress and mental suffering as a result of Edwards's phone calls and visits and her absence from her father's side on March 5, 2002.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was a "covered employer" as defined in ORS 659A.153.

2) The actions, inaction, statements and motivations of Marlene Edwards, Respondent's kitchen manager, are properly imputed to Respondent.

3) At all times material herein, Complainant was an "eligible" employee as defined in ORS 659A.156.

4) Complainant's father had a "serious health condition." Complainant was entitled to take up to 12 weeks of family leave to care for her father. ORS 659A.150(4) & (6); ORS 659A.159; ORS 659A.162.

5) Respondent, through Edwards's actions of pressuring Complainant to return to work while Complainant was on family leave, then requiring Complainant to return to work on March 5 or be fired, denied Complainant family leave in violation of ORS 659A.183 and *former* OAR 839-009-0320(2).

6) Respondent, through Edwards's action of requiring Complainant to return to work on March 5 or be fired, retaliated against Complainant based on her use of family leave and violated ORS 659A.183 and *former* OAR 839-009-0320(2).

7) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practices found. ORS 659A.183; ORS 659A.820; ORS 659A.830; ORS 659A.850(2).

OPINION

INTRODUCTION

In its Formal Charges, the Agency alleged that Respondent, through Marlene Edwards, dis-

criminated against Complainant based on three different theories – harassment, denial of family leave, and retaliation. The Agency sought $30,000 in damages for "mental, emotional, and physical suffering" caused by the alleged unlawful employment practices. Respondent alleged two affirmative defenses: (1) The Formal Charges failed to state sufficient facts to state a cause of action; and (2) Respondent was not liable for Edwards's conduct because the alleged harassment was "not within the time and space limits authorized by employment" and because Respondent "never instructed, nor authorized Marlene Edwards to contact Complainant regarding returning to work."

HARASSMENT

The forum evaluates the Agency's harassment charges in light of OAR 839-005-0010(4), BOLI's administrative rule that defines "[h]arassment in employment based on an individual's protected class." In order to prevail in this case, the Agency is required to prove the following: (1) Respondent was a "covered" employer under OFLA; (2) Complainant was an "eligible" employee under OFLA who took family leave; (3) Respondent, through Edwards, subjected Complainant to unwelcome verbal conduct related to her family leave; (4) Edwards's conduct was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with Complainant's work performance or created an intimidating, hostile or offensive working environment for Complainant; and (5) Edwards's conduct harmed Complainant.

The Agency proved the first three elements of its case. Respondent admitted facts that established it was a "covered" employer under ORS 659A.153 and stipulated to facts that established Complainant was an "eligible" employee under ORS 659A.150(2). Undisputed evidence established that Complainant took family leave. Through credible testimony by Complainant, Eaton-Wallace, Webster, and Sue Tinbush, the Agency proved that Respondent, through Edwards, subjected Complainant to unwelcome verbal conduct related to her family leave.

The Agency's case breaks down at this point. In order to prevail, the Agency must show that Edwards's conduct had "the purpose or effect of unreasonably interfering with Complainant's work performance or creating an intimidating, hostile or offensive working environment." OAR 839-005-0010(4)(a)(A). Here, all of Edwards's conduct occurred away from Respondent's workplace. Complainant credibly testified that she returned to work on March 5 because she was in fear of losing her job. However, she did not testify that Edwards's prior conduct interfered with her work performance or created an intimidating, hostile, or offensive working environment on that date, or that she was harassed in any way at work

on March 5 because she had taken family leave.

Because there is no evidence that Edwards's conduct, objectionable as it may have been, interfered with Complainant's work performance or created an intimidating, hostile or offensive working environment, the forum must conclude that Edwards's conduct did not constitute unlawful "harassment" in the manner alleged by the Agency.[1]

DENIAL OF FAMILY LEAVE

In order to prove Respondent unlawfully denied Complainant family leave, the Agency is required to prove the following elements: (1) Respondent was a "covered" employer; (2) Complainant was an "eligible" employee; (3) Complainant's family member had a "serious health condition"; and (4) Respondent denied Complainant family leave. *See, e.g. In the Matter of Magno-Humphries, Inc.,* 25 BOLI 175, 192 (2004).

As stated earlier, elements (1) and (2) are undisputed. "Serious health condition" includes "[a]n illness, disease or condition that in the medical judgment of the treating health care provider * * * is terminal in prognosis with a reasonable possibility of death in the near future [.]" ORS 659A.150(6)(b). The Agency's witnesses credibly testified that Complainant's father was diagnosed with terminal cancer in late November 2001, with a prognosis that he had six months to live. This condition is precisely the type of condition that the statute was intended to encompass and satisfies the third element of the Agency's case.

A. <u>Complainant was actually denied family leave on March 5, 2002.</u>

Respondent argues that Complainant was not denied family leave because Complainant was in fact allowed to take family leave and because Complainant voluntarily returned to work on March 5. The forum has already concluded that Complainant only returned to work on March 5 because she believed she would otherwise be fired.[2] Under these circum-

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[1] Under different circumstances, conduct away from the workplace could create a hostile, intimidating, or offensive work environment. In this case, there was simply no evidence in the record that it did. *Compare In the Matter of JLG4, Inc. dba Chalet Restaurant and Bakery,* 10 BOLI 183, 196 (1992), *affirmed without opinion, JLG4, Inc. v. Bureau of Labor and Industries,* 125 Or App 588, 865 P2d 1344 (1993) (supervisor's unwelcome sexual advances to complainant at her home after her work shift ended constituted unlawful harassment when complainant was working a regular shift for respondent when the advances occurred, the supervisor also made unwelcome sexual advances to complainant at work, and complainant testified that the supervisor's unwelcome sexual advances created a hostile, intimidating, or offensive work environment for complainant).

[2] *See* Finding of Fact 26 – The Merits, *supra*.

stances, Complainant's return to work on March 5 was a coerced act, not a voluntary one. With her father so close to death, Complainant did not want to return to work on March 5 and her forced return, under pain of discharge, was an actual denial of her right to continue her family leave for 12 weeks[3] or until her father died and an unlawful employment practice under ORS 659A.183.

B. Respondent constructively denied Complainant family leave from early February 2002 until March 4, 2002, and on March 6 and 7, 2002.

It is undisputed that Complainant began her family leave on February 3, 2002. It is also undisputed that that she had a very close relationship with her father and that her purpose for taking family leave was to spend as much time as possible with her dying father. When Complainant left work on February 3, 2002, she made it clear to Edwards, orally and in writing, that she would return to work when her father died or 12 weeks had passed, whichever occurred first. Two to three weeks later, Eaton-Wallace gave Edwards a second note from Complainant reiterating Complainant's intent to return to work when her father died or 12 weeks had passed, whichever occurred first. Because of these statements, Edwards, Complainant's supervisor, should have clearly understood that Complainant did not intend to return to work until the end of April 2002, unless her father died before that time. While on family leave, she was entitled to spend this time with her father without any interference from Respondent that disrupted her focus on her father.[4] Instead, what she got was a series of unsolicited and unwelcome visits and calls from Edwards that upset her and left her with an ongoing worry about whether she would lose her job if she continued to exercise her legal right to stay home with her father, causing an emotional disruption of her family leave. Edwards's insensitive comment to Webster that Complainant's father "could just linger on forever" is a glaring example of the attitude Edwards conveyed to Complain-

[3] Complainant's 12 week leave would have expired on April 26, 2002.

[4] Except for seeking medical verification of a serious health condition or the illness, injury or condition of an employee's child that requires home care, neither OFLA nor BOLI's administrative rules interpreting OFLA contain any provision that allows an employer to contact an employee taking OFLA family leave. ORS 659A.159, ORS 659A.168, OAR 839-009-0260. OAR 839-009-0170(7) provides that "[a]n employer may require an employee to follow the employer's established leave policy regarding periodic reporting to work of the employee's leave status." However, there was no evidence that Respondent had any such policy and, in any event, the rule envisions the employee being required to contact the employer.

ant during her family leave.[5] These calls and visits began during the first week of Complainant's family leave in early February 2002 and ended three hours after her father died.[6]

According to the Oregon Court of Appeals, one of the goals the Oregon legislature had in mind when it adopted OFLA was "to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity." *Yeager v. Providence Health System Oregon*, 195 Or App 134, 141, 96 P3d 862, 866 (2004), *rev den* 337 Or 658, 103 P3d 641 (2004).

Although Respondent allowed Complainant to take family leave from February 3 to March 4, 2002, Edwards substantially disrupted Complainant's family leave with visits and calls so that Complainant was not able enjoy the full benefits of time off work to spend with her father in his last days. Instead of devoting all her time and energy on her need to spend time with her father, she was repeatedly confronted with threats to her family's economic security by Edwards's attempts to get her to return to work. Those threats culminated in a final threat that forced her to return to work on March 5, only two days before her father died. Edwards's ongoing interference with Complainant's use and enjoyment of her family leave is contrary to the legislative goals expressed in OFLA and constitutes a constructive denial of Complainant's family leave in violation of ORS 659A.183.

RETALIATION

In its Formal Charges, the Agency alleged that Respondent violated *former* OAR 839-009-0320 and retaliated against Complainant in the following ways:

> "Respondent violated former and current OAR 839-009-0320 and retaliated against Complainant by urging her to return to work when she was on qualified family leave and by insinuating that if Complainant did not return to work, her job was in jeopardy.
>
> "Respondent deliberately pressured Complainant and coerced her to return to work from qualified family leave. This pressure was so great that Complainant returned to work when she should not have been required to do so, thereby missing an opportunity to spend precious time with her dying father. Complainant was entitled to protected family leave under these circumstances and the day she returned to work is a day that is lost forever and can never be recaptured or relived. Had Respondent, through Edwards, facilitated Complainant's use of

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[5] Edwards made similar comments to Sue Tinbush and Eaton-Wallace, but there was no testimony elicited concerning whether they repeated these comments to Complainant.

[6] *See* Findings of Fact 14, 18, and 29 – The Merits, *supra*.

> family leave instead of retaliating against Complainant for using her entitlement and threatening her with the loss of her job, Complainant would have elected to remain on family leave and spend that additional day comforting and caring for her dying father. Respondent's discriminatory and retaliatory actions are exactly those the Act was intended to prohibit and a violation of former and current OAR 839-009-0320."

ORS 659A.001(12) defines "unlawful practice" for purposes of OFLA to include "a practice that violates a rule adopted by the commissioner for the enforcement of the provisions of this chapter." *Former* OAR 839-009-0320(2) provided:

> "It is an unlawful employment practice for an employer to retaliate or in any way discriminate against an employee with respect to hiring, tenure or any other termination or condition of employment because the employee has inquired about OFLA leave, submitted a request for OFLA leave or invoked any provision of the Oregon Family Leave Act."[7]

Accordingly, OFLA-based retaliation is an unlawful employment practice. *See Yeager,* 96 P3d at 865.

To prevail in an OFLA retaliation case, the Agency must prove the following: (1) Complainant availed herself of a protected right under OFLA; (2) Respondent took an employment action that adversely affected Complainant; and (3) there is a causal connection between Complainant's protected OFLA activity and Respondent's adverse employment action. *In the Matter of Roseburg Forest Products,* 20 BOLI 1, 26-27 (2000).

A. <u>Complainant availed herself of a protected right under OFLA.</u>

Complainant was an "eligible" employee who was entitled to take 12 weeks of family leave to care for her father, who had a "serious" health condition. Complainant availed herself of this protected right in early February 2002, when she requested and was granted family leave. Complainant notified Edwards that she intended to continue her leave for 12 weeks or until her father died, whichever occurred first. Complainant began her family leave on February 3, 2002, and her family leave concluded on March 7, 2002, when her father died.

