

**BRAD AVAKIAN**  
COMMISSIONER



**DOUG MCKEAN**  
DEPUTY COMMISSIONER

**BUREAU OF LABOR AND INDUSTRIES**

**BEFORE THE COMMISSIONER  
OF THE BUREAU OF LABOR AND INDUSTRIES  
OF THE STATE OF OREGON**

In the Matter of:

**SCHULTZ MFG, INC.,**

Respondent.

Case No. **10-12**

FINDINGS OF FACT  
ULTIMATE FINDINGS OF FACT  
CONCLUSIONS OF LAW  
OPINION  
ORDER

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**SYNOPSIS**

Respondent violated Oregon child labor laws by employing a minor in 2008 and 2009 without first obtaining a validated employment certificate, pursuant to ORS 653.307. The minor was seriously injured while engaged in hazardous work prohibited by Oregon's child labor laws and Respondent was assessed a civil penalty in the amount of \$1,000. ORS 653.307; ORS 653.370; OAR 839-019-0010, OAR 839-019-0020, OAR 839-019-0025, OAR 839-021-0104.

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The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 19, 2012, in the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Case presenter Chet Nakada, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "Agency"). Matthew Schultz represented Schultz Mfg., Inc., as its authorized representative.

1 The Agency called as witnesses: Matthew Schultz, Respondent's authorized  
2 representative; Margaret Trotman, BOLI Wage and Hour Division compliance specialist;  
3 Karen Gernhart, BOLI Wage and Hour Division Child Labor administrative specialist;  
4 and Trevor Weller, former Respondent minor employee.

5 Respondent called Matthew Schultz as its only witness.

6 The forum received as evidence:

- 7 a) Administrative exhibits X-1 through X-6;
- 8 b) Agency exhibits A-1 through A-11 (filed with the Agency's case summary);
- 9 c) Respondent exhibits R-1 through R-7.

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

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

15 1) On August 8, 2011, the Agency issued a Notice of Intent to Assess Civil  
16 Penalties ("Notice") alleging that Respondent violated Oregon's child labor law,  
17 specifically ORS 653.307(2), by employing Trevor Weller, a minor, without first obtaining  
18 an Annual Employment Certificate ("Certificate"). The Agency alleged that  
19 Respondent's violation was aggravated by the fact that Weller suffered a serious injury  
20 while employed by Respondent, Respondent knew or should have known of the  
21 violation, the violation was serious and of great magnitude, and applying for and  
22 obtaining a Certificate would not have been difficult. The Agency sought to assess a  
23 \$1,000 civil penalty. (Exhibit X-1)

24 2) Respondent was served with the Notice and timely filed an answer and a  
25 request for hearing through its designated authorized representative Matthew Schultz.  
In its answer, Respondent admitted it did not have a Certificate when Weller was hired,

1 but contended that Weller's injury was "non-serious" and that \$1,000 was an excessive  
2 civil penalty, and that already paid a civil penalty to the U.S. Department of Labor  
3 related to the same injury. (Exhibit X-1)

4 3) On October 10, 2011, the Hearings Unit issued a Notice of Hearing stating  
5 the hearing would commence at 11:00 a.m. on March 19, 2012. The Notice of Hearing  
6 included a copy of the Notice of Intent to Assess Civil Penalties, a document entitled  
7 "Summary of Contested Case Rights and Procedures" containing the information  
8 required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act  
9 (SCRA) Notification, a multi-language notice explaining the significance of the Notice of  
10 Hearing, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to  
11 839-050-0445. (Exhibit X-2)

12 4) On January 10, 2012, the ALJ issued an order requiring the Agency and  
13 Respondent each to submit a case summary by March 9, 2012, and notified them of the  
14 possible sanctions for failure to comply with the case summary order. (Exhibit X-3)

15 5) The Agency and Respondent timely submitted case summaries. (Exhibits  
16 X-5, X-6)

17 6) At the start of hearing, the ALJ verbally informed the participants of the  
18 issues to be addressed, the matters to be proved, and the procedures governing the  
19 conduct of the hearing. (Statement of ALJ)

20 7) On March 28, 2012, the ALJ issued a proposed order that notified the  
21 participants they were entitled to file exceptions to the proposed order within ten days of  
22 its issuance. Respondent timely filed exceptions on April 2, 2012, that are addressed in  
23 the Opinion section of this Final Order. On April 3, 2012, the Agency filed objections to  
24 Respondent's exceptions.

