

In the Matter of

LABOR READY NORTHWEST, INC.

Case No. 49-05

Final Order of Commissioner Dan Gardner

Issued January 17, 2007

SYNOPSIS

Respondent was a subcontractor that provided workers to perform manual labor for another contractor on a public works project. Respondent paid three workers less than the applicable prevailing wage rates throughout their employment, committing three violations of *former* ORS 279.350(1). Respondent also failed to post the prevailing wage rates on the project in violation of *former* ORS 279.350(4). Respondent intentionally failed to pay the prevailing rates of wage and intentionally failed to post the prevailing wage rates on the project. The Commissioner assessed \$20,000 in civil penalties based on Respondent's three violations of *former* ORS 279.350(1) and single violation of *former* ORS 279.350(4). The Commissioner also placed Respondent on the list of contractors or subcontractors ineligible to receive any contract or subcontract for public works for three years. *Former* ORS 279.348(3) and (5), *former* ORS 279.350(1), *former* ORS 279.350(4), *former* ORS 279.361(1), *former* ORS 279.370(1); *former* OAR 839-016-0033(1), *former* OAR 839-016-0035(1), *former* OAR 839-016-0085(1)(c), *former* OAR 839-016-0520, *former* OAR 839-016-0530(3)(a) & (b), *former* OAR 839-016-0540(3)(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 July 11, 2006, in the offices of the Community Services Consortium, 545 SW 2nd Street, 2nd floor, Corvallis, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Jeffrey C. Burgess, an employee of the Agency. Respondent was represented by David J. Sweeney, attorney at law. Danielle Coverrubias, Respondent's paralegal services

manager, was present during the hearing as the person designated to assist the presentation of Respondent's case.

The Agency called the following witnesses: Gerhard Taeubel, BOLI Wage and Hour Division Compliance Specialist in BOLI's Prevailing Wage Rate unit; and James Rand and Charles Woods, former Respondent employees.

Respondent called the following witnesses: Ivy Finnegan, Respondent's prevailing wage administrator; Alma Casarez, Respondent's current Salem branch manager, and Susie Barrera, a customer service representative in Respondent's Salem branch office.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-16;
- b) Agency exhibits A-1 through A-17 (submitted prior to hearing);
- c) Respondent exhibits R-1, R-2, and R-5 through R-9 (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 October 11, 2005, the Agency issued a Notice of Intent to Place on List of Ineligibles and to Assess Civil Penalties in the amount of \$20,000 in which it made the following charges against Respondent:

“1. At all times material herein, Respondent performed work within the state of Oregon.

“2. Respondent entered into contracts or subcontracts to perform a public works for the City of Adair Village, Oregon involving construction, reconstruction and/or major renovation. The public works was known as

the Hospital Hill Reservoir Roofing Project (the 'Public Works'). The Public Works was located in Adair Village, Benton County, Oregon.

"3. The Public Works was being conducted by the City of Adair Village and consisted of construction, reconstruction and/or major renovation. The Public Works was not regulated under the federal Davis-Bacon Act and cost in excess of \$25,000. The Public Works was subject to regulation under Oregon's prevailing wage rate laws (ORS 279.348 *et seq.*) and was first advertised for bid on June 25, 2004.

"4. Intentional Failure or Refusal to Pay Prevailing Wages. Respondent provided Cement Masonry, Carpentry, Ironwork and Equipment Operating on the Public Works. Respondent intentionally failed or refused to pay three employees approximately \$762.85 in prevailing wages between approximately September 29, 2004 and October 15, 2004. The employees were James Rand, Charles Woods and Dimitri Kitterman. This is in violation of ORS 279.350 and OAR 839-016-0035. **CIVIL PENALTY of \$15,000.** Three (3) violations (\$5,000 per violation) – ORS 279.370, OAR 839-016-0530(3)(a) and 839-016-0540(3)(a).

"5. Failure to Post Prevailing Wage Rate. Respondent intentionally failed to keep the prevailing wage rates for the Public Works project posted in a conspicuous and accessible place in or about the Public Works project. This is a violation of ORS 279.350(4) and OAR 839-016-0033. **CIVIL PENALTY of \$5,000** against Respondent. One (1) violation – ORS 279.370 and OAR 839-016-0530(3)(b).

"6. Placement on List of Ineligibles. Respondent, and any firm, corporation, partnership or association in which it had a financial interest should be placed on the list of those ineligible to receive contracts or subcontracts for public works for a period of three years pursuant to ORS 279.361 and OAR 839-016-0085, based on the following:

1. Respondent intentionally failed or refused to pay the prevailing rate of wage to its workers as previously alleged herein.
2. Respondent has intentionally failed or refused to post the prevailing wage rate as previously alleged herein.

"7. Aggravating Factors. Respondent has had the opportunity to comply with the rules and laws regulating prevailing wage rates on public works and compliance would not have been difficult. Respondent's violations were serious and repetitious, and resulted in significant underpayment of wages to multiple employees. Respondent's violations have been ongoing. Respondent knew, or should have known, of its violations. Respondent was advised that it had failed to pay the prevailing rate of wage and continued its failure to pay the correct wage for the Work. OAR 839-016-0520."

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 October 13, 2005.

4) Respondent, through counsel, filed an answer and request for hearing on October 27, 2005.

5) The Agency filed a request for hearing with the Hearings Unit on March 23, 2006.

6) On March 23, 2006, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for June 6, 2006; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent.

7) On April 5, 2006, Respondent filed a motion to postpone the hearing based on the unavailability of a key witness at the time set for hearing. The Agency did not object and the ALJ granted Respondent's motion and reset the hearing to begin on July 11, 2006, at the same location.

8) 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.

9) Respondent objected to the forum taking official notice of prior adjudicatory actions against Respondent. Respondent's objection is overruled.

10) On September 14, 2006, 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.

9) On September 20, 2006, Respondent moved for an extension of time to file exceptions and requested a copy of the mechanical recording of the hearing. The Agency did not object, and the forum granted Respondent and the Agency an additional twenty working days after receipt of the mechanical record to file exceptions.

10) On October 19, 2006, the Agency timely filed exceptions. On October 19, 2006, Respondent timely filed exceptions. These exceptions are discussed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Labor Ready Northwest, Inc. was a foreign corporation based in Washington that was registered with the Oregon Corporations Division to perform work within the state of Oregon. At all times material herein, Respondent was a licensed contractor with the State of Oregon Construction Contractor's Board. Respondent is in the business of providing temporary labor.

2) At all times material herein, Respondent's corporate offices in Tacoma, Washington, administered prevailing wage rate jobs to which Respondent's Oregon branch offices dispatched workers. This included ensuring that employees were paid the required rates, that certified payroll reports were processed, and that posting was done on job sites.

3) On June 25, 2004, the City of Adair Village ("Adair Village"), a public agency, first advertised the "Hospital Hill Reservoir Roof Project" ("the Project") for bid. The job involved constructing a "free-span metal building and roof" over an existing reservoir in Benton County, Oregon, which is in Region 4 in BOLI's Prevailing Wage Rate book. On August 14, 2004, Adair Village awarded the project contract to Taylor

Site Development, Inc. ("Taylor") in the amount of \$107,475. The contract was not subject to the Federal Davis-Bacon Act.

4) Taylor contracted with Hicorp Steel Building, Inc. ("Hicorp") to perform site clearing, concrete work, and roof framing on the Project.

5) Hicorp, through George Frauendiener, Hicorp's president, hired James Rand and Charles Woods to work on the Project. Rand, a journeyman carpenter, began work on the Project on September 20, 2004, and acted as Hicorp's foreman. Woods, a carpenter and equipment operator, began work on the Project on September 21, 2004.

6) Rand and Woods worked exclusively for Hicorp on the Project through September 28, 2004.

7) On September 29, 2004, Frauendiener told Woods and Rand that they would no longer be working for Hicorp because Hicorp could not provide proof of workers compensation insurance and did not have a contractor's license. Frauendiener instructed them to Respondent's Salem office, telling them that they would now be working for "Labor Ready" on the same job.

8) On September 29, 2004, Sue Frauendiener, Hicorp's secretary, called Respondent's Salem office and spoke with Alma Casarez, a customer service representative employed by Respondent, about using Respondent's services to complete Hicorp's work at the Project. Frauendiener told Casarez that the job was a prevailing wage rate job, that all power equipment had been removed from the job, and that Hicorp's workers "were out there as laborers only." Casarez asked Frauendiener to fax the applicable prevailing wage rate sheet so Casarez could determine the appropriate job classification for Respondent's workers. In response, Frauendiener faxed pages 52 and 53 of the Appendix of BOLI's January 2004 Prevailing Wage Rate

booklet to Casarez. These faxes were transmitted from Hicorp at 11:59 a.m. and 11:41 a.m., respectively, on September 29, 2004.

9) At all times material, Respondent's Salem office relied on information from its clients to determine the correct prevailing wage rate for its workers on prevailing wage rate jobs.

10) Pages 52 and 53 of the Appendix of BOLI's January 2004 Prevailing Wage Rate booklet specify the basic hourly wage rate and fringe benefit for Laborers. The Appendix lists five classifications of Laborers -- Groups 1 through 5 -- and sets out the pay rates and job duties performed by each classification. Group 1 is the highest paid classification (\$21.42 basic hourly rate + \$8.90 fringe benefit = \$30.32 per hour). Group 5 is the lowest paid classification (\$18.75 basic hourly rate + \$8.90 fringe benefit = \$27.65 per hour). On page 52, Sue Frauendiener underlined the words "Group 5 18.75 8.90."ⁱ and wrote her initials next to the underline. On page 53, she circled the following words:

"Group 5

Clean up Laborer (building only)^{***}
Demolition, Wrecking & Moving (building only)^{***}
Flagger

^{***}Laborers can tear off roofs, clean up or handle roofing material only when at least one new story is added or in demolition work, where no re-roofing will occur."

11) Workers classified as Group 5 Laborers generally perform cleanup.

12) In response to Frauendiener's fax, Casarez prepared a one-page document entitled "Confirmation of Billing Services" that stated Respondent's terms for providing workers to Hicorp. Among other things, the agreement included the following statements:

"Customer: Hicorp Steel Building
Attn: Sue

“The hourly rate is based on the usage of workers who will be working under the

Workers’ Compensation Description of: 3004

Regular Hourly Rate (straight time): \$47.41 = P. Wage Job

Hospital Hill Res./Adair Village Job #0801-218621

(O.T. after 8 hours & all Saturday & Sunday on P.Wage Job)

4 Hr. Minimum billing on each worker ordered

Overtime Rate 1.5 times straight time as per Oregon law.

Labor Ready is responsible for all required employer’s costs. These costs have been calculated within the above bill rate.

- Worker’s Compensation Insurance
- F.I.C.A. & Medicare Contributions and Deposits
- State and Federal Unemployment Insurance
- Recruiting, Advertising and Administration Costs
- Employee Payrolling and Funding
- Liability Insurance
- Unemployment Claims and Filings
- Employment State and Federal Tax Deposits”

13) Casarez faxed the “Confirmation of Billing Services” to Frauendiener for her signature. Frauendiener signed and dated it and faxed it back to Casarez on September 29, 2004, at “16:00.”