B. <u>Respondent took an employment action that adversely affected Complainant.</u>

Former OAR 839-009-0320(2), applied to the facts and allega-

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[7] *Current* OAR 839-009-0320(3), which went into effect on May 17, 2002, is almost identical to *former* OAR 839-009-0320(2). The only difference is that the current rule substitutes "any person' for "an employee" and "person" for "employee."

tions in this case, prohibited Respondent from retaliating against Complainant with respect to "tenure or any other term or condition of employment." Although Edwards's unwanted visits and calls to Complainant were not authorized by OFLA, they cannot be considered a term and condition of employment or an adverse action against Complainant's tenure of employment because the Agency did not prove that Complainant was required to put up with them in order to keep her job. However, things changed when Edwards required Complainant to come to work for her full shift on March 5, 2002, on pain of losing her job. This action was an adverse employment decision that constituted a term and condition of Complainant's employment and directly affected her potential tenure of employment.

C. <u>There was a causal connection between Complainant's protected OFLA activity and Respondent's adverse employment action</u>

There is a direct causal connection between Complainant's protected OFLA activity and Edwards's action that forced Complainant to return to work on March 5, 2002. If Complainant had not been on family leave status, she would have been working, and Edwards would not have demanded that she return to work or be fired. Therefore, the forum construes Edwards's action as a retaliatory action that violated *former* OAR 839-009-0320(2) and ORS 659A.183.[8]

RESPONDENT'S LIABILITY FOR EDWARDS'S ACTIONS

It is undisputed that Edwards engaged in conduct on her own initiative that the forum has found to be unlawful and that she engaged in this conduct without Wanek's knowledge and away from Respondent's workplace. Respondent argues that these facts insulate it from liability under the common-law "scope of employment" test.

As an initial matter, Respondent's argument does not apply to the Agency's harassment allegations. The Agency alleged that Respondent, through Edwards, harassed Complainant while she was on OFLA leave. Based on the provisions of OAR 839-005-0010(4), the forum concluded that Edwards's conduct did not subject Complainant to a hostile, intimidating or offensive working environment and did not reach the question of liability. If the forum had reached the opposite conclusion, the forum would rely on the

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[8] *Compare In the Matter of Roseburg Forest Products,* 20 BOLI 1 (2000) (respondent's discharge of complainant while she was on family leave based on respondent's uniform application of its policy of discharging employees who obtain other employment without respondent's permission while on any type of leave from respondent's employment was not retaliatory because there was no causal connection between complainant's leave and respondent's action).

provisions of OAR 839-005-0010(4)(e), not the common-law "scope of employment" test, to determine Respondent's liability.[9]

Respondent is correct in its assertion that the forum must find that Edwards was acting within the scope of her employment for Respondent to be liable for its actual and constructive denial of Complainant's family leave and Edwards's retaliatory behavior. Respondent is also correct that "[u]nder the doctrine of *respondeat superior*, three requirements must be met to conclude that an employee was acting within the course and scope of employment." Those three requirements are:

> "(1) whether the act occurred substantially within the time and space limits authorized by the employment; (2) whether the employee was motivated, at least partially, by a purpose to serve the employer; and (3) whether the act is of a kind which the employee was hired to perform." *Chesterman v. Barmon*, 305 Or 439, 442, 753 P2d 404, 406 (1988).

Respondent contends that the first requirement was not met because Edwards's conduct occurred away from Respondent's workplace and during hours that Edwards was not working[10] and because Gordon Wanek had no knowledge of Edwards's actions.

In this case, Edwards was Complainant's immediate supervisor. Respondent, a truck stop with a restaurant, was open for business 24 hours a day, seven days per week. Edwards was responsible for Respondent's kitchen 24 hours a day, seven days a week, and that responsibility defines the time limits

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[9] OAR 839-005-0010(10)(4)(e) contains the following language:

"(e) Harassment by Supervisor, No Tangible Employment Action: When harassment by a supervisor with immediate or successively higher authority over the individual is found to have occurred, but no tangible employment action was taken, the employer is liable if:

"(A) The employer knew of the harassment, unless the employer took immediate and appropriate corrective action.

"(B) The employer should have known of the harassment. The division will find that the employer should have known of the harassment unless the employer can demonstrate:

"(i) That the employer exercised reasonable care to prevent and promptly correct any harassing behavior; and

"(ii) That the complaining individual unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm."

[10] There was no evidence presented to show the physical location from which Edwards made her phone calls to Complainant or the time of day that she called or visited the Tinbush house.

authorized by her employment.[11] She controlled the work schedule of the entire kitchen staff and was responsible for Respondent's kitchen operations. She also had the authority to fire members of the kitchen staff. Her visits with Complainant during Complainant's family leave were directed at getting Complainant to return to work. On her final contact, she threatened Complainant's job if Complainant did not return to work, which caused Complainant to return to work on March 5. These actions were directly related to the essential function of Edwards's job, which was the management and scheduling of Respondent's kitchen staff. As for the space limits authorized by her employment, the fact that some of Edwards's conduct towards Complainant occurred at the Tinbush house does not immunize Respondent from liability. Edwards could not carry on work-related discussions with Complainant at work because Complainant was on family leave status and not coming to work. Her visits to the Tinbush house were to carry on work-related discussions with Complainant related to Edwards's job duty of scheduling kitchen staff. Under these circumstances, Edwards's actions meet the "space" limits requirement. Based on the above, the forum finds that Edwards's actions were within the scope of her employment and that Respondent is liable for any of those actions that constitute an unlawful employment practice.

Under the doctrine of *respondeat superior*, an employer is liable for an employee's torts when the employee acts within the scope of employment. *Chesterman* at 406. Given the forum's conclusion that Edwards acted within the scope of her employment, Wanek's lack of knowledge of Edwards's actions is irrelevant.

DAMAGES

The Agency sought $30,000 in damages to compensate Complainant for the emotional distress and mental suffering she experienced from being badgered about returning to work during her family leave, then being compelled to return to work for one day on March 5, 2002. When a respondent is found to have engaged in an unlawful employment practice, ORS 659A.850(4)(a) gives the Commissioner the authority to order that respondent to "[p]erform an act or series of acts * * * that are reasonably calculated to carry out the purposes of [ORS chapter 659A], to eliminate the effects of the unlawful practice that the respondent is found to have engaged in, and to protect the rights of the complainant and others similarly situated[.]" That includes damages for emotional distress and mental suffering and a cease and desist order. 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

[11] *See* Finding of Fact 5 – The Merits, *supra*.

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).

Complainant and other Agency witnesses credibly testified that Complainant experienced substantial emotional upset because of Edwards's visits and calls, and that Complainant was extremely concerned about the loss of her job. She was the sole support of her two daughters and her job was critical to her.[12] Complainant and her father had a close emotional bond and it was extremely important for her to spend the last days of her father's life in his company. At a time when Complainant was already emotionally fragile, Edwards's repeated visits, calls, and insensitive comments created a Hobson's choice for Complainant – should she remain with her father and risk losing her job or return to work and miss some of the limited remaining time she had left with her father. This was a choice that OFLA is intended to prevent. According to Eaton-Wallace, Complainant was "terrified" of losing her job through most of her leave and felt "torn up" because of Edwards's actions. She only returned to work on March 5 to avoid losing her job, still thinks about being away from her father's side on that day, and still feels "very sad and emotional" about it. At the hearing, she was close to tears when she testified about having to work on March 5. The forum finds that Complainant's emotional response to reliving that day was genuine.

There is no doubt Complainant also experienced substantial emotional distress before and after her family leave because of her attachment to her father, his terminal illness, and his death on March 7, 2002. However, that does not detract from the emotional distress she experienced and continues to experience as a direct result of Edwards's behavior. As the Agency aptly pointed out in its Formal Charges and closing argument, "[c]omplainant was entitled to protected family leave under these circumstances and the day she returned to work is a day that is lost forever and can never be recaptured or relived." Complainant is still reliving March 5, 2002, but in the sense of loss instead of the time that she had with her father on that day.

Based on these facts, Complainant is entitled to damages for her mental suffering and emotional distress. Respondent committed two separate and distinct violations of the law -- denying Complainant family leave and retaliating against her for taking family leave -- that caused Complainant mental suffering and emotional distress. The forum merges the separate "denial" and "retaliation" violations that oc-

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[12] Complainant testified that she and her daughters lived rent-free in a house owned by her former husband, but there was no evidence that Complainant received financial assistance of any other type from any other source.

curred on March 5, 2002, for purposes of assessing damages because they are based on the same set of facts. Under these circumstances, the forum finds that $30,000 is an appropriate award of damages to compensate Complainant for the mental suffering and emotional distress she experienced as a direct result of Respondent's unlawful employment practices.

A. Award of Damages

Respondent excepted to the ALJ's proposed award of $30,000 in damages for emotional distress. Based on the facts in this case, $30,000 is an appropriate exercise of the commissioner's discretion "to eliminate the effects of any unlawful practices found." Respondent's exception is overruled.

ORDER

NOW, THEREFORE, as authorized by ORS 659A.850, and to eliminate the effects of Respondent's violation of ORS 659A.183 and *former* OAR 839-009-0320(2), and in payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Gordy's Truck Stop, LLC** to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in trust for Complainant Penny Howell in the amount of THIRTY THOUSAND DOLLARS ($30,000), plus interest on that sum at the legal rate from the date of the Final Order until paid, representing compensation for mental and emotional suffering.

2) Cease and desist from denying family leave to any employee who is entitled to take family leave under the provisions of the Oregon Family Leave Act (OFLA) and cease and desist from retaliating against any employee based upon the employee's use of OFLA.

In the Matter of

LOGAN INTERNATIONAL LTD.,

Case Nos. 78-03 & 79-03

Final Order of Commissioner Dan Gardner

Issued June 17, 2005

SYNOPSIS

The Agency alleged that Complainant was discharged for reporting and opposing drug use in Respondent's workplace, and that Respondent violated Oregon's whistleblower and OSHA anti-retaliation laws by discharging Complainant. The forum found that Complainant reported drug use in Respondent's workplace, but dismissed the Formal Charges because Complainant's report had

no basis in fact in that the conditions he opposed did not exist and because the Agency did not establish that the person who made the decision to discharge Complainant knew that Complainant had reported and opposed drug use. ORS 654.062(5), ORS 659A.230, ORS 659A.850; OAR 839-004-0004, OAR 839-001-0100(1)(a).

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on December 14-16, 2004, and April 19-20, 2005, at the Oregon Employment Department, 950 SE Columbia Drive, Suite "B," Hermiston, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Patrick Plaza, an employee of the Agency. Thomas Galbert ("Complainant") was present throughout the hearing and was not represented by counsel. Logan International Ltd. ("Respondent") was represented by Scott Terrall, attorney at law. Scott Neal was present throughout the hearing as the natural person designated by Respondent to assist in the presentation of its case pursuant to OAR 839-050-0150(3)(e).

The Agency called the following witnesses: Complainant; Danielle Galbert, Complainant's wife; Susan Moxley, Civil Rights Division senior investigator; Penny Dougherty, Complainant's former co-worker; Anthony Pixton, Complainant's former supervisor; Henry Ploeg, Respondent's quality assurance manager; Paul Eatinger (telephonic), Respondent's former manager; Scott Neal, Respondent's shipping manager; and Emmett Byma, Complainant's former co-worker.

Respondent called as witnesses: Sharon Camarillo, Respondent's customer service representative; Jim Daniels, Respondent's plant manager; Jerry Callahan, Respondent's controller; Calixto Perez, Respondent line driver; David Evans, Respondent shipping employee; Alfredo Mendez, former Respondent quality assurance employee; Susan Moxley; John Peterson, employee of Pro-Pak Logistics; Anthony Melius, employee of Pro-Pak Logistics; and Scott Neal.