## FINDINGS OF FACT – THE MERITS

1  
2 1) At times material, Respondent was an Oregon corporation that  
3 manufactured motocross parts in Oregon City. At times material, Matthew Schultz was  
4 Respondent's corporate president. (Testimony of Schultz; Exhibit A-2)

5 2) In October 2008, Respondent, through Schultz, hired Trevor Weller. Prior  
6 to being hired, Weller filled out an employment application. On the application, Weller  
7 wrote his date of birth is July 8, 1991, a date that is his actual date of birth. (Testimony  
8 of Weller, Schultz; Exhibit A-4)

9 3) Schultz knew that Weller was only 17 years old at the time he hired  
10 Weller. (Testimony of Schultz)

11 4) Until May 6, 2009, Weller's job duties with Respondent included operating  
12 a power-driven band saw. Schultz trained him how to use the band saw. When Weller  
13 used the band saw, he used his hands to guide a plastic part against the saw's blade.  
14 (Testimony of Weller, Schultz)

15 5) On May 6, 2009, Weller was operating Respondent's band saw when the  
16 middle finger of his right hand came in contact with the blade of the band saw. As a  
17 result of the contact, the top knuckle of the middle finger of Weller's right hand was  
18 fractured and he suffered a cut around the same knuckle that bled considerably.  
19 (Testimony of Weller)

20 6) When Weller was injured, "911" was called and Weller was transported by  
21 ambulance to Willamette Hospital in Oregon City. At the hospital, he spent  
22 approximately 90 minutes in the emergency room, where his wound was cleaned, his  
23 cut was sewn shut with 12 stitches and bandaged, and a padded metal splint was put  
24 on his finger. He kept the injury bandaged for about a month. (Testimony of Weller)

25 7) Weller filed for and received workers compensation benefits related to his  
May 6, 2009, injury. (Testimony of Weller; Exhibit A-1)

1           8)     Weller continued to work for Respondent after his injury, but did not  
2 operate the band saw again until after his 18<sup>th</sup> birthday. (Testimony of Weller, Schultz)

3           9)     At the time of hearing, Weller's injury only bothered him when he hits the  
4 injured finger against a hard object. His doctor expects the injury to heal completely  
5 with no residual effects. (Testimony of Weller)

6           10)    Respondent did not apply for or obtain an Annual Employment Certificate  
7 ("Certificate") from BOLI at any time while Weller worked for Respondent. Obtaining a  
8 Certificate would not have been difficult. (Testimony of Gernhart, Schultz)

9           11)    When employers apply for a Certificate, BOLI's application requires them  
10 to list the machinery that will be operated by the minor employee. Had Respondent  
11 applied for a Certificate and stated that Weller would be operating a band saw, BOLI's  
12 Child Labor administrative specialist Karen Gernhart would have immediately called  
13 Respondent to inform Respondent that it was unlawful for a minor to operate a band  
14 saw. Gernhart would not have issued a Certificate to Respondent if Respondent  
15 planned to have a minor employee operating a band saw. (Testimony of Gernhart)

16          12)    Had Respondent obtained a Certificate, Weller would not have been  
17 allowed to operate the band saw because Schultz would have learned that minors  
18 under the age of 18 are not legally allowed to operate a band saw and would have  
19 obeyed the law. (Testimony of Gernhart, Schultz)

20          13)    Schultz cooperated with the Agency's child labor investigation.  
21 (Testimony of Trotman)