14) Rand became Respondent’s employee on September 29, 2004, and worked from 7 a.m. – 3 p.m. that day on the Project.

15) Woods worked with Rand on the Project as Hicorp’s employee on September 29, 2004, from 7 a.m. – 3:30 p.m. Woods became Respondent’s employee on September 30, 2004.

16) Mark Hance was Respondent’s Salem office branch manager in September and October 2004. His responsibilities included visiting prevailing wage rate job sites to which Respondent’s workers had been dispatched, posting the applicable prevailing wage rates, and preparing a written job site evaluation.

17) Neither Hance nor any other employee of Respondent visited the Project between September 29 and October 15, 2004, and Respondent does not have a written jobsite evaluation for the Project.

18) From September 29 through October 15, 2004, Rand worked the dates and hours listed below, performing the duties listed after each date:

9/29/04: 7½ hours concrete form assembly
9/30/04: 8 hours concrete form assembly
10/1/04: 7½ hours concrete form assembly
10/4/04: 8 hours concrete form assembly
10/5/04: 8 hours resetting form assembly
10/6/04: 8 hours resetting form assembly
10/7/04: 8 hours concrete form assembly
10/8/04: 4 hours concrete form assembly
10/12/04: 8 hours poured concrete & finished
10/14/04: 8 hours concrete form work
10/15/04: 4 hours concrete form work

Respondent classified Rand as a Group 5 Laborer and initially paid him \$27.65 per hour (\$18.75 hourly rate + \$8.90 fringe benefit) for all his work.

19) From September 29 through October 15, 2004, Woods worked the dates and hours listed below, performing the duties listed after each date:

9/29/04: 8 hours excavation loading site debris
9/30/04: 8 hours site excavation
10/1/04: 7½ hours site excavation
10/4/04: 2 hours site excavation; 6 hours concrete form assembly
10/5/04: 8 hours concrete form assembly
10/6/04: 8 hours concrete form assembly
10/7/04: 8 hours concrete form assembly
10/8/04: 4 hours concrete form assembly
10/12/04: 8 hours concrete finishing
10/14/04: 8 hours excavation – back fill
10/15/04: 4 hours concrete form work

While excavating, Woods operated a 10,000 lb. tracked excavator. Respondent classified Woods as a Group 5 Laborer and initially paid him \$27.65 per hour (\$18.75 hourly rate + \$8.90 fringe benefit) for all his work.

20) Dimitri Kitterman was employed by Respondent on October 8 and 12, 2004, on the Project, working eight hours each day. He assisted in setting forms, shooting grade, tying rebar, pouring, and finishing concrete. Respondent classified Kitterman as a Group 5 Laborer and initially paid him \$27.65 per hour (\$18.75 hourly rate + \$8.90 fringe benefit) for all his work.

21) Respondent issued separate checks to Rand, Woods, and Kitterman for each day that they worked to compensate them for each separate day's labor.

22) The Carpenter, Group 1 classification in Region 4 in BOLI's January 2004 Prevailing Wage Rate booklet lists a number of types of work associated with that classification, including: "Auto. Nailing Machine, Carpenters, Form Strippers, Manhole Builders, Non-irritating Insulation, and Cabinet & Shelving Installers (wood or steel)."

23) The Cement Mason, Group 1 classification in Region 4 in BOLI's January 2004 Prevailing Wage Rate booklet lists a number of types of work associated with that classification, including: "Cement Masons, finishing, hand chipping, patching, grouting, end pointing, screed setting, plugging, filling bolt holes, dry packing, setting curb forms, planks, stakes, lines and grades. Grinding of concrete done as preparatory to patching or when done to produce a finished concrete product."

24) The Ironworker classification in Region 4 in BOLI's January 2004 Prevailing Wage Rate booklet lists several types of work associated with that classification, including: "Structural, Reinforcing, Ornamental, Riggers, Signal men."

25) The Power Equipment Operator II classification in Region 4 in BOLI's January 2004 Prevailing Wage Rate booklet lists a number of types of work associated with that classification, including "Excavator."

26) The appropriate classifications for the work performed by Rand, Woods, and Kitterman on the Project were Carpenter I (concrete forms), Power Equipment

Operator II (excavation), Cement Mason (concrete pour and finish), and Ironworker (tying rebar). The applicable prevailing wage rates for these classifications were:

<u>Classification</u>	<u>Basic Hourly Rate</u>	<u>Fringe Benefit</u>	<u>Total</u>
Carpenter 1	\$25.69	\$11.58	\$37.27
Power Equipment Operator II	\$22.61	\$ 6.45	\$29.06
Cement Mason	\$22.47	\$ 9.29	\$31.76
Ironworker	\$27.82	\$12.46	\$40.28

27) About a week after they became Respondent's employees, Rand and Woods made their first visit to Respondent's Salem office for the purpose of picking up their paychecks.ⁱⁱ During their visit, they told Susie Barrera, one of Respondent's customer service representatives, that they were operating power equipment, tying rebar, and building forms. They complained that they had been underpaid.

28) In response, Barrera called Hicorp to determine what job duties were being performed by Rand and Woods and spoke with George Frauendiener. As a result of her conversation, she concluded that Rand and Woods were misclassified as general laborers. After her conversation, she looked in Respondent's office copy of BOLI's Prevailing Wage Rate booklet to determine their appropriate classification and concluded they should be classified as Laborer, Group 1. She then told Woods that Hicorp told her that all power equipment was being taken off the job and that Respondent's employees would be performing general labor only. In response, Woods told her this information was not accurate and that Barrera might want to investigate.

29) The Laborer, Group 1 classification in Region 4 in BOLI's January 2004 Prevailing Wage Rate booklet lists a number of types of work associated with that classification, including: "Asphalt Spreader; Batch Weighman; Broomer; Brush Burner/Cutter; Car & Truck Loader; Carpenter Tender; Change-House Man; Chipper Operator; Choker Setter; Clean up Laborer; Curing, Concrete; Demolition, wrecking,

moving (Industrial); Driller Assistant; Dry-shack Man; Dumpers, road oiling crew; Dumpman for Grading crew; Elevator Feeder; Erosion Control Specialist; Fine Grader; Fire Watch; Form Stripper; General Laborer; Guardrail, Median Rail; Leverman or Aggregate Spreader; Loading Spotter; Material Yard Man; Powderman Assistant; Railroad Track Laborer; Ribbon Setter; Rip Rap Man (Hand Placed); Road Pump Tender/Mover; Scaffold Tender; Sewer Laborer; Signalman; Skipman; Sloper; Sprayman; Stake Chaser; Stockpiler; Tie Back Shoring; Timber Faller/Bucker (Hand Labor); Toolroom Man (Job Site); Traffic Control Supervisor (Certified); Weight-Man Crusher; and Wood Fence Builder.” In some cases, “Form Stripping” involves stripping forms from concrete.

30) On October 1, 2004, Respondent created invoice #75471123 in which it billed Hicorp for \$1,801.59, based on a total of 38 hours worked by Rand and Woods at the rate of \$47.41 per hour.

31) On October 8, 2004, Respondent created invoice #76141123 in which it billed Hicorp for \$3,792.80, based on a total of 80 hours worked by Rand, Woods, and Kitterman at the rate of \$47.41 per hour.

32) On October 13, 2004, Respondent created two certified payroll reports for the Project in which it certified, among other things, that: (a) it employed Rand on September 29-30, October 1, and October 4-8, 2004; (b) it employed Wood on September 30, October 1, and October 4-8, 2004; (c) it employed Kitterman on October 8, 2004; (d) Rand, Wood, and Kitterman were paid \$18.75 per hour (base rate of pay) plus \$8.90 (hourly fringe benefit amounts paid as wages); and (e) their “Work Classification Group #” was “Laborer, Group 5.”

33) On October 15, 2004, Respondent created invoice #76821123 in which it billed Hicorp for \$2,465.32, based on a total of 52 hours worked by Rand and Woods at the rate of \$47.41 per hour.

34) Respondent created a certified payroll reportⁱⁱⁱ for the Project in which it certified, among other things, that: (a) it employed Woods on October 12, and October 14-15, 2004; (b) it employed Rand on October 11-12, and October 14-15, 2004; (c) it employed Kitterman on October 12, 2004; (d) Rand, Wood, and Kitterman were paid \$18.75 per hour (base rate of pay) plus \$8.90 (hourly fringe benefit amounts paid as wages); and (e) their "Work Classification Group #" was "Laborer, Group 5."

35) On October 28, 2004, Respondent created three certified payroll reports for the Project. All three had the word "CORRECTION" typed on them.

In the first report, Respondent certified, among other things, that: (a) it employed Rand on September 29-30, and October 1, 2004; (b) it employed Woods on September 30, and October 1, 2004; (c) it employed Kitterman on October 8, 2004; (d) Rand, Wood, and Kitterman were paid \$18.75 per hour (base rate of pay) plus \$8.90 (hourly fringe benefit amounts paid as wages); and (e) their "Work Classification Group #" was "Laborer, Group 1."

In the second report, Respondent certified, among other things, that: (a) it employed Rand and Woods on October 4-8, 2004; (b) it employed Kitterman on October 8, 2004; (c) Rand, Woods, and Kitterman were paid \$18.75 per hour (base rate of pay) plus \$8.90 (hourly fringe benefit amounts paid as wages); and (d) their "Work Classification Group #" was "Laborer, Group 1."

In the third report, Respondent certified, among other things, that: (a) it employed Rand on October 11-12, and October 14-15, 2004; (b) it employed Woods on October 12 and 15, 2004; (c) it employed Kitterman on October 12, 2004; (d) Rand,

Wood, and Kitterman were paid \$18.75 per hour (base rate of pay) plus \$8.90 (hourly fringe benefit amounts paid as wages); and (e) their "Work Classification Group #" was "Laborer, Group 1."

36) On October 29, 2004, Respondent created invoice #78191123 in which it billed Hicorp for \$703.61, based on a total of 12.91 hours worked by Rand (7.27 hours), Woods (4.23 hours), and Kitterman (1.41 hours) at the rate of \$54.50 per hour. The invoice contained the notations: "**JOB LOCATION:** Back Pay for JC#3" and **JOB ADDRESS:** Hospitol [sic] Hill Reserver [sic]."

37) On October 29, 2004, Respondent created invoice #78201123 in which it billed Hicorp for \$63.63, based on a total of 1.15 hours worked by Woods at the rate of \$55.33 per hour. The invoice contained the notations: "**JOB LOCATION:** Back Pay for JC#3" and **JOB ADDRESS:** Hospitol [sic] Hill Resovor [sic]."

38) On November 2, 2004, Respondent created two certified payroll reports. Both had the word "Restitution" handwritten or typed on them.

In the first report, Respondent certified, among other things that: (a) it employed Rand (7.27 hours), Woods (4.23 hours), and Kitterman (1.41 hours) for the pay period beginning "10/23/04" and ending "10/29/04"; (b) Rand, Wood, and Kitterman were paid \$21.42 per hour (base rate of pay) plus \$8.90 (hourly fringe benefit amounts paid as wages); and (c) their "Work Classification Group #" was "Laborer, Group 1."