The forum received into evidence:

a) Administrative exhibits X-1 through X-37 (submitted or generated prior to and after the hearing);

b) Agency exhibits A-1 through A-5, A-7 through A-9, A-12, A-15, A-16 (page 8 only), A-17 and A-18 (submitted prior to hearing); and A-19 through A-22 (submitted at hearing);

c) Respondent exhibits R-1 through R-5, R-18, R-21 (submitted prior to hearing); and R-23 (submitted at hearing).

Having fully considered the entire record in this matter, I, Dan Gardner, 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 3, 2002, Complainant filed a verified complaint with the Agency's Civil Rights Division alleging that Respondent discharged him because he reported health or safety hazards in the workplace.

2) On December 3, 2002, Complainant filed a second verified complaint with the Agency's Civil Rights Division alleging that Respondent discharged him because he reported criminal activity in the workplace.

3) After investigation, the Agency issued a Notice of Substantial Evidence Determination on March 20, 2003, finding substantial evidence supporting the allegations of the complaint filed by Complainant in which Complainant alleged he had been discharged for reporting health or safety hazards in the workplace.

4) After investigation, the Agency issued a Notice of Substantial Evidence Determination on April 23, 2003, finding substantial evidence supporting the allegations of the complaint filed by Complainant in which Complainant alleged he had been discharged for reporting criminal activity in the workplace.

5) On July 23, 2004, the Agency issued Formal Charges alleging that Respondent discriminated against Complainant by discharging him: (a) in retaliation for opposing safety hazards in Respondent's workplace in violation of ORS 654.062(5)(a) and OAR 839-004-0004, and (b) in retaliation for reporting criminal activity in or around the workplace, in violation of ORS 659A.230 and OAR 839-001-0100(1)(a). The alleged safety hazard and criminal activity was the purchase and use of methamphetamine by Complainant's supervisor and a lead worker. The Agency sought damages of "[l]ost wages in an amount to be proven at hearing and currently estimated to be approximately $8,000" and $10,000 for emotional stress.

6) On July 26, 2004, the forum served the Formal Charges on Respondent, accompanied by the following: a) a Notice of Hearing setting forth October 19, 2004, in Hermiston, 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.

7) On August 11, 2004, Respondent's controller, Jerry

Callahan, filed an answer and request for hearing.

8) On August 16, 2004, the Agency filed a Notice of Intent to File a Motion for Default based on Respondent's failure to file an answer to the Formal Charges through an authorized representative or attorney licensed to practice law in Oregon.

9) On September 7, 2004, Oregon attorney Scott Terrall filed a Notice of Representation on Respondent's behalf and a motion to postpone the hearing based on "a conflict with another case set for the same time in Pendleton, Oregon * * * [t]hat involves multiple parties and it has been reset on a number of occasions." (Exhibit X-9)

10) On September 20, 2004, the ALJ reset the hearing for December 14, 2004, based on Mr. Terrall's clarification that he represented a party in a case with an existing court date of October 20, 2004.

11) On November 24, 2004, the Agency filed a motion opposing a subpoena served by Respondent on Leah Hamilton, Human Resources Manager, Pro-Pak Logistics, for a deposition related to records subpoenaed from Pro-Pak by Respondent. Respondent also served a subpoena duces tecum on Ms. Hamilton for the production of records.

12) On November 24, 2004, Respondent filed a motion in which it alleged that the Agency had withheld "materials relating to telephone conferences with complainant and perhaps others following the issuance of the 'substantial evidence determination'" and argued that this prejudiced Respondent and inhibited its ability to prepare case summaries and prepare fully for the hearing. Specifically, Respondent sought an "Order compelling complete discovery, compelling the deposition of the Complainant, compelling the provision of information leading to the whereabouts of Mr. Bohms, resetting of case summary dates and resetting of the hearing date."

13) On November 24, 2004, the Agency filed a response opposing the issuance of the orders sought by Respondent's motions of the same day. The Agency represented that the complete investigatory files had been provided to Respondent, that the Agency had contacted Complainant after the issuance of the substantial evidence determination and the notes of this interview were not copied with the investigatory files. The Agency further stated that additional witnesses had been contacted in anticipation of litigation and that it did not know the present whereabouts of Mr. Bohms. Finally, the Agency stated that it had advised Respondent one month earlier that, under the forum's rules, Respondent needed to file a motion before deposing Complainant, that the Agency would oppose that motion, and that the Agency would accept written interrogatories from Respondent.

14) On November 29, 2004, the ALJ issued an interim order denying Respondent's motion in its entirety. The ALJ addressed Respondent's different requests as follows:

Motion for Discovery Order: The ALJ ordered the Agency to deliver the following documents and information to Respondent by December 5, 2004:

"1. To the extent not already provided to Respondent, records of all interviews, including handwritten and typed notes and any recording conducted with Complainant and any other witnesses regarding this case. This does not include interviews specifically conducted by Mr. Plaza, but does include interviews conducted by any other BOLI employee or BOLI agent, whether or not acting under Mr. Plaza's direction, and includes interviews conducted from the time Complainant initiated his complaint until the present.

"2. If the Agency intends to call Mr. Bohms as a witness at the hearing, any information the Agency has concerning the current address of Mr. Bohms that has not already been provided to Respondent."

Motion to Depose Complainant: The ALJ denied Respondent's request on the basis that Respondent had not demonstrated that "other methods discovery are so inadequate that the participant will be substantially prejudiced by the denial of a motion to depose" Complainant. The ALJ noted that Respondent had not established that the information that it sought could not be obtained through interrogatories, and apparently had not served any yet. Finally, the ALJ concluded that the "nature of the allegations" did not provide a basis for compelling a deposition of Complainant, and it was disputed whether or not the Agency had purposefully withheld any discoverable information from Respondent.

Motion to Reset Hearing: Respondent based its motion to reset the hearing based "on the lack of complete discovery on the part of BOLI" and to give Respondent "additional time to investigate matters that may arise when discovery is completed." The ALJ ruled that Respondent had not established "good cause," stating that "Respondent has neither established that that the Agency has withheld discoverable information nor that it is entitled to a deposition of the Complainant. Respondent's apparent failure to serve interrogatories is solely attributable to Respondent."

Motion to Reset Case Summary Due Date: The ALJ ruled that "because additional discovery may be provided in response to [the ALJ's] Interim Order, both sides may submit addendums to their case

summaries related to responses to interrogatories or any additional evidence provided by the Agency to Respondent as a result of [the ALJ's] Interim Order. The deadline for submitting addendums is 9 a.m. on December 14 * * *."

15) On November 29, 2004, the ALJ issued an interim order ruling that Respondent had not complied with the forum's rule that requires a party seeking to take a deposition to file a motion, and that Respondent could not take Leah Hamilton's deposition until it filed such a motion and the forum granted Respondent's motion. The ALJ ruled that Ms. Hamilton must comply with the subpoena duces tecum and produce the documents sought by Respondent.

16) As part of its case summary, Respondent submitted 40 pages of drug screen reports for specific employees of Respondent. Although Respondent did not request a protective order regarding those documents, the ALJ issued a Protective Order on December 8, 2004, governing the Agency's use and disposition of the documents and any testimony at hearing related to those documents.

17) The hearing commenced at 9 a.m. on December 14, 2004. The ALJ advised Respondent and Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

18) At the outset of the hearing, the Agency objected to the presence of Scott Neal, who was listed as a witness in the Agency's and Respondent's case summary. Mr. Terrall stated that Neal was present as the natural person designated to assist him in the presentation of Respondent's case, pursuant to OAR 839-050-0150(3)(e), and the ALJ overruled the Agency's objection.

19) Jeffrey Ware, another employee of Respondent, was also present during the hearing. The ALJ ordered that Neal, Ware, and Complainant were not to discuss any testimony given or statements made at hearing with anyone else except Mr. Plaza or Mr. Terrall until the hearing was concluded. The ALJ also ordered Mr. Plaza and Mr. Terrall to not discuss any witness testimony given at hearing with any other witnesses until the hearing was concluded.

20) The ALJ instructed other witnesses who testified at the hearing not to discuss their testimony with any other witnesses until the hearing was concluded.

21) When the Agency rested its case, Respondent moved to dismiss the Formal Charges. The ALJ denied the motion.

22) The hearing adjourned on December 16, 2004. On December 22, 2004, the ALJ issued an interim order stating that the hearing would reconvene on April 19, 2005, in Hermiston.

23) The ALJ ordered a transcript of the hearing to be

prepared before the hearing reconvened. While the transcript was being prepared, the transcriber determined that Tape 1 from the hearing was blank. On March 4, 2005, the ALJ mailed a transcript of the hearing to the Agency and Respondent's counsel. The ALJ ordered that the transcript was not to be shared with any witnesses at the hearing, whether they had or had not already testified. The ALJ also prepared a written summary of Tape 1 from his hearing notes, provided it to the Agency and Respondent's counsel, and asked if they would stipulate that his summary was "an adequate representation of the record during Tape 1."

24) Before the hearing reconvened, the Agency and Respondent stipulated that the ALJ's written summary of Tape 1 was "an adequate representation of the record during Tape 1."

25) On April 14, 2004, the Agency moved to amend the Formal Charges to increase the amount claimed in damages to conform to the evidence presented at hearing. The Agency sought to increase the amount of back pay sought to $9,680 and the amount of emotional distress damages to $30,000.

26) The hearing reconvened at 9 a.m. on April 19, 2005.

27) When the hearing reconvened, Respondent objected to the Agency's proposed amendment. The ALJ granted the Agency's request to increase the amount of back pay sought to $9,680 because the Agency had presented evidence supporting that figure without objection from Respondent. The ALJ reserved ruling on the increase in emotional distress damages for the proposed order. The Agency's motion is granted in its entirety for reasons stated in the Opinion. This ruling is affirmed.

28) Respondent called Jim Daniels and Jerry Callahan as impeachment and rebuttal witnesses. The Agency objected to their testimony on the grounds that neither was listed in Respondent's case summary. The ALJ ruled that he would consider their testimony as an offer of proof and rule on its admissibility in the proposed order. After reviewing the record, the ALJ concludes that only part of their testimony is admissible. The details of this ruling are contained in the Opinion.

29) Respondent called John Peterson and Anthony Melius, two employees of Pro-Pak, Complainant's subsequent employer, as witnesses. The Agency objected to their testimony as irrelevant and immaterial. Respondent represented that they were called to provide evidence that would show habit, routine, and pattern and practice of Complainant that related to the Formal Charges, and that Respondent planned to offer exhibits R-9 through R-14, which documented Complainant's performance and discharge from Pro-Pak, and R-23, Complainant's employment application at Pro-Pak, based on their testimony.

Respondent further represented that Peterson and Melius were being called as impeachment witnesses with regard to Complainant's employment application at Pro-Pak. The ALJ ruled that he would allow Peterson and Melius to testify about Complainant's employment application at Pro-Pak to show prior inconsistent statements by Complainant, but would consider the remainder of their testimony as an offer of proof and rule on its admissibility and the admissibility of exhibits R-9 through R-14 in the order. For reasons stated in the Opinion, the ALJ sustains the Agency's objection to all of Peterson's and Melius's testimony about Complainant's actual work performance at Pro-Pak and exhibits R-9 through R-14. This ruling is affirmed.

30) At the conclusion of the hearing, the Agency and Respondent both asked to submit written closing arguments in lieu of oral argument. The ALJ granted the motion and set a deadline of May 6, 2005, for filing closing arguments.