22          14)    Respondent has had no other violations of Oregon's child labor laws.  
23 (Testimony of Schultz; Entire Record)

24          15)    Respondent paid a civil penalty of \$1,485.00 to the U. S. Department of  
25 Labor ("USDOL") on February 26, 2010, based on the USDOL's finding that

1 Respondent had employed a minor "contrary to the child labor provisions of the [FLSA]."  
2 (Testimony of Schultz; Exhibit R-3)

3 16) All of the witness testimony was credible and undisputed. (Statement of  
4 ALJ)

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

6 1) At all times material, Respondent was an Oregon corporation operating a  
7 manufacturing facility that employed one or more persons in Oregon.

8 2) In October 2008, Respondent hired Trevor Weller, a minor who did not  
9 turn 18 years old until July 8, 2009. Respondent, through Schultz, knew that Weller was  
10 only 17 years old when he was hired.

11 3) Until May 6, 2009, Weller's job duties included operating a power-driven  
12 band saw. On May 6, 2009, Weller was operating Respondent's band saw when the  
13 middle finger of his right hand came in contact with the blade of the band saw and he  
14 fractured his top knuckle and suffered a cut around the same knuckle that bled  
15 considerably. Weller was transported by ambulance to a hospital, where his wound was  
16 cleaned, his cut sewn shut with 12 stitches and bandaged, and a padded metal splint  
17 put on his finger.

18 4) Respondent did not apply for or obtain an Annual Employment Certificate  
19 from BOLI at any time while Weller worked for Respondent.

### 20 **CONCLUSIONS OF LAW**

21 1) At all times material herein, Respondent was an employer subject to the  
22 provisions of ORS 653.305 to 653.370. ORS 653.010(3); OAR 839-019-0004(5)

23 2) The actions, inaction, statements, and motivations of Matthew Schultz,  
24 Respondent's corporate president, are properly imputed to Respondent.

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



1 sheet summarizing all rules and laws governing the employment of  
2 minors.”

3 A “minor” is “any person under 18 years of age.” OAR 839-019-0004(7).

4 OAR 839-021-0220 contains the rules promulgated by the Wage and Hour  
5 Commission pursuant to ORS 653.307 governing annual employment certificates.

6 Those rules provide:

7 “(1) Unless otherwise provided by rule of the commission, no minor 14  
8 through 17 years of age may be employed or permitted to work unless the  
9 employer:

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

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

13 “(2) An employer may not employ a minor without having first obtained  
14 a validated employment certificate from the Bureau of Labor and  
15 Industries. Application forms for an employment certificate may be  
16 obtained from any office of the Bureau of Labor and Industries or by  
17 contacting the Child Labor Unit, Wage and Hour Division, Bureau of Labor  
18 and Industries, 800 NE Oregon Street Suite 1045, Portland OR 97232,  
19 971-673-0836.

20 “(a) The Bureau of Labor and Industries will issue a validated  
21 employment certificate upon review and approval of the application. The  
22 validated employment certificate will be effective for one year from the  
23 date it was issued, unless it is suspended or revoked.

24 “(b) If, after the issuance of a validated employment certificate, the  
25 duties of the minors are changed from those originally authorized under  
the employment certificate or the employer wishes to employ minors at an  
additional establishment, the employer must submit a ‘Notice of Change  
(to Annual Employment Certificate)’ form to the Child Labor Unit, Wage  
and Hour Division of the Bureau of Labor and Industries. The “Notice of  
Change (to Annual Employment Certificate)’ form must be submitted  
within 15 days of the change on a form provided by the bureau. The  
bureau will approve or deny any change(s) in duties and notify the  
employer. If the bureau denies the changes, the employer must  
immediately reassign any affected minor to approved duties or terminate  
the minor's employment.”