In the second report, Respondent certified, among other things that: (a) it employed Woods for the pay period beginning "10/23/04" and ending "10/29/04" for 1.15 hours; (b) Woods was paid \$22.61 per hour (base rate of pay) plus \$6.45 (hourly fringe benefit amounts paid as wages); and (c) his "Work Classification Group #" was "Power Equipment Operator II."

39) On October 27, 2004, James Rand filed a wage claim with BOLI's Wage & Hour Division in which he alleged that he had worked for "HI CORP Steel Build Inc." from 9/20/04 through 10/15/04, that he had been paid \$2087.58, and that he was still owed \$1285.72 in earned and unpaid wages. That same day, Rand filed a "Prevailing Wage Rate Complaint Form" with BOLI's Prevailing Wage Unit alleging he had not been paid from his work for "HI CORP STEEL" for work performed from "9-20 through 9-29-04" and he was underpaid for his work "from 9-30 through 10/12" at the rate of \$27.65 per hour.

40) On October 27, 2004, Charles Woods filed a wage claim with BOLI's Wage & Hour Division in which he alleged he had worked for "HI Corp Steel Buildings Inc." from 9/21/04 through 10/15/04. The same day, Woods also filed a "Prevailing Wage Rate Complaint Form" with BOLI's Prevailing Wage Unit alleging he had had not been paid for his work for "Hi Corp Steel" for work performed from "9/21/04 through 9/30/04" and he was underpaid for his work "from 10/1/04 to 10/12/04" at the rate of \$27.65 per hour.

41) Along with their wage claims, Rand and Woods provided a handwritten log that accurately showed the number of hours they worked each day and the type of work they performed.

42) Hicorp had not paid Rand and Woods anything for their work at the time Rand and Wood filed their complaints with BOLI.

43) Rand's and Woods's complaints were assigned for investigation to Gerhard Taeubel, a compliance specialist in BOLI's Prevailing Wage unit. At the time, Taeubel had worked in BOLI's Prevailing Wage unit for four years. Taeubel sent a letter to Hicorp on November 2, 2004, in which he requested the following documents:

“A list of names of employees who worked for [Hicorp] between September 20, 2004 and October 15, 2004, including their last known addresses and phone numbers.

“Complete daily time cards or time sheets for each employee who worked on this project from September 20, 2004 through the most current week of week performed on this project.

“Complete payroll records showing gross wages earned and itemized deductions made from all wages for all employees who worked on this project from September 2, 2004 through the most current week of work performed on this project.

“A complete set of certified payrolls filed beginning on September 20, 2004, through the most current week of work performed on this project.

“A detailed description of the actual duties performed for each classification identified on your certified payroll reports.

“A description of where and how you post(ed) the prevailing wage rates, and fringe benefit information if applicable, upon the public works site.

“A copy of your subcontract, including scope of work.”

Taeubel sent this letter to Hicorp instead of Respondent because the complaints named Hicorp as the employer. At the time, Taeubel believed there was a joint employment relationship between Hicorp and Respondent based on a signed written statement that had been submitted by Rand and Woods at the time they filed their wage claims.

44) In response, Hicorp sent a number of documents to Taeubel, including invoices from Respondent, certified payroll records, corrected certified payroll records, and back pay records. Taeubel had already determined that Rand, Woods, and Kitterman had been misclassified as Laborers. From the records provided by Hicorp and information provided by Rand and Woods concerning their hours worked and duties performed, Taeubel determined that additional wages were still owed to Rand, Woods, and Kitterman for work performed from September 29 through October 15, 2004.

45) On November 17, 2004, Taeubel sent another letter to Hicorp, in which he stated the following:

“Thank you for submitting copies of the payroll records, which included pay statements from Labor Ready as well as certified payroll reports, for

the [Hospital Hill Project]. While reviewing these documents, I noticed that most of the workers were classified and paid as laborers (the exception being a relatively small amount of hours paid as power equipment operator). My understanding of the project, however, is that the actual work consisted largely of building and setting concrete forms, tying rebar, and pouring and finishing concrete. The work classifications appropriate to these tasks are carpenter, ironworker, and cement mason, respectively.

“Consequently, I have recalculated the wages earned by the three workers during the period September 29, 2004, through October 15, 2004, based on the prevailing wage rates for carpenter, ironworker, and cement mason. The results are as follows:

“Dimitri Kitterman

Wages Earned	8 hours @ \$40.28 = \$322.24 (rebar)
	8 hours @ \$31.76 = <u>\$254.08</u> (concrete pour)
	\$576.32
Paid by Labor Ready	- <u>\$485.15</u>
Wages Owed	\$ 91.17

“James Rand

Wages Earned	71 hours @ \$37.27 = \$2,646.17 (building forms)
	8 hours @ \$31.76 = <u>\$ 254.08</u> (concrete pour)
	\$2,900.25
Paid by Labor Ready	- <u>\$2,501.56</u>
Wages Owed	\$ 398.69

“Charles Woods

Wages Earned	25.5 hours @ \$29.06 = \$ 741.03 (excavation/backfill)
	38.0 hours @ \$23.27 = \$1,416.26 (building forms)
	8.0 hours @ \$31.76 = <u>\$ 254.08</u> (concrete pour)
	\$2,411.37
Paid by Labor Ready	- <u>\$2,138.65</u>
Wages Owed	\$ 272.72

“If you disagree with the number of hours assigned to each type of work, it is necessary that you submit detailed time records demonstrating the hours spent by each worker in the performance of the various classifications of work.

“In addition to the underpayment of prevailing wages, my investigation of this project indicates that:

- the prevailing wage rates were not posted at the job site, as required by ORS 279.350(4) and OAR 839-016-0033; and,
- certified payroll reports were not filed with the contracting agency, as required by ORS 279.354(2) and OAR 839-016-0010(3).

“At this time, I am requesting that Hicorp Steel Buildings submit paychecks, made out to the individual workers, to the Bureau in the amounts listed above (less any lawful deductions). In addition, please sign and return to me, along with the payments, the enclosed compliance agreement. The Bureau utilizes such agreements to ensure that contractors are familiar with their obligations under the state’s prevailing wage regulations.

“Your response to this letter should arrive in this office by **November 26, 2004**. As I noted in my earlier correspondence, violations of the prevailing wage regulations are a serious matter. Failure to respond may result in further action to collect any unpaid wages, liquidated damages, and civil penalties, as well as any other enforcement actions permissible under the law.

“Thank you for your cooperation. If you have any questions, you can reach me at 503-872-6728.”

46) Respondent, through Barrera, responded to Taeubel’s letter. On December 6, 2004, Barrera sent a fax to Taeubel, enclosing copies of three checks issued to Woods, Rand, and Kitterman on November 19, 2004, along with statements of itemized deductions. The checks were issued in the gross amounts of \$272.88 (Woods), \$398.71 (Rand), and \$91.26 (Kitterman). This constituted full payment of the back wages that Respondent owed to Woods, Rand, and Kitterman.

POSTING

47) Respondent’s corporate office has an intranet site for its Oregon employees. Casarez was aware of this intranet site in September 2004. Respondent’s intranet page entitled “Oregon BOLI” contained the following information and policy statements:

“Processing of Oregon Prevailing Wage work requires Labor Ready to comply with some state specific guidelines. This site is intended to provide the following:

- Oregon specific BOLI information
- Instructions for posting of rate sheet on all Oregon Prevailing Wage job sites
- Oregon statute relating to the posting of rate sheets on all job sites

“Oregon Prevailing Wage Rate Sheet Posting Requirement

“When staffing a prevailing wage job site in the state of Oregon the following process must be followed:

- Obtain the current rate sheet from your customer
- Fax to the corporate Prevailing Wage Department
- Corporate Prevailing Wage Department will review rate sheet, transfer it to Labor Ready Prevailing Wage letterhead and send it back to your branch immediately via certified mail.
- Upon receipt this rate sheet must be posted on the job site next to the sheet posted by the general contractor. Attach a branch manager business card to the rate sheet prior to posting. Keep an exact copy of what you posted in the customer file, with a note of when and where it was posted.
- Contact the corporate Legal/PW Department if any customer protests the posting by Labor Ready.
- Make a follow up visit to be sure the posting is still there.

“Statute Form

“Oregon BOLI powerpoint presentation

“Please contact the corporate PW department with any questions.

“Questions about the PWW Website?”

“Email: intranet@laborready.com”

48) An intranet user who clicks on “Statute Form” is linked to another page that contains Oregon’s laws that regulate posting on prevailing wage rate jobs.

49) An intranet user who clicks on “Oregon BOLI powerpoint presentation” is linked to a powerpoint presentation created by BOLI in 2002 that explains Oregon prevailing wage rate rules and regulations.

50) In September and October 2004, Respondent’s corporate policy and procedures regarding posting on prevailing wage rate job sites was the same as the policy and procedures stated under the heading “**Oregon Prevailing Wage Rate Sheet Posting Requirement**” on Respondent’s intranet page entitled “Oregon BOLI.”

51) On September 29, 2004, Casarez faxed a copy of Hicorp’s rate sheet to Respondent’s Prevailing Wage Department in Tacoma. On the cover sheet, Casarez made the following notation:

“Please review this job and fax us a rate sheet so we could post at job site as soon as possible. Thank you, Alma.”

52) On October 15, 2004, Respondent’s Prevailing Wage Unit returned the rate sheet by certified mail to Respondent’s Salem office. The rate sheet was reduced in size and Respondent’s letterhead appeared at the top of the sheet.

53) The jobsite at the Hospital Hill Project was approximately 84 feet long and 67 feet 8 inches wide. There was a chain link fence around the property, and there was no structure on the property other than the concrete reservoir itself. During the time that Rand, Woods, and Kitterman worked on the Project, the only sign posted anywhere on the Project was a notice that read: “City of Adair Village – No Trespassing.”

54) Respondent did not post the applicable prevailing wage rates on the Project and no one from Respondent ever visited the Project to see if the rates were posted.

CREDIBILITY FINDINGS

55) Finnegan and Taeubel were credible witnesses and their testimony has been credited in its entirety.

56) Woods testified by telephone, answering questions directly and without hesitation on both direct and cross examination. His testimony was internally consistent and there was no evidence that he was biased against Respondent. He was not impeached on cross examination. The forum has credited Woods’s testimony that he never saw a prevailing wage rate posting on the Project because of his overall credibility, his presence on the Project job site for 11 days -- including the day Respondent allegedly posted the rates, the relatively small size of the job site and lack of structures on the job site that would have made any posting apparent, and Casarez’s and Barrera’s lack of credibility on this issue. However, the forum did not believe his testimony that his initial rate of pay was \$17 per hour because this figure was

inconsistent with prior written statements he made to BOLI and with payroll records provided by Respondent that the forum has found to be reliable. The forum has credited the remainder of his testimony.