31) On May 4, 2005, the ALJ conducted a post-hearing conference requested by Respondent in which Mr. Terrall requested an extension of time until May 13, 2005, to submit written closing argument. The Agency objected. After discussion, the ALJ proposed granting an extension of time until May 9, 2005. The Agency did not object to this and the ALJ granted the Agency and Respondent an extension of time until May 9, 2005, to file simultaneous written closing arguments.

32) On May 9, 2005, the Agency and Respondent filed written closing arguments.

33) On May 26, 2005, 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. The Agency filed exceptions on June 3, 2005. Respondent did not file exceptions. The Agency's exceptions are discussed at the end of the Opinion.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Logan International Ltd. was an Oregon corporation doing business in Boardman, Oregon, and engaged or used the personal service of one or more employees.

2) At all times material herein, Respondent was engaged in the business of processing potatoes into frozen french fries. Respondent processes approximately 100 million pounds of french fries per year.

3) Complainant was first hired by Respondent on August 16, 2000, as a forklift driver on swing shift in Respondent's shipping department. His starting rate of pay was $9.50 per hour plus a $.10 per hour shift differential. Pursuant to Respondent's policy, he was required to take a pre-employment drug screen and

started work on a 90 day probationary period.

4) Between 1999 and 2004, Respondent contracted with Comprehensive Toxicology Services to screen drug tests administered to applicants and employees. Respondent had Comprehensive screen for the presence of amphetamines, cocaine metabolite, ethanol, opiates, and THC.

5) Tony Pixton, Respondent's shipping manager, hired Complainant and was Complainant's immediate supervisor until Complainant quit Respondent's employment in July 2002. Paul Eatinger was Respondent's general manager throughout Complainant's employment with Respondent.

6) On November 30, 2000, Pixton completed a form entitled "Employee Status Change" on which he noted that Complainant had completed his probationary period and that Complainant was given a raise to $10 per hour, plus a $.10 per hour shift differential.

7) Effective January 11, 2001, Complainant was transferred to day shift.

8) On April 4, 2001, Complainant was promoted to day shift lead and given a raise to $12 per hour.

9) Complainant received no written warnings or disciplinary action during the entire time he was employed by Respondent.

10) Pixton considered Complainant to be a good employee who had no performance issues, showed a lot of initiative, and got along with his co-workers. Pixton gave Complainant three written evaluations, rating him as average or above average on each evaluation. When Pixton was gone from Respondent's facility, he delegated some of his duties to Complainant.

11) Pixton did not formally discipline Complainant at any time and Complainant was not formally disciplined by anyone else employed by Respondent between his date of hire and July 2002.

12) In or around July 2002, Pixton accepted a job offer with another employer and gave Respondent notice that his last day of work would be July 31, 2002. Pixton talked with Eatinger about hiring a new shipping manager. They decided to name an interim replacement while conducting a job search for Pixton's replacement.

13) Complainant understood that Respondent planned to fill Pixton's position on an interim basis, and that if things worked out, the person occupying the interim might be hired as Pixton's replacement. Complainant hoped to get the position.

14) After discussion, Pixton and Eatinger decided to offer the interim position to Emmett Byma, an employee who had worked for Respondent for several months in Respondent's quality assurance department. Byma accepted the position.

15) On July 30, 2002, Complainant was aware that Pixton's position had been offered to and accepted by Byma.

16) Complainant believed the job should have been offered to him and was upset because the job wasn't offered to him. He also believed that Byma "couldn't handle the job."

17) Respondent stores frozen French fries in its freezer in cardboard totes that are 4'x4'x4' in size. The totes are stacked four high in Respondent's freezer, which can store 10 million pounds. If a tote is damaged by being improperly stacked, the entire contents of the tote may have to be destroyed.

18) On July 30, 2002, Byma arrived at work between 5:30 and 6 a.m. Later that morning, he observed that a tote was improperly stacked. The date on the tote indicated it had been stacked by Respondent's night shift. Byma tried unsuccessfully to fix the stack before asking Complainant, whom Byma recognized as a better hyster driver, to help him. Complainant immediately went to assist Byma, and Byma went to the office, where he remained while Complainant tried to repair the tote stack. Complainant believed Byma was responsible for the problem and became angry with him for not helping Complainant fix the problem.[1] After trying unsuccessfully to repair the tote stack, Complainant quit and walked off the job in the middle of his shift.

19) When Pixton was told that Complainant walked off the job, he completed an employee status form for Complainant and wrote on it "Voluntary quit – walked off the job 3 hours into shift – last day worked 7/30/02 – due 2 weeks vacation – 80 hours."

20) Respondent hired Scott Neal as shipping manager in early September 2002. Shortly after he was hired, Neal concluded that the shipping department was understaffed. Penny Dougherty, who was employed as a data entry clerk in Respondent's shipping department, told him Complainant might be a good person to rehire. Neal consulted with Eatinger, who pointed out Complainant's prior employment history, but told Neal if he was sure he wanted to hire Complainant to go ahead. Henry Ploeg, Respondent's quality assurance manager and safety director, also told Neal that he would be careful about hiring Complainant because he had walked off the job already in a fit of anger. In early September, 2002, Neal contacted Complainant, interviewed him, and offered him a job. Complainant accepted and went back to work as a forklift driver on day shift on September 10, 2002, at the rate of $10 per hour.

21) Complainant was not required to take a drug test when he was rehired. However, Neal told him he would be subject to a

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[1] Complainant testified he was upset because Byma didn't follow "[t]he golden rule: You make the mess, you clean it up."

90-day probationary period and treated as a new employee.

22) When Complainant was rehired, he wanted to work day shift, as he and his wife were applying for child care through the Head Start program, which required that both parents work day jobs.

23) On his second day at work, Complainant became upset because co-workers were asking him product-related questions. He became angry and snapped at someone. That person complained to Neal, and Neal told Complainant that if he kept that attitude he would be discharged.

24) Shortly after Complainant's rehire, Neal offered him the job of swing shift lead in the shipping department, with a raise of $1 per hour. Neal left work each day not long after swing shift started. He offered Complainant the job because he wanted someone with experience who was reliable and a hard worker as the lead person on swing shift. Complainant accepted the offer and transferred to swing shift.

25) Complainant's performance was very good during the first few weeks that he occupied the lead swing shift position.

26) Two to three weeks after Complainant's promotion, Neal promoted Kent Cate, who had less experience than Complainant in shipping, to the lead day shift position in the shipping department. Neal did not offer the job to Complainant and explained to Complainant that he wanted Complainant on swing shift, when Neal would be gone, because of Complainant's greater experience. Neal also told Complainant that he expected Complainant to work with and cooperate with Cate.

27) Complainant resented Neal's promotion of Cate and believed he should have been given that position.

28) For Respondent's shipping department to run effectively, it is important that the day shift and swing shift lead persons communicate with one another.

29) Complainant's performance began to deteriorate after Cate's promotion. Cate complained regularly to Neal that Complainant would not communicate or work with him.

30) Starting in mid-October 2002, Neal complained to Eatinger that Complainant would not listen to him, did not follow through with his directions, ran things in his own way, and did not get work completed.

31) At some point prior to November 1, 2002, Neal warned Complainant that he needed to work with Cate if he wanted to remain employed with Respondent.

32) On November 1, Complainant observed Cate and Neal in the freezer for 10 seconds. Based on statements from a co-worker whom he did not identify at hearing, Complainant believed Cate and Neal had been in the freezer for an hour to perform a

job that should have taken only 20 minutes.

33) Complainant was a methamphetamine user from 1992 to 1996. Based on his own experiences as a methamphetamine user, Complainant believed that "a simple task like that taking an extra amount of time is just another sign * * * that they might be on speed."

34) Neal has never spent an hour in Respondent's freezer at one time.

35) On Saturday, November 2, 2002, Complainant, Kent Cate, Alfredo Mendez, and Dave Evans worked together to prepare some product Respondent needed to ship next door to Respondent's closed storage facility.

36) On Monday, November 4, 2002, Cate complained to Neal that Complainant had spent most of November 2, 2002, on the computer instead of working with Cate and the others. Neal spoke with Mendez, who confirmed this. That same day, Neal made a unilateral decision to terminate Complainant based on this information, Cate's prior complaints, and the prior warning he had given to Complainant about the need to work with Cate. Complainant and Neal did not see each other at work on November 4, 2002.

37) At the start of his shift on November 4, 2002, Complainant went to Ploeg and told him he had suspicions that Kent Cate was doing drugs, that Neal was either involved in the drug activity or knew about it, and that Complainant had a real problem with those activities happening at work.

38) Within 20 minutes of talking with Complainant, Ploeg reported Complainant's conversation to Eatinger.

39) At the start of his shift on November 5, 2002, Complainant assumed that Ploeg had not talked to Eatinger about Complainant's report of drug use and went to Eatinger.[2] Complainant told Eatinger that he was concerned that drug use was going on in the shipping department and implicated the entire department, including Neal. Complainant did not identify the drug he believed employees were using. Complainant also stated that it was not a safe working environment.

40) Ploeg and Eatinger both assumed that Complainant's

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[2] Complainant's testimony regarding his reason for assuming Ploeg had said nothing to Eatinger is an example of the tendency he showed to jump to conclusions based on assumptions instead of facts. In pertinent part, his testimony on this subject was:

Q. "So why did you really go to Mr. Eatinger?"

A. "Because I knew nothing had been done."

Q. "And you didn't show up until just [a] quarter to 3:00 that day, and you knew that the day before he'd talked to Cate; how did you [know] nothing had been done?"

A. "Good ol' boy syndrome."

complaints of drug use related to safety issues in the workplace.

41) Ploeg and Eatinger considered having employees drug tested and both spent time observing shipping department employees, including Cate and Neal, in the days following Complainant's complaint of drug use in the shipping department. They did not see anything that made them suspicious of drug use, so decided not to have anyone drug tested as a result of Complainant's report.

42) On November 6, 2002, Neal told Complainant that he was fired. At that time, Neal was not aware that Complainant had made allegations that Neal and Cate had attempted to buy methamphetamine at the workplace or were using it or that Neal knew that Cate had done this. On November 7, 2002, Neal completed an employee status change report for Complainant on which he wrote that "11-6-02" was the date of Complainant's "termination" and wrote the following explanatory remarks: "Tom was still in his probationary period. Tom was let go due to not following instructions. Tom wanted to do it his way and as his mgr [sic] I needed him to work with me not against me."

43) Complainant did not file a complaint of criminal activity against Neal or Cate "[b]ecause I didn't see it for myself [and] I only had suspicions." Complainant did not file a safety complaint with OR-OSHA "[b]ecause I didn't witness it."

44) During the Agency's investigation, Moxley asked Complainant what he thought "the real reason was for his termination." Moxley recorded the following response:

> "Complainant explained that Neal didn't like the way Complainant ran things. Neal thought Complainant was a threat to his authority because Complainant knew more about the company, Respondent's policies and procedures then (sic) he did. Neal was not qualified for the shipping manager position and he was afraid Complainant would show him up. He was also aware that employees listened to Complainant and did what he said. On one occasion, Neal called Complainant 'pushy' with the employees but Complainant pointed out that there was a job to be done. Complainant believes that Neal wanted to be liked by all of the subordinates whereas Complainant didn't care[;] he was there to do a job."

45) Complainant completed an intake questionnaire prior to filing his complaint and was interviewed twice by Moxley during her investigation. Complainant did not make any reference to the purchase or use of methamphetamine in the questionnaire or in his interviews with Moxley. There was no evidence presented that Complainant brought up the subject of methamphetamine at any time be-

fore the Formal Charges were drafted.

46) Complainant actively sought work after his termination. He collected unemployment benefits at the rate of $270 per week, but had no other earnings until April 10, 2003, when he was hired by Pro-Pak to fulltime work at $12 per hour. Complainant lost $9,680 in wages (calculated at $11 per hour x 22 weeks) as a result of his discharge.[3]

47) As a result of his termination, Complainant became depressed and withdrawn; this affected his relationship with his wife and child. He had significant financial difficulties as a result of his loss of income, including the loss of his house.