The statute and rule leave no doubt that a primary purpose of the Employment  
Certificate requirement is to protect minors by ensuring they are not allowed to perform  
job duties or work in occupations deemed hazardous to minors by requiring that BOLI

1 screen all minor's stated job duties prior to their commencement of work. Respondent  
2 did not apply for and obtain a Certificate, thereby violating ORS 653.307(20) and  
3 exposing Weller to injury.

#### 4 **CIVIL PENALTY**

5 In its amended answer, Respondent admitted its violation of ORS 653.307, but  
6 alleges immunity from a civil penalty under ORS 653.307(5)(a). In the alternative,  
7 Respondent alleges several mitigating factors that make the Agency's proposed civil  
8 penalty of \$1,000 excessive.

9 First, Respondent contends that its payment of a civil penalty to the U. S.  
10 Department of Labor ("USDOL") for a violation of the child labor provisions of the  
11 Federal Fair Labor Standards Act ("FLSA") makes Respondent immune from an civil  
12 penalty pursuant to ORS 653.370(5)(a). Respondent introduced evidence that it paid a  
13 penalty of \$1,485.00 to the USDOL on February 26, 2010, based on the USDOL's  
14 finding that Respondent had employed a minor "contrary to the child labor provisions of  
15 the [FLSA]." ORS 653.370(5)(a) provides:

16 "(5)(a) Notwithstanding subsection (1) of this section, the commissioner  
17 may not impose a civil penalty pursuant to this section upon any person  
who provides evidence satisfactory to the commissioner that:

18 "(A) The person has paid a civil penalty to the United States Department  
19 of Labor for violation of the child labor provisions of the Federal Fair Labor  
Standards Act (29 U.S.C. 201 et seq.); and

20 "(B) The civil penalty involved the same factual circumstances at issue  
before the commissioner."

21 There is no evidence in the record as to the specific factual circumstances on which the  
22 USDOL based its assessment of civil penalties. Without evidence that the USDOL's  
23 penalty was based on the "same factual circumstances" as those before the  
24 Commissioner in this case, Respondent's defense must fail.

1 Respondent, through Schultz, presented undisputed testimony that Respondent  
2 cooperated with BOLI's investigation, that it has had no prior or subsequent violations,  
3 that its employees have suffered no other serious injuries, and that it did not allow  
4 Weller to operate the band saw after his injury until he was 18 years old. Respondent  
5 also did not dispute the Agency's contention that it would have been relatively simple for  
6 Respondent to apply for and obtain a Certificate, an action that would have prevented  
7 Weller's injury from occurring.<sup>1</sup>

8 Finally, Respondent contends that Weller's injury was "non-serious."  
9 Respondent argues that Weller's injury was "non-serious" because he was released to  
10 return to work the day after the injury, a fact not disputed by the Agency. For added  
11 support, Respondent cites ORS 161.015(8), a provision of the Oregon Criminal Code  
12 that defines "serious physical injury" as "physical injury which creates a substantial risk  
13 of death or which causes serious and protracted disfigurement, protracted impairment of  
14 health or protracted loss or impairment of the function of any bodily organ." That  
15 definition relates only to crimes and is inapplicable to this proceeding.

16 Whether or not Weller's injury was "serious" is particularly significant based on  
17 the following rules adopted by the Wage and Hour Commission in its schedule of civil  
18 penalties for child labor violations:

19 OAR 839-019-0025(4) provides:

20 "When a minor incurs a serious injury or dies while employed in violation  
21 of any of the following statutes and rules, the violation is considered to be  
22 so serious and of such magnitude that the maximum penalty will be  
23 imposed when the Commissioner determines to impose a civil penalty:

24 \* \* \* \* \*

25 "(d) Employment of a minor in violation of \* \* \* OAR 839-021-0104."

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<sup>1</sup> It is undisputed that Weller would not have been allowed to operate the band saw, had Schultz known the law prohibits minors from operating a band saw, something Schultz would have learned almost immediately from Gernhart if he had applied for an Employment Certificate on Respondent's behalf at the time Weller was hired.