57) Rand testified by telephone. Like Woods, he testified that Respondent only paid him \$17 per hour at first, which was contrary to his prior written statements and to Respondent's reliable payroll records. Unlike Woods, Rand expressed considerable bitterness about being underpaid, through his answer and in the tone of his voice, and conveyed the sentiment that he took strong personal offense that Respondent did not pay him the correct prevailing wage rate until a little more than a month after he last worked for Respondent. He was argumentative with Respondent's attorney during cross examination. At one point during cross examination, when he perceived that Respondent's counsel was attempting to point out a contradiction in his testimony, Rand became extremely combative. He tried to back off from his prior written statement that "Labor Ready has agreed to properly compensate us at the appropriate scale for the work we performed, and to seek compensation from Mr. Frauendiener" and claim that Respondent had only agreed to "take it under consideration." He testified that he informed Respondent's office, when he and Woods visited it to pick up their first paychecks, that one of the jobs he had been doing was pouring concrete. His own written record, however, shows he did not pour concrete until October 12, 2004, which would have been at a least a week after this visit. Finally, he also testified that he signed his "Statement of Circumstances" after he filed his prevailing wage rate claim, when the date of the document showed he signed it the same day as his prevailing wage rate complaint and wage claim. In short, he seemed determined to paint Respondent in as bad a light as possible. Based on Rand's inconsistencies and demeanor, the forum has concluded that he bore a grudge against

Respondent and that his testimony was biased because of it. The forum has only credited his testimony when it was uncontradicted or corroborated by other credible evidence.

58) Alma Casarez is Respondent's current branch manager in Salem and had worked for Respondent for nine years at the time of hearing. In the fall of 2004, she was a customer service representative in Respondent's Salem office. She maintained a pleasant, calm demeanor while testifying, responding directly to questions, and did not become argumentative or defensive during a rigorous cross examination. Her testimony regarding Respondent's corporate procedures and policies related to prevailing wage rate jobs was internally consistent and consistent with Respondent's written policies and has been credited in its entirety. Her testimony regarding her interactions with Hicorp was also credible, as was her testimony concerning her inability to locate Mark Hance, Respondent's Salem branch manager at the time Respondent employed workers at the Project.

In contrast, Casarez's testimony regarding the posting of the Project was not credible. She testified that on September 29, 2004, she took a copy of the rate sheet that Hicorp had faxed to her, put it on Respondent's letterhead, and inserted it in a plastic sheet for posting. She testified that she gave it to Mark Hance, Respondent's Salem branch manager, to post at the Project because Hance was going out to Adair Village later that morning. She testified that she took this action to avoid the delay caused by Respondent's corporate policy of returning posting-ready rate sheets by certified mail after branch offices faxed them to Respondent's corporate office. She further testified that Hance returned to the office that afternoon and said he had posted it, but that he had not seen any workers at the Project. The forum has disbelieved this testimony for several reasons. First, Respondent's exhibits show that Hicorp faxed the

rate sheets to Casarez at 11:41 a.m. and 11:59 a.m. on September 29, 2004. These transmission times establish that it would have been impossible for Hance to have taken the rate sheets to Adair Village in the morning. Second, Casarez wrote on the cover sheet of her fax to Respondent's corporate headquarters on September 29, 2004, to which she attached the rate sheets provided by Hicorp -- "Please review this rate and fax us a rate sheet so we could post at job site as soon as possible." Since it was Respondent's corporate policy to "send [the rate sheet] back to your branch as soon as possible," there would have been no reason for Casarez to write this note if Hance had already posted the rate sheet at the Project. Third, Casarez asserted that Hance told her he saw no one at the Project on September 29, 2004, whereas undisputed evidence shows that both Rand and Woods worked at the Project that day, from 7 a.m. – 3 p.m. and from 7 a.m. – 3:30 p.m., respectively. Fourth, both Rand and Woods credibly testified that no one from Respondent's office ever visited the Project. Fifth, both Rand and Woods credibly testified that they never saw any posting of the prevailing wage rates on the Project, and that they would have seen a posting, inasmuch as the only structures on the Project were the reservoir itself and the fence around it, on which was fastened a "No Trespassing" sign.

59) At the time of hearing, Barrera had been a customer service representative for Respondent in its Salem branch office for five years. Like Casarez, her testimony regarding corporate procedures and policies related to prevailing wage rate jobs was internally consistent and consistent with Respondent's written policies and has been credited in its entirety. However, Barrera's testimony about Casarez's preparation of the rate sheet and Hance's posting was almost identical to that given by Casarez, and the forum has discredited it for the same reasons. In addition, her testimony that she changed Rand's and Woods's classification and pay rates to

Laborer, Group 1 after their complaints that they were being underpaid was not credible because it conflicted with Respondent's certified payroll reports, which showed that Rand and Woods were not reclassified and paid as Laborers, Group 1, until October 28 or November 2, 2004.^{iv}

OFFICIAL NOTICE

60) On December 13, 2001, the Commissioner issued a Final Order in case no. 31-01, a case in which the Agency charged that Respondent had violated provisions of Oregon's prevailing wage rate laws. The Final Order included several conclusions of law. One conclusion was that Respondent had committed eight violations of *former* ORS 279.350(1) in 1998 on the New Bend Middle School Project, a public works, by failing to pay workers the prevailing wage rate. The Commissioner assessed civil penalties of \$1,500 for each of the eight violations. Another conclusion was that Respondent committed one violation of *former* ORS 279.350(4) on the same project by failing to post the prevailing wage rates. The Commissioner assessed a civil penalty of \$2,000 for this violation. The Commissioner also concluded that Respondent had intentionally failed to pay and post the prevailing wage rate and ordered Respondent to be placed on the list of those ineligible to receive any contract or subcontract for public works. Respondent appealed the case to the Oregon Court of Appeals, challenging the debarment, the assessment of a \$2,000 civil penalty based on Respondent's failure to post, and the forum's rejection of Respondent's estoppel defense to the imposition of any sanctions. Respondent did not assign error to the Commissioner's conclusion that Respondent committed eight violations of *former* ORS 279.350(1). On June 26, 2003, the Oregon Court of Appeals issued a decision in which it reversed Respondent's debarment, but sustained the forum's imposition of a civil penalty based on Respondent's failure to post. Specifically, the court held that "ORS 279.350(4) requires

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, 71 P3d 559 (2003), *rev den* 336 Or 534, 88 P3d 280 (2004). ("LRNW #1")

61) On November 28, 2005, the Commissioner issued a Final Order on Reconsideration in consolidated cases nos. 122-01 and 149-01. In both cases, the Agency charged that Respondent had violated provisions of Oregon's prevailing wage rate laws. The Commissioner's Final Order included several conclusions of law. One of the Commissioner's conclusions was that Respondent committed five violations of *former* ORS 279.350(1) in 2000 on the Cornelius Project, a public works, by failing to pay the prevailing rate of wage to five workers, and an additional violation of *former* ORS 279.350(1) in 2000 by failing to pay the prevailing rate of wage to a single worker on the Central Project, another public works. The Commissioner ordered Respondent to pay \$15,000 in civil penalties for the Cornelius violations (\$3,000 per violation) and \$5,000 in civil penalties for the Central violation. Another of the Commissioner's conclusions was that Respondent committed two violations of *former* ORS 279.350(4) by failing to post the prevailing wage rates on the Cornelius and Central Projects. The Commissioner ordered Respondent to pay \$4,000 in civil penalties for the Cornelius violation and \$5,000 in civil penalties for the Central violation. The Commissioner also ordered Respondent to be placed on the list of those ineligible to receive any contract or subcontract for public works for one year based on the conclusion that Respondent intentionally failed to pay the prevailing wage rate to its one worker on the Cornelius Project and intentionally failed to post the Cornelius Project. Respondent appealed the Commissioner's Final Order to the Oregon Court of Appeals, assigning error to the

Commissioner's determinations that: (1) Respondent intentionally failed to pay its worker the prevailing wage rate on the Cornelius Project; (2) Respondent intentionally failed to post and keep posted the prevailing wage rate at the Cornelius job site; and (3) Respondent should be debarred for one year. Respondent did not assign error to the Commissioner's conclusions that Respondent failed to pay the prevailing wage rate to six workers, that Respondent failed to post, or to the civil penalties assessed for those violations. On September 27, 2006, the Oregon Court of Appeals issued a written decision affirming the Commissioner's Final Order. *In the Matter of Labor Ready Northwest*, 27 BOLI 83 (2005), 208 Or App 195 (2006), *petition for recon. filed*. ("Labor Ready #2)

62) On January 4, 2007, the Commissioner issued a Final Order in case no. 77-04. In that case, the Agency charged that Respondent had violated provisions of Oregon's prevailing wage rate laws. The Commissioner's Final Order included several conclusions of law. One of the Commissioner's conclusions was that Respondent committed four violations of *former* ORS 279.350(1) in 2003 on the Liberty High School Project, a public works, by failing to pay the prevailing rate of wage to four workers. The Commissioner ordered Respondent to pay \$20,000 in civil penalties for the four violations. The Commissioner also concluded that Respondent committed one violation of *former* ORS 279.350(4) by failing to post the prevailing wage rates on the Liberty High School Project and ordered Respondent to pay \$5,000 in civil penalties. The Commissioner also ordered Respondent to be placed on the list of those ineligible to receive any contract or subcontract for public works for three years based on the conclusion that Respondent intentionally failed to post the Liberty High School Project. ("LRNW #3)

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Labor Ready Northwest, Inc. was a foreign corporation based in Washington that was registered with the Oregon Corporations Division to perform work within the state of Oregon.

2) On June 25, 2004, the City of Adair Village, a public agency, first advertised the Project for bid. The Project involved constructing a “free-span metal building and roof” over an existing reservoir in Benton County, Oregon. On August 14, 2004, Adair Village awarded the project contract to Taylor, in the amount of \$107,475.

3) The prevailing wage rates printed in BOLI’s January 2004 Prevailing Wage Rate booklet applied to the Project.

4) Taylor contracted with Hicorp to perform site clearing, concrete work, and roof framing on the Project. Hicorp hired James Rand and Charles Woods to work on the Project.

5) On September 29, 2004, Hicorp contracted with Respondent’s Salem branch office to provide workers on the Project. Hicorp’s representative told Respondent that the workers would be performing prevailing wage rate work that was appropriately classified as Laborer, Group 5, and that all power equipment had been removed from the job.

6) Rand became Respondent’s employee on September 29, 2004, and Woods became Respondent’s employee on September 30, 2004. Both worked for Respondent on the Project through October 15, 2004, performing work that properly fit in the classifications of Carpenter I, Power Equipment Operator II (Woods only), Cement Mason, and Ironworker.

7) About a week after Rand and Woods began working for Respondent, they informed Respondent’s Salem office that they were operating power equipment, tying rebar, and building forms, and they complained that they were being underpaid.

Respondent's representative Barrera called Hicorp and was told that all power equipment was being taken off the job and that Respondent's employees would be performing general labor only. After consulting BOLI's Prevailing Wage Rate booklet, Barrera decided that Rand and Woods were appropriately classified as Laborers, Group 1. Barrera shared this information with Woods, who told her the information provided by Hicorp was not accurate and suggested she investigate.

8) Dimitri Kitterman was employed by Respondent on the Project on October 8 and 12, 2004, performing work that properly fit in the classifications of Carpenter I, Cement Mason, and Ironworker.

9) Respondent classified Rand, Woods, and Kitterman as Laborers, Group 5, throughout their work on the Project, and paid them \$27.65 per hour (\$18.75 per hour hourly rate + \$8.90 fringe benefit).

10) Respondent did not post the prevailing wage rates applicable to Respondent's workers at the Project at any time while Respondent's workers were employed at the project.