48) At some time between June 2000 and March 28, 2003, her last date of work, Dougherty told Ploeg that she suspected drug use in the shipping department and said she thought everyone in the shipping department should be required to take a drug test. Dougherty was not discharged because of her report.

49) Kent Cate reported safety problems related to the maintenance of hysters during his employment and never received any negative feedback from management based on his reports.

50) Alfredo Mendez reported safety issues with Respondent's battery changing equipment and never received any negative feedback from management based on his reports.

51) Susan Moxley was a credible witness. Her testimony centered on the written content of the investigative interviews she conducted. She testified that her investigative notes were an accurate reflection of the statements made by witnesses she interviewed and that she had no independent recollection of those statements. This testimony was not impeached and the forum has credited her testimony in its entirety.

52) Anthony Pixton testified in a forthright manner. He voluntarily left Respondent's employment in 2002 for another job opportunity. However, he also noted that he was not happy working for Respondent. There was no evidence that he had any grudge against Respondent, that he had maintained contact with Complainant since leaving Respondent's employ, or that he had anything to gain or lose in the hearing. He credibly testified that he did not recall telling Camarillo that Complainant became extremely upset when Pixton told him he wasn't getting Pixton's job, or that he wouldn't put Complainant in that job because of Complainant's tendency to lose his temper. His testimony that he documented everything and wrote

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[3] The Agency's amended Formal Charges sought "$9,680" in back pay based on the calculation of $11.10 per hour x 40 hours x 22 weeks. However, the figure of $9,680 is arrived at by using the wage rate of $11 per hour.

three performance reviews for Complainant and would have noted an anger problem on the reviews, assuming Complainant had such problem, was unrebutted. He also testified credibly that he had no knowledge that Complainant damaged the totes on July 30, and the forum believes this testimony for the reason that there is no mention of it on the employee status report related to Complainant's quitting on July 30 that Pixton signed. Based on Pixton's undisputed testimony about his habit of documenting every significant personnel event, the forum believes that Pixton would have noted Complainant's extreme anger and destruction of totes on Complainant's termination slip if he believed Complainant engaged in that behavior. The forum has credited his testimony in its entirety.

53) Sharon Camarillo was employed by Respondent from October 2000 to August 2002, then was rehired in April 2003 and was still employed by Respondent when she testified. She is a friend of Scott Neal and testified that she had been close friends with Pixton but has had a "falling out" and had some "animosity" towards Pixton at the time of the hearing. Her most significant testimony was directed at rebutting Pixton's testimony. She testified that Pixton told her that Complainant wouldn't be a good replacement for him because of anger problems, that Complainant was too critical of other employees in the workplace, and that Complainant might not be a good person to deal with customers because of a tendency to lose his temper. She also testified that Pixton told her that when Complainant became extremely upset when he learned he wasn't getting Pixton's job, and that Pixton implied that Complainant damaged totes in the freezer on July 30 before walking off the job. Based on her admitted bias towards Neal and Respondent and against Pixton and the forum's assessment of Pixton's credibility, the forum has only believed Camarillo's testimony when it was supported by credible testimony. The forum has believed Pixton's testimony whenever it conflicted with Camarillo's.

54) Henry Ploeg has been employed since 2000 by Respondent and became production supervisor in November 2003. His testimony was made suspect by prior inconsistent statements on two major issues. On February 11, 2003, he told Moxley that Complainant told him he believed Scott Neal, John Bohms, and Kent Cate were using illegal drugs and that Bohms was the drug supplier. On August 2, 2004, he stated in writing that Complainant told him that "John Bohms and Scott Neal were taking drugs." At hearing, he testified that Complainant only complained about Scott Neal and Kent Cate going to lunch together and Cate returning from lunch with alcohol on his breath. He attempted to explain this apparent inconsistency between his statements about "drugs" and "alcohol" by saying he considered they meant the same to him, and that he considered alcohol to be a

drug. The forum does not find it believable that he meant "alcohol" when he told Moxley "illegal drugs." He told Moxley that he had John Bohms drug tested a week after November 4, 2002, as a result of his discussion with Eatinger concerning Complainant's complaint, then testified that no one was drug tested as a result of Complainant's complaint. Based on his bias and these inconsistent statements, the forum has only believed Ploeg when his testimony was either corroborated by other credible evidence or undisputed by other credible evidence.

55) Emmett Byma was no longer employed by Respondent at the time of his testimony. He testified in a forthright manner and had no apparent bias. His testimony focused on the "tote" situation in the freezer on July 30, 2002. The forum has credited his testimony in its entirety and believed his testimony whenever it conflicted with Complainant's.

56) Gary Neal, Scott Neal's brother, and Pamela Neal, Scott Neal's wife, testified primarily as to their knowledge that Scott Neal has never had a drug problem and that they have never known him to use or buy methamphetamine. Their testimony was not impeached. Despite their familial bias, the forum found both to be credible witnesses and has credited their testimony in its entirety.

57) Paul Eatinger was a credible witness. Eatinger has not been employed by Respondent since 2003, when he voluntarily left Respondent's employment to move back to Idaho and work for another employer. Because he was a telephone witness, the ALJ was unable to observe his demeanor. He responded directly to all questions put to him and stated, without hesitation, what he could and could not remember. Other than his former employment with Respondent, there was no evidence of any bias in his testimony. The only significant inconsistency in his testimony was his testimony on direct, when asked if he was aware of any performance issues with regard to Complainant before November 5, 2002. He answered he recalled that "Scott had made some minor comments, I guess I would call them, concerning Tom previous to that. And of course, I was aware of Tom's previous employment record. But nothing more than that, I guess." On cross examination, Eatinger's memory was refreshed by reviewing his investigative interview with Moxley, conducted only three months after Complainant was fired, in which he stated that Neal had been complaining to him for several weeks before November 5, 2002, about various aspects of Complainant's work performance. Based on Eatinger's lack of bias, the overall consistency of his testimony, and the fact that his statements to Moxley were made closer to the events in question, the forum concludes that the prior statements made to Moxley were truthful. The forum has credited Eatinger's testimony in its entirety.

58) Calixto Perez, a current employee of Respondent at the

time of his testimony, had difficulty understanding English and asked for an interpreter during his testimony. His responses to the questions asked of him reflected his lack of understanding. Based on his language difficulties and the forum's uncertainty that he fully understood the questions asked of him, the forum has given his testimony no weight.

59) David Evans worked for Respondent from 2000 to 2003, then left and was rehired in August 2004 and employed by Respondent at the time of his testimony. He testified primarily as to Complainant's work attitude and reaction to Byma's promotion. Evans's testimony was based almost exclusively on statements he purportedly heard from others and his memory was somewhat vague. For these reasons, the forum has attached no weight to his testimony concerning Complainant. However, the forum has credited his testimony that he started a new probationary period when he returned to work for Respondent in August 2004.

60) Alfredo Mendez was employed by Respondent from August 2002 until June 2004, when he left for a different career. The forum found his testimony to be only partly credible for several reasons.

First, he still stays in touch with Neal and Ploeg and has a social relationship with Neal. In his investigative interview, he told Moxley that he and Complainant "did not meet eye to eye on things," and the ALJ concluded from his attitude at hearing, as reflected in the tone of his voice when he responded to questions about Complainant, that he disliked Complainant. This demonstrated a personal bias.

Second, he was responsive to questions on direct examination, but openly hostile towards and combative with the Agency case presenter during cross-examination. In addition, his answers on cross-examination on two significant issues were evasive. On direct examination, he testified affirmatively that Complainant's reputation in the workplace for truthfulness and veracity was questionable. When cross-examined about specific incidents, he was evasive, finally testifying that he did not recall any incidents that made him conclude that Complainant was not truthful. He was also evasive when asked to explain what he meant when he told Moxley that there was "a lot of finger pointing" going on in the shipping department.

Third, he gave considerable testimony about Complainant's attitude problems at work, then acknowledged that he only saw Complainant at shift changes.

Fourth, he testified that the previous shipping department manager walked off the job and he was in charge of shipping for two months before Scott Neal was hired. This contradicts Pixton's undisputed testimony that he resigned and left Respondent's employment on July 31, 2002, and Neal's otherwise undisputed testimony that he was hired in

September 2002. There is no evidence that Pixton, the previous shipping department manager, walked off the job. He also testified on direct examination that he didn't know Complainant was swing shift lead, then testified on cross-examination that he knew Complainant had been promoted to shipping lead.

Based on Mendez's bias, demeanor, the internal inconsistency in his testimony, and the inconsistency between his testimony and other testimony that the forum has found credible, the forum has only believed his testimony when it was supported by other credible evidence in the record.

61) Dougherty was the Agency's most important witness other than Complainant and provided the only direct evidence supporting the Agency's allegations that Complainant was not on probation and that Neal knew of Complainant's reports that he and Cate were using drugs before he fired Complainant. She testified that she heard Neal tell Complainant that he wasn't on probation and that Neal told her on November 6, 2002, that he "couldn't believe that Tom was trying to spread the word that he was accusing him of using drugs and trying to take away his livelihood." The forum does not believe this testimony for two primary reasons. First, Dougherty was a biased witness. She is a friend of Complainant. Like Complainant, she hoped to get the shipping department supervisor position and was passed over. Then she lost her job in March 2003, not due to a lay off, but because Respondent eliminated her position and Neal assumed her job duties. Second, Dougherty did not tell Moxley, the BOLI investigator, of Neal's alleged November 6, 2002, statement, claiming she "didn't remember" at that time, but recalled later when she found a contemporaneous note she wrote in a notebook she kept. She testified that she still had the note, but left it at home when she came to testify. The forum has only believed Dougherty's testimony when it was corroborated by other credible evidence in the record and has disbelieved Dougherty's testimony whenever it conflicted with Neal's.

62) Scott Neal is currently employed by Respondent and was accused of criminal activity by Complainant in the Formal Charges. Despite the fact that Complainant had no real evidence to support his accusations,[4] Neal did not appear vindictive. He testified with a calm demeanor and responded directly to questions. Although the Agency's case was premised on the allegation that Neal had been a user of methamphetamine or was knowledgeable about a subordinate's use of methamphetamine, there was absolutely no credible evidence

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[4] *See* Finding of Fact 64 – The Merits, in which the forum draws this conclusion and the Opinion, in which the forum concludes that Complainant's complaint of drug use was not made in good faith.

presented to support this allegation. Overall, Neal's lengthy testimony was consistent and credible. There was one major inconsistency in his testimony. This inconsistency was his contradictory statements that (a) he did talk to Complainant between November 2 and November 6, 2002, about Cate's complaints; (b) he didn't talk to Complainant in that time period about Cate's complaints; and (c) he couldn't recall if he had done so. These inconsistencies could be due to failure of memory or a deliberate attempt to obscure the truth. Based on the forum's assessment of Neal's overall credibility, the forum concludes that these inconsistent statements were due to a failure of memory and credits Neal's testimony in its entirety except for these inconsistent statements. The forum has believed Neal's testimony whenever it conflicted with Complainant's testimony.

63) Danielle Galbert has been married to Complainant for four years. They have one child together. She testified that they lost their home as a result of Complainant being fired and the resultant loss of his income. Her only knowledge of Complainant's work circumstances was what Complainant told her. Based on Complainant's lack of credibility, the forum has only credited her testimony about Complainant and his work circumstances when it was corroborated by other credible testimony or undisputed. The forum has credited her testimony about Complainant's emotional state and the impact of Complainant's discharge from Respondent on Complainant and his family in its entirety.

64) Complainant was not a credible witness and his lack of credibility was reflected in several ways.