1 OAR 839-021-0104 provides:

2 “(1) Except as provided in OAR 839-021-0285, an employer may not  
3 employ a minor under 18 years of age in any occupation declared  
4 particularly hazardous or detrimental to their health or well-being, except  
5 under terms and conditions specifically set forth by rules of the Wage and  
6 Hour Commission.

7 “(2) Those occupations set out in Title 29 CFR, Part 570.51 to and  
8 including Part 570.68 as amended July 19, 2010 are hereby adopted as  
9 occupations particularly hazardous or detrimental to the health and well-  
10 being of minors 16 and 17 years of age and the regulations pertaining to  
11 these occupations set out in Title 29 CFR, Part 570.51 to and including  
12 Part 570.68 as amended July 19, 2010 are hereby adopted and  
13 incorporated by reference herein and are attached as Appendix 1.”

14 Title 29 CFR, Part 570.65 - Occupations involved in the operations of circular  
15 saws, band saws, and guillotine shears (Order 14) provides:

16 “(a) Findings and declaration of fact. The following occupations are  
17 particularly hazardous for the employment of minors between 16 and 18  
18 years of age:

19 “(1) The occupations of operator of or helper on the following power-  
20 driven fixed or portable machines except machines equipped with full  
21 automatic feed and ejection:

22 “\* \* \*

23 “(ii) Band saws.

24 “\* \* \*

25 “(b) Definitions. As used in this section:

“*Band saw* shall mean a machine equipped with an endless steel band  
having a continuous series of notches or teeth, running over wheels or  
pulleys, and used for sawing materials.

“*Operator* shall mean a person who operates a machine covered by this  
section by performing such functions as starting or stopping the machine,  
placing materials into or removing them from the machine, or any other  
functions directly involved in operation of the machine.”

26 There is no dispute that Weller's injury occurred while he was the operator of machinery  
27 that fits within the above definition of band saw. The very fact that Weller was hand-  
28 feeding the plastic piece to be cut at the time he was injured demonstrates that  
29 Respondent's band saw was not equipped with “full automatic feed and ejection.”

1 Given these facts, under OAR 839-019-0025(4) the forum has no choice but to assess  
2 the maximum civil penalty of \$1,000 if it determines that Weller's injury was "serious."

3 The term "serious injury" is not defined in Oregon's child labor statutes, BOLI's  
4 administrative rules, or any prior BOLI Final Orders, including three BOLI Final Orders  
5 assessing a maximum civil penalty when a minor died or was injured during their  
6 employment.<sup>2</sup> The "injury" in this case was a fracture to the top joint of Weller's middle  
7 finger on his right hand and a cut that bled a considerable amount and required  
8 immediate medical attention. Weller had to be driven by ambulance to a local hospital,  
9 where he received 12 stitches, a bandage that had to be changed for a month, and a  
10 metal splint. Although Weller's doctor anticipates no residual effects, the finger is still  
11 painful whenever Weller accidentally bumps it against a hard object. It is also apparent  
12 to the forum, given the type of machinery Weller was operating and the particular  
13 injuries he suffered, that his finger could have been severed instead of fractured and  
14 cut. Under these facts, the forum concludes that Weller suffered a "serious injury"  
15 within the meaning of OAR 839-019-0025(4).

16 As alluded to earlier, there have been three previous cases in which the forum  
17 has assessed civil penalties when a minor employee was injured or killed while  
18 performing the minor's job duties. In 1992, the commissioner imposed the maximum  
19 civil penalty of \$1,000 when a minor was killed<sup>3</sup> while employed in the hazardous  
20 occupation of driving a motor vehicle on a public road or highway in violation of OAR  
21 839-21-104 (subsequently renumbered as OAR 839-021-0104). In 1994, the  
22 commissioner imposed the maximum civil penalty of \$1,000 when a minor suffered a  
23 "devastating back injury" while employed in hazardous occupation of logging in violation  
24

25 \_\_\_\_\_  
<sup>2</sup> See discussion of these cases, *infra*.