11) On October 28, 2004, Respondent reclassified Rand, Woods, and Kitterman as Laborers, Group 1.

12) On or about November 2, 2004, Respondent issued back pay checks to Rand and Kitterman for amounts that reflected the difference between the pay they initially received and the pay they would have received, had they been classified as Laborers, Group 1, instead of Laborers, Group 5.

13) On or about November 2, 2004, Respondent issued back pay checks to Woods for amounts that reflected the difference between the pay he initially received and the pay he would have received, had he been classified as Laborer, Group 1, and Power Equipment Operator II, instead of Laborer, Group 5.

14) On November 17, 2004, BOLI sent a letter to Hicorp in which it notified Hicorp that Rand, Woods, and Kitterman had been underpaid \$398.69, \$272.72, and \$91.17 in gross wages, respectively, because Respondent had misclassified and paid them as laborers.

15) On November 19, 2004, Respondent issued back pay checks to Rand, Woods, and Kitterman in the respective gross amounts of \$398.69, \$272.72, and \$91.26.

CONCLUSIONS OF LAW

1) The Hospital Hill Project was a public works project that was not regulated under the Davis-Bacon Act for which the contract price exceeded \$25,000, and Respondent was a subcontractor that employed workers on the project. *Former* ORS 279.348(3),^v *former* ORS 279.357(1)(a), *former* OAR 839-016-0004(30).^{vi}

2) Respondent paid its workers, including James Rand, Charles Woods, and Dimitri Kitterman, less than the prevailing rates of wage for work they performed on the Project from September 29 through October 15, 2004. This constitutes three violations of *former* ORS 279.350(1) and *former* OAR 839-016-0035.

3) Respondent did not post or keep posted the prevailing wage rates for the Project, constituting one violation of *former* ORS 279.350(4) and *former* OAR 839-016-0033.

4) The Commissioner's imposition of civil penalties for Respondent's three violations of *former* ORS 279.350(1) and *former* OAR 839-016-0035 and one violation of *former* ORS 279.350(4) and *former* OAR 839-016-0033 is an appropriate exercise of his discretion. *Former* ORS 279.370(1); *former* OAR 839-016-0530(3)(b); *former* OAR 839-016-0540(3)(a).

5) Respondent intentionally failed to pay the prevailing rates of wage on the Project. When the Commissioner determines that a contractor or subcontractor has

intentionally failed or refused to pay the prevailing rate of wage, the contractor, 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 ("List") maintained by the Commissioner, to receive any contract or subcontract for public works. The Commissioner's decision to place Respondent on the List for three years based on Respondent's intentional failure to pay the prevailing wage rate to its three workers is an appropriate exercise of his discretion. *Former* ORS 279.361(1).

6) Respondent intentionally failed to post the prevailing wage rates on the Project. When the Commissioner determines that a contractor or subcontractor has intentionally failed or refused to post the prevailing wage rate as required by *former* ORS 279.350(1), the contractor, 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 maintained by the Commissioner, to receive any contract or subcontract for public works. The Commissioner's decision to place Respondent on the List for three years based on Respondent's intentional failure to post the prevailing wage rate is an appropriate exercise of his discretion. *Former* ORS 279.361(1).

OPINION

RESPONDENT FAILED TO PAY THE PREVAILING WAGE RATE

A. The Project was a public works.

Former ORS 279.348(3) provided that:

"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.”

Former ORS 279.348(5) provided:

“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.”

“Construction,” as used in *former* ORS 279.348(3), was defined in *former* OAR 839-016-004(5) as “the initial construction of buildings and other structures, or additions thereto[.]” The work on the Project consisted of building concrete footings and a roof over an existing reservoir, which meets the definition of “additions” to “other structures,” and the forum concludes that Respondent’s workers performed labor on a “public works” as defined in *former* ORS 279.348(5).

B. Respondent was a subcontractor that employed workers on the Project whose duties were manual or physical in nature.

It is undisputed that Taylor subcontracted with Hicorp to perform work on the Project, and that Hicorp paid Respondent to provide employees to perform Hicorp’s work on the Project. This makes Respondent a subcontractor. *Former* OAR 839-016-0004(29) defined “worker” as “a person employed on a public works project and whose duties are manual or physical in nature[.]” From September 29 through October 15, 2004, Respondent’s employees performed work that included operating power equipment, building concrete forms, tying rebar, pouring and finishing concrete, and dismantling concrete forms. These are all “manual” and “physical” duties that were performed by persons employed by Respondent on a public works project.

C. Respondent failed to pay three workers at least the prevailing rate of wage for each hour worked on the Project.

Former ORS 279.350(1) required contractors and subcontractors upon all public works to pay their workers “no 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.” That rate is set out, by statute and administrative rule, in BOLI’s Prevailing Wage Rate book. *Former* ORS 279.359(1), *former* OAR 839-016-0035(1). In this case, Respondent issued separate paychecks to its three workers for each day that they worked. There are a number of exhibits in the record, all created by Respondent, that document payment of wages to Rand, Woods, and Kitterman. They range from a summary of checks issued, with itemized deductions, to certified payroll reports, and consistently report two salient facts -- that Rand, Woods, and Kitterman were initially paid \$27.65 per hour (\$18.75 per hour + \$8.90 fringe benefit) for all the work that they performed, and that Respondent classified them as Laborers, Group 5, throughout their employment on the Project.

The same records also show that approximately two weeks after the job ended, Respondent issued back pay checks to compensate Rand, Woods, and Kitterman for the difference between the pay they received and what they would have been paid if classified as Laborers, Group 1 (Rand, Woods, and Kitterman), and Power Equipment Operator II (Woods).^{vii}

About the same time, unbeknownst to Respondent, BOLI’s Prevailing Wage Unit was conducting an investigation of the prevailing wage complaints and wage claims filed by Rand and Woods. Taeubel, an experienced compliance specialist in BOLI’s Prevailing Wage Unit, reviewed the records provided by Hicorp, Rand, and Woods. After comparing the work actually performed with the classification descriptions in BOLI’s January 2004 Prevailing Wage Rate book, Taeubel concluded that Rand, Woods, and Kitterman had been misclassified as Laborers and underpaid as a result.^{viii} At hearing, this conclusion was bolstered by Rand’s and Woods’s credible testimony describing the work they performed on Project and the dates and hours they performed

that work, the published descriptions of types of work performed by workers in the classification of Laborer, Carpenter I, Power Equipment Operator II, Cement Mason, and Ironworker in BOLI's January 2004 Prevailing Wage Rate book, and the published rates of pay for work performed in those classifications.

On November 17, 2004, Taeubel sent a letter to Hicorp in which he summarized the results of his investigation. In that letter, Taeubel stated that Rand, Woods, and Kitterman had been underpaid due to Respondent's failure to classify them properly as Carpenter, Ironworker, and Cement Mason, all higher paid classifications than Laborer, Group 1. Taeubel specifically set out the hours worked by each worker in each classification, calculated the amount of wages owed, and requested payment of those wages. In response, on November 19, 2004, Respondent issued back pay checks to Rand, Woods, and Kitterman in the amounts sought by Taeubel.

In summary, the preponderance of the evidence shows that: (1) Respondent misclassified Rand, Woods, and Kitterman as Laborers, Group 5, throughout their work on the Project; (2) While Rand, Woods, and Kitterman were employed by Respondent, Respondent issued daily paychecks to them, calculating their pay at the rate of \$27.65 per hour, the prevailing wage rate for Laborer, Group 5; (3) Throughout their work on the Project, Rand, Woods, and Kitterman performed work that was properly classified as Carpenter 1, Power Equipment Operator II, Cement Mason, or Ironworker, all classifications that had a higher prevailing wage rate than \$27.65 per hour; and (4) Respondent did not pay Rand, Woods, and Kitterman all the wages they earned until November 19, 2004, slightly more than a month after their last day of work. The prevailing wage requirement in *former* ORS 279.350 is violated when a contractor or subcontractor upon a public works tenders checks to workers less than the prevailing wage rate for an hour's work in the same trade or occupation in the locality where such

labor is performed. See *North Marion School District v. Acstar Insurance Co.*, 205 Or App 484, 494, 136 P3d 42, 47 (2006). Respondent tendered multiple checks to Rand, Woods, and Kitterman in which their wages were calculated at the Laborer, Group 5 rate, which was less than the prevailing wage rates for their trades in Region 4. This constitutes three violations of *former* ORS 279.350(1) and *former* OAR 839-016-0035. The question of whether Respondent's failure to pay the prevailing wage rate was "intentional" is discussed later in this Opinion.

CIVIL PENALTY – FAILURE TO PAY THE PREVAILING WAGE RATE

The Commissioner may assess a civil penalty of up to \$5,000 for each violation of *former* ORS 279.350(1). *Former* ORS 279.370(1); *former* OAR 839-016-0540(1). In this case, the Agency cited *former* OAR 839-016-0540(3)(a) as partial authority for the \$15,000 in civil penalties it proposed to assess for Respondent's three violations. That rule, stated below, set a minimum civil penalty for a first violation of *former* ORS 279.350(1):

"(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 will be calculated as follows:

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

As noted, this rule established a minimum, not an upper limit, on the Commissioner's authority to determine an appropriate civil penalty.^{ix} In determining an appropriate penalty, the forum must also consider any aggravating circumstances alleged and proved by the Agency, any mitigating circumstances, and prior final orders. *In the Matter of Harkcom Pacific, Inc.*, 27 BOLI 62, 77 (2005). When seeking more than the minimum civil penalty, the Agency must establish aggravating circumstances to justify the increased amount. *In the Matter of Design N Mind*, 27 BOLI 32, 44 (2005).

A. Aggravating Circumstances

Former OAR 839-016-0520 set out the following criteria for the Commissioner to consider in determining the amount of civil penalty:

“(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 section (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.”

There are several aggravating circumstances in this case.

1. Respondent's prior violations of statutes and rules.

Respondent has committed 18 prior violations of *former* ORS 279.350(1), eight in 1998 on the New Bend Middle School Project, six in 2000 on the Cornelius and Central Projects, and four in 2003 on the Liberty High School Project.

2. Opportunity and degree of difficulty to comply.

About a week after they started work, Rand and Woods visited Respondent's office for the first time to pick up their paychecks. At that time they described the duties they were performing and complained they were underpaid. In response, Barrera

telephoned Hicorp and talked to Hicorp's president. As a result of that conversation and her review of BOLI's Prevailing Wage Rate booklet, Barrera concluded that the work being performed by Rand and Woods was in a higher classification than Laborer, Group 5, the classification originally specified by Hicorp, and that Rand and Woods should be paid as Laborers, Group 1. When Barrera told Woods of her conclusion, he disagreed and suggested she investigate. However, Barrera did not visit the job site or take any other action to determine the actual work that Rand and Woods were performing, despite her apparent conclusion that Hicorp had misstated the classification of the work to be performed on the Project when Hicorp first contracted for Respondent's services. Furthermore, despite Barrera's conclusion that Rand and Woods should be paid in the higher classification as Laborers, Group 1, there was no evidence that she took any action, at any time during their employment, to see that they were reclassified and paid at the Laborer, Group 1 rate. In sum, Respondent had opportunities to correct their initial error that would not have been difficult to pursue, but failed to take advantage of them.