First, in his demeanor. When the hearing reconvened, he wore his sunglasses on top of his head while observing and testifying. This conveyed an impression that he did not take the proceedings seriously. While testifying and observing the proceedings, his facial expressions and body language conveyed an arrogant, almost swaggering attitude.

Second, the ease with which he made unfounded assumptions about serious matters. For example, his testimony that "good 'ol boy syndrome" was the reason he believed Ploeg had not talked to Eatinger about Complainant's report of drug use and his assumption that Neal and Cate were together when Cate made his alleged phone call to Bohms because Neal and Cate had left work together six hours earlier. This demonstrated a lack of concern for ascertaining facts and a willingness to accuse persons of very serious matters in order to further his personal agenda.

Third, Complainant's testimony concerning why he believed Cate and Neal were using drugs had numerous holes. Complainant testified that his suspicions of drug use were aroused when Kent Cate called John Bohms at work on the evening on October 31,

2002. Complainant testified that he answered the phone before handing it to Bohms, and that Bohms subsequently told him that Cate was trying to buy some "speed." Complainant unequivocally testified that this was the "primary reason" he believed Cate was using methamphetamine, and that he concluded Neal was also involved in or acquiescent to Cate's drug use because Neal and Cate were together. On cross-examination, he acknowledged that the only evidence he had that Neal and Cate were together was that Neal and Cate had left work together six hours before the phone call and his unsubstantiated assumption that they were working together on a janitorial job. When asked on cross-examination why he failed to mention this "primary reason" for believing that Neal and Cate were using drugs at any time prior to or during the investigation of his complaints, his only explanation was that he believed "it was irrelevant."

Fourth, Complainant testified that he obtained further evidence that Neal and Cate were under the influence of methamphetamine at work on November 1, 2002. On that day, he observed them working in the freezer together for 10 seconds and later concluded, based on unsubstantiated hearsay, that they had taken an hour to perform a 20 minute job. Complainant concluded they were under the influence of methamphetamine – not because of anything he observed in the 10 seconds that he watched them work -- but because his personal experience as a methamphetamine user had shown him that methamphetamine caused people to take longer than usual to perform simple jobs. In rebuttal, Neal credibly testified that he has never spent a continuous hour in the freezer, noting its sub-zero temperature that requires workers in the freezer to wear "freezer suits."

Based on these reasons, Complainant reported to Ploeg and Eatinger that Neal and Cate were using drugs in the workplace. In light of the importance Complainant attached to the event, the forum finds Complainant's pre-hearing failure to mention Cate's supposed call to Bohms inexplicable. Even if the forum believed that this phone call had occurred, the forum finds Complainant's assumption about Neal's association with Cate to be totally unfounded.

Fifth, Complainant also told Moxley that he had described to Eatinger "the strange behavior that Cate had displayed at work." At hearing, Complainant failed to describe any "strange behavior" by Cate or to testify that he made this statement to Eatinger. The forum considers this a significant omission that further degrades Complainant's credibility.

Based on Complainant's personal experience with methamphetamine and his serious concerns about its use, the forum finds it improbable that he would not have mentioned methamphetamine use in his reports to Ploeg and Eatinger or state that

he suspected the use of "illegal" drugs if he had any factual basis for believing that methamphetamine use was occurring.

Taking all these circumstances into account, the forum finds that Complainant's explanation about why he failed to mention Cate's call to Bohms in the investigation is not credible and concludes that Complainant made up the call from Cate to Bohms after the investigation in an attempt to bolster his case. The forum also concludes that Complainant's asserted belief that Neal and Cate were using methamphetamine in the workplace on November 1, 2002, was an unfounded assumption with no basis in fact.

In conclusion, the forum has discredited all of Complainant's testimony that was not corroborated by other credible evidence.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Logan International Ltd was an Oregon corporation doing business in Boardman, Oregon, and engaged or used the personal services of one or more employees.

2) Complainant worked for Respondent from August 16, 2000, until July 30, 2002, when he quit and walked off the job.

3) Respondent hired Scott Neal as shipping manager in early September 2002. On September 10, 2002, Neal rehired Complainant as a probationary forklift driver on day shift.

4) Shortly after Complainant's rehire, Neal promoted Complainant to swing shift lead in the shipping department. While working as swing shift lead, Complainant would not communicate with Kent Cate, the day shift lead. Neal warned him he would be terminated if he maintained that attitude. Complainant did not improve his attitude.

5) On November 4, 2002, Neal made a unilateral decision to terminate Complainant based on his work attitude and performance.

6) When Complainant arrived at work on November 4, 2002, Complainant went to Henry Ploeg, Respondent's quality assurance manager and safety director, and told him he had suspicions that Kent Cate, the shipping department's day shift lead, was doing drugs, that Neal was either involved in the drug activity or knew about it, and that Complainant had a real problem with those activities happening at work.

7) Within 20 minutes of talking with Complainant, Ploeg reported Complainant's conversation to Paul Eatinger, the plant manager.

8) At the start of his shift on November 5, 2002, Complainant told Eatinger he was concerned that drug use was going on in the shipping department and implicated the entire department, including Neal. Complainant did not identify the drug he believed employees were using. Complainant also stated that it was not a safe working environment.

9) Ploeg and Eatinger both assumed that Complainant's complaints of drug use related to safety issues in the workplace.

10) On November 6, 2002, Neal told Complainant that he was fired. At that time, Neal was not aware that Complainant had made allegations that Neal and Cate were using drugs.

CONCLUSIONS OF LAW

1) At all times material, Respondent was an Oregon employer as defined in ORS 659A.001 and ORS 654.005(5).

2) The actions, inactions, statements, and motivations of Scott Neal 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 659A.800 to ORS 659A.850.

4) Respondent did not terminate Complainant because he complained of drug use in the work place and did not violate ORS 654.062(5)(a) or ORS 659A.230.

5) Under ORS 659A.850(3), the Commissioner of the Bureau of Labor and Industries shall issue an order dismissing the charge and complaint against any respondent not found to have engaged in any unlawful practice charged.

OPINION

TESTIMONY OF JIM DANIELS AND JERRY CALLAHAN

As discussed in Procedural Finding of Fact 28, the Agency objected to Respondent calling Jim Daniels and Jerry Callahan as witnesses based on the fact that Respondent did not list them as witnesses in its case summary. Respondent argued that it did not have to disclose them as witnesses in its case summary because they were being called as impeachment and rebuttal witnesses. The ALJ accepted their testimony as an offer of proof, subject to a final ruling on admissibility in this Order.

Pursuant to OAR 839-050-0210, the ALJ's case summary order required the Agency and Respondent to list all persons to be called as witnesses "except that impeachment or rebuttal witnesses need not be included on the witness list[.]"

The forum's administrative rules anticipate that Respondent will structure its case in chief to meet the allegations contained in the Agency's Formal Charges and support Respondent's defenses. Any witnesses who are called to testify about those matters must be listed in Respondent's case summary.

In this case, Respondent elicited testimony on the following issues by Daniels and Callahan:

1) Respondent's record-keeping procedures;

2) Pixton's reputation for truthfulness;

3) Complainant's work attitude;

4) Problems with Penny Dougherty at work (Daniels only).

The Agency elicited testimony from Pixton and others about Respondent's record-keeping procedures in an attempt to show that Respondent deliberately hid or destroyed records that would have been harmful to its case. Respondent's record-keeping procedures are not mentioned in the Agency's Formal Charges or in Respondent's affirmative defenses, and the forum admits the testimony by Daniels and Callahan on direct examination and cross examination concerning Respondent's record-keeping procedures. The forum also admits the testimony by Daniels and Callahan on direct and cross concerning Pixton's reputation in the workplace for truthfulness, as it related to Pixton's credibility.[5] On the other hand, the testimony concerning Dougherty's problems at work did not rebut any prior evidence or impeach any witness and the issue of Complainant's attitude is one that was raised in Respondent's answer. Consequently, the Agency's objection is sustained regarding the testimony by Daniels and Callahan on direct and cross concerning Dougherty's problems at work and Complainant's work attitude.

TESTIMONY OF ANTHONY MELIUS, JOHN PETERSON, AND EXHIBITS R-9 THROUGH R-14

The Agency objected to the testimony of Anthony Melius and John Peterson, both employees of Pro-Pak, Complainant's next employer after Logan, as irrelevant. Respondent offered their testimony to demonstrate habit, routine, and pattern and practice of Complainant in support of Respondent's defense that Complainant had anger issues and was discharged based on his work performance. Melius and Peterson both testified that Complainant had performance issues, relying heavily on exhibits R-9 through R-14, which documented the following:

1) Complainant was hired by Pro-Pak on April 11, 2003;

2) Complainant was counseled on April 24, 2004 for being late due to a flat tire and failing to call in;

3) Complainant was counseled on April 30, 2004, for discussing personnel matters in the break room with others present;

4) Complainant was counseled on May 13, 2004, for interviewing an applicant

[5] Although the forum is not bound by the Oregon Evidence Code, it may rely on it for guidance and does so in this case. *See, e.g., In the Matter of Harney Rock & Paving Co.,* 22 BOLI 177, 184 (2001). ORS 40.350 (OEC 608.01(1)) provides that "[t]he credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation[.]"

whom he had been instructed not to interview, then contacting the applicant's supervisor;

5) Complainant was counseled on May 13, 2004, for not reporting for work or calling on two days;

6) Complainant was counseled on May 14, 2004, for falsifying a work report to show that more pallets had been sorted on his shift than had actually been sorted; and

7) Complainant was fired on May 14, 2004, for initiating a confrontation with a co-worker and shouting profanity loud enough to attract the attention of others.

ORS 40.180 (OEC 406) provides:

"(1) Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

(2) As used in this section, "habit" means a person's regular practice of meeting a particular kind of situation with a specific, distinctive type of conduct."

Although the forum is not bound by the Oregon Evidence Code, the forum looks to OEC 406 for guidance in this instance because OEC 406 specifically relates to relevancy. The forum finds that none of the testimony given by Melius or Peterson relating to the performance issues documented in exhibits R-9 through R-14 meets OEC 406(2)'s definition of "habit." Only the last item relates to any behavior that Complainant is alleged to have engaged at Respondent's place of employment, and that single incident is not enough to qualify as a "habit." Consequently, neither the testimony given by Melius and Peterson related to Complainant's work performance at Pro-Pak, nor exhibits R-9 through R-14 are admissible.

AGENCY'S MOTION TO AMEND ITS PLEADING FOR DAMAGES FOR EMOTIONAL SUFFERING

In the Formal Charges, the Agency sought $10,000 in damages for emotional distress. After it rested its case, but before Respondent concluded its case, the Agency moved to amend the Formal Charges to increase the amount to $30,000. Respondent objected on the grounds that the amendment was untimely.

OAR 839-050-0140 provides, in pertinent part:

"(1) Prior to the hearing a participant may amend its pleading once as a matter of course at any time before a responsive pleading is served. Otherwise, a participant may amend its pleading only by permission of the administrative law judge or by written consent of the other participants. Permissible

amendments to charging documents include, but are not limited to: * * * increases or decreases to the damages, penalties, or other remedies sought. * * * Permission will be given when justice so requires."

"(2)(a)* * * Any participant raising new issues must move the administrative law judge, before the close of the evidentiary portion of the hearing, to amend its pleading to conform to the evidence and to reflect issues presented. The administrative law judge may address and rule upon such issues in the Proposed Order."