<sup>3</sup> *In the Matter of Panda Pizza*, 10 BOLI 132, 144 (1992).

1 of Oregon law.<sup>4</sup> In 2009, the commissioner again imposed the maximum civil penalty of  
2 \$1,000 in the case of *In the Matter of Spud Cellar Inc.*, 30 BOLI 185, 189, 192-93 (2009)  
3 based on the respondent's failure to obtain a validated Certificate, when a minor  
4 employee sliced off the tip of her thumb on a meat slicer and was taken to the hospital,  
5 where she received seven to nine stitches, was left with a permanently scarred thumb,  
6 and still suffered discomfort two years later from the injury. Following its precedent, the  
7 forum exercises its authority under ORS 653.370 to assess a \$1,000 civil penalty  
8 against Respondent for its single violation of ORS 653.307(2).

### 9 **RESPONDENT'S EXCEPTIONS**

10 Respondent's exceptions argues two points. First, that the civil penalty of \$1,000  
11 proposed by the ALJ is excessive and should be reduced to \$100 because Weller's  
12 injury was "non-serious" and Respondent's first offense. Second, that the USDOL  
13 already assessed a penalty based on similar facts. The forum rejects Respondent's  
14 exceptions for the reasons stated below.

15 First, Respondent attached an exhibit to its exceptions that was not offered at the  
16 hearing and requested that it be considered as evidence. That exhibit is the USDOL's  
17 "Notice to Employer-Employment of Minors Contrary to the Fair Labor Standards Act"  
18 that advised Respondent that USDOL's investigation to determine that Weller had been  
19 employed by Respondent to operate a band saw. The Notice further indicated the  
20 USDOL's conclusion that Weller had sustained a "Nonserious" injury "in illegal  
21 employment." Respondent gave no reason for not offering this exhibit at hearing and  
22 the forum will not reopen the record to consider it now. Even if the forum did reopen the  
23 record to consider this exhibit, the USDOL's conclusion that Weller sustained a  
24 "Nonserious" injury would not be binding on the forum. For the reasons stated in the

25 \_\_\_\_\_  
<sup>4</sup> *In the Matter of Ronald Turman*, 13 BOLI 166, 174-75.

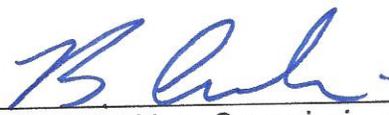
1 proposed order, the forum stands by its conclusion that Weller's injury was "serious" as  
2 defined by OAR 839-019-0025(4).

3 Second, forum rejects Respondent's argument that the USDOL already assessed  
4 a penalty based on similar facts. The penalty assessed in this case is based on  
5 Respondent's failure to obtain an Employment Certificate, not Weller's injury. The injury  
6 is relevant to the amount of penalty assessed but is not the reason a penalty was  
7 assessed. In contrast, according to Respondent's statement, the USDOL's penalty was  
8 assessed based on the fact that Weller suffered an injury.

9 **ORDER**

10 NOW THEREFORE, as authorized by ORS 653.370, and as payment of the  
11 penalties assessed for Respondent Schultz Mfg., Inc.'s violation of ORS 653.307(2), the  
12 Commissioner of the Bureau of Labor and Industries hereby orders **Schultz Mfg., Inc.**,  
13 to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State  
14 Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check  
15 payable to the Bureau of Labor and Industries in the amount of ONE THOUSAND  
16 DOLLARS (\$1,000), plus any interest thereon that accrues at the legal rate between a  
17 date ten days after the issuance of the Final Order and the date Schultz Mfg., Inc.,  
18 complies with the Final Order.

19 DATED this 4<sup>th</sup> day of April, 2012.

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22 \_\_\_\_\_  
23 Brad Avakian, Commissioner  
24 Bureau of Labor and Industries  
25