3. Magnitude and seriousness of Respondent's violations.

Former OAR 839-016-0520(1)(d) required the Commissioner to consider "[t]he magnitude and seriousness of the violation" in determining the amount of a civil penalty. In *former* ORS 279.349, the Legislature set forth four specific purposes for the prevailing wage rate law. The second purpose was "[t]o recognize that local participation in publicly financed construction and family wage income and benefits are essential to the protection of community standards." *Former* ORS 279.349(2). To carry out that purpose, *former* ORS 279.350(1) required that "[t]he hourly rate of wage to be paid by any contractor or subcontractor to workers upon all public works shall not be less than the prevailing rate of wage[.]" This requirement goes to the very heart of the

Legislative policy expressed in *former* ORS 279.349(2). As a result, the commissioner considers violations of *former* ORS 279.350(1) to be a serious matter. In determining the magnitude, the forum considers the following facts:

- (1) Over a two week period, Respondent initially underpaid its three workers the total amount of \$1,529.82;^x
- (2) In making the underpayments, Respondent paid its three workers \$27.65 per hour instead of one of four applicable prevailing wage rates that ranged from \$29.06 per hour to \$40.28 per hour;
- (3) Respondent's workers did not receive their back pay until 5-7 weeks after that pay was due.^{xi}

Based on these facts, the forum concludes that Respondent's violations were of moderate magnitude.

B. Mitigating circumstances.

There are two mitigating circumstances. First, Respondent issued partial back pay checks to Rand, Woods, and Kitterman two weeks after their last day of work on the Project. Second, Respondent issued back pay checks to all three workers immediately after BOLI notified Hicorp that Rand, Wood, and Kitterman had been misclassified and underpaid for their work.

C. Amount Of Civil Penalty.

Although mitigating circumstances are present, they are outweighed by the aggravating circumstances, particularly the number of prior violations and Respondent's failure to visit the jobsite to determine the type of work being performed by its workers. In LRNW #1, the Commissioner imposed a \$1,500 civil penalty for each of Respondent's eight violations of *former* ORS 279.350(1) on the New Bend Middle School Project. In LRNW #2, the Commissioner imposed a \$3,000 civil penalty for each of Respondent's five violations of *former* ORS 279.350(1) on the Cornelius Project and a \$5,000 civil penalty for Respondent's violation of *former* ORS 279.350(1) on the Central Project. In LRNW #3, the Commissioner imposed a \$5,000 civil penalty for

each of Respondent's four violations of *former* ORS 279.350(1) on the Liberty High School Project. In this case, an appropriate assessment is a \$5,000 civil penalty for each of Respondent's three violations, for a total of \$15,000.

RESPONDENT FAILED TO POST THE PREVAILING WAGE RATE

The Agency alleged that Respondent violated *former* ORS 279.350(4) and *former* OAR 839-016-0033 in that Respondent "intentionally failed or refused to keep the prevailing wage rates for the [Hospital Hill Project] posted in a conspicuous and accessible place in or about the [Hospital Hill Project]." Respondent denied this allegation in its Answer. *Former* ORS 279.350(4) provided:

"Every contractor or subcontractor engaged on a project for which there is a contract for a public work shall keep the prevailing wage rates for that project posted in a conspicuous and accessible place in or about the project. Contractors and subcontractors shall be furnished copies of these wage rates by the commissioner without charge."

Former OAR 839-016-0033(1) provided:

"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."

The Oregon Court of Appeals has determined that *former* ORS 279.350(4) "requires 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 at 369.

At hearing, the Agency built its case around the testimony of Rand and Woods, both who testified that they never saw the prevailing wage rates posted at the Project and that they never saw anyone from Respondent's business at the Project. In rebuttal, Respondent presented testimony by Casarez and Barrera concerning Casarez's actions with regard to posting the Project and statements made by Hance, Respondent's branch manager at the time, to Casarez and Barrera concerning actions he took to post

the Project. Consequently, resolution of this issue rests on the forum's assessment of the credibility of these four witnesses.

The forum has already determined that Rand's and Woods's testimony on this issue was truthful.^{xii} The forum also concludes, based on the relatively small size of the jobsite, Rand's and Woods's daily presence on the Project, and the existence of only two structures on the jobsite – the concrete reservoir itself and the chain link fence around it – that Rand and Woods would have seen the posted rates, had Respondent posted them “in a conspicuous and accessible place in or about” the Project.

In contrast, the forum has found that Casarez's and Barrera's testimony regarding posting was not believable. There are a number of reasons for this conclusion, all set out in Findings of Fact 58 & 59 – The Merits and in the forum's response to Respondent's Exception 6 at the end of this Opinion. There is no other credible evidence in the record that supports a conclusion that Respondent posted the prevailing wage rates on the Project.

In conclusion, the Agency proved its posting allegation by a preponderance of the evidence through the credible testimony of Rand and Woods. Respondent offered no credible rebuttal evidence, and the forum concludes that Respondent did not post the prevailing wage rates on the Project or keep them posted, thereby committing one violation of *former* ORS 279.350(4) and *former* OAR 839-016-0033. The question of whether Respondent's failure to post the prevailing wage rate was “intentional” is discussed later in this Opinion.

CIVIL PENALTY

A. Aggravating Circumstances

There are several aggravating factors in this case.

1. Respondent's prior violations of statutes and rules.

Respondent committed four prior violations of *former* ORS 279.350(4) on the New Middle School, Cornelius, Central, and Liberty High School Projects. *Labor Ready #1, Labor Ready #2, Labor Ready #3.*

2. Opportunity and degree of difficulty to comply.

Respondent had ample opportunity to comply. Respondent's Salem branch office and Respondent's corporate office were aware of Oregon's prevailing wage rate posting requirement. Casarez even followed Respondent's corporate policy by faxing the rate sheet provided by Hicorp to Respondent's corporate headquarters in Tacoma, Washington, on September 29, 2004, the first day that Respondent employed a worker on the Project. However, according to Finnegan, Respondent's corporate prevailing wage rate administrator, Respondent's corporate headquarters did not mail a posting-ready rate sheet to the Salem branch office until October 15, 2004, the last day that Respondent employed workers on the Project. The forum notes that, even if Respondent had timely posted the rate sheet provided by Hicorp, Respondent still would have violated *former* ORS 279.350(4) because it did not contain the prevailing wage rates that applied to Respondent's workers.

No evidence was presented to show that it would have been difficult for Respondent to post. The forum takes judicial notice that Adair Village is not far from Salem. There was a chain link fence around the reservoir at the Project upon which the rates could have been posted. In fact, Adair Village had posted a "No Trespassing" sign on that very fence.

3. Magnitude and seriousness of Respondent's violation.

The requirement that every contractor or subcontractor post the prevailing wage rates for its employees promotes the statutory purpose of assuring compliance by

informing employees of the rate of pay they should be receiving. *LRNW #1* at 369. When contractors or subcontractors do not post, this directly undermines the Legislature's intent of ensuring that workers on public works be paid the prevailing wage rate. Consequently, the forum considers failure to post to be a serious matter. In determining the magnitude, the forum considers the following facts:

- (1) Over a two week period, Respondent underpaid its three workers the total amount of \$1,529.82;
- (2) Two of the workers, Rand and Woods, knew they were being underpaid and filed complaints with BOLI that resulted in all three workers receiving their full back pay a little more than one month after their last day of work;
- (3) Respondent's corporate office did not provide its Salem office with a posting ready rate sheet until the last day that Rand and Woods worked on the Project, and after Kitterman had already completed his employment with Respondent -- more than two weeks after Respondent's Salem office provided Respondent's corporate office with the requisite paperwork.

Based on these facts, the forum concludes that Respondent's violations are of moderate magnitude.

4. Respondent knew or should have known of its violation.

The evidence was undisputed that Respondent's corporate and Salem offices knew that Oregon law required Respondent to post the prevailing wage rates on all public works projects to which it dispatched workers, and that both offices knew that Respondent was employing workers on the Project beginning September 29, 2004. Despite this knowledge, Respondent's Salem office did not post and Respondent's corporate office did not provide the means for Respondent's Salem office to timely post. Consequently, the forum concludes that Respondent knew or should have known of its violation.

B. Mitigating Circumstances

Respondent's development of intranet training for its Oregon employees on Oregon prevailing wage rate law and its posting requirements that includes corporate procedures and policies for posting is a mitigating circumstance. However, in this case it was rendered moot by the fact that Respondent's corporate office did not even mail a posting-ready rate sheet to its Salem office until October 15, 2004, 17 days after Casarez faxed it, and the last day that Respondent employed workers on the Project.

C. Amount Of Civil Penalty.

The Agency sought a \$5,000 civil penalty for Respondent's single violation of *former* ORS 279.350(4). In LRNW #1, the Commissioner imposed a \$2,000 civil penalty for Respondent's first violation of *former* ORS 279.350(4). In LRNW #2, the Commissioner imposed a \$4,000 civil penalty for Respondent's second violation and a \$5,000 civil penalty for Respondent's third violation of *former* ORS 279.350(4). In LRNW #3, the Commissioner imposed a \$5,000 civil penalty for Respondent's fourth violation of *former* ORS 279.350(4). Considering the number of aggravating circumstances and absence of any mitigating circumstances, the forum concludes that \$5,000 is an appropriate penalty.

PLACEMENT ON THE LIST OF INELIGIBLES

The Agency seeks to debar^{xiii} Respondent for three years based two separate charges -- that Respondent intentionally failed or refused to pay the applicable prevailing wage rates, and that Respondent intentionally failed or refused to post the prevailing wage rates on the Project. Each charge, if proven, is grounds for debarment. *Former* ORS 279.361(1).

RESPONDENT'S FAILURE TO PAY THE PREVAILING WAGE RATE WAS INTENTIONAL

Former ORS 279.361(1) provided:

“When the Commissioner of the Bureau of Labor and Industries, in accordance with the provisions of ORS chapter 183, determines that a * * * subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works * * *, the * * * subcontractor * * * shall be ineligible for a period not to exceed three years from the date of publication of the name of the * * * subcontractor on the ineligible list as provided in this section to receive any contract or subcontract for public works. * * *”

Former ORS 279.348(1) defined the phrase “prevailing rate of wage” as follows:

“‘Prevailing rate of wage’ means the rate of hourly wage, including all fringe benefits under subsection (4) of this section, paid in the locality to the majority of workers employed on projects of similar character in the same trade or occupation, as determined by the Commissioner of the Bureau of Labor and Industries. * * *”

The forum has already determined that Respondent failed to pay the prevailing rate of wage as required by *former* ORS 279.350(1). It must now determine whether that failure was “intentional.”

The Oregon Court of Appeals has determined that, under *former* ORS 279.361, to “intentionally” fail to pay the prevailing rate of 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 Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App at 364 (“LRNW #1”). The focus is on what the employer intentionally failed or refused to do, not what the employer intentionally did. *Id.* at 359. The inclusion of the word “intentionally” in *former* 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. This requires an assessment of an employer’s state of mind at the time that its employees were not paid the prevailing wage in order to determine whether the employer “intentionally” failed or refused to pay the prevailing wage.