The Agency moved to amend the Formal Charges before the close of the evidentiary portion of the hearing to conform to testimonial evidence that was elicited without objection. In the past, the Commissioner has awarded the sum of $30,000 for emotional distress damages in a number of cases. *See In the Matter of Robb Wochnick,* 25 BOLI 265, 289-90 (2004) ($40,000 awarded for emotional distress), *appeal pending*; *In the Matter of Northwest Pizza, Inc.*, 25 BOLI 79, 90 (2004); *In the Matter of Sears, Roebuck and Company,* 18 BOLI 47, 77 (1999); *In the Matter of Body Imaging, P.C.,* 17 BOLI 162, 189 (1998), *affirmed in part, reversed in part, Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries,* 166 Or App 54 (2000). If the Agency prevailed in this case, it is possible that the testimony of Complainant and his wife might support an award of $30,000. Respondent did not argue that it would have prepared differently for the case if the Formal Charges had originally sought $30,000 and did not request a continuance to present additional evidence on the issue of the extent and amount of Complainant's emotional distress. In conclusion, the Agency's motion was timely and justice requires that it be granted.

THE AGENCY'S FORMAL CHARGES

In its Formal Charges, the Agency alleged that Respondent discharged Complainant in retaliation for reporting criminal activity in the workplace and opposing health and safety hazards in the workplace. The alleged criminal activity, use of methamphetamine, was also the alleged workplace health and safety hazard opposed by Complainant.

REPORTING CRIMINAL ACTIVITY IN OR AROUND THE WORKPLACE (WHISTLEBLOWER)

In pertinent part, ORS 659A.230(1) states that it is an unlawful employment practice "for an employer to discharge * * * an employee * * for the reason that the employee has in good faith reported criminal activity by any person[.]" OAR 839-010-0110(1) provides that an employee "reporting criminal activity is protected by ORS 659A.230(1) and these rules if * * * [t]he employee reports to any person, orally or in writing, the criminal activity of any person."

The Agency's prima facie case with regard to reporting criminal activity in or around the workplace consists of the following elements:

(1) Respondent is an employer as defined by statute;

(2) Complainant was employed by Respondent;

(3) Complainant in good faith reported the criminal activity of a person;

(4) Respondent discharged Complainant;

(5) Complainant's report of criminal activity was a substantial factor in Respondent's discharge of Complainant.

See In the Matter of Hermiston Assisted Living, 23 BOLI 96, 121 (2002).

A. Employer/employee relationship & discharge.

Respondent and the Agency agree that Respondent was an employer as defined by statute, that Complainant was employed by Respondent, and that Respondent discharged Complainant.

B. Reporting criminal activity.

The next element of the Agency's prima facie case requires the Agency to establish the existence of three interrelated events. First, the complainant must make a report. Second, the report must concern activity believed to be criminal. Third, the activity believed to be criminal must be reported in good faith.

1. Complainant made a "report."

Complainant, Ploeg, and Eatinger agree that Complainant told both Ploeg, Respondent's quality assurance manager, and Eatinger, Respondent's plant manager, that employees in Respondent's shipping department, including Neal, were using drugs. This constitutes an oral "report" within the meaning of 659A.230(1) and OAR 839-010-0110(1) that satisfies the reporting element of the Agency's prima facie case. *Id* at 122-23.

2. Reporting "criminal activity."

Complainant, Ploeg, and Eatinger all agree that Complainant reported that employees in the shipping department, including Neal, were using drugs. Although Complainant testified at hearing that he believed Cate and Neal were using methamphetamine, he did not report a specific drug or report that "illegal" drugs were being used. Based on the fact that Ploeg and Eatinger considered administering drug tests to shipping department employees based on Complainant's report, the type of drugs that Comprehensive Toxicology Services screens for,[6] and the fact that Ploeg and Eatinger considered Complainant's report to raise a safety issue, it can be inferred that Ploeg and Eatinger assumed Complainant was reporting illegal drug use. However, the forum

[6] *See* Finding of Fact 4 – The Merits, *supra*.

does not need to resolve that issue for the reason that Complainant's report was not made in "good faith."

3. Complainant's report of drug use was not made in "good faith."

To determine whether or not Complainant's report of drug use was made in "good faith," the forum must examine the reasons that prompted his report, including his beliefs about the nature of Cate's and Neal's activity.

The "good faith" requirement in ORS 659A.230 is met when a whistleblower has a reasonable belief that the wrongdoing reported has occurred, and the wrongdoing reported, if proven, constitutes criminal activity. *Hermiston* at 126. The presence of ulterior motives, such as malice, spite, jealousy, or personal gain, does not *per se* demonstrate the absence of "good faith," but may tend to show that the whistleblower lacked reasonable belief that criminal activity was occurring. In this case, Complainant's lack of credibility, coupled with his ulterior motives, show that he did not have a reasonable belief that criminal activity was occurring. Consequently, the forum must conclude that his report was not made in "good faith."

First, Complainant's credibility. Complainant testified at hearing that his primary reason for making the report was the phone call that Cate made to Bohms. For reasons previously discussed,[7] the forum has concluded that this call never occurred. A fabricated, nonexistent occurrence cannot form the basis for a reasonable belief. The only other basis for Complainant's report was his 10 second observation of Neal and Cate in the freezer and his conclusion that they were under the influence of methamphetamine because they purportedly took longer than usual to perform a job. This was an unfounded assumption that had no basis in fact.

Second, Complainant's ulterior motives. Neal and Cate both occupied jobs that Complainant wanted. Complainant resented that he had not been hired to those jobs and believed he was more qualified than Neal or Cate for their positions.[8] Since Complainant had no basis in fact for suspecting that Neal and Cate were using methamphetamine, the forum infers that Complainant's report was a vindictive act based on his resentment and jealousy.

C. Complainant's report was not a substantial factor in Respondent's decision to discharge Complainant.

Even if Complainant had made a good faith report of criminal activity, he would still not prevail for the reason that there was no

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[7] *See* Finding of Fact 64 – The Merits, *supra*.

[8] *See* Findings of Fact 16, 27, 44 – The Merits, *supra*.

credible evidence that Neal, the person who made the decision to discharge Complainant, had any knowledge of Complainant's report before he made the decision to fire Complainant.

Complainant testified that he made his reports to Eatinger and Ploeg and he also told Dougherty, Mendoza, and Bohms about his suspicions before his discharge. Eatinger, whom the forum found to be a credible witness, testified that he did not tell Neal of Complainant's accusations prior to Complainant's discharge. Ploeg, who was only partly credible, testified to the same and the forum has credited his testimony because it was not disputed by any credible evidence. No testimony was elicited from Mendoza concerning his knowledge of whether or not Neal knew of Complainant's report before Neal discharged Complainant. Dougherty was the only person who testified that Neal was aware of Complainant's reports, but the forum did not believe her testimony for reasons stated in Finding of Fact 61 – The Merits. Bohms did not appear as a witness. Neal himself credibly testified that he had no knowledge of Complainant's reports or accusations of drug use before Neal made the decision to discharge Complainant and actually discharged him. In addition, there was credible evidence that Complainant was fired for reasons related to his performance. Without knowledge of Complainant's report, the forum cannot conclude that Neal retaliated against Complainant for making the report.[9]

OPPOSITION TO HEALTH AND SAFETY HAZARDS IN THE WORKPLACE

In pertinent part, ORS 654.062(5)(a) provides that it is an unlawful employment practice "for any person to * * * discharge from employment * * * because such employee has opposed any practice forbidden by ORS 654.001 to 654.295[.]" OAR 839-0004-0004(2) provides that "Protected activities include, but are not limited to: (a) Opposing any practice forbidden by Oregon Safe Employment Act[.]" OAR 839-004-0021(1) clarifies the scope of protection, providing that:

> "ORS 654.062(5) prohibits discrimination against an employee because the employee "opposed" health and safety hazards in the work-

[9] *See In the Matter of Oregon Rural Opportunities,* 2 BOLI 8, 13-14 (1980) (respondent found not to have retaliated against complainant for assisting another employee in filing a complaint with the Civil Rights Division when the commissioner determined there was no evidence to establish that respondent had knowledge that complainant had assisted in the filing and where there was evidence of complainant's insubordination and poor work performance); *In the Matter of Western Stations Co*., 18 BOLI 107, 122-23 (1999) (where there was no evidence that the manager who fired complainant was aware of complaints made by complainant, respondent's manager could not have fired complainant in retaliation for making those complaints).

place. OSEA does not specify to whom or in what manner an employee must oppose health and safety hazards and be protected. The concern is not with how the opposition is communicated, but with the employer's reaction to the opposition."

The Agency's prima facie consists of the following elements:

(1) Respondent is an employer as defined by statute;

(2) Complainant was employed by Respondent;

(3) Complainant opposed practices forbidden by ORS 654.001 to 654.295;

(4) Respondent discharged Complainant;

(5) Complainant's opposition to practices forbidden by ORS 654.001 to 654.295 was a substantial factor in Respondent's discharge of Complainant.

A. Employer/employee relationship & discharge.

Again, Respondent and the Agency agree that Respondent was an employer as defined by statute, that Complainant was employed by Respondent, and that Respondent discharged Complainant.

B. Complainant did not oppose practices forbidden by ORS 654.001 to ORS 654.295.

Respondent and the Agency agree that Complainant's "opposition" consisted of a report of "drug use" by his co-workers and supervisor in the workplace that Complainant made to Ploeg and Eatinger. The forum has already concluded that Complainant had no basis in fact for concluding that his co-workers and supervisor were using drugs, and there is no other credible evidence in the record to support a conclusion that drug use was occurring in Respondent's workplace. Accordingly, the forum cannot conclude that Complainant opposed a practice forbidden by ORS 654.001 to ORS 654.295.[10]

C. Complainant's opposition to alleged drug use was not a substantial factor in Respondent's discharge of Complainant.

The forum has already concluded that Neal, the person who made the decision to discharge Complainant, was unaware of Complainant's "opposition" prior to deciding to discharge Complainant. Without this knowledge, the forum cannot conclude that Neal discharged Complainant because he opposed drug use in Respondent's workplace.

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[10] *Compare In the Matter of Tomkins Industries, Inc.*, 17 BOLI 192, 206 (1998) (agency's proof that complainant's fears about exposure to lacquer thinner were objective and reasonable, even though the exposure was not proven to violate a statute or an OR-OSHA rule, extended the protection of ORS 654.026(5) to complainant).

CONCLUSION

The Agency bears the ultimate burden of proof on all matters alleged in the Formal Charges and did not meet that burden. Therefore, the Agency's case fails with regard to its whistleblower and OSHA allegations and must be dismissed.

THE AGENCY'S EXCEPTIONS

The Agency filed six exceptions that can be summarized as follows:

(1) Respondent fabricated Complainant's employment record concerning the circumstances of his last day of work in his first period of employment and fabricated Complainant's probationary period during his second period of employment.

(2) Sufficient evidence was placed on the record that would lead a reasonably prudent person to find that illegal drugs were being used at work and the evidence demonstrates that, based on what Complainant heard and observed in the workplace, Complainant's reports of illegal drug use were in fact made in good faith.

(3) The Agency proved, through Dougherty's testimony, that Scott Neal knew of Complainant's report of illegal drug use, and that Kent Cate likely also told Neal of Complainant's report.

(4) Scott Neal was not a credible witness.

(5) Dougherty was a credible witness.

(6) Complainant early arrival at the hearing each day, his early return after lunch and breaks, and his words and actions were a better reflection of his seriousness with which he took the proceedings than the fact that he wore sunglasses on the top of his head while observing and testifying.

To begin with, the Agency's exceptions are notable in that they do not contest the ALJ's finding that Complainant was not a credible witness and the fact that the ALJ discredited all of Complainant's testimony that was not corroborated by other credible evidence.

The ALJ's assessment of Neal's and Dougherty's credibility is set out in Findings of Fact 61 and 62 – The Merits. That assessment is supported by substantial evidence in the record. Exceptions 4 and 5 are overruled.