In LRNW #1, Respondent misclassified eight workers and paid them less than the prevailing wage as a result. The forum found that, without calling BOLI, Respondent

could not have known the correct prevailing wage for the workers because the classification corresponding to their job duties was published only in an internal BOLI document. Consequently, Respondent had no reason to believe that it had misclassified and underpaid its workers until a BOLI investigator contacted Respondent after Respondent's workers were no longer employed on the jobsite. The Commissioner concluded that Respondent's underpayment constituted an intentional failure to pay the prevailing wage and issued a Final Order debarring Respondent. The Court of Appeals reversed the Commissioner's determination, holding that Respondent's underpayment was based on a mistake and was therefore not intentional. *Id.* at 364.

This is an unusual case, in that Respondent's three workers performed work that fit into four distinct classifications -- Carpenter 1, Power Equipment Operator II, Cement Mason, and Ironworker -- during the two weeks that Respondent employed them. The evidence is undisputed that, one week into the workers' employment, Respondent believed that it should have been paying its workers at the higher rate for Laborer, Group 1, but there was no evidence that Respondent had contemporaneous knowledge of the correct prevailing wage rates for the classifications of Carpenter 1, Power Equipment Operator II, Cement Mason, and Ironworker, and consciously chose not to pay those rates. However, whether or not Respondent consciously chose not to determine those prevailing wage rates is a different matter. In this case, the forum considers the following factors in making that determination:

1. The circumstances of the Project that were known by Respondent's employees;
2. When Respondent's employees acquired that knowledge;
3. The action or failure to take action by Respondent's employees in response to that knowledge;
4. Reason or reasons, if any were given, for the action or failure to take action by Respondent's employees.

The knowledge possessed by, action taken by, and failure to take action by Respondent's employees are imputed to Respondent.

On September 29, 2004, Respondent, through Casarez, learned from Sue Frauendiener, Hicorp's secretary, that the Hospital Hill Project was a prevailing wage rate project. Frauendiener also told Casarez that all power equipment had been removed from the job and that Hicorp's workers "were out there as laborers only." Casarez asked Frauendiener to fax the applicable prevailing wage rate sheet so Casarez could determine the appropriate job classification for Respondent's workers. In response, Frauendiener faxed the rate sheet for Laborer, indicating that Respondent's workers fit into the classification of Laborer, Group 5. Respondent did not visit the job site and relied on Frauendiener's representation to pay Rand and Woods \$27.65 per hour, the prevailing wage rate for Laborer, Group 5, during the first week of their employment.

Rand and Woods first communicated with Respondent's office about a week after they became Respondent's employees, when they came to pick up their paychecks. During their visit, they told Barrera, one of Respondent's customer service representatives, that they were operating power equipment, tying rebar, and building forms. They complained that they had been underpaid. In response, Barrera contacted Hicorp. Barrera's testimony on this matter on direct examination is reprinted below:

Q: "After [Rand and Woods] were sent out on the job, did they raise questions about the rates they were being paid?"

A: "They didn't raise questions until approximately about a week or so after. They would come in once a week to get paid."

Q: "Okay, and based on those questions, did you investigate as to whether or not their rates should be changed?"

A: "I did call * * * the actual Hicorp Steel Building [and] spoke to a gentleman there; I believe George was the person, in regards to adjusting the rates due to that they had been providing heavy equipment operation so they had been moving equipment so that's when we decided to change

the rates for them because they had been specified only to do general labor.

Q: "Did you also change the Laborer Group rate at that time?"

A: "From Laborer, Group 5, to Group 1."

Q: "Okay. And why did you do that?"

A: "The Laborer skills within the groups were different from what we were told they were doing."

Q: "And did you ascertain yourself what those new rates should be?"

A: "I went through, a little bit through the actual documentation, yes."

Q: "When you say documentation, do you have a prevailing wage rate book there at the branch?"

A: "Yes, and also through the rates that the customer [itself] provided for us."

Q: "And did you look at the prevailing wage rate book to try to determine what an appropriate rate would be?"

A: "Yes."

Testimony by Barrera and Woods further established that Barrera then told Woods that Hicorp had told her that all power equipment was being taken off the job and that Respondent's employees would be performing general labor only, and Woods responded by telling her this information was not accurate and she might want to investigate.

Barrera's and Woods's testimony established several points about Respondent's "state of mind" after Barrera's conversations with Rand, Woods, and George at Hicorp. First, Barrera believed that either Woods or Rand had been performing the duties of a power equipment operator on the Project. Second, she believed that they had been misclassified and the duties they were performing fit into the higher paying Laborer, Group 1 classification. Third, she believed Rand and Woods should be paid at the higher Laborer, Group 1 rate. Fourth, she had received information from Rand and Woods that they had been operating power equipment, tying rebar, and building forms on the Project and that they were not performing general labor as Frauendiener had

represented. This evidence establishes that Barrera had actual knowledge that Respondent had misclassified and had been underpaying its workers and that she was told by Respondent's workers that they were doing work that was not in the Laborer classification. Armed with this knowledge, Barrera and Respondent failed to take any subsequent action to "investigate" or otherwise verify the actual job duties that Rand, Woods, and Kitterman were performing and continued to pay them as Laborers, Group 5, the lowest classification possible. There is no evidence in the record as to a reason or reasons why Barrera and Respondent failed to take any additional action and no evidence that Barrera and Respondent failed to take any additional action because of a "mistake."^{xiv} Rather, the evidence is that Respondent recklessly disregarded facts and circumstances that would have led a reasonable employer to make a further inquiry to determine if workers it employed upon a public work were being paid correctly. This amounts to a conscious choice on Respondent's part not to determine the prevailing wage and a corresponding intentional failure to pay the prevailing rates of wage to its three workers.

RESPONDENT'S FAILURE TO POST THE PREVAILING WAGE RATES WAS INTENTIONAL

Former ORS 279.361(1) provided:

"When the Commissioner of the Bureau of Labor and Industries, in accordance with the provisions of ORS chapter 183, determines that a * * * subcontractor has intentionally failed or refused to post the prevailing rates as required by ORS 279.350(4), the * * * subcontractor * * * shall be ineligible for a period not to exceed three years from the date of publication of the name of the * * * subcontractor on the ineligible list as provided in this section to receive any contract or subcontract for public works. * * *"

The forum has already determined that Respondent failed to post the prevailing rates of wage as required by *former* ORS 279.350(4). The only question is whether that failure was "intentional." If so, the Commissioner is required to place Respondent on

the List of Ineligibles. Again, the forum focuses on what Respondent failed to do, not what Respondent did.

On June 26, 2003, in a case involving Respondent, the Oregon Court of Appeals held that subcontractors were required to post the prevailing wage rates at all public works on which they employed workers. LRNW #1. On May 5, 2004, the Supreme Court denied review of the same case. *Id.* As a result, at the time Respondent sent workers to the Project, there can be no question that Respondent knew that it was required to post all prevailing wage rate jobs. There is no dispute that Respondent, through Casarez, knew the Project was a prevailing wage rate job on September 29, 2004, the first day Respondent employed a worker on that project, that she knew Oregon law required employers to post, and that she knew Respondent's corporate posting policy. When Casarez faxed the rate sheet to Respondent's corporate office on September 29, 2004, Respondent's corporate office also learned that Respondent's Salem branch office was employing workers on a prevailing wage rate job.

In response, Respondent failed to post any prevailing wage rates at the Project and Respondent's corporate office did not even mail a posting-ready rate sheet to its Salem office until October 15, 2004, the last day Respondent employed workers on the Project. Respondent gave no reason for its failure to post, but instead argued that it did post, an argument that the forum did not believe.

Although Respondent may have had a mistaken belief as to the correct prevailing wage rates for Rand, Woods, and Kitterman, this does not save Respondent from debarment. Unlike LRNW #1, where Respondent had no way of knowing the correct prevailing wage for the workers because the classification corresponding to their job duties was published only in an internal BOLI document, there is no dispute in this case about the classification of work that Rand, Woods, and Kitterman performed, or that the

classification could have been determined by observing the workers and reading BOLI's Prevailing Wage Rate booklet. All subcontractors and contractors on prevailing wage rate jobs are accountable for knowing the classifications of work performed by their employees. The fact that Respondent is a temporary employment agency and has no supervisory workers on the job site does not relieve it of the same obligation. If Respondent had any doubt about the appropriate classifications for its workers, it could have fulfilled its posting obligation by simply posting the entire Prevailing Wage Rate booklet that Barrera testified was in Respondent's office. Under these circumstances, Respondent's failure to take any action whatsoever to post amounts to a conscious and intentional choice not to post the prevailing wage rates as required by *former* ORS 279.350(4).

LENGTH OF DEBARMENT

Former ORS 279.361 provided 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).^{xv} 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 eight prior violations of *former* ORS 279.350(1) on the New Bend Middle School public works project; (2) Respondent's five prior violations of *former* ORS 279.350(1) on the Cornelius Project; (3) Respondent's single prior violation of *former* ORS 279.350(1) on the Central Project; (4) Respondent's four prior violations of *former* ORS 279.350(1) on the Liberty High School Project; and (5) Respondent's four prior violations of *former* ORS 279.350(4) on New Bend Middle School, Cornelius, Central, and Liberty High School Projects.

In mitigation, the forum considers that Respondent: (1) has paid back wages in full to three workers on the Hospital Hill Project; and (2) has created an intranet site where its Oregon employees can review Oregon's posting requirements.

The forum finds that three years is an appropriate period of debarment based on Respondent's intentional failure to pay the prevailing rate of wage to three workers employed on the Hospital Hill Project. Three years is also an appropriate period of debarment based on Respondent's intentional failure to post the prevailing wage rates as required by *former* ORS 279.350(4) on the Hospital Hill Project. The forum would impose the same three-year debarment for either violation independently but chooses, in its discretion, to run the two three-year debarment periods concurrently rather than consecutively.

RESPONDENT'S EXCEPTIONS

A. Exceptions 1, 2, & 3.

Respondent excepted to Proposed Findings of Fact 17, 53, and 54 -- The Merits in which the ALJ found that no employees of Respondent visited the jobsite and the Respondent did not post the jobsite. Respondent based its exceptions on the contention that Barrera and Casarez were credible witnesses, and that their testimony

that Mark Hance visited and posted the jobsite should be believed. Respondent also contended that Rand's testimony concerning Respondent's failure to post should not be believed because the forum found his testimony unbelievable in other areas. The ALJ's credibility findings are supported by the record, and Rand's testimony was credited on this issue because it was supported by the credible testimony of Woods. Respondent's exceptions are DENIED.

B. Exception 4.

Respondent argues that the forum should include the following Finding of Fact after Proposed Finding of Fact 52 -- The Merits: "[N]one of Respondent's employees, whether at its corporate headquarters, or its branch employees Casarez and Barrera, intended not to post the prevailing wage information at the Adair job site." Whether or not Respondent or any its employees posted or did not post the prevailing wages at the Adair job site is a factual question that is answered in Findings of Fact 53 and 54 -- The Merits. Whether or not this failure was "intended" is a legal question that is appropriately addressed in the Conclusions of Law.^{xvi} Respondent's exception is DENIED.

C. Exception 5.

Respondent excepted to Proposed Finding of Fact 56 -- The Merits in which the ALJ credited Woods' testimony and discredited testimony by Casarez and Barrera on the posting issue. The ALJ's credibility finding is supported by the record. Respondent's exception is DENIED.

D. Exception 6.

Respondent excepted to Proposed Finding of Fact 58 -- The Merits in which the ALJ discredited Casarez's testimony regarding the posting of the Project. Respondent contends that "[t]he forum's credibility finding is unsupported." Respondent advanced

several arguments in support of its exception. Respondent's arguments are addressed in this section and Finding of Fact 58 has also been modified to delete one point.

First, Respondent argues that Casarez had little motivation to testify falsely, and if, *arguendo*, there was a failure to post it rests with Mark Hance. The forum did conclude that it was Hance's responsibility to post and that he failed to do so. The forum also notes that Casarez is currently Respondent's branch manager, as well as a longtime employee of Respondent, and infers that Respondent's potential debarment for three years could directly affect her job.

Second, Respondent contends that Casarez's testimony, coupled with Exhibits R-1 and R-2 "conclusively demonstrates the Casarez sent Hi-Corp the rate sheets" before 11:41 and 11:59 on September 29, 2004. The forum disagrees with Respondent's assessment of Casarez's testimony and the two exhibits for the following reasons that are in addition to or expand on the reasoning in Finding of Fact 58 – The Merits:

- a) The first step in Respondent's corporate posting policy, which Casarez testified she was aware of on September 29, 2004, is to "[o]btain the current rate sheet from your customer." Respondent suggests that Casarez instead first sent a rate sheet to Hicorp.
- b) Casarez testified that R-1 is the rate sheet she received by fax from Sue at Hicorp in response to Casarez's request that Sue send her a rate sheet. Casarez did not testify, as Respondent suggests, that R-1 was the same document Casarez had earlier faxed to Hicorp.
- c) R-7, a document that Casarez faxed to Labor Ready corporate and that Casarez testified was "more than likely from our fax," bears a date imprint from Casarez's fax machine.
- d) Casarez testified that she faxed R-2, Respondent's "Confirmation of Billing Services," to Hicorp on September 29, 2004, and that Sue Frauendiener signed and dated it and faxed it back to her. That document bears a date imprint from Casarez's fax machine, as well as a date and time from Hicorp's fax machine.
- e) Page 2 of R-8 is another document that Casarez testified she faxed to Labor Ready corporate on September 29, 2004. It also bears a date imprint from Casarez's fax machine.

- f) R-1, the rate sheet Casarez testified she received from Hicorp, is conspicuously missing a date imprint from Casarez's fax machine.
- g) Although Respondent's corporate policy concerning posting on prevailing wage rate jobs, posted on Respondent's intranet site, requires Respondent's employees to "[k]eep an exact copy of what you posted in the customer file, with a note of what and where it was posted," Respondent was unable to produce a copy of the alleged posting.

Third, Respondent contends that Casarez's note on her fax to Labor Ready corporate stating "[p]lease review this rate and fax us a rate sheet so we could post at job site as soon as possible" is merely an indicator of Casarez's compliance with Respondent's posting policies. Respondent's intranet posting policy states that after its branch office faxes the current rate sheet to corporate, then "Corporate Prevailing Wage Department will review rate sheet, transfer it to Labor Ready Prevailing Wage Department letterhead **and send it back to your branch immediately via certified mail.**" (emphasis added) Since Casarez already knew that corporate would be reviewing the rate sheet and immediately returning it for posting, the urgency of her message seems incongruous, especially given Respondent's assertion that it had already satisfied Oregon's posting requirement at that time.

Fourth, Respondent contends that the fact that Woods and Rand did not see Hance on the Project on September 29, 2004, does not undermine Casarez's or Barrera's credibility. Respondent is partially correct. Although the forum still does not believe that Hance posted, it is possible that he may have told Casarez and Barrera that (1) he posted and (2) that no one was there when he posted. However, the forum finds it more likely that Hance did not make these statements to them, which does undermine their credibility.

Fifth, Respondent objects to the forum's statement that Casarez's credibility was affected by the lack of evidence that Casarez had ever taken the initiative to prepare a

rate sheet for immediate posting on any other occasion. In response, the forum has deleted this statement in Finding of Fact 58 – The Merits.

Respondent's exception as to the forum's finding on Casarez's credibility is DENIED.

E. Exception 7.

Respondent excepted to Proposed Finding of Fact 59 -- The Merits in which the ALJ discredited Barrera's testimony regarding the posting of the Project. Respondent based its exceptions on the arguments set forth in Exception 6. Respondent's exception is DENIED for the same reasons that Exception 6 was denied.

F. Exception 8.

Respondent objected to Proposed Ultimate Finding of Fact 9 regarding the posting of the prevailing wage rates for the reasons set forth in Exceptions 4, 6 and 7. Respondent's exception is DENIED for reasons stated in the forum's response to Exceptions 4, 6 and 7.

G. Exception 9.

Respondent excepted the forum's third Proposed Conclusion of Law in which the ALJ concluded that Respondent did not post or keep posted the prevailing wage rates posted on the Project. Respondent's exception is DENIED.

H. Exception 10.

Respondent excepted to the ALJ's reliance on the credibility of Rand and Woods and lack of credibility of Casarez and Barrera in the Proposed Opinion in the discussion of Respondent's failure to post. Respondent's exception is DENIED.

I. Exception 11.

Respondent excepts to the forum's failure to include "[I]anguage such as the following:"

“An additional basis for the forum to conclude that the heightened standard for debarment was not met in this case, was the forum’s conclusion that the Bureau has not demonstrated by the preponderance of evidence that any of Labor Ready employees in this matter intentionally failed to post the prevailing wage rate as that standard is set forth in *Labor Ready Northwest*.”

The forum has granted the Agency’s exception to the ALJ’s conclusion that Respondent did not intentionally fail to post. Implicit in that conclusion is an acknowledgment that the Agency proved its allegation by a preponderance of evidence. See *Gallant v. Board of Medical Examiners*, 159 Or App 175, 180 (1999) (ORS 183.450(5), which sets forth the standard of proof in administrative hearings, prescribes the preponderance of evidence standard of proof in contested cases). Respondent’s exception is DENIED.

THE AGENCY’S EXCEPTIONS

The Agency excepted to the forum’s conclusions that Respondent’s failures to pay the prevailing wage rate and failure to post were not “intentional” and did not subject Respondent to debarment. The Agency’s exceptions are GRANTED for reasons stated in the Opinion.

ORDER

NOW, THEREFORE, as authorized by *former* ORS 279.361, the Commissioner of the Bureau of Labor and Industries hereby orders that, based on its intentional failure to pay the prevailing rates of wage on the Hospital Hill Project and intentional failure to post the prevailing wage rates as required by *former* ORS 279.350(4) on the Hospital Hill Project, 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 three years from the date of publication of their names on the list of those ineligible to receive such contracts that is maintained and published by the Commissioner of the Bureau of Labor and Industries. This period of ineligibility shall be in addition to any other period of ineligibility imposed

as a result of a separate proceeding by the Commissioner of the Bureau of Labor and Industries against Respondent.

NOW, THEREFORE, as authorized by *former* ORS 279.370, and as payment of the penalties assessed as a result of its violations of *former* ORS 279.350(1), *former* ORS 279.350(4), *former* OAR 839-016-0033, and *former* 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, 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 TWENTY THOUSAND DOLLARS (\$20,000), plus interest at the legal rate on that sum between the date ten days after the issuance of the final order and the date Respondent **Labor Ready Northwest, Inc.** complies with the Final Order.

ⁱ These words appear in a chart that shows the basic hourly wage rate and fringe benefit for the five Laborer classifications.

ⁱⁱ There is no evidence in the record as to the exact date that Rand and Woods first visited Respondent's office.

ⁱⁱⁱ The certified, dated page that accompanied the previous two certified payroll reports is not part of the record and there is no evidence as to the specific date this certified payroll report was created.

^{iv} See Findings of Fact 31, 33-34, 38 – The Merits, *supra*.

^v Effective March 1, 2005, ORS chapter 279 was reorganized and *former* ORS 279.005 to 279.833 and 279.990 were repealed or renumbered.

^{vi} Effective July 2005, *former* OAR 839-016-000 *et seq* was renumbered as OAR 839-025-000 *et seq*.

^{vii} There is no evidence in the record to establish the exact date Respondent issued these back pay checks. The forum concludes issuance occurred approximately two weeks after the job ended based on three facts: (1) Respondent's workers last worked on the Project on October 15, 2004; (2) On November 2, 2004, Respondent created two certified payroll reports reflecting the described back pay; and (3) Four days earlier, on October 29, 2004, Respondent billed Hicorp for a corresponding amount of "back pay."

^{viii} The prevailing wage rates on the Project for Carpenter 1, Power Equipment Operator II, Cement Mason, and Ironworker were all higher than the prevailing wage rate for Laborer, Group 5. See Findings of Fact 10, 26 – The Merits.

^{ix} See, e.g., *In the Matter of Harkcom Pacific, Inc.*, 27 BOLI 62, 77 (2005) (\$2,000 civil penalty assessed for each of respondent's seven "first" violations of ORS 279.350(1)); *In the Matter of Labor Ready Northwest, Inc.*, 22 BOLI 245, 283 (2001), *reversed in part*, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), *rev den* 336 Or 534, 88 P3d 280 (2004) (\$1,500 civil penalty assessed for each of respondent's eight "first" violations of ORS 279.350(1)); *In the*

Matter of Johnson Builders, Inc., 21 BOLI 103, 124 (2000) (\$2,000 civil penalty assessed for each of respondent's three "first" violations of ORS 279.350(1)).

^x The forum calculated this sum by adding the back pay wages Respondent billed to Hicorp on October 29, 2004, to the unpaid wages calculated by Taeubel in his letter of November 17, 2004. See Findings of Fact 36, 37, 46 – The Merits, *supra*.

^{xi} See ORS 652.120(1), which provides that "[e]very employer shall establish and maintain a regular payday, at which date all employees shall be paid the wages due and owing to them." Respondent's practice was to pay wages on the same day they were earned. Rand and Woods, who were respectively hired on September 29 and 30, 2004, did not receive their full back pay until sometime after November 19, 2004, the date on which Respondent mailed final back pay wages to Rand, Woods, and Kitterman.

^{xii} See Findings of Fact 56, 57 – The Merits, *supra*.

^{xiii} In this Order, "debar" and "debarment" are synonymous with placement on the List of Ineligibles.

^{xiv} The forum does not believe that unquestioning acceptance of a client's word for the type of work Respondent's workers would be performing, after the client had earlier misstated the type of work those same workers would be performing, and after those workers had notified Respondent that they were performing a higher paid classification of work, is the kind of "mistake" contemplated by the Court of Appeals in LRNW #1.

^{xv} 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."

^{xvi} Compare *In the Matter of Labor Ready Northwest, Inc.*, 22 BOLI 245 (2001); *In the Matter of Labor Ready Northwest, Inc.*, 27 BOLI 83 (2005) (the "intentionality" of Respondent's failure to post was an issue in both cases, and in both cases "intentionality" is not addressed in the Findings of Fact, but in the Conclusions of Law).