Exception 1, the Agency's characterization of the circumstances of Complainant's initial termination and his employment status upon rehire, is not supported by credible evidence. The Agency did not establish that Byma was responsible for improperly stacking the totes and the evidence was undisputed that Complainant, the lead person at the time, walked off the job. Although there is some circumstantial evidence indicating that Complainant may not have been on probation when rehired,

there is also circumstantial evidence supporting the conclusion that he was on probation, as well as Neal's credible testimony to that fact. Exception 1 is overruled.

In its second exception, the Agency contends that there was evidence placed on the record that would lead a reasonably prudent person to find that illegal drugs were being used at work and that evidence demonstrated that, based on what Complainant heard and observed in the workplace, Complainant's reports of illegal drug use were in fact made in good faith. As described in the Opinion, there is no evidentiary support for the conclusion that Complainant himself had a good faith belief that illegal drugs were being used in the workplace. The Agency's second exception is overruled.

In its third exception, the Agency would have the forum rely on Dougherty's testimony and the notes of Cate's investigative interview to show that Neal was aware of Complainant's report at the time he fired Complainant. The Agency's exception fails based on Dougherty's lack of credibility and the fact that there is nothing in the unsworn contents of Cate's investigative interview that establishes that Neal was aware of Complainant's report at the time he fired Complainant.

The Agency's sixth exception concerning the ALJ's evaluation of Complainant's demeanor is also overruled. Finding of Fact 64 – The Merits contains an evaluation of Complainant's words and actions that is supported by substantial evidence in the record. The fact that Complainant made timely appearances at the hearing does not change the forum's assessment of his credibility. The Agency's statement that "Complainant waited almost two and a half years to have his case heard before the Forum and during that time he fully cooperated, participated in, and ably assisted the Agency in the preparation of his case against Respondent" is irrelevant and not a part of the record.

ORDER

NOW, THEREFORE, as Respondent **Logan International Ltd.** has not been found to have engaged in any unlawful practice charged, the Complaint and the Formal Charges filed against Respondent are hereby dismissed under the provisions of ORS 659A.850.

In the Matter of

EMMERT INDUSTRIAL CORP.

Case No. 78-05

Final Order of Commissioner Dan Gardner

Issued August 30, 2005

SYNOPSIS

Respondent failed to complete and return BOLI's 2004 prevailing wage rate survey by the date the Commissioner specified. The forum imposed a $500 civil penalty for Respondent's violation of ORS 279.359(2). ORS 279.359; ORS 279.370; OAR 839-025-0530.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 29, 2005, in the W. W. Gregg hearing room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Case Presenter Cynthia L. Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Debi Trimm, payroll manager for Emmert Industrial Corp. ("Respondent"), appeared on Respondent's behalf as its authorized representative.

The Agency called Vee Souryamat, BOLI Wage and Hour Division Order Processor, and Debi Trimm, Respondent's authorized representative, as witnesses.

Respondent's authorized representative, Debi Trimm, testified for Respondent.

The forum received into evidence:

a) Administrative exhibits X-1 through X-4 (submitted or generated prior to hearing)[1] and

b) Agency exhibits A-1, A-2, A-3 (filed with the Agency's case summary).

Having fully considered the entire record in this matter, I, Dan Gardner, 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 18, 2005, the Agency issued a Notice of Intent to Assess Civil Penalties ("Notice") in which it alleged that Respondent unlawfully failed to complete and return the 2004 Construction Industry Occupational Wage Survey ("wage survey") by September 17, 2004, in violation of ORS 279.359(2). The Agency alleged aggravating circumstances and sought a civil penalty of $500 for the single alleged violation. The Notice of Intent gave Respondent 20 days to file an answer and make a writ-

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[1] The original hearing file failed to include the ALJ's case summary order as an administrative exhibit and the ALJ only received administrative exhibits X-1 through X-3 at the start of hearing. Since discovering the omission, the ALJ marked the case summary order as administrative exhibit X-4 and admitted it in the record.

ten request for a contested case hearing.

2) The Agency served the Notice on Respondent's registered agent, Terry W. Emmert, on or about March 21, 2005, by certified mail.

3) On April 6, 2005, Respondent filed an answer to the Notice through its authorized representative, Debi Trimm.

4) On May 16, 2005, the Agency filed a request for hearing. On May 21, 2005, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for June 29, 2005; 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.

5) On June 13, 2005, 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; and any civil penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by June 20, 2005, and notified them of the possible sanctions for failure to comply with the case summary order.

6) The Agency timely filed a case summary. The Hearings Unit did not receive a case summary from Respondent.

7) 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.

8) On July 13, 2005, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At times material, Respondent was an Oregon corporation that employed one or more persons in Oregon.

2) The Workplace and Economic Research Division of the Oregon Employment Department contracted with BOLI each year from 1999 through 2004 to conduct a wage survey. The BOLI Commissioner used the survey results 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 entity to whom wage survey packets were sent, the address where each survey was sent, whether each survey was returned and whether it was timely returned, the date on which each survey was sent, and whether and when reminders were mailed to each business entity.

4) During the week of July 5, 2004, the Employment Department notified Respondent by "presurvey postcard" that it would "soon be sending [Respondent] the survey material." During the week of August 9, 2004, the Employment Department mailed a "wage survey packet" to Respondent at 11811 SE Hwy 212, Clackamas, Oregon 97015. The survey packet included a postage paid, preaddressed envelope for the return of the survey. The survey packet also included a notice that its completion and return was required by law and that failure to return the survey could result in penalties, along with instructions to complete and return the survey to the Workforce and Economic Research Division by September 17, 2004.

5) During the week of September 21, 2004, the Employment Department sent Respondent a "reminder card" indicating that the wage survey had not been received, that Respondent was required by law to complete and return it, and that penalties could be imposed.

6) During the week of October 12, 2004, the Employment Department sent Respondent a second wage survey packet that included another reminder that the wage survey had not yet been received, that Respondent was required by law to complete and return it, and that penalties could be imposed. The second packet was labeled "Final Notice."

7) Despite the September 17, 2004, deadline for returning completed survey forms, returned surveys were accepted and included in the survey results up to and until the time the BOLI Commissioner scheduled a rate setting meeting to review the survey data. Some surveys received as late as November 15, 2004, were included in the survey results. Surveys received after November 15, 2004, and some of the surveys received between September 17 and November 15, 2004, were not included in the results of the survey as published by the Oregon Employment Department in January 2005 and not considered by the BOLI Commissioner when setting prevailing wage rates.

8) By letter dated February 3, 2005, the BOLI Wage and Hour Division, Judgment Unit, notified Respondent that unless it returned the wage survey information by February 21, 2005, BOLI intended to assess a civil penalty against Respondent for its "continuing violations."

9) On March 18, 2005, the Agency issued a Notice of Intent to Assess Civil Penalties ("Notice") against Respondent for its failure to return the 2004 wage survey.

10) On April 6, 2005, Respondent, through its registered agent, Terry W. Emmert, filed a letter authorizing its payroll manager, Debi Trimm, to answer the Notice on Respondent's behalf. Included with the authorization was Trimm's answer to the Notice and the 2004 wage survey infor-

mation. The answer, dated April 6, 2005, stated in pertinent part:

> "We received notice that the Bureau intends to assess civil penalties for failure to return the 2004 Construction Industry Occupational Wage Survey.
>
> "I thought it was voluntary to submit this survey and was not aware that it was required until I received a letter from Vee Souryamat on February 3, 2005. I called her and asked what needed to be filled out and told her I would have [it] in by the due date, which I did, but inadvertently filed the wrong survey. I submitted the survey from U.S. Department of Labor which was also blue and white so I accidentally submitted the wrong survey.
>
> "I spoke with her after I received the Intent to Assess Penalties, and we finally figured out I had submitted the wrong survey. Since my Payroll background was mainly in a manufacturing environment I was not aware of the requirements in returning this information.
>
> "I am submitting the information with this letter in hopes that the fees will be dismissed, and I know that in the future I will be timely in processing the information to the [BOLI]. I hope you will allow me a hearing and let me explain the miscommunication on my part. I have submitted with this a letter from the owner of our company allowing me to response [sic] on behalf of [Respondent]."

11) Respondent has been in business for 30 years and has performed public works contracts in the past. Respondent currently is working on a five-year maintenance public work contract that began in 2000.

ULTIMATE FINDINGS OF FACT

1) Respondent is an Oregon employer.

2) The commissioner conducted a wage survey in 2004 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 2004 wage survey packet.

4) Respondent failed to return the completed survey by September 17, 2004, the date specified by the Commissioner.

CONCLUSIONS OF LAW

1) The actions, inaction, and statements of Debi Trimm are properly imputed to Respondent.

2) As an Oregon employer, Respondent was a "person" as defined in ORS 279.359(5) required to make reports and returns under ORS 279.359(2) and violated ORS 279.359(2) by failing to return a completed 2004 wage survey by September 17, 2004.

3) The Commissioner is authorized under ORS 279.370 to assess civil penalties not to ex-

ceed $5,000 for each violation of any provision of ORS 279.348 to 279.380 or any rule of the commissioner adopted thereunder and, having considered any mitigating and aggravating factors in accordance with OAR 839-025-0520, has exercised his discretion appropriately by imposing a $500 civil penalty for Respondent's violation of ORS 279.359(2).

OPINION

PRIMA FACIE CASE

To prove a violation of ORS 279.359(2), the Agency must show that:

(1) Respondent is a "person;"

(2) The commissioner conducted a survey in 2004 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing wage rates;

(3) Respondent received the commissioner's 2004 survey; and

(4) Respondent failed to make the required reports or returns within the time prescribed by the commissioner.

In the Matter of Cedar Landscape, Inc., 23 BOLI 287, 292 (2002).

The Agency properly alleged and Respondent did not dispute any of the elements and the forum deems them admitted. OAR 839-050-0130(2). The only issue remaining is the appropriate civil penalty.

CIVIL PENALTY

The Agency seeks a $500 civil penalty for a single violation of ORS 279.359(2). In determining an appropriate penalty, the forum must consider Respondent's history, including prior violations and Respondent's actions in responding to the prior violations, the seriousness of the current violation, and whether Respondent knew it was violating the law. The forum must also consider any mitigating circumstances offered by Respondent. OAR 839-025-0520.

In this case, it would have been relatively easy for Respondent to comply with the law by simply returning the wage survey, and Respondent was given several opportunities to do so. Moreover, evidence shows Respondent knew of the violation before the Agency issued its Notice of Intent because it received at least two reminders beforehand which were disregarded. The violation is serious because the Commissioner would be unable to complete his statutory 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 will not speculate on the magnitude of Respondent's violation when the Agency offers no evidence from which the forum can gauge the extent to which, if any, Respondent's failure to return the 2004 wage survey skewed the Commissioner's determination of the prevailing wage rates.

The Agency did not allege and there is no evidence that Respondent has previously violated ORS 279.359(2). However, Respondent's assertions that Trimm was inexperienced in prevailing wage rate matters and "accidentally submitted the wrong survey" do not mitigate Respondent's violation. Employers cannot avoid their legal responsibilities by their or their employees' selective ignorance or inattention. *In the Matter of Sealing Technology, Inc.*, 11 BOLI 241, 251 (1993) (citing *In the Matter of Jet Insulation*, 7 BOLI 135, 142 (1988)).

Having considered the aggravating and mitigating circumstances in this case, the forum finds $500 an appropriate penalty.

ORDER

NOW, THEREFORE, as authorized by ORS 279.370 and as payment of the penalty assessed as a result of Respondent's violation of ORS 279.359(2), the Commissioner of the Bureau of Labor and Industries hereby orders **Emmert Industrial Corp.** 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 FIVE HUNDRED DOLLARS ($500), 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.